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Climate Change-Induced Migration:

Addressing the Legal Gap

The Case of Pacific Small Island Developing States

Supervisor

Ch. Prof. Sara De Vido

Assistant supervisor

Ch. Prof. Stefano Soriani

Graduand

Silvia Borsato

Matriculation Number 865358

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ABSTRACT

La questione del cambiamento climatico rimane uno dei temi più caldi del dibattito internazionale degli ultimi decenni, in particolare a partire dal 2015 con la negoziazione dell'Accordo di Parigi entrato in vigore l'anno seguente, momento storico in cui si è raggiunto il massimo consenso politico sulla consapevolezza del problema dei cambiamenti climatici indotti dalle emissioni di gas ad effetto serra. Oggetto di questa tesi è, invece, il più controverso riconoscimento dell'esistenza di una relazione tra cambiamento climatico e migrazioni. A livello internazionale l'esistenza di una correlazione tra i due fenomeni venne individuata per la prima volta nel 2009 nella bozza finale del testo elaborato alla Conferenza ONU di Copenhagen sui Cambiamenti Climatici (COP 15). Tuttavia, il riferimento alle migrazioni venne escluso dalla versione definitiva del testo, approvata dagli Stati firmatari. L'anno seguente, alla Conferenza di Cancún (COP 16), gli Stati trovarono un accordo per l'inclusione, a livello nazionale ed internazionale, di raccomandazioni sull'adozione di misure per la coordinazione del fenomeno delle migrazioni indotte dal cambiamento climatico. Il più recente riconoscimento ha avuto luogo nel dicembre 2018 con l'adozione del Global Compact per una migrazione sicura, ordinata e regolare.

Lo stimolo ad intraprendere la ricerca su questa tematica, tuttavia, non è derivato solamente dalla lettura di dichiarazioni e accordi internazionali, bensì da un'esperienza diretta che ha avuto luogo in Nuova Zelanda. Nella regione del Pacifico, il problema delle migrazioni indotte dal cambiamento climatico è una questione urgente, percepita sia dalla classe politica che dalle popolazioni che abitano gli Stati insulari del Sud del Pacifico e la Nuova Zelanda. I primi, infatti, essendo piccoli Stati formati da isole vulcaniche e atolli poco elevati sul livello del mare, sono particolarmente minacciati dagli effetti che il cambiamento climatico ha sull'innalzamento del mare e sulla variazione delle precipitazioni e delle temperature; tali effetti provocano inaspettate inondazioni e cicloni, sempre più intensi nella frequenza e nella forza. Le conseguenze drammatiche di questi fenomeni accrescono le vulnerabilità preesistenti all'interno delle comunità che abitano le isole, dovute al basso o modesto livello di sviluppo degli Stati ed alla forte

dipendenza dalle risorse naturali, nonché al sovrappopolamento nelle aree urbane e alla scarsità di acqua potabile disponibile. Come conseguenza della progressiva degradazione dell'ambiente in cui abitano, sempre più isolani vengono spinti a spostarsi all'interno del proprio Stato verso le aree urbane, verso altri Stati insulari della regione, o verso la Nuova Zelanda e l'Australia. Il governo neozelandese, in particolare, riconosce l'urgenza della questione e l'amministrazione in carica si sta dimostrando attenta alle necessità dei partner del Pacifico.

La presa di consapevolezza che le migrazioni indotte dal cambiamento climatico non sono un fenomeno limitato alla regione del Pacifico ma che l'aumento della mobilità di individui e comunità in contesti in cui si manifestano i cambiamenti climatici viene osservata su scala globale, ha suggerito che la ricerca prendesse avvio dall'analisi del fenomeno a livello internazionale, per poi approfondirne la dimensione regionale, ed infine concludere con la presentazione del caso di studio sulla regione del Pacifico, focalizzandosi prevalentemente sulla relazione tra Stati insulari e Nuova Zelanda.

La prima problematica che emerge riguarda l'assenza di un consenso internazionale sulla natura del fenomeno e sulla definizione da attribuirgli. Infatti, nonostante l'esistenza della correlazione tra effetti del cambiamento climatico e flussi migratori sia stata riconosciuta negli accordi internazionali sopra citati, non è ancora stato siglato un trattato o uno strumento giuridicamente vincolante che definisca le migrazioni indotte dal cambiamento climatico e le caratteristiche proprie di questo fenomeno. Non esiste nemmeno un consenso internazionale in merito alla terminologia con la quale indicare i flussi migratori che si generano in tale contesto e gli individui coinvolti in questi movimenti. Infatti, accademici e politici hanno adottato negli anni una molteplicità di espressioni e termini con implicazioni di significato differenti, ad esempio "migranti climatici" e "rifugiati climatici", generando il controproducente effetto di sollevare fraintendimenti sulla natura del fenomeno e di porre ostacoli all'elaborazione di soluzioni adeguate. Alla mancanza di una definizione giuridica corrisponde un vuoto legale nella protezione degli individui e delle comunità che si spostano su base nazionale o internazionale in seguito all'impatto dei cambiamenti climatici sul proprio ambiente. Perciò, la necessità di un riconoscimento giuridico del fenomeno da parte della comunità

internazionale si fa sempre più improrogabile al fine di colmare il vuoto giuridico ed elaborare politiche per la protezione di tale categoria di migranti.

Data l'assenza di un quadro giuridico specifico, si è valutato se gli esistenti sistemi di protezione internazionale si possano applicare al contesto delle migrazioni indotte dai cambiamenti climatici, partendo dall'analisi della Convenzione relativa allo Statuto dei Rifugiati del 1951 e della definizione di "rifugiato" contenuta all'articolo 1(A)2 della stessa Convenzione. La sua formulazione, infatti, non permette l'estensione di tale status ad individui che non soddisfano i requisiti elencati, ovvero l'aver attraversato un confine internazionale ed essere stato vittima di persecuzione da parte del proprio Stato o di attori non statali sulla base di uno dei cinque motivi previsti dal trattato: razza, religione, nazionalità, gruppo sociale o opinione politica. Posto che i migranti climatici si spostano prevalentemente all'interno del paese di origine e che essi vengono colpiti indiscriminatamente dai fenomeni climatici, è altamente improbabile che venga loro riconosciuto lo status di rifugiato.

Al contrario, i Principi Guida sugli Sfollati, strumento internazionale non giuridicamente vincolante per la protezione di sfollati interni, includono nella definizione di sfollato interno anche individui indotti a spostarsi a causa di disastri naturali o prodotti dall'attività umana. Per tale ragione e per il fatto che adottano un forte approccio basato sui diritti umani, i Principi Guida risultano uno strumento potenzialmente più efficace per la protezione dei migranti climatici. D'altra parte, molti osservatori ne criticano l'adeguatezza poiché essi non offrono protezione a coloro che attraversano confini internazionali. Inoltre, data la loro natura generale e non vincolante, i Principi Guida vengono spesso differentemente interpretati ed adeguati durante la trasposizione all'interno del sistema legislativo nazionale da parte degli Stati, rimanendo impraticabili e inattuati.

Si è indagata, perciò, l'efficacia della protezione sussidiaria basata sul principio di *non-refoulement* derivante dagli strumenti internazionali per la protezione dei diritti umani, in particolare il diritto alla vita e il divieto di tortura e trattamento disumano. Se, da una parte, la protezione sussidiaria offre il vantaggio di non richiedere prova dell'esistenza di una relazione di causa-effetto tra il cambiamento climatico e la

violazione dei diritti umani fondamentali, dall'altra parte i requisiti sul grado di severità e imminenza della violazione adottano uno standard molto elevato, che spesso non si verifica nel contesto delle migrazioni climatiche. Perciò, la protezione sussidiaria è in grado di fornire assistenza alla categoria dei migranti climatici solo in casi eccezionali.

Si menzionano, infine, i quadri sulla Riduzione del Rischio di Disastri, tra cui il quadro di riferimento di Sendai, come strumenti in grado di supportare le popolazioni con misure concrete di adattamento al cambiamento climatico e assistenza alle comunità attuabili a livello locale. Tuttavia, alcune critiche sono state rivolte anche a questo strumento.

Lo stesso esercizio è stato successivamente svolto sugli strumenti, vincolanti e non vincolanti, rivolti alla protezione di rifugiati, sfollati interni e diritti umani adottati a livello regionale in Asia, Americhe, Africa ed Europa. Anche in questo caso il grado di protezione che gli strumenti analizzati possono fornire non è risultato sufficiente. Tuttavia, è emerso che a livello regionale vi è un maggiore potenziale per lo sviluppo di quadri legislativi e strategie politiche mirate alla gestione delle migrazioni climatiche, grazie alla presenza di più efficaci meccanismi di applicazione delle norme e a minori ostacoli politici. Per tale ragione questa tesi sostiene l'adozione di una prospettiva regionale nell'impegno ad elaborare una soluzione alla questione trattata, piuttosto che seguire le proposte avanzate da governi e accademici internazionali di emendare la Convenzione sui Rifugiati del 1951 o di creare una convenzione universale *ad hoc* per la protezione di "rifugiati" o "sfollati climatici".

Un cauto e progressivo lavoro su scala regionale sarebbe avvantaggiato da una più interessata cooperazione tra stati confinanti e nazioni che condividono salde relazioni geopolitiche ed economiche; di conseguenza, ne deriverebbe un più genuino impegno a rispettare gli obblighi stabiliti dagli accordi regionali adottati. Allo stesso tempo, consultazioni che coinvolgono le comunità colpite, la società civile e le organizzazioni non governative, fondamentali per l'elaborazione di soluzioni mirate ed efficaci, risultano più facilmente praticabili a livello regionale. Inoltre, dal momento che le attuali stime sui flussi migratori indotti dal cambiamento climatico prospettano movimenti prevalentemente interni o diretti verso nazioni confinanti, la creazione di un

sistema di norme e politiche regionale meglio risponderebbe alle variabili di contesto e ai bisogni delle comunità locali, nonché a specifiche problematiche relative alla dimensione culturale e identitaria dei soggetti coinvolti.

L'impegno degli stati dovrebbe essere focalizzato su un doppio obiettivo. In primo luogo, si dovrebbero gettare le basi per l'elaborazione di un nuovo strumento regionale di diritto non vincolante per la protezione dei migranti climatici attraverso consultazioni e processi negoziali. Nel frattempo, si potrebbe cercare di applicare i quadri regionali di protezione dei migranti e dei diritti umani alla categoria dei migranti climatici per quanto possibile, almeno nel breve o medio periodo, attraverso la loro trasposizione nei sistemi legislativi domestici e il potenziamento dei meccanismi per il conferimento di residenza e protezione temporanea. In secondo luogo, il tentativo di colmare il vuoto legislativo dovrebbe essere affiancato dall'elaborazione e attuazione di politiche mirate all'adattamento al cambiamento climatico e alla riduzione delle vulnerabilità, allo scopo di prevenire flussi migratori incontrollati nei contesti più sensibili agli impatti del cambiamento climatico. È possibile, infatti, formulare un quadro di politiche a lungo termine conformi ai regimi legislativi vigenti, volte ad intervenire in merito a una serie di questioni prioritarie riguardanti il reperimento di dati affidabili, l'adozione di misure per la riduzione del rischio di disastri, misure per la riduzione delle vulnerabilità delle comunità interessate, l'accesso al microcredito, la riduzione dei costi di transazione delle rimesse dei migranti, e l'accesso a programmi migratori preventivi. A questi aspetti si aggiungono le riflessioni sul ruolo della produzione alimentare come stimolo al miglioramento della resilienza delle comunità locali e sulla pianificazione delle migrazioni come strategia di adattamento.

La tesi si chiude con l'analisi del caso dei piccoli stati insulari in via di sviluppo del Pacifico Meridionale. Le isole del Pacifico, infatti, sono gli stati più direttamente e drasticamente minacciati dagli effetti del cambiamento climatico, soprattutto dall'innalzamento del livello del mare che rischia di renderne inabitabile il territorio o addirittura provocarne l'intera scomparsa, sollevando inedite questioni giuridiche a livello internazionale sulla continuità degli stati e sul diritto all'autodeterminazione delle popolazioni del Pacifico. Tuttavia, questo caso di studio è particolarmente interessante

poiché conferma le considerazioni precedentemente condotte a livello teorico. Innanzitutto, dall'analisi della giurisprudenza neozelandese in materia di rifugiati, in particolare dal caso *Teitiota*, emerge l'inapplicabilità della Convenzione sui Rifugiati del 1951 nel contesto delle migrazioni indotte dal cambiamento climatico, nonostante le Corti abbiano lasciato aperta la possibilità di future interpretazioni in favore della categoria dei migranti climatici. In secondo luogo, il Piano d'Azione elaborato dalla Nuova Zelanda, uno dei principali attori della regione del Pacifico, assume l'approccio sostenuto in questa ricerca.

In conclusione, le migrazioni indotte dal cambiamento climatico rappresentano una questione internazionale molto attuale, particolarmente complessa e problematica. Ciò che emerge da questa ricerca è che spesso la letteratura si sofferma su articolate speculazioni giuridiche a livello teorico le quali, tuttavia, risultano poco praticabili o perdono di vista il reale scopo dell'indagine, ovvero il miglioramento delle condizioni umane delle vittime di tale fenomeno. Per tale ragione in questa tesi si predilige un approccio più cauto ma realistico, in grado di suggerire misure pratiche e implementabili a livello nazionale e regionale in conformità con i regimi legislativi vigenti, considerate le riserve politiche che allo stato attuale si frappongono alle questioni della mobilità internazionale e del cambiamento climatico.

INTRODUCTION

The inspiration for this research came during a work experience in New Zealand, at the Embassy of Italy in Wellington. While drafting the political and economic profiles of the Pacific Small Island Developing States (PSIDS) under the jurisdiction of the Embassy, references to climate change appeared daily in the news regarding the Pacific region. Often, climate change was related to the issues of displacement, evacuation in the aftermath of cyclones – recently increased in frequency and intensity –, migration, and even to refugees¹. In particular, since October 2017, a proposal by the New Zealand government considering the creation of a *sui generis* visa category for Pacific people displaced by climate change has been subject of a lively debate². Looking deeper into the issue of climate change-induced displacement, the urgency perceived by peoples and institutions of the Small Island States populating the South Pacific Ocean with regard to the existential threat posed by climate change to their homeland and their way of living clearly emerged, so much to fear, in some cases, the worst scenario of having to abandon permanently their home countries. In fact, the Pacific region hosts a number of Island States composed of volcanic islands and coral atolls particularly exposed to the impacts of climate change. Among these, sea level rise is the phenomenon that most threatens the equilibrium of coastal ecosystems, already delicate and vulnerable. Salt water intrusions causing the salinisation of the soil, coastal erosion, and inundations, together with the acidification of the ocean and the other effects of climate change on temperatures and weather events are responsible for the degradation of the Islands' environment³. Exacerbating existing vulnerabilities, such as poverty, urban overcrowding, and dependence on natural resources, climate change impacts are

¹ See for example: Radio New Zealand, *Climate-induced migration critical issue for Pacific NGOs*, 6 December 2017; *World Bank aims to ensure no surge in climate migration*, 20 March 2018; *Climate, migration, US on Micronesia summit agenda*, 27 April 2018; available at <https://www.radionz.co.nz> [Accessed 8 January 2019].

² Radio New Zealand, *NZ considers developing climate change refugee visa*, 31 October 2017, available at: <https://www.radionz.co.nz/international/pacific-news/342749/nz-considers-developing-climate-change-refugee-visa> [Accessed 8 January 2019].

³ K. E. McNamara, C. Gibson, "We don't want to leave our land": *Pacific ambassadors at the United Nations resist the category of "climate refugees"*, in *Geoforum*, 40, 2009, p. 475.

increasingly exercising a direct or indirect pressure on islanders to move towards more stable environments.

However, the phenomenon of climate change-induced displacement is not limited to the Pacific region. International reporters, including the UNHCR and the International Organisation for Migration (IOM), are witnessing an increase in human mobility related to climatic events and environmental degradation at global level. Nevertheless, reliable figures are difficult to collect because of the complexities surrounding the issue which will be extensively explained in the study, starting from the absence of a legal definition of climate change-induced displacement established by an international binding instrument. Terminology referring to climate change migration and people displaced by climate change effects, in the first instance, is not the result of an agreed international consultation. On the contrary, politicians and scholars deploy very different terms to identify these migration flows and the individuals involved, – such as “environmental migration”, “environmental or climate refugees”, “eco-refugees”, “climate change migrants”, “environmentally displaced persons” – with the counterproductive effect of creating misunderstanding on the nature of the phenomenon and, consequently, obstacles to the development of desirable solutions⁴. In this study, the terms “climate change-induced migration” and “climate change-displaced persons” have been chosen for their neutrality.

The acknowledgment of the existence, at international and regional level, of a legal void in the protection of persons moving inside their country or across borders pushed by the effects of climate change guides this research. The recognition of climate change-induced migration by the international community is becoming necessary in order to fill the legal gap and develop suitable policies for the protection of these persons. However, it is unlikely that an international consensus on the matter will be reached in the short run, due to a series of impediments regarding the nature of the phenomenon and the lack of political will of States that emerge assessing the alternative possibilities advanced in the last decades by governments and the academy. It will rather be suggested to change the focus on solutions from the international level to the

⁴ O. Dun, F. Gemenne, *Defining “environmental migration”*, in *Forced Migration Review*, 31, 2008, p. 10.

regional dimension, and to overcome the legal impasse with a series of appropriate policies elaborated within existing legislative frameworks.

The investigation has been conducted principally in New Zealand, where the academic debate on this subject is particularly dynamic. Extensive reference has been made to academic publications issued in Oceania, available in the physical and digital libraries of the Victoria University of Wellington. Though, also European literature and jurisprudence have been taken in consideration and confronted with the Oceanic perspective. The most important international academic journals specialised in international law and politics, refugee law, human rights, and climate change have been widely consulted. Moreover, broad reference has been made to documents issued by the United Nations and other international and regional organisations or agencies, including conventions, resolutions, declarations, and reports. The analysis of selected case law has been conducted to support the argumentation and the findings of this study. In addition, first-hand research has been pursued through the exchange of emails and meetings with New Zealand scholars and researchers studying the issue of climate change-induced migration, and through the participation to conferences dedicated to the matter. In particular, an interesting meeting was held in March 2018 with Nathan Ross, PhD student at the Victoria University of Wellington. In the same period an instructive colloquium took place with Alexandra Pierard, Senior Policy Officer for the Pacific Division of the New Zealand Ministry of Foreign Affairs and Trade. Ms. Pierard provided relevant information on the strategy that the government intends to undertake in the near future in order to face climate change migration from the Pacific. Eventually, significant insights were provided by Lopeti Senituli, Political and Media Adviser to the Hon. Prime Minister of Tonga, whose contribution represents the perspective of the people most directly concerned by the phenomenon of climate change-induced migration and subject of the case study presented in the last chapter of this dissertation.

This work deliberately avoids reporting data and figures hinting at the dimension of climate change-related displacement and other aspects linked to it. In fact, due to the complexities and variables that influence the phenomenon, the lack of a shared legal

definition, and the different perceptions that the involved communities have of the phenomenon and its risks, statistics and figures might reveal incorrect and inaccurate, not doing any service to the purpose of this study.

The thesis is organised in five chapters, beginning with a general presentation of the problem and progressively narrowing the focus, to conclude with the analysis of the case study concerning the Small Island Developing States of the South Pacific. In chapter One important premises for understanding the nature of the phenomenon and its legal implications are explicated. It is clarified that climate change displacement may be induced both by sudden-onset events, that is to say disasters such as hurricanes, cyclones, floods and landslides, and by slow degrading processes gradually deteriorating the environment, like sea level rise, desertification, droughts, extreme temperature, precipitation variations, and coastal erosion. Displacement, then, may assume different forms: it may be forced upon persons or may be voluntarily undertaken as a survival or adaptation strategy; it may be temporary, implying the return to the place of origin, or permanent; persons and communities may displace inside their national territory or across international borders. This plurality of variables and other factors, such as the existence of concurrent causes that hardly can be disentangled, the cumulative effect of climate change impacts, and the difficulty in acquiring reliable data hinder the elaboration of an unequivocal legal definition. Instead, a number of operational definitions have been proposed by different organisations and scholars.

Chapter Two takes stock of the current international legal framework for protection of displaced persons: the regime defined by the 1951 Refugee Convention, the Guiding Principles on Internal Displacement for the protection of Internally Displaced Persons, complementary protection provided by human rights frameworks, and other instruments for Disaster Risk Reduction are analysed in order to determine whether they are applicable to the context of climate change-induced displacement.

In chapter Three a similar investigation is conducted at the regional level, through the examination of the legal systems for protection adopted in Asia, the Americas, Africa and Europe. Therefore, for example, it is assessed whether the Cartagena Declaration, the OAU Convention and the European Qualification Directive

contain provisions that could include climate change-displaced persons among the recipient of refugee status. In addition, relevant jurisprudence of the European Court of Human Rights is analysed to investigate whether human rights law could protect such category of displaced persons against *refoulement*, grounding on article 3 of the European Convention of Human Rights, prohibition of torture and inhuman or degrading treatment.

After having assessed the unsuitability of the existing legal frameworks at international and regional level, in chapter Four different measures and instruments addressing the phenomenon of climate change-induced displacement proposed by the academy and governments are examined. The most shared proposals advanced in the past decade are considered, namely the amendment of the 1951 Refugee Convention, and the adoption of a new *ad hoc* legally binding treaty at international level. However, both these proposed solutions are dismissed in favour of a more appropriate approach: the development of soft law regional instruments. It is also proposed to complement the effort of filling the legal void with the adoption of targeted policies to support adaptation and lower vulnerabilities. A set of priority policy areas are suggested, supplemented by a focus on two relevant aspects: enhancing resilience of communities through the food production system, and planned migration as an adaptation strategy.

The last chapter focuses on the case of the “sinking islands” of the South Pacific, in particular Tuvalu and Kiribati, the low-lying atoll states most threatened by the impacts of climate change. Due to sea level rise, these countries may become uninhabitable or even lose their entire territory. Such extreme but possible scenario generates novel legal questions regarding the continuity of states and the right to self-determination of Pacific populations, which remain partially unanswered. In this regard, the perspective of the Political and Media Adviser to the Hon. Prime Minister of Tonga is reported, before concluding with the presentation of New Zealand’s regional approach and action plan on the forefront of the fight against climate change and of the management of climate migration from the Pacific. In this section, the case of *Teitiota v The Chief Executive of Ministry of Business, Innovation, and Employment*, which received

great international media attention for being the world's first application for “climate change refugee status”, is analysed.

CHAPTER ONE

DEFINING PEOPLE DISPLACED BY THE EFFECTS OF CLIMATE CHANGE

Summary: 1.1 An overview of the phenomenon. – 1.1.1 Slow-onset versus sudden-onset events. – 1.1.2 Voluntary versus forced displacement. – 1.1.3 Cross-border versus internal displacement. – 1.2 Absence of a legal definition. – 1.2.1 The “climate refugee” label. – 1.3 Proposed operational definitions. – 1.3.1 Environmentally Displaced People (EDPs), Environmental Migrants, Climate-Change-Displaced Persons (CCDPs). – 1.3.2 Internally Displaced Persons (IDPs). – 1.3.3 Other frameworks for the conceptualisation of climate migrants. – 1.3.4 Risks of definitions. – 1.4 Reasons explaining the difficulties in conceptualising climate-induced migrants. – 1.4.1 Concurrent causes. – 1.4.2 The cumulative effect. – 1.4.3 Context-specific variables. – 1.4.4 Counting climate migrants.

1.1 AN OVERVIEW OF THE PHENOMENON

The fact that climate change is a reality has been recognised almost universally by the scientific community and governments, so that since the 1980s a series of conferences and agencies have been established to analyse the phenomenon and provide policymakers with insights and instruments to develop appropriate adaptive and mitigating strategies⁵. The highest level of consensus was reached with the adoption of the Paris Agreement, entered into force in 2016; to this date, the agreement has been ratified by 184 States of 197 States Party to the United Nations Framework Convention on Climate Change (UNFCCC)⁶.

⁵ In 1988 the World Meteorological Organisation set up the Intergovernmental Panel on Climate Change (IPCC), see: http://www.ipcc.ch/news_and_events/docs/factsheets/FS_what_ipcc.pdf. In 1992 during the Earth Summit in Rio de Janeiro the treaty establishing the United Nations Framework Convention on Climate Change (UNFCCC) was adopted, see: <https://unfccc.int/about-us/about-the-secretariat>. The United Nations Environment Programme (UNEP) enumerates climate change among its thematic areas of competence, see: <https://www.unenvironment.org/about-un-environment/what-we-do>. The 2030 Agenda for Sustainable Development adopted in 2015 includes among its objectives Goal N. 13 on Climate Action, see: <https://www.un.org/sustainabledevelopment/climate-change-2/>, and others [All accessed 27 July 2018].

⁶ United Nations Framework Convention on Climate Change, 2018. <https://unfccc.int/process/the-paris-agreement/status-of-ratification> [Accessed 28 January 2019].

Despite the high consensus, there are oppositions to the agreement from some States, like Russia and Turkey, including the United States which in June 2017 announced the withdrawal from the Paris Agreement. See: T. Roberts, *One year since Trump's withdrawal from the Paris climate agreement*, Brookings, 1 June 2018, available at: <https://www.brookings.edu/blog/planetpolicy/2018/06/01/one-year-since-trumps-withdrawal-from-the-paris-climate-agreement/> [Accessed 28 January 2019].

What is more controversial is the relationship between climate change and migration. Environment has always been a factor influencing human displacement, but lately also climate change has started to be identified as a driver of voluntary and forced migration. This was acknowledged for the first time in 2009 in the final draft for the UNFCCC Copenhagen climate change conference (COP15) in which States were called to cooperate to assist populations crossing international borders due to the effects of climate change, and to foster migration and planned relocation as adaptation strategies⁷. However, in the definitive text of the Copenhagen Accord voted by States, references to migration were excluded, signalling that politicians were not ready to further discuss the issue. The following year, at the Cancún Conference (COP16), the final text included the provision encouraging States to consider “measures to enhance understanding, coordination and cooperation with regard to climate change-induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels”⁸. Although this document is not legally binding, as the use of terminology suggests – in fact it addresses the States with the verb “invites” – it nonetheless constitutes the acknowledgment that climate change plays a role in human displacement, and that consequently States have to take action to deal with this phenomenon. The latest progress was achieved on 13th July 2018 when UN Member States agreed on the first multilateral framework for cooperation on migration, the “Global Compact for Safe, Orderly and Regular Migration”. The final draft, adopted at the UN Marrakech Conference held in Morocco on the 10th and 11th December 2018, recognises climate change as a driver of migration, when it manifests both as “sudden-onset and slow-onset natural disasters”⁹, like cyclones, hurricanes and floods on the one hand, and desertification, sea level rise and land impoverishment on the other hand. States also commit to facilitate mobility and cooperate at international and regional level in order to reach the objectives stated in the Global Compact, including finding

⁷ Negotiating Text, UN Doc FCCC/AWGLCA/2009/14, 20 November 2009, 38, para 12(c) and 56, para 13(b), qtd. in J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 230.

⁸ Decision 1/CP.16, UN Doc FCCC/CP/2010/7/Add.1, 15 March 2011, para 14(f), qtd. in McAdam, 2012, p. 232.

⁹ UN, *Global Compact for Safe, Orderly and Regular Migration*, 13 July 2018, para 18(i).

solutions for migrants forced to leave due to the impacts of climate change¹⁰. Although there is not a specific international institution governing climate-induced migration, existing institutions as the UN Refugee Agency (UNHCR) and the International Organisation for Migration (IOM) have engaged actively in the assistance to populations displaced by climate change and disasters¹¹.

Climate change affects territories and human settlements indiscriminately, not targeting specific categories of populations. However, some areas of the globe will be more severely impacted, namely low-lying islands, coastal areas, delta regions and arid areas¹² which, as the Fifth Assessment Report by the Intergovernmental Panel on Climate Change (IPCC) asserts, are located especially in underdeveloped and developing countries with reduced capacity and funding availability to face the effects of climate change, as for example Bangladesh and low-lying Pacific islands¹³. Hence, these areas could be the most interested by the phenomenon of climate-induced migration, a complex phenomenon to which the level of vulnerability of populations¹⁴, economic and social factors, the capacity to resort to adaptation strategies and existing patterns of mobility are the additional variables that influence and determine its extent and modalities¹⁵. Nevertheless, it has to be acknowledged that migration could not be a viable possibility for the majority of these populations who lack the financial resources and the social linkages to move and settle in a new context, or do not envisage

¹⁰ Ibid. para 21(g) and 21(h).

¹¹ UNHCR 2001-2018, <http://www.unhcr.org/en-au/environment-disasters-and-climate-change.html>; International Organisation for Migration 2018, <https://www.iom.int/migration-and-climate-change>, [Accessed 27 July 2018].

¹² M. Klein Solomon, K. Warner, *Protection of Persons Displaced as a Result of Climate Change, Existing Tools and Emerging Frameworks*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 244.

¹³ IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Geneva, Switzerland, 2014, pp. 15-16.

¹⁴ The term vulnerability is intended according to the definition provided by the IPCC: "The degree to which geophysical, biological and socio-economic systems are susceptible to, and unable to cope with, adverse impacts of climate change". IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Cambridge, UK, 2007, p. 6.

¹⁵ G. Hugo, *Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 9.

displacement as a feasible option due to age, disability or cultural reasons. In fact, the most vulnerable are often incapable to migrate since the choice of moving implies a certain degree of insecurity about income, discrimination, health and so on¹⁶. However, those who remain at home constitute an urgent humanitarian issue deserving the attention of the international community.

This realistic approach questions the exaggerated projections of mass displacement of people that will be forced to move over this century emphasised by media and politicians, with subsequent implications on international security¹⁷. In fact, the narratives on climate-related migration have not been impartial. Also the academy has been divided between “alarmists” or “maximalists” and “sceptics” or “minimalists”: the former inflating the figures of “climate refugees” forecasted and focusing on deterministic scenarios; the latter acknowledging the complexity of climate-related migrations and considering all the involved variables aiming at identifying the most suitable legal and policy instruments to protect those displaced¹⁸. Consequently, such discourses have influenced the legal debate around climate-induced migrants and the appropriate international legal responses to be developed, which will be presented and discussed in this study. To acquire a more comprehensive understanding of the complexity underlying climate-induced migration the following subparagraphs illustrate some basic factors and distinctions that shall be considered when dealing with climate change-induced migration.

1.1.1 SLOW-ONSET VERSUS SUDDEN-ONSET CLIMATE EVENTS

¹⁶ F. Gemenne, *Climate-induced population displacements in a 4°C+ world*, in *Philosophical Transaction of the Royal Society*, A, 369, 2011, p. 188.

¹⁷ See e.g.: F. Harvey, *Devastating climate change could lead to 1m migrants a year entering EU by 2100*, *The Guardian*, 21 December 2017, available at: <https://www.theguardian.com/environment/2017/dec/21/devastating-climate-change-could-see-one-million-migrants-a-year-entering-eu-by-2100>. A. C. Kaufman, *Climate Change Could Threaten Up To 2 Billion Refugees By 2100*, *HuffPost*, 26 June 2017, available at: https://www.huffingtonpost.com/entry/crefugees_us_59506463e4b0da2c731c5e73?guccounter=1 [Accessed 27 July 2018].

¹⁸ F. Thornton, *Climate Change, Displacement and International Law: Between Crisis and Ambiguity*, in *The Irish Yearbook of International Law*, 147, 2012, pp. 149, 159.

Climate change acts in a dual form on the environment. On the one hand, it amplifies the frequency and magnitude of natural disasters, such as hurricanes, cyclones, floods and landslides¹⁹. These sudden-onset or rapid-onset events are usually dealt with as a matter of urgency by media and policymakers because their intensity and their consequences on territories and populations are immediately visible and give rise to critical circumstances. However, human displacement resulting from disasters generally has temporary character, and populations tend to return to reconstruct their homes and resettle their communities²⁰. On the other hand, slow processes induced by climate change, like sea level rise, desertification, droughts, extreme temperature, precipitation variations, and coastal erosion, are responsible for a gradual degradation of the environment and deterioration of natural resources²¹. In the long-run, cumulative slow-onset changes could compromise the sources of livelihood of the populations that are most reliant on their natural surroundings²², to the point of rendering some territories uninhabitable and making environmental conditions irreversible²³. Nevertheless, the relationship between slow-onset events and migration is more debated as, at the current state of science, the timing and entity of the impacts on territories is uncertain. Furthermore, this kind of changes is more likely to cause pre-emptive and organised migration outflows rather than sudden mass displacement²⁴. Therefore, climate-related movement triggered by gradual processes risks to remain ignored in legal terms. Instead, these are fundamental discriminating factors to be born in mind when addressing the issue, as the needs of people displaced by sudden-onset or slow-onset events will be specific.

¹⁹ Whereas earthquakes and tsunamis are not exacerbated by climate change since they depend on tectonic movements of the earth's crust.

²⁰ G. Hugo, *Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 14.

²¹ J. McAdam, *Building International Approaches to Climate Change, Disasters, and Displacement*, 33 in *Windsor Yearbook of Access to Justice*, 1, 2016, p. 3.

²² O. Dun, F. Gemenne, *Defining "environmental migration"*, in *Forced Migration Review*, 31, 2008, p. 10.

²³ M. Klein Solomon, K. Warner, *Protection of Persons Displaced as a Result of Climate Change, Existing Tools and Emerging Frameworks*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 247.

²⁴ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 6.

1.1.2 FORCED VERSUS VOLUNTARY DISPLACEMENT

In certain circumstances, especially in the aftermath of a disaster, such as a flooding or a cyclone, displacement can be the only option to survive. Then, fleeing from these extreme events is considered forced migration. In other scenarios, usually those produced by slow-onset processes, individuals or groups of people could decide to migrate and resettle elsewhere before their environment reaches the threshold of unsustainability or uninhabitability. In this case, anticipated and planned displacement would be voluntarily pursued as an adaptation strategy allowing families to diversify sources of livelihood and reduce vulnerability²⁵. However, sometimes the distinction between voluntary and forced migration is blurred, and it becomes difficult to assess how much the decision to move is deliberate or compelled, in particular in contexts impacted by slow-onset events, like in the case of the sinking islands. Here, it is challenging to identify the tipping point, namely the moment from which displacement will be inevitable due to the exhaustion of resources and the failure of adaptation action²⁶. In the “grey area” between the two poles of voluntary and forced displacement the choice of moving can be unconsciously driven by a varying degree of coercion²⁷.

In this regard, Biermann and Boas notice how discerning strictly between forced and voluntary migrants would underestimate the extent of the phenomenon. This could lead to the definition of certain categories entitled to receive international protection, while other groups would be excluded, without the foundation of an accurate and endorsed set of political, legal and ethical criteria²⁸. Nevertheless, it has to be acknowledged that movement driven by climate change can assume the form of sudden

²⁵ G. Hugo, *Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 13.

²⁶ M. Klein Solomon, K. Warner, *Protection of Persons Displaced as a Result of Climate Change, Existing Tools and Emerging Frameworks*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 247.

²⁷ W. Kälin, *Conceptualising Climate-Induced Displacement*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 95.

²⁸ F. Biermann, I. Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, in *Global Environmental Politics*, 10: 1, 2010, p. 65.

and unplanned flight or programmed and pre-emptive migration; in fact, depending on the type of movement, migrants will have different assets and capacities to establish successfully in the recipient location²⁹.

Moreover, displacement can be temporary or permanent. In the event of forced migration, it is more likely that people displaced will try to go back once the emergency has been overcome. Sometimes, temporary displacement becomes permanent when conditions at home do not improve or the disruption of the environment persists, and it could be not always possible to determine whether and when return is feasible; as an example, McAdam reports the findings of a 2009 study on Vietnam, according to which movement started with a temporary nature tends to become permanent due to recurrent floods that preclude different routes of temporary displacement³⁰. This will have different implications in terms of policies³¹.

1.1.3 INTERNAL VERSUS CROSS-BORDER DISPLACEMENT

Climate migration occurs predominantly within the country of origin: people choose to move internally, usually from the impacted coastal or delta regions towards the inland and urban centres. International reports on climate migration suggest that the majority of those displaced by disasters will travel short distances and not step over national borders³². However, it might happen that migrants cross international borders when lacking the option of internal resettlement, for example in the case of the low-lying islands in which there is no highland where to establish to escape sea level rise and coastal erosion. In addition, movement induced by climate change tends to overlap with traditional and seasonal flows of mobility because of the presence of family ties or other

²⁹ G. Hugo, *Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 12.

³⁰ EACH-FOR, *Synthesis Report*, 2009, p. 33, qtd. in J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 168.

³¹ M. Klein Solomon, K. Warner, *Protection of Persons Displaced as a Result of Climate Change, Existing Tools and Emerging Frameworks*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 248.

³² See e.g. Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, p. 3.

social networks facilitating displacement and providing support to migrants. There could also be the development of unprecedented patterns of mobility towards new directions even with less experience and information about the destination, but perhaps favoured by governmental policies and programmes. Nevertheless, it is more likely that climate migration will increase existing patterns of mobility rather than opening new channels of migration³³.

Let us examine the case of Bangladesh, nation ranked first on the Climate Change Vulnerability Index in 2014 and fifth in the Global Climate Risk Index 2015³⁴. Bangladesh is a low-lying delta area highly vulnerable to floods, cyclones, increasing temperatures, monsoon rain and erosion, factors that exacerbate the already precarious social and economic context concurrently causing displacement principally of internal, sudden and temporary nature³⁵. Although, it induces also an indirect “domino effect” on cross-border migration. In fact, the rural population who moves as a result of flooding and river banks’ collapsing resettle in urban centres enlarging the suburbs and pressuring resources. Usually these people lack means and ability to move further, and resettling in another country would be very challenging for them. Consequently, the urban middle class with a certain degree of education and skills seek to move abroad applying for work visas, while semi-skilled labourers are more likely to migrate intra-regionally to look for temporary or seasonal contracts in neighbouring countries³⁶. In Bangladesh such

³³ J. Barnett, M. Webber, *Migration as Adaptation: Opportunities and Limits*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom 2012, p. 42.

³⁴ International Organization for Migration (IOM) Bangladesh, *Assessing the Climate Change Environmental Degradation and Migration Nexus in South Asia*, December 2016, p. 42, available at: <https://bangladesh.iom.int/sites/default/files/publication/IOM%20Book%20-%20Assessing%20the%20Climate%20Change%2C%20Environmental%20Degradation%20%26%20Migration%20Nexus%20in%20South%20Asia.pdf> [Accessed 31 July 2018].

³⁵ International Organization for Migration (IOM) Regional Office for South Asia, *Assessing the Evidence: Environment, Climate Change and Migration in Bangladesh*, 2010, p. 28, available at: <https://bangladesh.iom.int/sites/default/files/publication/Environment-ClimateChange-and-Migration-in-Bangladesh.pdf> [Accessed 31 July 2018].

³⁶ International Organization for Migration (IOM) Bangladesh, *Assessing the Climate Change Environmental Degradation and Migration Nexus in South Asia*, December 2016, p. 45, available at: <https://bangladesh.iom.int/sites/default/files/publication/IOM%20Book%20-%20Assessing%20the%20Climate%20Change%2C%20Environmental%20Degradation%20%26%20Migration%20Nexus%20in%20South%20Asia.pdf> [Accessed 31 July 2018].

dynamics are building a long-term economic and adaptation strategy, easing the urban over-population, providing economic support to vulnerable households through remittances, and benefitting also bordering countries with shortages of specific categories of workforce. Therefore, in spite of the unavailability of precise figures, a scenario of large-scale cross-border displacement does not have concrete foundation and does not correspond to existing pathways of migration. Conversely, the phenomenon could be underestimated, since the relatively wealthy migrating abroad are often not recognised as climate-induced migrants, even though indirectly driven by climate change³⁷, because of the difficulty to prove such correlation and, more generally, because of the absence of an international legal definition of climate-induced migrants, issue that will be discussed in the following paragraph.

Evidence, then, contradicts the alarmist approaches forecasting the influx of masses of people displaced by the effects of climate change through international borders towards developed countries and dampens political discourses focusing on the security threat posed by the phenomenon of climate migration, leading countries to adopt a defensive stance, rather than concentrating on its humanitarian dimension.

Surely, internal and cross-border displacement shall be addressed differently on matters of legal responsibility for the protection of displaced people. However, consideration should be given to the fact that the categories presented in the above paragraphs are not always fixed and clear: ambiguities and changes can occur in the condition of climate-induced migrants. This explains the difficulties and the risks of applying either too strict or too wide categorisations when dealing with the phenomenon of climate change-related displacement.

1.2 ABSENCE OF A LEGAL DEFINITION

In literature about migration related to environment and climate a vast use of terminology to identify the issue has been observed. Lacking a legal definition agreed at

³⁷ J. McAdam, *Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*, *International Journal of Refugee Law*, 23:1, 2011, pp. 22-24; J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, pp. 161-172.

international level through the adoption of a binding treaty, the most recurrent terms deployed to identify such category of migrants are “environmental migration”, “climate change-induced migration”, “environmental or climate refugees”, “eco-refugees”, “climate change migrants”, “environmentally displaced persons”³⁸, some of which are used in this study, too. The reasons for this gap are multiple, like the difficulty of establishing a direct causal relationship between climate change and migration separated from other concurrent factors, and the many specific context-related variables examined in the section 1.4.

The consequence of the lack of consensus on a definition is the risk of formulating inappropriate policies and targeting unsuited groups of people³⁹. In addition, this conceptual ambiguity undermines research on people moving due to the impacts of climate change and precludes the collection of reliable data⁴⁰.

1.2.1 THE “CLIMATE REFUGEE” LABEL

“Environmental refugees” and “climate refugees” have become popular terms in the media and in literature. The notion of “environmental refugees” was introduced in 1970 by Lester Brown, environmentalist analyst founder of the Worldwatch Institute, but the term has started spreading since 1985 when it appeared in the title of a UNEP report written by Essam El-Hinnawi⁴¹. The author defined environmental refugees as:

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 life⁴².

His connotation encompasses three categories of environmental refugees: people displaced temporarily, and usually internally, by sudden-onset events; those displaced permanently in another area of their country due to accidents and man-made changes

³⁸ O. Dun, F. Gemenne, *Defining “environmental migration”*, in *Forced Migration Review*, 31, 2008, p. 10.

³⁹ *Ibid.* p. 10.

⁴⁰ F. Biermann, I. Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, in *Global Environmental Politics*, 10: 1, 2010, p. 62.

⁴¹ M. Picchi, *Climate Change and Protection of Human Rights: The Issue of Climate Refugees*, in *US-China Law Review*, 13: 576, 2016, p. 578.

⁴² E. El-Hinnawi, *Environmental Refugees*, United Nations Environment Programme, Nairobi, 1985.

of the habitat; people responding to slow-onset deterioration of their environment and moving temporarily or permanently usually across international borders⁴³.

Another definition, more specific in identifying the causes of environmental disruption, was provided by Myers and Kent in 1995 referring to people:

who can no longer gain a secure livelihood in their traditional homelands because of environmental factors of unusual scope, notably drought, desertification, deforestation, soil erosion, water shortages and climate change, also natural disasters such as cyclones, storm surges and floods. In face of these environmental threats, people feel they have no alternative but to seek sustenance elsewhere, whether within their own countries or beyond and whether on a semi-permanent or permanent basis⁴⁴.

According to these definitions, the concept of “climate refugees” is a subgroup of environmental refugees. However, there is no accordance in the specification of the notion of “climate refugees”. Biermann and Boas propose their restrictive definition which encompasses people forced to flee, consequently automatically excluding migrants who voluntarily resettle pressured by slow-onset processes. Furthermore, they leave out those impacted by phenomena – according to them – not related to forced migration such as temperature variation, those displaced by mitigation projects that could affect their livelihood, and people displaced by disasters related to accidents and pollution or events unrelated to climate change, like earthquakes and volcano eruptions. The authors rule out also migrants induced to move by conflicts or scarcity of resources, even though these events could have a linkage with climate change. In conclusion, Biermann and Boas “propose to restrict the notion of climate refugees to the victims of a set of three direct, largely undisputed climate change impacts: sea-level rise, extreme weather events, and drought and water scarcity”⁴⁵.

Undoubtedly, using the term “refugees” the intention is to converge the attention of media and policymakers towards the urgency of the problem, but,

⁴³ W. Franklin, G. Cardy, *Environment and Forced Migration, a Review*, United Nations Environment Programme, Nairobi, 1994, p. 3.

⁴⁴ N. Myers, J. Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena*, Climate Institute, Washington D.C., 1995, pp. 18-19.

⁴⁵ F. Biermann, I. Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, in *Global Environmental Politics*, 10: 1, 2010, pp. 63-64.

according to many scholars, its adoption in relation to climate-related migration is erroneous. To understand this, firstly it is necessary to recall the origin of the term “refugee” and the legal definition it was assigned in the 1951 Convention Related to the Status of Refugees and in the 1967 Protocol to the Convention. The issue of refugees emerged at the beginning of the Twentieth century and the international community, at the time organised in the League of Nations, adopted a series of agreements addressing the matters of responsibility and protection of refugees⁴⁶. Article 1A(1) of the 1951 Refugee Convention recalls such legal instruments and paragraph 2, read in conjunction with the above-mentioned protocol which removed the time limit of applicability⁴⁷, proposes a definition of refugees as individuals who are outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion⁴⁸.

As a consequence, Jayawardhan in a publication by Columbia University notices that the use of the term “climate refugee” is not coherent with the legal definition of refugee stated in the 1951 Refugee Convention. In fact, as it will be largely investigated in Chapter Two, persons induced to migrate by climate change impacts do not meet the conditions established by article 1A(2) of the Convention to be granted the status of refugee; for example, it would not be possible to identify the direct causal link between climate change and migration⁴⁹. Conversely, the expression “climate refugees”, according to the author, leads to an oversimplification of the problem and the failure to evaluate the complexity of contexts and variables involved⁵⁰.

⁴⁶ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees*, 2011, para 1-4.

⁴⁷ According to art. 1A(2) of the 1951 Convention, the status of refugee was applicable only to persons who acquired the status as a consequence of events occurred in Europe before 1 January 1951, as the Convention was an instrument specifically designed to address the refugee crisis resulted from World War II. The 1967 Protocol removed the time and geographical requirements in order to solve the divergence between the universal and unlimited definition of refugee contained in the UNHCR Statute and the scope of the 1951 Convention. See: G. S. Goodwin-Gill, J. McAdam, *The Refugee in International Law*, Third Ed., Oxford University Press, Oxford, 2007, p. 32.

⁴⁸ G. S. Goodwin-Gill, J. McAdam, *The Refugee in International Law*, Third Ed., Oxford University Press, Oxford, 2007, pp. 36-37.

⁴⁹ See Chapter 2.

⁵⁰ S. Jayawardhan, *Vulnerability and Climate Change Induced Human Displacement*, in Consilience, 17, Columbia University, 2017, pp .106-107.

Mence and Parrinder add that the notion of “refugees” is tied to the specific historical situation in which the Convention was conceived and deny that environmental or climate change as driver of forced displacement was envisaged in the intentions of the authors of the treaty. Moreover, stretching the scope of the Refugee Convention to include climate migrants would compromise the protection of refugees under the status of the treaty⁵¹.

Furthermore, the expression “climate refugees” would not benefit climate migrants, either. According to Jane McAdam, the identification of such category could generate a stricter classification of people moving due to climate change impacts, preventing the groups excluded from the definition of climate refugee, for example people affected by slow-onset processes, from receiving international protection⁵².

Lastly, the stigma and the fear of being subject to prejudice for being considered by States a threat to national security are associated with the term “refugee”. In fact, communities particularly vulnerable to climate change, feeling they might resort to migration, resist the label of refugees. Not only do they perceive a deprivation of dignity and a sense of victimisation, but also the condition of refugee makes them appear as responsible for the circumstances they are fleeing from, while, on the contrary, these communities are usually the minor emitters of greenhouse gasses and pollution producing climate change. In their opinion, then, the “refugee” label leaves the issue of responsibility unresolved⁵³. In this respect, former President of Kiribati Anote Tong in 2009 declared:

When you talk about refugees – climate refugees – you’re putting the stigma on the victims, not the offenders. [...] We don’t want to lose our dignity. We’re sacrificing much by being displaced, in any case. So we don’t want to lose that, whatever dignity is left. So the last

⁵¹ V. Mence, A. Parrinder, *Environmentally related international migration: Policy challenges*, in *A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-making*, ed. by M. McAuliffe and al., ANU Press, 2017, p. 320.

See Chapter 4, para 4.1.

⁵² J. McAdam, *Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*, in *International Journal of Refugee Law*, 23: 1, 2011, p. 17.

⁵³ See Chapter 4, para 4.4.

thing we want to be called is “refugee”. We’re going to be given as a matter of right something that we deserve, because they’ve taken away what we have⁵⁴.

In addition, the leaders of these communities disregard the imposition of such label since it would diverge international political attention from mitigation and adaptation efforts *in situ*, compromising community strength and resilience⁵⁵.

For all the above reasons, the “climate refugee” definition is not adequate to represent the vast group of individuals and communities moving in response to climate change impacts, especially in the light of the considerable range of determinants shaping the modalities of displacement previously examined.

1.3 PROPOSED OPERATIONAL DEFINITIONS

Despite the absence of a legal definition recognising the issue of climate migration and its features, the increasing scale of human displacement related to climate change and the necessity to deal with it led to the conceptualisation of working definitions by international organisations in charge of refugees and migrants’ assistance, like UNHCR and IOM. Even though environmental and climate change-induced displacement was not originally present in their mandate, these agencies responded to these new humanitarian challenges broadening their scope of action. However, it should be recalled that such definitions are merely descriptive and do not confer any legal status on environmental and climate migrants, and therefore do not constitute a ground for international protection⁵⁶.

⁵⁴ Interview with President Anote Tong, President of Kiribati, Tarawa, Kiribati, 12 May 2009, qtd. in J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, pp. 40-41.

⁵⁵ K. E. McNamara, C. Gibson, “*We don’t want to leave our land*”: *Pacific ambassadors at the United Nations resist the category of “climate refugees”*, in *Geoforum*, 40, 2009, p. 480.

⁵⁶ M. Klein Solomon, K. Warner, *Protection of Persons Displaced as a Result of Climate Change, Existing Tools and Emerging Frameworks*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 250.

1.3.1 ENVIRONMENTALLY DISPLACED PERSONS (EDPs), ENVIRONMENTAL MIGRANTS, CLIMATE-CHANGE-DISPLACED PERSONS (CCDPs)

The first UNHCR's publication on the matter⁵⁷ was issued in 2008 acknowledging the role of climate change in human displacement and how this phenomenon could intersect with the mandate of the agency, influencing the implementation of its operations. In the paper, the use of the terms "environmental refugees" or "climate refugees" are rejected, since they lack foundation in international refugee law. UNHCR, then, adopted the term Environmentally Displaced Persons (EDPs) referring to the definition formulated by Brian Gorlick, Senior Policy Advisor to the UN. In his words EDPs are those persons:

who are displaced from or who feel obliged to leave their usual place of residence, because their lives, livelihoods and welfare have been placed at serious risk as a result of adverse environmental, ecological or climatic processes and events⁵⁸.

The definition is deliberately unspecific, not mentioning the difference between internal and cross-border migration, nor the potential linkages with conflict or persecution⁵⁹. Alternatively, the International Organisation for Migration has preferred the term environmental migrants, to which an operational definition is associated:

Environmental migrants are persons or groups of persons who, for compelling reasons of sudden or progressive change in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad⁶⁰.

This second definition is more comprehensive in recognising the collective dimension of human displacement related to environmental and climate change. Moreover, it specifies the different time dimensions that movement might assume, together with its

⁵⁷ UNHCR, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, October 2008, (updated 14 August 2009), available at: <http://www.unhcr.org/4901e81a4.pdf> [Accessed 7 August 2018].

⁵⁸ C. Boano, R. Zetter, T. Morris, *Environmentally Displaced Persons: Understanding the linkages between environmental change, livelihoods and forced migration*, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, November 2008, p. 8.

⁵⁹ *Ibid.*, p. 8.

⁶⁰ IOM, *Discussion Note: Migration and the Environment*, DOC MC/INF/288, 1 November 2007, para 6.

internal or cross-border geographical scope. Hence, it encompasses all the diverse scenarios of displacement that climate change might trigger. Nevertheless, as clarified in the document presenting the definition, a mention to other intersecting political, economic and social factors is omitted not for reason of negligence, but to concentrate the political attention on environment and climate as factors inducing displacement⁶¹. A third definition proposed by the scholars David Hodgkinson and Lucy Young slightly differs from the previous ones:

CCDPs (Climate-Change-Displaced Persons) are groups of people whose habitual homes have or will become temporarily or permanently uninhabitable as a consequence of a climate change event⁶².

The authors conceive this formulation in function of their project of Convention for CCDPs, in which a climate change event is defined as a sudden or gradual environmental devastation “very likely” caused by men-made climate change⁶³. Therefore, the relation between anthropogenic activities and climate change manifestations is acknowledged, contrary to the other definitions which do not make explicit reference to this aspect. In addition, there is no differentiation between forced and voluntary migration since, in Hodgkinson and Young’s view, proactive forms of displacement are considered compelled by the assumption that at some point in the future their place of residence will become uninhabitable. Lastly, the authors focus the attention on the collective dimension of CCDPs, suggesting that the status would be not conferred on individual basis, but after a process of designation to entire groups of people and communities from the same region affected by climate change events⁶⁴.

⁶¹ Ibid., para 7.

⁶² D. Hodgkinson, L. Young, *“In the Face of Looming Catastrophe”, A Convention for Climate-Change-Displaced Persons*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 314.

⁶³ The project of the Convention for CCDPs by Hodgkinson and Young will be analysed in Chapter 4, para 2.

⁶⁴ D. Hodgkinson, L. Young, *“In the Face of Looming Catastrophe”, A Convention for Climate-Change-Displaced Persons*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, pp. 314-315.

1.3.2 INTERNALLY DISPLACED PERSONS (IDPs)

As previously mentioned, the majority of migration flows induced by climate change takes place within national borders. Since 1998 a document elaborated by the Representative to the UN Secretary-General at the time in charge of internally displaced persons (IDPs), under request of the Commission on Human Rights, has established the international standards for the protection and the assistance to internally displaced persons⁶⁵. The Guiding Principles on Internal Displacement is a non-binding mechanism of soft law that equips States with a legal framework for managing internal displacement. It does not impose obligations on governments but constitutes an incentive to comply with international standards. In fact, it is observed that States and regional organisations are progressively incorporating the Principles into domestic law. Despite the limited enforceability due to the non-legally binding nature of the text, this instrument has the advantage of leaving to States enough flexibility for its implementation⁶⁶.

According to the definition provided at paragraph two of the document, IDPs are:

persons or groups of persons who have been forced or obliged to flee or to leave their homes of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border⁶⁷.

The formulation is broad and encompasses categories of people displaced by multiple reasons; however, annotations of Special Rapporteurs on the Human Rights of IDPs and annual reports on internal displacement have clarified that environmentally displaced persons, both by sudden and slow-onset events, are included in the definition⁶⁸.

⁶⁵ OHCHR 2018, <https://www.ohchr.org/en/issues/idpersons/pages/standards.aspx> [Accessed 8 August 2018].

⁶⁶ S. Jayawardhan, *Vulnerability and Climate Change Induced Human Displacement*, in Consilience, 17, Columbia University, 2017, p. 110.

⁶⁷ UN High Commissioner for Refugees (UNHCR), *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 1998, para 2.

⁶⁸ See: UNGA, A/54/409, 29 September 1999, para 12, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/278/90/PDF/N9927890.pdf?OpenElement> [Accessed 8 August 2018].

The Guiding Principles recognise to IDPs the same rights and freedoms as the other citizens of the country⁶⁹ and outline governments' duties and strategies to assist displaced persons through all the phases of internal displacement⁷⁰.

UNHCR's role in relation to internal displacement is not exclusive, since the Statute of the organisation does not confer a general mandate regarding IDPs. Conversely, UNHCR is entitled to deliver assistance to IDPs in specific emergency situations. Given the primary responsibility of national governments⁷¹, UNHCR shall be involved provided that the UN Secretary General or other competent organs of the UN have addressed an explicit request, and that the State has granted to the agency its consent to conduct operations in its territory⁷².

1.3.3 OTHER FRAMEWORKS FOR THE CONCEPTUALISATION OF CLIMATE MIGRANTS

Not only have scholars formulated definitions, but some of them have also elaborated detailed frameworks foreseeing different typologies of scenarios in order to provide policymakers with guidance for the development of adequate legal and policy responses.

Walter Kälin, former Secretary-General's Representative on the Human Rights of Internally Displaced Persons and currently on the Board of Directors of the Norwegian Refugee Council, has proposed a classification of climate-induced displacement focusing on the impacts on water, based on the research conducted by the IPCC. Kälin depicts five scenarios: firstly, he refers to *sudden-onset disasters*, causing internal or cross-border displacement of large groups of people that usually manage to return. The author includes in this category also people displaced by disasters unrelated to climate change, who, he argues, have the same necessity and right to receive assistance. Secondly, *slow-*

UNGA, A/64/214, 3 August 2009, p. 6, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/437/86/PDF/N0943786.pdf?OpenElement> [Accessed 8 August 2018].

⁶⁹ UNHCR, *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 1998, Principle 1.

⁷⁰ See Chapter 2, para 2.

⁷¹ UNHCR, *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 1998, Principle 3.

⁷² UNHCR, *UNHCR's mandate for refugees, stateless persons and IDPs*, 2018, available at: <https://emergency.unhcr.org/entry/113370/unhcrs-mandate-for-refugees-stateless-persons-and-idps> [Accessed 9 August 2018].

onset environmental degradation, derived from sea level rise and salinisation of soil, drought and desertification, will affect economic activities in the concerned territories. It may not trigger forced displacement in the first place but induce people to relocate voluntarily elsewhere. If adaptation fails also the part of the population that did not choose to move might be compelled to move and resettle permanently. The third scenario regards “*sinking*” *small island states*. Climate change will impact low-lying islands with amplified magnitude rendering these territories uninhabitable. Potentially, their entire population might be forced to displace to other countries and return would be impossible. In fourth place, Kälin considers those territories that may be declared *high-risk areas*, from which population shall be evacuated in the predicted event of flooding or other disasters. In this case, displacement is expected to be predominantly internal. Ultimately, *public disorders, violence and armed conflict* may be exacerbated by the scarcity and pressure on essential resources such as drinking water in areas already stressed by poverty. Such scenario could trigger internal displacement as well as cross-border movement looking for asylum in another country under international refugee law⁷³.

Barnett and Webber, political and economic geographers at the University of Melbourne, provide an alternative classification based on the patterns of movement. The first category includes *international and internal labour migrants*: individuals whose livelihood is compromised by the effects of climate change may choose migration as an adaptation strategy; therefore, they will try to use the already existing channels for labour migration. The authors argue that this category does not necessitate humanitarian assistance, but they need the political conditions facilitating integration in the host country and to maintain relations with their place of origin. The second one contains *internal and international displaced persons*, whose movement is driven by sudden-onset disasters amplified by climate change. Displacement is likely to occur over short distances, and displaced persons will tend to return. Developing plans to manage disasters, increasing the efficiency in aid delivering, and facilitating the return of

⁷³ W. Kälin, *Conceptualising Climate-Induced Displacement*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, pp. 84-86.

displaced people are the policy areas on which governments shall focus. On the contrary, *internal and international permanent migrants* follow a pattern of displacement pushed by slow-onset degradation processes. This category is more problematic because of the difficulties in distinguishing whether people are forced to move predominantly by environmental and climate changes or whether other concurrent causes played a substantial role. The last group involves the *relocation of communities*: the authors prospect the resettlement of entire communities or populations, as for the case of low-lying islands, whose sustenance and human rights are severely insecure. This scenario would pose significant legal challenges at international level⁷⁴.

1.3.4 RISKS OF DEFINITIONS

Some scholars have raised the issue of risks deriving from the attempts to conceptualise and define climate migrants. As a matter of fact, for practical reasons any definition results artificial in order to be applicable; then, as previously noticed, it might fail to take in consideration the ambiguous cases and the overlap between categories. On the contrary, in Gemenne's point of view, a too broad framework that encompasses every minor variation according to which climate migration could manifest, risks to damage those that necessitate assistance most urgently and substantially⁷⁵. The same concerns are expressed by Thornton when analysing the environmental migrant's definition adopted by the International Organisation for Migration. In fact, while acknowledging that such formulation takes into account the multiple complexities of climate-induced displacement, she questions the uncertainties it might generate with

⁷⁴ J. Barnett, M. Webber, *Migration as Adaptation: Opportunities and Limits*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom 2012, pp. 42-43.

⁷⁵ O. Dun, F. Gemenne, *Defining "environmental migration"*, in *Forced Migration Review*, 31 (2008), p. 11.

the danger of becoming unworkable⁷⁶. For this reason, some even wonder whether a universal legal definition would be convenient given the number of possible scenarios⁷⁷.

On the other hand, though, the necessity of producing a universal and accepted denotation has become a crucial matter for many scholars and scientists in the international arena.

1.4 REASONS EXPLAINING THE DIFFICULTIES IN CONCEPTUALISING CLIMATE-INDUCED MIGRANTS

As can be observed, researchers among the scientific and academic communities have not reached an agreement on how to understand and categorise climate migration because of a deficiency of information about the relationship between climate change and human displacement.

1.4.1 CONCURRENT CAUSES

While it is fundamental to recognise that the impacts of climate change are to some extent responsible for human migration, a critical analysis shall be conducted on the nature of such linkage. At the present state of science, there is not enough theoretical and empirical evidence to identify a direct causal relation justifying the claim that climate change functions as an autonomous driver of forced or voluntary migration. Firstly, in some cases it is not possible to discern the effects of anthropogenic climate change from the natural processes of degradation and transformation to which the Earth's environment is subject⁷⁸.

⁷⁶ F. Thornton, *Climate Change, Displacement and International Law: Between Crisis and Ambiguity*, in *The Irish Yearbook of International Law*, 147, 2012, pp. 156.

⁷⁷ V. Mence, A. Parrinder, *Environmentally related international migration: Policy challenges*, in *A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-making*, ed. by M. McAuliffe and al., ANU Press, 2017, p. 326, quoting J. McAdam, *Climate change, displacement and the role of international law and policy*, paper presented at the international dialogue on migration 2011, Geneva 29/30 March 2011, p. 4.

⁷⁸ R. Zetter, *Protecting People Displaced by Climate Change: Some Conceptual Challenges*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 138.

Secondly, the impacts of climate change alone are unlikely to produce displacement. Instead, the political, social and economic underlying conditions, combined with climatic stressors, influence the decision or the coercion to move. Additional factors are, for example, the demographic situation of the country, the presence of conflicts and violence, or the culture of populations, especially if indigenous people are concerned⁷⁹. Vulnerability, indeed, is a key variable to consider: it explains why communities respond differently to disasters and other climatic processes. Thus, since populations and territories have diverse degrees of vulnerability and resilience, it is arduous to conceive a system able to assess the level of implication of climate change in generating displacement. Not surprisingly, then, when disasters impact Western countries, the presence of resilient structures, efficient networks of services, and the prompt reaction of the authorities avoid the necessity to migrate or reduce it to a temporary short-term displacement in order to rehabilitate the affected area. However, in a certain affected area a role in displacement is played also by inequalities and differences in the society. As an example, after Hurricane Katrina hit New Orleans in 2005, for the majority of people among marginalised minorities and disadvantaged classes return was not possible and permanent relocation remained the only option, proving how social and economic conditions influence displacement in the context of disasters and climate change⁸⁰.

In conclusion, climate-related migration is a multi-causal phenomenon⁸¹. Due to this, restricting or widening the definition, or trying to categorise climate migrants to provide them with diverse levels of protection becomes challenging and perhaps unreasonable. In fact, no matter to what extent the decision to move is directly conditioned by climate change, displaced people face obstacles, frustration and uncertainties with regard to the respect of their human rights. Therefore, McAdam

⁷⁹ V. Mence, A. Parrinder, *Environmentally related international migration: Policy challenges*, in *A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-making*, ed. by M. McAuliffe and al., ANU Press, 2017, pp. 322-323.

⁸⁰ S. Jayawardhan, *Vulnerability and Climate Change Induced Human Displacement*, in *Consilience*, 17, Columbia University, 2017, pp. 116-117.

⁸¹ V. Mence, A. Parrinder, *Environmentally related international migration: Policy challenges*, in *A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-making*, ed. by M. McAuliffe and al., ANU Press, 2017, p. 323.

suggests that displacement should be approached in the light of the needs it generates, rather than according to its causes⁸². However, in spite of being a fair consideration in principle, it appears politically impracticable; this attitude would potentially expand the number of persons seeking international protection in a context in which States do not want to commit further to assist displaced people mainly for reasons of national security.

Going back to the issue of multiple causality, in addition to not reflecting reality, the attempt to isolate climate change as a single factor inducing migration does not benefit people in need of national and international protection. In fact, conceptualising an independent legal status for migrants displaced uniquely by climate change is not supported by factual foundation and might compromise the formulation of adequate policies and, consequently, the delivery of effective assistance. The coexisting political and socio-economic aspects that play a role in driving migration related to environmental disaster or degradation are, according to Zetter, essentially ignored by policymakers, who adopt a technical and apolitical framework to deal with the phenomenon⁸³.

1.4.2 THE CUMULATIVE EFFECT

Another reason complicating the conceptualisation of climate migration is the cumulative effect that climate change has on the environment. According to the United States Council on Environmental Quality, cumulative effect is the incremental repercussion that climate change, in this case, causes on the environment by the sum of past, present and future events impacting land and sea. New disasters and climatic processes, then, will have different consequences on human habitats depending on the transformations implemented on the territory by communities through their human

⁸² J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 23.

⁸³ R. Zetter, *The Politics of Rights Protection for Environmentally Displaced People*, in *Environmental Change*, 44, ed. by T. Martikainen, Migration Institute of Finland, 2017, p. 5, available at: http://www.migrationinstitute.fi/files/pdf/siirtolaisuus-migration/sm_1_2017_nettiin.pdf [Accessed 14 August 2018].

activities⁸⁴. For example, the exploitation of land for intensive food production impoverishes the soil undermining its resistance to desertification, flooding, landslides, and so on. If a climate change manifestation, such as a cyclone, hits this territory, the effects will be amplified given the pre-existent condition of the soil. The magnitude of the impacts could be severe enough to reach the tipping point, inducing people inhabiting that territory to displace elsewhere⁸⁵. Therefore, climate change exacerbates already existing threats and factors of stress, but how is it possible to determine whether it was climate change or other factors to play the fundamental role in displacement?

1.4.3 CONTEXT-SPECIFIC VARIABLES

It has been said that climate change impacts interact with other political, social and economic factors in triggering displacement. Moreover, several modalities of movement have been discussed – temporary or permanent, internal or cross-border, coerced or voluntary displacement. All these aspects combine differently producing diverse results depending on the characteristics of populations and territories involved. These context-specific variables shape the patterns of migration, while there is not a universal theory predicting in which form displacement will occur regardless of the spatial and time dimension. That is why it will be demonstrated in the next chapters that solutions to the climate migration issue will be more effective if developed and applied at regional level.

1.4.4 COUNTING CLIMATE MIGRANTS

Intentionally, this study omits figures and estimates related to the number of people displaced by the effects of climate change because of a lack of scientific evidence providing data accurate enough to calculate the dimension of present and future

⁸⁴ L. Reid, T. Lisle, *Cumulative Effects and Climate Change*, U.S. Department of Agriculture, Forest Service, Climate Change Resource Center, 20 May 2008, available at: <http://www.fs.fed.us/ccrc/topics/cumulative-effects.shtml> [Accessed 14 August 2018].

⁸⁵ United Nations Convention to Combat Desertification (UNCCD), *Global Land Outlook, First Edition*, Bonn, Germany, 2017, pp. 48-49, 96-97.

mobility. The first reason for this is the already discussed difficulty in determining a direct causal relationship between climate change and human displacement. Since other factors are entangled in what motivates individuals and communities to move, it is problematic to assess for how many of them climate change constitutes the main or exclusive push factor. In addition, given the absence of a universal legal definition of climate-induced migrants, researches cannot rely on specific criteria to discern climate migrants from persons displaced by other reasons⁸⁶. This implies that confronting different studies does not lead to successful results, as statistics and estimates are based on different conceptions of climate migrants and diverse terminology⁸⁷.

Because of this void in terms of data, forecasts about flows generated by the effects of climate change can only be built on existing patterns of migration induced by changes in the environment. This shall enable to recognise major tendencies of the size and the geographical scope of migration flows but will not provide reliable figures; in fact, such models do not take into account the development of human adaptation and resilience over time⁸⁸. It might even happen that, as Gemenne expects, climate change impacts will reach such an acute degree of magnitude that communities will no longer be able to resort to migration as an adaptation option, and traditional patterns of displacement will be altered⁸⁹.

Nevertheless, it should be considered that alarmist inflated projections which appear in newspapers' headlines and political discourses are not founded on verifiable data for the reasons enumerated above.

⁸⁶ O. Dun, F. Gemenne, *Defining "environmental migration"*, in *Forced Migration Review*, 31, 2008, p. 11.

⁸⁷ F. Biermann, I. Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, in *Global Environmental Politics*, 10: 1, 2010, p. 66.

⁸⁸ F. Gemenne, *Climate-induced population displacements in a 4°C+ world*, *Philosophical Transaction of the Royal Society*, A, 369, 2011, p. 186.

⁸⁹ *Ibid.* p. 187.

CHAPTER TWO

THE CURRENT LEGAL FRAMEWORK: THE INTERNATIONAL LEVEL

Summary: 2.1 The 1951 Refugee Convention. – 2.1.1 A restrictive definition of “refugee”. – 2.1.2 The element of persecution. – 2.1.3 The time dimension. – 2.1.4 The *Non-Refoulement* principle. – 2.2 The Guiding Principles on Internal Displacement. – 2.2.1 How the instrument could enhance the protection of climate migrants. – 2.3 Role of Human Rights Legal Instruments: Complementary Protection. – 2.3.1 Right to Life. – 2.3.2 Cruel, Inhuman or Degrading Treatment. – 2.3.3 Analysis. – 2.4 Other Instruments. – 2.4.1 The Nansen Initiative and The Platform on Disaster Displacement. – 2.4.2 Disaster Risk Reduction.

2.1 THE 1951 REFUGEE CONVENTION

Climate change induced migration is a phenomenon which existence has been acknowledged only recently by the international community. However, among the academic and political spheres a consensus on the nature of the issue has not been achieved yet, since uncertainties and controversies hinder the capacity of conceiving a legal definition and a framework to regulate flows of migration related to sudden disasters as well as slow degrading processes, as the first chapter illustrates. That is why there is no specific legally-binding treaty addressing the issue and providing governments with guidelines on how to ensure protection to climate change migrants⁹⁰.

In this chapter, then, existing legal instruments regarding displacement and international protection will be analysed in order to assess whether they could be beneficial to climate migrants. The Convention and the Protocol relating to the Status of Refugees of 1951 is the first treaty to be examined.

⁹⁰ L. Nishimura, “Climate Change Migrants”: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, in *International Journal of Refugee Law*, 27: 1, 2015, pp. 108-110.

The Refugee convention was conceived in the aftermath of World War II in order to protect the great number of internationally displaced persons produced by the conflict. The text, approved in 1951 and entered into force in 1954, has been ratified by 145 State parties. In 1967 a Protocol was added to the Convention amending and broadening the scope of the treaty, as the scale of displacement due to persecution reached a global level⁹¹. The treaty confers rights to people fleeing their countries which no longer guarantee them safety and protection, and it suggests guidelines to host states on how to implement international legal standards and to manage asylum procedures⁹². The Convention establishes a set of essential principles: firstly, a customary international legal obligation lies at the basis of the treaty, namely the principle of *non-refoulement* which prevents the repatriation of persons to their countries where they would suffer serious threats to their life and fundamental rights⁹³. Secondly, among the human rights ensured to refugees there are the rights to work and housing, education, freedom of religion, access to court, and the right to receive identity and travel documents. This is related to the principle of non-discrimination according to which in the host State refugees should be treated as nationals⁹⁴. Thirdly, acknowledged the global dimension of the problem, the importance of international solidarity and cooperation between states and with NGOs is emphasised⁹⁵.

These standards have also been integrated and elaborated in regional legal instruments, namely the OAU Refugee Convention of 1969 in Africa and the Cartagena

⁹¹ UNHCR, *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Geneva, Switzerland, 2011, p. 1, available at: <http://www.unhcr.org/en-au/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html> [Accessed 5 September 2018].

⁹² *Ibid.* pp. 4-6.

⁹³ UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner)*, EC/SCP/2, Executive Committee of the High Commissioner's Programme, Twenty-eighth session, Sub-Committee of the whole on International Protection, 23 August 1977, available at: <http://www.unhcr.org/afr/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> [Accessed 5 September 2018].

⁹⁴ UN General Assembly, *Convention and Protocol relating to the Status of Refugees*, 189 UNTS, 28 July 1951, articles 22-30.

⁹⁵ *Ibid.* para 4, B.

Declaration of 1984 in South America, while in the European Union the Common European Asylum System (CEAS) has been in place since 2005⁹⁶.

Given the constant evolution of drivers and modalities of displacement, and the emergence of new patterns of forced migration, the protection of refugees through the 1951 Convention faces pressures and different challenges, while debates about the necessity of its amendment and adaptation to the changing global context are rising⁹⁷. For the scope of this study, four aspects of the Refugee Convention will be analysed in detail in order to assess whether such instrument could succeed in providing protection to climate migrants, bearing in mind the varied nature and all the complexities concerning climate change-induced migration.

2.1.1 A RESTRICTIVE DEFINITION OF “REFUGEE”

Firstly, it is crucial to understand why, legally speaking, the notion of “refugee” as defined by the 1951 Convention cannot apply to the status of people displaced by climate change. In addition to not being suitable for the reasons expressed in paragraph 1.2.1 of the first chapter, the legal definition of “refugee” contained in article 1(A)2 provide a restrictive connotation and an exhaustive list of circumstances under which the criteria for being a refugee are met, therefore limiting the flexibility of judicial interpretation⁹⁸. According to the Convention and the Protocol, in fact, a refugee is a person who:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his

⁹⁶ UNHCR, *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Geneva, Switzerland, 2011, p. 1, available at: <http://www.unhcr.org/en-au/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html> [Accessed 5 September 2018].

The regional instruments of protection will be analysed in Chapter 3.

⁹⁷ UNHCR, *Commemorating 60 Years of the Refugee Convention: Commitments for Protection and Solutions in the OSCE Region*, HDIM.IO/0248/11, 30 September 2011, UNHCR Contribution to the OSCE Human Dimension Implementation Meeting, Working Session 11: Humanitarian Issues and Other Commitments, Warsaw, 26 September to 7 October 2011, available at: <https://www.osce.org/odihr/83396?download=true>, [Accessed 5 September 2018].

⁹⁸ A. Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, in *Law & Policy*, 30: 4, October 2008, pp. 507-508.

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 it⁹⁹.

The first observation is that this formulation is applicable to people who have forcibly crossed an international border and find themselves outside their country of origin¹⁰⁰. As it was previously discussed, movement induced by climate change assumes predominantly an internal nature, trend which is confirmed by projections for the near future; therefore, the Convention would not address the issue of Internally Displaced Persons¹⁰¹.

Moreover, in order to be considered a refugee, the Convention's definition requires that an individual is persecuted because of specific elements, namely race, religion, nationality, social group or political opinion¹⁰². It is not sufficient to determine that a person is at risk of being persecuted; a causal linkage between the risk of being persecuted and the protected grounds must be established¹⁰³. However, the effects of climate change affect individuals and populations indiscriminately, regardless of identity or any particular membership. In spite of the fact that some regions will be especially impacted due to geographical reasons and poor conditions, displacement driven by climate change does not target people according to the grounds presented in the Convention's definition of refugee¹⁰⁴. Lastly, as it has been already mentioned, after World War II displacement due to environmental or climatic reasons was not an issue, and the notion of climate change had not been conceived until the 1970s, as the effects

⁹⁹ UN General Assembly, *Convention and Protocol relating to the Status of Refugees*, 189 UNTS 137, 28 July 1951, article 1(A)2.

¹⁰⁰ G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Third Ed., Oxford University Press, Oxford, 2007, pp. 35-36.

¹⁰¹ R. Zetter, *Protecting People Displaced by Climate Change: Some Conceptual Challenges*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 133.

¹⁰² J. C. Hathaway, M. Foster, *The Law of Refugee Status*, 2nd ed., Cambridge University Press, 2014, pp. 363-367.

¹⁰³ J. C. Hathaway, M. Foster, *The Law of Refugee Status*, 2nd ed., Cambridge University Press, 2014, p. 363.

¹⁰⁴ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 46.

were not consistently manifest before that time¹⁰⁵. Therefore, addressing the needs of climate migrants was not in the intentions of the drafters of the Convention, and consequently the treaty's provisions – as they are currently written – are not appropriate for the protection of such group¹⁰⁶.

2.1.2 THE ELEMENT OF PERSECUTION

Displacement generated by the impacts of climate change, being rapid-onset or slow-onset events, does not conform with the second important element established by the Convention, either. Despite the absence of a definition of “persecution” in the Convention¹⁰⁷, in order to be recognised a refugee, the applicant must be able to prove “to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition”¹⁰⁸; in other words, the individual should demonstrate a “well-founded fear” of persecution due to one of the factors enumerated in the previous paragraph (race, nationality, religion, etc...). Nevertheless, in order to satisfy the criterium of “well-founded fear” the applicant does not need to prove that the circumstances will probably or certainly culminate in persecution, but it is sufficient that the existence of “reasonable possibility” of persecution is demonstrated¹⁰⁹. Therefore, being the assessment of persecution composed of an objective and a subjective element, with regard to the latter the issue of credibility of the applicant is of central importance¹¹⁰.

¹⁰⁵ E. Conway, *What's in a Name? Global Warming vs. Climate Change*, NASA, 12 May 2008, available at: https://www.nasa.gov/topics/earth/features/climate_by_any_other_name.html, [Accessed 5 September 2018].

¹⁰⁶ S. Jayawardhan, *Vulnerability and Climate Change Induced Human Displacement*, in Consilience, 17, Columbia University, 2017, p. 107.

¹⁰⁷ G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Third Ed., Oxford University Press, Oxford, 2007, p. 90.

¹⁰⁸ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees*, Geneva, 2011, para 42.

¹⁰⁹ UNHCR, *The Refugee Convention 1951, The Travaux Préparatoires analysed with a commentary by Dr. Paul Weis*, 1990, pp. 7-8. See also: P. Weis, *The refugee convention, 1951: the travaux préparatoires analysed, with a commentary*, Cambridge University Press, 1995, p. 8.

¹¹⁰ G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Third Ed., Oxford University Press, Oxford, 2007, pp. 63-64.

In the case of climate change-related displacement two main problems arise: firstly, especially in the event of slow degrading processes, determining the degree to which the impacts meet the threshold of persecution becomes particularly challenging. In fact, if the process of environmental degradation has not yet achieved its tipping point, the corroboration of the severity of the threat fails¹¹¹. Nevertheless, since the gravity of the situation is given by the nature of the threat or by its constant repetition leading to the violation of fundamental human rights¹¹², Ragheboom suggests that the cumulative character of climate change impacts should justify the meeting of the threshold required by the Convention¹¹³.

Secondly, identifying the persecutor, that is to say determining the agent who perpetrated the threats and ill-treatment inducing displacement, would be equally difficult. According to the Convention, the persecutor must be a State, which purposely adopts policies or practices causing damage to an individual, or a non-state entity but identifiable in a real agent (as for example rebel groups or terrorist groups) against which the State cannot defend its citizens¹¹⁴. Defining climate change a persecutor is technically incorrect, since it does not represent a human agent. Moreover, the State of habitual residence of the individual might be willing but unable to protect its citizens from the effects of climate change, lacking the resources and the financial means to adapt to the impacts of disasters and degradation¹¹⁵. That is why Ragheboom, in the effort of evaluating whether the Refugee Convention could provide a legal basis for the protection of climate migrants, refers to the “protection theory” embraced by the European Union legislation, which focuses on assessing the presence or absence of protection by the State rather than on the identity of the persecutor¹¹⁶. The author,

¹¹¹ J. McAdam, *Building International Approaches to Climate Change, Disasters, and Displacement*, 33 in Windsor Yearbook of Access to Justice, 1, 2016, p. 4.

¹¹² G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Third Ed., Oxford University Press, Oxford, 2007, p. 91.

¹¹³ H. Ragheboom, *The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective*, Brill Nijhoff, Leiden, 2017, p. 299.

¹¹⁴ J. C. Hathaway, *The Law of the Refugee Status*, Butterworths, London, 1991, pp. 125-133.

¹¹⁵ W. Kälin, *Conceptualising Climate-Induced Displacement*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, pp. 96-97.

¹¹⁶ H. Ragheboom, *The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective*, Brill Nijhoff, Leiden, 2017, pp. 314-316.

then, tests in her essay the validity of the theory applicable to climate change migration, drawing the conclusion that “for the most part, environmental displacement cannot fall under the Refugee Convention because there is no identifiable «persecutor» which in turn points to the absence of discriminatory reasons for the harm invoked”¹¹⁷. However, some scholars argue that a persecutor could be identified in the international community, especially in the industrial countries of the Western World mainly responsible for the emissions of greenhouse gases in the last decades¹¹⁸. Nevertheless, this implication creates some legal problems and it is not sufficient to ensure protection to climate change-induced migrants under the scope of the 1951 Convention¹¹⁹.

Furthermore, the facts that in inducing displacement climate change acts as a threat amplifier and that, at the current state of science, isolating a single cause of movement seems to be impossible constitute an additional obstacle to the detection of the element and the agent of persecution¹²⁰.

2.1.3 THE TIME DIMENSION

McAdam draws the attention to another Convention’s requirement that in the case of climate change-induced displacement can hardly be satisfied. Under the 1951 Refugee framework, in fact, protection is directly related to the imminence of the threat, other than to the degree of severity of the damage. Although it foresees the possibility of anticipatory flight in view of the forthcoming threat, the extent to which pre-emptive movement is admissible under the scope of the Convention is rather limited. Therefore, the Refugee Convention results unsuitable to provide protection especially to pre-emptive displacement induced by the effects of slow-onset events degrading the environment¹²¹; indeed, it is not possible to establish a certain timeframe in which these

¹¹⁷ Ibid. p. 335.

¹¹⁸ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 45.

¹¹⁹ The issue of the responsibility of States will be further investigated in Chapter 4.

¹²⁰ A. Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, in *Law & Policy*, 30: 4, October 2008, p. 509.

¹²¹ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, pp. 49-50, 84.

processes will reach their highest level of intensity, as the development of adaptation strategies and the state of science are in constant evolution.

2.1.4 THE NON-REFOULEMENT PRINCIPLE

In article 3 of the Refugee Convention the principle of *non-refoulement* is defined as follows:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion¹²².

Besides being established in the Convention, the principle is reasserted in article 3 of the 1984 UN Convention against Torture¹²³. In addition, it has been incorporated in regional legal instruments, such as the OAU Convention and the Cartagena Declaration, some of which broadened the applicability of the norm, according to the evolving interpretation of the principle in light of the changing context¹²⁴. Though, primarily the *non-refoulement* principle is a norm of customary international law that every State of the international community is required to respect¹²⁵. In the UNHCR Advisory Opinion, in fact, it is asserted that the prohibition of *refoulement* of refugees constitutes a rule of customary international law as it meets the two criteria required by article 38(1)b of the Statute of the International Court of Justice, namely consistent state practice and *opinio*

¹²² UN General Assembly, *Convention and Protocol relating to the Status of Refugees*, 189 UNTS, 28 July 1951, article 33(1).

¹²³ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS, 10 December 1984, article 3.

¹²⁴ Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”)*, 1001 UNTS, 10 September 1969, article 2(3).

Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, article 3(5).

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16*, ETS 5, 4 November 1950, article 3.

See Chapter 3.

¹²⁵ See: C. Costello, M. Foster, *Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, in M. Heijer, H. van der Wilt (ed. by), *Netherlands Yearbook of International Law*, vol 46. T.M.C. Asser Press, The Hague 2015, pp. 273-327. See also: J. Allain, *The jus cogens nature of non-refoulement*, in *International Journal of Refugee Law*, 13, 2002, pp. 533–558.

juris. Consequently, the norm is binding on all States, including those which have not ratified the 1951 Convention or the 1967 Protocol¹²⁶.

From the analysis of the nature of *non-refoulement*, some observations on the applicability of the principle in relation to climate change-induced displacement can be inferred. Under customary law and human rights law, the applicability of *non-refoulement* cannot be denied to groups of displaced persons escaping from the same threat and applying for protection in another State. It is required that the State proceeds to examine individually the circumstances of each component of the group to establish whether they may receive protection or should be removed¹²⁷. This is made clear, for example, by the European Convention on Human Rights which in article 4 of Protocol No. 4 to the Convention prohibits the “collective expulsion of aliens”. The purpose of this provision is “to prevent States from being able to remove a certain number of aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority”¹²⁸. The same provision can be encountered in the American Convention on Human Rights at article 22(9)¹²⁹. Apparently, this aspect would be especially suitable to the case of climate change-related movement; in fact, both disasters and slow-onset events are likely to contribute to the displacement of large groups of people from the same area¹³⁰.

However, the *non-refoulement* norm does not constitute a legal ground to ensure permanent residence in another country, but it provides a basis for allowing a

¹²⁶ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Geneva, 26 January 2007, para 14-15.

¹²⁷ The most relevant judgments from the case-law of the European Court of Human Rights will be analysed in Chapter 3.

¹²⁸ European Court of Human Rights, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights - Prohibition of collective expulsions of aliens*, last update 31 December 2018, p. 5 available at: https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf [Accessed 28 January 2019].

¹²⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16*, ETS 5, 4 November 1950, article 4 of Protocol No. 4.

Organisation of American States (OAS), *American Convention on Human Rights*, San Jose, Costa Rica, 22 November 1969, article 22(9).

¹³⁰ H. Ragheboom, *The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective*, Brill Nijhoff, Leiden, 2017, pp. 367-368.

temporary stay during which examinations are conducted in order to assess whether each individual might be granted international protection. According to Kälin, temporary protection emanating from the *non-refoulement* principle applies to people escaping from persecution caused by a concrete agent; therefore, people displaced directly by climate-related disasters, who are not threatened by the action of an agent, would not benefit from the protection granted according to *non-refoulement* principle¹³¹.

2.2 THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

It has been acknowledged that human mobility induced by climate change takes place predominantly within the borders of the country of origin; therefore, it will be investigated below how the framework on Internal Displacement can provide a ground for protection and assistance to climate migrants displaced internally.

The adoption of the Guiding Principles on Internal Displacement was urged by a humanitarian crisis that at the beginning of the 1990s boosted the number of IDPs around the globe. Since IDPs are not protected under international refugee law, the issue of the legal void concerning international displacement had to be addressed in the short term. Non-governmental organisations and civil society pushed for an intervention of the UN Secretary-General Boutros Boutros-Ghali who, in turn, entrusted Francis Deng with the role of Special Representative for Internally Displaced Persons in 1992¹³². After a preliminary phase conducted by Deng under invitation of the Commission of Human Rights, in which the development of a new convention specifically related to IDPs and the creation of a soft law instrument were alternatively evaluated, the latter option encountered the endorsement of the majority of stakeholders. Hence, a group of independent experts in dialogue with a variety of interested parties and governments was established to draft the guidelines. As a result, the Guiding Principles were approved

¹³¹ W. Kälin, *Conceptualising Climate-Induced Displacement*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 94.

¹³² F. Gemenne and P. Brücker, *From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration can learn from the Governance of Internal Displacement*, in *International Journal of Refugee Law*, 27: 2, 2015, p. 247.

in 1998. The text is organised in a first section stating the definition and the general principles concerning IDPs – such as non-discrimination in the application of the Principles –, and in other four sections namely relating to protection from displacement, protection during displacement, humanitarian assistance, and return, resettlement and reintegration, thus covering all the phases of displacement¹³³. In particular, the Guiding Principles recognise in the first place the duty of national authorities and international actors to “prevent and avoid conditions that might lead to displacement of persons” and assert that “every human being shall have the right to be protected against being arbitrarily displaced”, like in the case of ethnic cleansing, armed conflict, development projects and disasters¹³⁴. When the scenario of displacement cannot be circumvented for the sake of nationals’ security, individuals have the right to be informed about motives, procedures of relocation and compensation, and shall take part in the organisation of their relocation with respect for the rights to life, security and liberty. Host communities shall be consulted, too, as their rights and interests must be equally respected¹³⁵. Regarding the phase of displacement, a set of civil, political, socio-economic and cultural rights to which IDPs are entitled are enumerated, while the articles dealing with the delivery of humanitarian assistance clarify responsibilities of national authorities and international institutions. Ultimately, the guidelines are innovative also because they envisage the possibility of voluntary return or resettlement inside the country, assigning to authorities the task to manage informative and participative procedures and to facilitate reintegration¹³⁶.

The decision to produce an instrument of soft law rather than a new convention was favoured for a number of reasons. The context was demanding the formulation of a rapid solution, avoiding the prospect of prolonged negotiations and the impasse of political will. In addition, pursuing the elaboration of a specific binding treaty would have inevitably led to political compromises at the expense of effective provisions for the

¹³³ UN High Commissioner for Refugees (UNHCR), *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 1998.

¹³⁴ *Ibid.*, principles 5 and 6(1).

¹³⁵ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 250.

¹³⁶ *Ibid.* pp. 251-252.

protection of human rights of IDPs¹³⁷. Conversely, a non-binding legal instrument allowed the engagement of an inclusive process in which a significant variety of stakeholders could take part, ultimately referring to a panel of independent experts the task of writing the principles. Moreover, a human rights-based approach was adopted, expanding the purpose of protection and focusing on the assertion of the human rights to which IDPs are entitled, rather than on the establishment of policies and procedures that the States must implement¹³⁸. In this respect, national governments dispose of sufficient flexibility with regard to the application of the provisions – in terms of timing and degree of implementation – in order to facilitate the elaboration of targeted policies responding to specific local necessities. However, above all, its informal nature was the key to the success of the instrument: the Principles did not conceive any new norm of international law, but rather organised and consolidated existing provisions of international human rights law, international humanitarian law and international criminal law in a unique framework. Therefore, the guidelines do not impose new legal obligations and responsibilities to States but clarify the commitment that national authorities have to fulfil, which they had already recognised adhering to existing international treaties. In this way, the divergence of political interests of governments was overcome, and the Guiding Principles have been widely accepted and transposed into national legislations¹³⁹.

Nevertheless, a final question about sovereignty and responsibilities was solved subsequently to its adoption. In fact, the Guiding Principles are founded on national sovereignty as bearer of the primary responsibility to protect internally displaced persons. However, the issue of responsibility of international institutions and agencies remained to be clarified in the case of inability or unwillingness of the State to assist its

¹³⁷ M. Klein Solomon, K. Warner, *Protection of Persons Displaced as a Result of Climate Change, Existing Tools and Emerging Frameworks*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 264.

¹³⁸ F. Gemenne and P. Brückner, *From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration can learn from the Governance of Internal Displacement*, in *International Journal of Refugee Law*, 27: 2, 2015, p. 250.

¹³⁹ M. Klein Solomon, K. Warner, *Protection of Persons Displaced as a Result of Climate Change, Existing Tools and Emerging Frameworks*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 265.

citizens. As Gemenne and Brücker report, “the Guiding Principles do not *per se* attribute any responsibility to specific international actors but may legitimize their action towards IDPs”¹⁴⁰. Therefore, due to difficulties in coordinating the activity of all the humanitarian agencies involved, in 2005 a “clustered approach” for the division of tasks and responsibilities was adopted in substitution for the unaccountable collaborative approach, and UNHCR was assigned an official role in the field of protection, emergency shelter and camp management of IDPs¹⁴¹.

2.2.1 HOW THE INSTRUMENT COULD ENHANCE THE PROTECTION OF CLIMATE MIGRANTS

As it was anticipated in the previous chapter, climate change migrants fall within the framework for the protection of IDPs on the basis of the definition of Internally Displaced Person stated in the Guiding Principles, which refers to “natural or human-made disasters” as drivers of displacement¹⁴², and of the subsequent declarations of the Special Rapporteurs on the Human Rights of IDPs¹⁴³. Although the guidelines do not address every possible pattern according to which climate change-induced displacement could occur, considering that a significant amount of climate migrants follow internal routes, the Guiding Principles are proving a valid instrument and a legitimate starting point for engaging national governments and promoting a human rights-based legal standard also for persons displaced by the effects of climate change¹⁴⁴. In particular, McAdam highlights how the incorporation in the text of human rights regarding cultural and ethnical aspects of internal relocation is especially

¹⁴⁰ F. Gemenne and P. Brücker, *From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration can learn from the Governance of Internal Displacement*, in *International Journal of Refugee Law*, 27: 2, 2015, p. 253.

¹⁴¹ B. Ní Ghráinne, *UNHCR’s Involvement with IDPs – “Protection of that Country” for the Purposes of Precluding Refugee Status?*, in *International Journal of Refugee Law*, 26: 4, 2014, p. 549.

¹⁴² UN High Commissioner for Refugees (UNHCR), *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 1998, para 2.

¹⁴³ L. Nishimura, *“Climate Change Migrants”: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies*, in *International Journal of Refugee Law*, 27: 1, 2015, p. 115.

¹⁴⁴ *Ibid.* p. 115.

important in climate change-induced displacement, when sensitive matters related to identity and access to land may arise¹⁴⁵.

However, some scholars are still doubtful about the efficacy of the Guiding Principles in protecting persons displaced by slow-onset climate events, fearing that these people may not be recognised as IDPs¹⁴⁶. As a matter of fact, being the guidelines non-legally binding but based on voluntary commitment of the States, and in the absence of an enforcing mechanism, the Principles might not be sufficient to guarantee protection to climate migrants and IDPs on the whole. In fact, in their transposition into the domestic legal systems the Guiding Principles are differently interpreted and adjusted. For example, in some cases they are directly incorporated without any specification about policies and procedures, and for this reason they remain impracticable and unimplemented. Otherwise, in national laws some rights may be neglected, in spite of being present in the Guiding Principles; for example, in Turkey the right to protection against forced displacement is not recognised. In the case of Colombia, moreover, the definition of IDPs was modified, admitting only persons forcibly displaced by conflict, and therefore leaving behind climate change migrants¹⁴⁷. Ultimately, in countries like Yemen national policies on IDPs have already been adopted but their implementation is hindered by political instability; in 2013, in fact, Yemen introduced a policy on prevention of displacement and long-term solutions for the protection of those displaced, but it became ineffective after the government's breakdown¹⁴⁸.

Nevertheless, despite their non-legally binding nature, many scholars are confident on the fact that over time new norms of customary international law may emerge from the Guiding Principles. In fact, thanks to the advantages previously

¹⁴⁵ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 74.

¹⁴⁶ R. Zetter, *Protecting People Displaced by Climate Change: Some Conceptual Challenges*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 138.

¹⁴⁷ F. Gemenne and P. Brücker, *From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration can learn from the Governance of Internal Displacement*, in *International Journal of Refugee Law*, 27: 2, 2015, p. 251.

¹⁴⁸ Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, pp. 26-27.

mentioned, namely that they do not impose new obligations on States and that they allow a discrete degree of flexibility, according to Williams “the ongoing national adoption of IDP principles could eventually indicate the emergence of a new norm of customary international law, thereby resulting in binding universal norms via *ad hoc* national and regional policy initiatives”¹⁴⁹.

2.3 ROLE OF HUMAN RIGHTS LEGAL INSTRUMENTS: COMPLEMENTARY PROTECTION

It has been recognised that the impacts of climate change affect the enjoyment of a variety of human rights, namely the right to life, to an adequate standard of living and the right to health among others. The exercise of such rights is jeopardised also during the phases of displacement¹⁵⁰. The linkage between human environment and human rights has been acknowledged in several international resolutions and declarations, starting from the 1968 UN General Assembly Resolution 45/94¹⁵¹. In 1972 it was reaffirmed in the Report of the United Nations Conference on the Human Environment, known as Stockholm Declaration; this document stated that “both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself”¹⁵². A subsequent resolution of the UNGA adopted in 1990, recalling the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights as legal basis, asserted that a healthy environment facilitates the achievement of the right to an adequate standard of living and enhances the enjoyment of all basic human rights; besides, the text warned against the risks for life that environmental degradation

¹⁴⁹ A. Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, in *Law & Policy*, 30: 4, October 2008, p. 512.

¹⁵⁰ L. Nishimura, “*Climate Change Migrants*”: *Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies*, in *International Journal of Refugee Law*, 27: 1, 2015, p. 117.

¹⁵¹ UNGA, Resolution 2398 (XXIII), 3 December 1968, available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/243/58/IMG/NR024358.pdf?OpenElement> [Accessed 18 September 2018].

¹⁵² UN Conference on the Human Environment (UNCHE), *Report of the United Nations Conference on the Human Environment*, Stockholm, Sweden, 16 June 1972, para 1(1), available at: <http://www.un-documents.net/aconf48-14r1.pdf> [Accessed 18 September 2018].

can generate¹⁵³. Although these documents did not make reference to climate change yet, they acknowledged the impact that human activity, and not only natural events, can have on the environment and recognised men's responsibility to preserve their habitat for the enjoyment of human rights.

Since the 2000s, the international community has started to frame climate change as a human rights issue as well. In 2007, at the Bali Conference of Parties (COP 13), the Deputy High Commissioner for Human Rights Kyung-wha Kang highlighted the threat that climate change poses to the fulfilment of human rights and addressed the need of adopting an anthropocentric approach towards climate change. In particular, Kang emphasised the aspects of vulnerability, gender, indigenous culture and discrimination that are implicated, advocating for a comprehensive human rights-based framework of protection¹⁵⁴. In fact, she declared: “[...] safeguarding of human rights should be a key consideration in efforts to address the impact of climate change. International human rights law imposes several obligations on States that are relevant to addressing human vulnerabilities to climate change”¹⁵⁵. In 2008, the UN Human Rights Council adopted Resolution 7/23, requesting an assessment of the implications of climate change for the enjoyment of human rights, focusing particularly on vulnerable communities¹⁵⁶. The following year, in Resolution 10/4 it was confirmed that climate change impacts both directly and indirectly the enjoyment of human rights¹⁵⁷. In Resolution 18/22 of 2011, then, the Human Rights Council declared that: “human rights obligations, standards and principles have the potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy

¹⁵³ UNGA, Resolution 45/94, A/RES/45/94, 14 December 1990, available at: <http://www.un.org/documents/ga/res/45/a45r094.htm> [Accessed 18 September 2018].

¹⁵⁴ S. McInerney-Lankford, *Human Rights and Climate Change, Reflections on International Legal Issues and Potential Policy Relevance*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 201.

¹⁵⁵ Kyung-wha Kang, Deputy High Commissioner for Human Rights, OHCHR, *Address at the Convention on Climate Change and its Kyoto Protocol: Climate Change and Human Rights*, 14 December 2007, Available at: <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=200&LangID=E> [Accessed 19 September 2018].

¹⁵⁶ UN Human Rights Council (UNCHR), Resolution 7/23, A/HRC/7/78, 14 July 2008, available at: http://ap.ohchr.org/documents/e/hrc/resolutions/a_hrc_res_7_23.pdf [Accessed 19 September 2018].

¹⁵⁷ UN Human Rights Council (UNCHR), Resolution 10/4, A/HRC/10/L.11, 25 March 2009, available at: https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf [Accessed 19 September 2018].

coherence, legitimacy, and sustainable outcomes”¹⁵⁸. More recently, in 2017 the Council acknowledged a further dimension of the issue: the implications of climate change for human rights during migration and displacement. In the Report elaborated under request of Resolution 35/20 of the Human Rights Council¹⁵⁹ in preparation for the intergovernmental negotiations of the Global Compact on Safe, Orderly and Regular Migration, it was highlighted that during displacement driven by climate change people could suffer breaches of their fundamental rights, namely the access to food and water, the right to health, to housing, in addition to the right to life and the right against cruel, inhuman or degrading treatment. The Report envisages the option of voluntary planned relocation and calls the States to assist such processes without discrimination and with respect for human rights throughout all the phases of resettlement. Furthermore, it encourages the governments to develop mechanisms of migration as an adaptive response to climate change but recognises also the role of human rights law to provide refugee in another State to people displaced by disasters¹⁶⁰.

Browne observes how these resolutions are cautious in the language and recommendations adopted, which do not constitute binding obligations on States. Nevertheless, he is confident that the recognition of the linkage between climate change, migration and human rights at international level has the potential to trigger the development of law at the regional level¹⁶¹. Nishimura, in addition, notes that the lack of a specific international binding obligation to respect the right to a safe and healthy environment hinders the safeguard of climate change-induced migrants, who

¹⁵⁸ UN Human Rights Council (UNCHR), Resolution 18/22, A/HRC/RES/18/22, 30 September 2011, available at: <https://www.ohchr.org/Documents/Issues/ClimateChange/A.HRC.RES.18.22.pdf> [Accessed 19 September 2018].

¹⁵⁹ UN Human Rights Council (UNCHR), Resolution 35/20, A/HRC/RES/35/20, 22 June 2017, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/184/52/PDF/G1718452.pdf?OpenElement> [Accessed 19 September 2018].

¹⁶⁰ UN Human Rights Council, *Summary of the panel discussion on human rights, climate change, migrants and persons displaced across international borders - Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/37/35, 17 November 2017, available at: https://www.ohchr.org/Documents/Issues/ClimateChange/ClimateChangeMigration/A_HRC_37_35.pdf [Accessed 19 September 2018].

¹⁶¹ D. Browne, *Causation and Damages in Climate Litigation: Evaluating the Role of Human Rights Law*, in *The Irish Yearbook of International Law*, 6: 49, 2011, p. 60.

could have resorted to the enforcement of such right to obtain international protection¹⁶².

Let us consider, thus, in which situations and to what extent human rights law has widened State's obligations to protect displaced persons beyond the scope of the 1951 Refugee Convention; in other words, the role that "complementary protection", meaning human rights-based protection, plays in guaranteeing access and residence in a host State will be analysed.

2.3.1 RIGHT TO LIFE

A legal basis for protection of climate migrants alternative to the refugee framework can derive from the enforcement of the right to life. At the international level the right to life has its foundations in Article 3 of the Universal Declaration of Human Rights (UDHR)¹⁶³, in Article 6 of the International Covenant on Civil and Political Rights (ICCPR)¹⁶⁴, and it is reaffirmed in other international treaties such as the Convention on the Rights of the Child¹⁶⁵ and the Declaration on the Rights of Indigenous People¹⁶⁶. A non-derogable nature has been recognised to the right to life which, in addition, gives rise to a *non-refoulement* obligation on States.

Furthermore, it has been observed that the right to life is composed of the right to an adequate standard of living, meant as having access to food and water, housing, and health, and the right not to be deprived of the means of subsistence. Specifically, the Human Rights Committee asserts that "the measures called for addressing adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health-care, electricity and sanitation, and other measures

¹⁶² L. Nishimura, "Climate Change Migrants": Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, in *International Journal of Refugee Law*, 27: 1, 2015, p. 117.

¹⁶³ UNGA, *Universal Declaration of Human Rights*, 217A (III), 10 December 1948, article 3.

¹⁶⁴ UNGA, *International Covenant on Civil and Political Rights*, UNTS 999, 16 December 1966, article 6.

¹⁶⁵ UNGA, *Convention on the Rights of the Child*, UNTS 1577, 20 November 1989, article 6.

¹⁶⁶ UNGA, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, A/RES/61/295*, 2 October 2007, article 7.

designed to promote and facilitate adequate general conditions [...]”¹⁶⁷. Therefore, the inability to access basic goods or the destruction of the means of subsistence of an individual would constitute a violation of article 6 of the Covenant and, as a consequence, would entail the *non-refoulement* obligation upon States towards the individual that faced the deprivation of his or her livelihood in the context of climate change disasters¹⁶⁸.

2.3.2 CRUEL, INHUMAN OR DEGRADING TREATMENT

Another non-derogable right generating the obligation of *non-refoulement*, to which breaches of human rights are often redirected¹⁶⁹, is the provision prohibiting torture and cruel, inhuman or degrading treatment or punishment. This right is contained in Article 7 of the ICCPR¹⁷⁰, and an explicit prohibition of *refoulement* derives from Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁷¹. The articles do not determine an exhaustive list of cases characterised as inhuman or degrading treatment; conversely, a margin for interpretation is accorded, provided that the violation reaches a certain degree of severity. However, jurisprudence has limited the extent to which a condition is recognised as inhuman or degrading treatment, to prevent the abuse of the provision. Nevertheless, although jurisprudence on the enforcement of the prohibition of torture and cruel, inhuman or degrading treatment in the context of climate change has not consolidated yet, people displaced or impacted by climate change are not excluded from

¹⁶⁷ Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 30 October 2018, para 26.

¹⁶⁸ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 56.

¹⁶⁹ As for the Right to Life, violations of other human rights are often reframed as violations of Article 7 of the ICCPR, especially the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), whose provisions do not entail *non-refoulement* obligations. See: M. Foster, *Non-Refoulement on the basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law*, in *New Zealand Law Review*, Part II, 2009, p. 281.

¹⁷⁰ UNGA, *International Covenant on Civil and Political Rights*, UNTS 999, 16 December 1966, article 7.

¹⁷¹ UNGA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNTS 1465, 10 December 1984, article 3.

the application of such right in order to obtain international protection¹⁷². Relevant case law on this matter can be encountered in regional systems, in particular in the ECHR jurisprudence, which will be analysed in Chapter 3.

2.3.3 ANALYSIS

The advantage of resorting to human rights law for the protection of people displaced by the effects of climate change is that this instrument, contrary to the Refugee Convention framework, does not require to prove a causal link between climate change and the breach of human rights. The fact that individuals rejected by a host State and returned to their country would face conditions amounting to violations of fundamental rights is sufficient to guarantee protection¹⁷³.

However, it will be seen in the following chapter how the requirements of imminence and severity of the violation compromise the effectiveness of such instrument in the context of climate change, especially when dealing with people displaced by slow-onset processes. Mence and Parrinder, thus, do not consider complementary protection sufficiently adequate to respond to the complex issue of climate change-related displacement¹⁷⁴. Jaswal and Jolly add that human rights instruments only establish a minimum standard to follow and are far from offering a satisfactory solution to the issue¹⁷⁵. Furthermore, Ragheboom criticises the “persistent tendency of asylum authorities to rely on a hierarchical approach to human rights [...], instead of recognising the indivisibility or interconnectedness of human rights”¹⁷⁶.

¹⁷² J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, pp. 54, 63-64.

¹⁷³ J. McAdam, *Building International Approaches to Climate Change, Disasters, and Displacement*, 33 in *Windsor Yearbook of Access to Justice*, 1, 2016, pp. 5-6.

¹⁷⁴ V. Mence, A. Parrinder, *Environmentally related international migration: Policy challenges*, in *A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-making*, ed. by M. McAuliffe and al., ANU Press, 2017, p. 328.

¹⁷⁵ P. S. Jaswal, S. Jolly, *Climate Refugees: Challenges and Opportunities for International Law*, in *Journal of the Indian Law Institute*, 55: 1, 2013, p. 53.

¹⁷⁶ H. Ragheboom, *The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective*, Brill Nijhoff, Leiden, 2017, p. 309.

Nevertheless, many scholars agree on the potentiality of human rights perspective to inform governments' strategies and policies towards climate change, especially the measures addressed to marginalised and vulnerable groups¹⁷⁷.

2.4 OTHER INSTRUMENTS

In the last two decades new initiatives and frameworks addressing the issue of displacement induced by environmental degradation and disasters – including the effects of climate change – have been launched. These are instruments that do not aim at filling the legal gap existing in international law by drafting treaties and creating new norms; on the contrary, they constitute an operational response providing concrete actions that can be implemented at national and local level to address adaptation to climate change and the protection of the rights of those displaced. Therefore, such initiatives are non-legally binding but have a relevant operative value that in the long-term might lead to the development of harmonised practices at global level¹⁷⁸. However, also in this case scholars have concerns with respect to the capacity of these instruments to respond to the needs generated by slow-onset processes¹⁷⁹.

2.4.1 THE NANSEN INITIATIVE AND THE PLATFORM ON DISASTER DISPLACEMENT

In October 2012 the governments of Norway and Switzerland sponsored the Nansen Initiative on Disaster-Induced Cross-Border Displacement, a three-year programme based on the Nansen Principles adopted the previous year at the conference on climate change and displacement organised on the 150th anniversary of the birth of

¹⁷⁷ S. McNerney-Lankford, *Human Rights and Climate Change, Reflections on International Legal Issues and Potential Policy Relevance*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 235.

¹⁷⁸ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, pp. 241-242.

¹⁷⁹ *Ibid.* p. 248.

Fritdjof Nansen, the first High Commissioner for Refugees¹⁸⁰. The Initiative, to which Walter Kälin was appointed Envoy of the Chairmanship, is defined as:

a state-led, bottom-up consultative process intended to identify effective practices and build consensus on key principles and elements to address the protection and assistance needs of persons displaced across borders in the context of disasters, including the adverse effects of climate change¹⁸¹.

Even though the project is a result of an intergovernmental process, since the beginning the Nansen Initiative has been highly participatory, including stakeholders from academia, civil society and people impacted by disasters. In fact, at the core of its activity there was a structure of regional consultations held between 2013 and 2014 that actively engaged local civil society; the findings of these consultations were subsequently discussed in a global intergovernmental conference in 2015 and organised into an Agenda for the protection of people displaced across borders by disasters¹⁸². The Agenda, endorsed by 109 States, identified some priority areas on which concentrating national and regional activity, namely the collection of data, the development of harmonised humanitarian protection policies, and the management of disaster displacement risk enhancing national disaster risk reduction frameworks¹⁸³. As it was anticipated, this instrument does not seek to impose new legal obligations on States, but rather “focuses on the integration of effective practices by States and (sub-) regional organizations into their own normative frameworks in accordance with their specific situations and challenges”¹⁸⁴. Nevertheless, Gemenne and Brücker recognise to the Agenda a “pre-soft law” value, affirming that the Initiative has the potential to lead to political consensus and to the achievement of higher legal standards¹⁸⁵.

¹⁸⁰ F. Gemenne and P. Brücker, *From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration can learn from the Governance of Internal Displacement*, in *International Journal of Refugee Law*, 27: 2, 2015, p. 258.

¹⁸¹ The Nansen Initiative Global Consultation, *Conference Report*, Geneva, 12-13 October 2015, p. 15.

¹⁸² The Nansen Initiative Secretariat, *Working towards a Global Protection Agenda*, 2014, available at: www.nanseninitiative.org [Accessed 24 September 2018].

¹⁸³ The Nansen Initiative Global Consultation, *Conference Report*, Geneva, 12-13 October 2015, p. 19.

¹⁸⁴ *Ibid.* pp. 16-17.

¹⁸⁵ F. Gemenne and P. Brücker, *From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration can learn from the Governance of Internal Displacement*, in *International Journal of Refugee Law*, 27: 2, 2015, p. 259.

Follow-up to the Nansen Initiative, the Platform on Disaster Displacement was founded in 2016 in order to assist the implementation of the provisions included in the Protection Agenda through the adoption of actual practices and policies. The Platform maintains the plurality of stakeholders involved and offers a forum for constructive dialogue and practice sharing in order to prevent and prepare for displacement, as well as to respond to forced movement across international borders in the context of natural and climate change disasters¹⁸⁶.

2.4.2 DISASTER RISK REDUCTION

Disaster risk reduction is becoming an increasingly important element to address climate change-related displacement. Its focus is not directly on responses to displacement and protection for people forced to move, but rather on adaptation to the impacts of climate change in order to minimise displacement. Seeking to provide a pre-emptive strategy to enhance adaptation and prevent forced migration, the implementation of frameworks on disaster risk reduction might prove particularly effective in the context of slow-onset degradation¹⁸⁷.

In 2005, the Hyogo Framework for Action (HFA) 2005-2015: Building the Resilience of Nations and Communities to Disasters was adopted by the World Conference on Disaster Reduction. It is a non-binding instrument endorsed by 168 States that advocates for the integration of preventive action for the reduction of disaster risk into national and regional policies; the framework is supplemented by legally-binding human rights obligations¹⁸⁸. The HFA was succeeded in 2015 by the Sendai Framework, which outlines a plan of action for the period 2015-2030. As the previous framework, the agreement has a non-binding nature and relies on voluntary contribution of

¹⁸⁶ Platform on Disaster Displacement, Report – Advisory Committee Workshop, Geneva 13-14 October 2016, p. 4.

¹⁸⁷ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, pp. 242-243.

¹⁸⁸ W. Kälin, *Conceptualising Climate-Induced Displacement*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 83.

States¹⁸⁹. Although issues about migration and displacement that were overlooked in the HFA have been integrated in the new framework, some scholars believe that disaster risk reduction still lacks a comprehensive perspective about human mobility in relation with disasters¹⁹⁰. Some criticize the adoption of a time frame not sufficiently extended for the understanding of migration and the planning of effective measures, especially when the possibility of community relocation is involved¹⁹¹.

¹⁸⁹ UNISDR, *Sendai Framework for Disaster Risk Reduction*, available at: <https://www.unisdr.org/we/coordinate/sendai-framework> [Accessed 25 September 2018].

¹⁹⁰ L. Guadagno, *Human Mobility in a Socio-Environmental Context: Complex Effects on Environmental Risk*, in *Identifying Emerging Issues in Disaster Risk Reduction, Migration, Climate Change and Sustainable Development – Shaping Debates and Policies*, ed. by K. Sudmeier-Rieux et al., Springer International Publishing, Switzerland, 2017, p. 14.

¹⁹¹ A. E. Collins, *Applications of Disaster Risk Reduction Principles and Operational Mechanisms to Migration in Contexts of Instability*, in *Identifying Emerging Issues in Disaster Risk Reduction, Migration, Climate Change and Sustainable Development – Shaping Debates and Policies*, ed. by K. Sudmeier-Rieux et al., Springer International Publishing, Switzerland, 2017, p. 134.

CHAPTER THREE
**THE CURRENT LEGAL FRAMEWORK:
THE REGIONAL LEVEL**

Summary: 3.1 Asia and the Pacific. – 3.1.1 A protection gap. – 3.2 The Americas. – 3.2.1 Protection under the notion of “refugee”: The Cartagena Declaration and after. – 3.2.2 Protection to IDPs; 3.2.3 Complementary Protection. – 3.3 Africa. – 3.3.1 Protection under the notion of “refugee”: the OAU Convention. – 3.3.2 Protection to IDPs: The Great Lakes IDP Protocol and the Kampala Convention. – 3.3.3 Complementary Protection. – 3.4 Europe. – 3.4.1 The Common European Asylum System and the Qualification Directive. – 3.4.2 EU Temporary Protection Directive. – 3.4.3 Protection to IDPs. – 3.4.4 Complementary Protection: The European Convention on Human Rights. – 3.4.5 Non-refoulement under Article 3 of the ECHR: Case Law.

3.1 ASIA AND THE PACIFIC

Asia and the Pacific is the region most severely impacted by the effects of climate change, both sudden disasters and slow degrading processes. The area, in fact, is hit by the highest number of disrupting climate events globally, especially in South and Southeast Asia and in the Pacific atolls. The scale of populations affected is extensive, considering that the continent is very densely populated and that is inhabited by already highly vulnerable groups. The less resilient communities are concentrated in low-lying coastal and delta areas, river banks, plains and slopes, the most exposed to flooding, sea-level rise, droughts and extreme weather events¹⁹². Likewise, in rural areas, where households are particularly dependent on natural resources for their livelihood, climate change exacerbates economic and social insecurity, affecting principally women and individuals who do not own land or do not have access to land¹⁹³. Furthermore, poverty

¹⁹² Asian Development Bank, *Addressing Climate Change and Migration in Asia and the Pacific*, Mandaluyong City, Philippines, 2012, p. 2.

¹⁹³ Economic and Social Council, Economic and Social Commission for Asia and the Pacific, *Migration and climate change in Asia and the Pacific*, E/ESCAP/GCM/PREP/5, 5 September 2017, p. 4.

and climate change increase the phenomenon of urbanisation in coastal areas, where people have no other option than settling in slums and working in the informal economy, consequently incrementing their vulnerability and exposure to the risk of disasters¹⁹⁴. Therefore, in Asia and the Pacific climate change is expected to produce displacement directly and indirectly through the intensification of other drivers of migration, such as poverty, food security and social tensions. Most of migration flows will follow existing patterns of movement, assuming predominantly an internal and temporary nature; however, international displacement is also likely to occur, especially where measures for the assistance of IDPs are poorly implemented¹⁹⁵.

3.1.1 A PROTECTION GAP

Contrary to other continents, no regional legally-binding framework has been adopted for the protection of refugees and forcibly displaced people, and protection under international law for people displaced by climate change is even narrower. As Hedman reports, in fact, “the wider context of weakly institutionalized regional cooperation and a patchwork of intra-regional protocols and bilateral agreements, have not lent themselves to the articulation of an Asia Pacific protection regime focused on the rights and needs of displaced populations”¹⁹⁶. More than half of the countries have not even adhered to the 1951 Refugee Convention and its 1967 Protocol¹⁹⁷. However, in 1966 the Asian-African Legal Consultative Organisation (AALCO) approved the Bangkok Principles on Status and Treatment of Refugees. The agreement, whose final text had not been adopted until 2001, is a declaratory and non-binding instrument currently endorsed by the 47 AALCO’s Member States in Africa, Asia, and the Middle East. The Bangkok Principles, like the OAU Convention and the Cartagena Declaration,

¹⁹⁴ Human Rights Council (HRC), *The slow onset effects of climate change and human rights protection for cross-border migrants*, A/HRC/37/CRP.4, 22 March 2018, p. 26.

¹⁹⁵ Economic and Social Council, Economic and Social Commission for Asia and the Pacific, *Migration and climate change in Asia and the Pacific*, E/ESCAP/GCM/PREP/5, 5 September 2017, pp. 2-3.

¹⁹⁶ E. Hedman, *Refugees, IDPs, and regional security in the Asia-Pacific*, in *CSCAP Regional Security Outlook 2009-2010: Security through co-operation*, Ed. by B. L. Job and E. E. Williams, 2009, p. 34.

¹⁹⁷ International Federation of Red Cross and Red Crescent Societies, *The legal framework for migrants and refugees*, Geneva, 2017, p. 13.

propose a definition of “refugee” broader than the one contained in the 1951 Convention. Namely, it includes individuals escaping from “external aggression, occupation, foreign domination or events seriously disturbing public order [...]”¹⁹⁸. The Principles favour the sovereign right and the interests of States over the humanitarian rights of refugees, therefore there is a lack of harmonisation in State practice; nevertheless, the principle of *non-refoulement* and the principle of burden sharing are recognised. Also, the right to voluntary return to the country of origin is envisaged¹⁹⁹. However, even though the framework adopts a more comprehensive definition of “refugee” and interpretations tend to admit the inclusion of persons displaced in situations of public disorder provoked by natural disasters, its application is uncertain and insufficient to face the increasing extent of climate-induced displacement in Asia.

As for the protection of internally displaced persons, in Asian countries the Guiding Principles on Internal Displacement are not adequately known and transposed into national legislations. Some countries, such as Afghanistan, Bangladesh, the Maldives, Nepal, Pakistan and Sri Lanka have elaborated policies addressing disaster risk reduction and displacement; Bangladesh adopted a specific measure on the management of IDPs in the context of natural disasters, while India concentrated on the protection of human rights of people displaced by development projects. In the region, though, governance capacity and responsiveness to displacement induced by disasters or conflicts remain fragmented²⁰⁰.

The Asia-Pacific area has significantly ratified international human rights instruments; however, a substantial gap in protection persists due to inability to assist or unwillingness to implement positive measures during displacement. A considerable number of countries among Southeast and Pacific States are not even parties to the

¹⁹⁸ Asian-African Legal Consultative Organisation (AALCO), “*Final Text of the AALCO’s 1966 Bangkok Principles on Status and Treatment of Refugees*” as Adopted on 24 June 2001 at the AALCO’S 40th Session, New Delhi, 2001, art. 2.

¹⁹⁹ B. Sen, *Protection of Refugees: Bangkok Principles and After*, in *Journal of the Indian Law Institute*, 34:2, 1992, pp. 189, 197, 203.

²⁰⁰ Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, pp. 29, 35.

ICCPR nor the ICESCR²⁰¹. In addition, some countries are reported to ordinarily abuse human rights of their people and when disasters hit their territory greater human rights violations might occur²⁰². At regional level, a human rights instrument had been missing until 2012, when the Association of Southeast Asian Nations (ASEAN) adopted the Declaration of Human Rights. The text includes both civil and political rights, and economic, social and cultural rights; among the latter it incorporates the right to an adequate standard of living – specifying that it consists of access to safe food and water, housing, clothing, medical care – and the right to development, rights that might provide a legitimate ground for the protection of people displaced by climate events. Since the instrument is a Declaration and not a Convention, it does not impose legally binding obligations upon ASEAN Member States. Moreover, the language adopted is sometimes ambiguous and creates conditionality on the protection of human rights²⁰³: according to Principle 6, in fact, “the enjoyment of human rights and fundamental freedom must be balanced with the performance of corresponding duties”, while Principle 7 proclaims that the “realisation of human rights must be considered in the regional and national context” acknowledging the different political and socio-economic backgrounds²⁰⁴. Nevertheless, the Declaration constitutes a first step towards an improved protection of human rights.

The linkage between climate change and human rights has been especially recognised by the Association of Small Island States (AOSIS), that includes the Pacific Islands, in the Malé Declaration on the Human Dimension of Global Climate Change; although it does not mention the issue of the protection of human rights during

²⁰¹ The Cook Islands, the Federated States of Micronesia, Kiribati, Niue, Tonga, Tuvalu have not ratified neither the ICCPR nor the ICESCR. Nauru has only signed the ICCPR, the Solomon Islands have only ratified the ICESCR, Vanuatu has only ratified the ICCPR. Brunei, Malaysia, and Singapore are not parties to neither of the Covenants. See <http://indicators.ohchr.org/> [Accessed 3 October 2018].

²⁰² B. Lewis and R. Maguire, *A Human Rights-based Approach to Disaster Displacement in the Asia-Pacific*, in *Asian Journal Of International Law*, 6, 2016, pp. 339-340.

²⁰³ See: Amnesty International, *Postpone Deeply Flawed ASEAN Human Rights Declaration*, 5 November 2012, available at: <https://www.amnesty.org/en/press-releases/2012/11/postpone-deeply-flawed-asean-human-rights-declaration/> [Accessed 3 October 2018].

Human Rights Watch, *Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration*, 19 November 2012, available at: <https://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration> [Accessed 3 October 2018].

²⁰⁴ Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012, Principles 6 and 7.

displacement induced by climate events, it clearly affirms the implications that climate change has for the enjoyment of human rights²⁰⁵.

It becomes clear that the Asia-Pacific region, in spite of being the area most affected by the impacts of climate change, lacks a relevant framework for the protection of individuals and communities displaced by natural disasters and degrading environmental processes. However, the UN Economic and Social Commission for Asia and the Pacific emphasises the possibility to address indirectly the protection of climate migrants through other ASEAN existing agreements on disaster management, and on the assistance to migrant workers, women and children²⁰⁶. New forums, like the Colombo Process and the Asia Dialogue on Forced Migration, have been initiated to improve the protection of climate workers; although migration related to climate change is not a priority, such consultative process provides an occasion for further discussion on the matter²⁰⁷.

Nevertheless, despite the existing legal gap, the issue has partially been addressed through the adoption of operational frameworks suggesting policies and good practices to manage the huge amount of people displaced by climate events in the Asia-Pacific. In 2011, for example, the Asian Development Bank started a series of intergovernmental meetings to address climate-induced displacement in the region. The process resulted in the elaboration of five recommendations to governments regarding adaptation, improvement of migrants' conditions, development of knowledge and data, cooperation and financial measures²⁰⁸. In 2014 another action named the Migrants in

²⁰⁵ Small Islands Developing States (SIDS), *Malé Declaration on the Human Dimension of Global Climate Change*, Malé, Republic of Maldives, 14 November 2007, available at: http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf [Accessed 3 October 2018].

²⁰⁶ See ASEAN Agreement on Disaster Management and Emergency Response, the ASEAN Trade Union Council Inter-Union Cooperation Agreement (for the promotion of decent work in labour migration), the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, cited in Economic and Social Council, Economic and Social Commission for Asia and the Pacific, *Migration and climate change in Asia and the Pacific*, E/ESCAP/GCM/PREP/5, 5 September 2017, p. 14.

²⁰⁷ Economic and Social Council, Economic and Social Commission for Asia and the Pacific, *Migration and climate change in Asia and the Pacific*, E/ESCAP/GCM/PREP/5, 5 September 2017, p. 15.
See also: Colombo Process, website: <https://www.colomboprocess.org/> [Accessed 3 October 2018], Centre for Policy Development, *Asia Dialogue on Forced Migration*, website: <https://cpd.org.au/intergenerational-wellbeing/asia-dialogue-on-forced-migration/> [Accessed 3 October 2018].

²⁰⁸ Asian Development Bank, *Addressing Climate Change and Migration in Asia and the Pacific*, Mandaluyong City, Philippines, 2012, pp. 72-73.

Countries in Crisis Initiative (MICIC) was launched. Like the Platform on Disaster Displacement and the Sendai Framework, MICIC is a global intergovernmental initiative which, however, has a relevant involvement of Asian and Pacific countries; in fact, the initiative is chaired by the Philippines together with the United States, and among the co-chairs the governments of Australia and Bangladesh stand out. The framework addresses specifically the needs and the rights of migrants in countries affected by conflicts and natural disasters²⁰⁹.

3.2 THE AMERICAS

The American continent is particularly subject to extreme climate events, and with respect to the share of population displaced in the context of disasters globally it is second only to East Asia and the Pacific²¹⁰. Displacement, which is both internal and cross-border, is primarily induced by cyclones, floods and wildfires. In the Atlantic region displacement occurs mainly during the hurricane season, that especially hits the Caribbean Island States, but also the United States; indeed, in the last few years, and particularly in 2017, hurricanes' intensity is reported to have critically increased, as well as the number of countries and the proportion of territory affected²¹¹. Whereas, the West Coast has been severely impacted by wildfires that in 2017 caused the displacement – at least the temporary evacuation – of more than 200,000 people only in California²¹². Flooding is responsible for another relevant share of displacement, especially in Canada, in the US, and in several Latin American countries. Such disasters and climate events have serious repercussions on the economies of Caribbean countries,

²⁰⁹ Migrants in Countries in Crisis Initiative (MICIC), *Guidelines to protect migrants in countries experiencing conflict or natural disaster*, 2016, p. 13.

²¹⁰ The percentage of global displacement associated with disasters in America amounted to 24% in 2017. See: Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, p. 38.

²¹¹ National Oceanic and Atmospheric Administration, *Extremely Active 2017 Atlantic Hurricane Season Finally Ends*, November 2017, available at: <https://goo.gl/ipJssA> [Accessed 5 October 2017].

²¹² Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, p. 38.

impacting food production, infrastructure resilience, and tourism²¹³. However, in spite of the higher level of development of Canada and the US, stronger governance, and the availability of more advanced technology, North American countries are not immune to climate change impacts and displacement. Moreover, not only are sudden-onset disasters generating displacement, but also slow-onset processes such as land degradation and drought compromising agriculture. Identifying and quantifying the figures of displacement generated by slow-onset events, though, is more challenging given the lack of data and the ambiguities between voluntary pre-emptive movement and forced displacement²¹⁴.

3.2.1 PROTECTION UNDER THE NOTION OF “REFUGEE”: THE CARTAGENA DECLARATION AND AFTER

In November 1984 the Colloquium on the International Protection of Refugees in Latin America, Mexico and Panama, a panel of independent experts, adopted the Cartagena Declaration on Refugees. Despite not being legally-binding, the instrument has been transposed into national legislations by the majority of Latin American countries; furthermore, the following year the Declaration was endorsed by the Organisation of American States (OAS) which, at the time, already included most of Central and Latin American countries and the United States²¹⁵.

To respond to the critical context of authoritarianism and violence that caused the displacement of millions of individuals in the decades between the 1960s and the 1980s, the Colloquium formulated a broad definition of “refugee”. The text of the Declaration, in fact, enunciates:

To reiterate that, 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, bearing in mind, as far as appropriate and in the light of the situation prevailing in the

²¹³ Ibid. p. 43.

²¹⁴ Ibid. p. 81.

²¹⁵ S. Kneebone, *Comparative regional protection frameworks for refugees: norms and norm entrepreneurs*, in *The International Journal of Human Rights*, 20: 2, 2016, p. 157.

region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order²¹⁶.

Such definition, compared to the ones contained in the 1951 Convention and the OAU Convention, is innovative because extends the status of “refugee” to individuals who suffer a severe breach of human rights. Even though this formulation could constitute a legal ground for the protection of persons forcibly displaced by disasters and extreme climate events, for whom the enjoyment of fundamental human rights results severely compromised, the jurists that drafted the text had not included such scenario in their intentions. However, through the adoption of subsequent Declarations, follow-ups to the Cartagena Declaration, a recognition of the new challenges of displacement, including “displacement generated by climate change and natural disasters” has been achieved in 2014 in the Brazil Declaration and Plan of Action endorsed at the Cartagena+30 anniversary event²¹⁷. The document, in fact, acknowledges the phenomenon of cross-border displacement in the region caused by climate change and disasters; moreover, it addresses the necessity of conducting further studies, requiring also the involvement of UNHCR, in order to formulate adequate national and regional measures, plans and tools, like humanitarian visa programmes, to tackle the issue of climate change-induced displacement²¹⁸. Therefore, the American regional framework in the near future might become a legal reference for the protection of people displaced

²¹⁶ Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, III (3).

²¹⁷ UNHCR, *57th Lecture of the Americas: “From the Cartagena Declaration to the Brazil Plan of Action: The new Frontiers of Protection in the Americas”*, António Guterres, UNHCR, Washington, D.C., 22 April 2015, available at: <http://www.unhcr.org/admin/hcspeeches/553a475c9/57th-lecture-americas-cartagena-declaration-brazil-plan-action-new-frontiers.html> [Accessed 8 October 2018].

²¹⁸ *Brazil Declaration and Plan of Action*, Brasilia, 3 December 2014, available at: <http://www.acnur.org/5b5101644.pdf> [Accessed 8 October 2018].

by climate change across countries. Nevertheless, McAdam observes that in the Cartagena Declaration the condition of the manifestation of the threat is required; contrary to the 1951 Refugee Convention which envisages the protection against potential future harm, the Declaration can be invoked only if the harm has already occurred and caused displacement. Hence, the instrument would have a limited capacity to provide pre-emptive protection in the context of climate change²¹⁹.

In October 2017 the governments of Belize, Costa Rica, Guatemala, Honduras, Mexico and Panama signed the San Pedro Sula Declaration, a contribution of the Central American region to the Global Compact of Refugees. The text acknowledges the multi-causal nature of the phenomenon – including the role of climate change and natural disasters, and advocates for the development of a comprehensive regional framework able to address such causes while protecting and assisting refugees, asylum seekers, IDPs and returnees, with particular attention to vulnerable categories²²⁰. As a matter of fact, the conference elaborated and proposed a regional model of “Comprehensive Refugee Response Framework (CRRF)” called for by the New York Declaration for Refugees and Migrants adopted in 2016 by the UN General Assembly. The guidelines for the “Comprehensive Regional Protection and Solutions Framework” endorsed by the San Pedro Sula Declaration are based on the principles of regional cooperation, responsibility sharing and participation through the engagement of local consultative processes²²¹.

3.2.2 PROTECTION TO IDPS

On the occasion of the Tenth Anniversary of the Cartagena Declaration, Latin American countries conducted an evaluation of the impact that the instrument was

²¹⁹ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 49.

²²⁰ Governments of Belize, Costa Rica, Guatemala, Honduras, Mexico, Panama, *San Pedro Sula Declaration As A Regional Contribution to the Global Compact on Refugees*, Honduras, 26 October 2017, available at: <http://www.acnur.org/fileadmin/Documentos/BDL/2017/11337.pdf> [Accessed 9 October 2018].

²²¹ Regional Conference in San Pedro Sula as follow up of the New York Declaration, *Comprehensive Regional Protection and Solutions Framework*, Honduras, 26 October 2017, available at: <http://www.acnur.org/fileadmin/Documentos/BDL/2017/11273.pdf> [Accessed 9 October 2018].

having on the region and drew conclusions in the San José Declaration. In addition to recalling the relevance of the Cartagena Declaration, the new document extended protection to internally displaced persons²²². It is affirmed that internal displacement, a phenomenon that had steadily increased during that decade, is primary responsibility of States of origin but, at the same time, the international community shall be engaged as the issue involves the potential violation of human rights and the degeneration into cross-border flows. Then, the Declaration lists a number of provisions that countries shall implement for the protection of IDPs, including the application of *non-refoulement* and the respect of their right to have adequate documentation²²³.

The Inter-American Commission of Human Rights has acted since the 1960s for the management of internal displacement, in particular investigating human rights abuses; in 1996 the Commission appointed a Special Rapporteur on Internally Displaced Persons to enhance the protection framework. However, the Commission's activity and initiatives implemented were not sufficient to deal with the problem²²⁴. In fact, in 2004 the General Assembly of the OAS issued a Resolution to encourage the incorporation of the Guiding Principles on Internal Displacement to its member States²²⁵.

Nevertheless, the San Pedro Sula Declaration represents an important commitment undertaken by American States to improve their accountability and responsibility for the protection of internally displaced persons. In fact, the document calls for a regional joint effort through the adoption of harmonised policies and mechanisms in a continent where the Guidelines for the protection of IDPs had been inconsistently and insufficiently incorporated at national level, especially in Central

²²² S. Kneebone, *Comparative regional protection frameworks for refugees: norms and norm entrepreneurs*, in *The International Journal of Human Rights*, 20: 2, 2016, p. 157.

²²³ *San Jose Declaration on Refugees and Displaced Persons*, San Jose, Costa Rica, 7 December 1994, available at: <https://biblioteca.iidh-jurisprudencia.ac.cr/index.php/in-english/universal-system-of-human-rights/nationality-statelessness-asylum-and-refugees/2183-san-jose-declaration-on-refugees-and-displaced-persons-san-jose-1994/file> [Accessed 9 October 2018].

²²⁴ Organization of American States (OAS), Department of International Legal Affairs, *The Response Of Regional Organizations To Internal Displacement in The Americas*, Washington D. C., October 1997, available at: <http://www.oas.org/juridico/english/cohene.html> [Accessed 9 October 2018].

²²⁵ Organization of American States, *Internally Displaced Persons*, AG/RES. 2055 (XXXIV-O/04), 8 June 2004, available at: https://www.oas.org/dil/AG-RES_2055_XXXIV-O-04_eng.pdf [Accessed 9 October 2018].

American countries²²⁶. Policy advancements in this respect will benefit persons internally displaced by climate change-related disasters, as in the case of Colombia, which in the transposition of the Guiding Principles into national legislation has not included persons displaced by natural disasters in the definition of IDPs²²⁷.

3.2.3 COMPLEMENTARY PROTECTION

Complementary protection in the Americas has been founded on the American Declaration of Rights and Duties of Man since 1948²²⁸ and the American Convention on Human Rights since 1969²²⁹. Afterwards, an additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol of San Salvador, was integrated to the Convention in 1988, although it did not enter into force until 1999. The Protocol includes a set of rights particularly relevant in the circumstances of climate change and displacement, namely the right to health, to food, and to a healthy environment²³⁰; however, as observed in the previous chapter, these provisions do not contain *non-refoulement* obligations. Therefore, it is more likely that protection arising from human rights instruments in the region will be grounded on the Right to Life, contained in article 4 of the Convention and article I of the Declaration, and on the Right to Humane Treatment, contained in article 5 of the Convention²³¹. Nevertheless, it has to be noticed

²²⁶ Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, p. 39.

²²⁷ F. Gemenne and P. Brücker, *From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration can learn from the Governance of Internal Displacement*, in *International Journal of Refugee Law*, 27: 2, 2015, p. 251.

²²⁸ Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948.

²²⁹ Organisation of American States (OAS), *American Convention on Human Rights*, San Jose, Costa Rica, 22 November 1969.

²³⁰ Organization of American States (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")*, San Salvador, El Salvador, 17 November 1988.

²³¹ Inter-American Commission of Human Rights (IACHR), *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, 2015, pp. 43, 79.

that neither the American Convention nor the Protocol of San Salvador have been ratified by Canada and the United States²³².

The Inter-American Commission on Human Rights (IACHR), recalling the OAS General Assembly Resolution on “Human Rights and Climate Change in the Americas” approved in 2008²³³, acknowledged the interrelation between the enjoyment of human rights and climate change. The IACHR recognised that the effects of climate change, both sudden and slow-onset events, play a significant role in causing displacement of individuals and populations. In particular, the Commission expressed its concern for the indigenous populations of the Americas: because of their indissoluble bond with the land and environment, they will suffer greater consequences, being forced to displace or, whether such option is not practicable or is rejected, being exposed to serious environmental risk. Furthermore, the IACHR was concerned with climate change impacts overlapping with contexts of social and political instability, especially in Latin America, where tensions could be exacerbated culminating in conflict²³⁴.

Another important recognition came from jurisprudence. On 7th February 2018, the Inter-American Court of Human Rights issued an unprecedented Advisory Opinion, responding to a request made by the Republic of Colombia regarding “state obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity recognized in Articles 4 and 5 of the American Convention, in relation to Articles 1(1) and 2 of said treaty”²³⁵. In this document the Court recognised the indisputable linkage between a safe environment and the

²³² IACHR, *B-32: American Convention on Human Rights Pact of San José, Costa Rica, Signatories and Ratifications*, website: <https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm> [Accessed 10 October 2018].

OAS, *A-52 Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol of San Salvador, Signatories and Ratifications*, website: <http://www.oas.org/juridico/english/signs/a-52.html> [Accessed 10 October 2018].

²³³ Organization of American States (OAS), *Human Rights and Climate Change in the Americas*, AG/RES. 2429 (XXXVIII-O/08), 3 June 2008, available at: https://www.oas.org/dil/AGRES_2429.doc [Accessed 10 October 2018].

²³⁴ Inter-American Commission on Human Rights, *IACHR Expresses Concern regarding Effects of Climate Change on Human Rights*, Press Release 140/15, 2 December 2015, available at: http://www.oas.org/en/iachr/media_center/preleases/2015/140.asp [Accessed 10 October 2018].

²³⁵ Inter-American Court of Human Rights, *Environment and Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia - Official Summary issued by the Inter-American Court*, 15 November 2017, p. 1, available at: http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf [Accessed 11 October 2018].

enjoyment of human rights and identified fundamental state obligations for the protection of the right to a healthy environment and the other entangled human rights. The important implications of such right highlighted by the Court were its both individual and collective nature and its universal value which applies also to future generations. Furthermore, particularly relevant is the specification that the jurisdiction of the States regarding the protection of human rights goes beyond their territory, and that States have the duty to prevent any violations of human rights in their territory²³⁶. Although the Advisory Opinion responds to a concrete case referred by the State of Colombia regarding environmental damage caused by the activity of States, the Court explicitly mentions also the role of climate change in hindering the realisation of the right to a healthy environment and the other indivisible human rights, recalling several international conventions and protocols on climate change to assert the States' duty to prevent the degradation of the environment and the consequential breaches of human rights²³⁷. Such developments might pave the way for the emergence of state obligations towards individuals and communities displaced as a consequence of environmental damage and climate change.

3.3 AFRICA

Africa is expected to be the continent most impacted by climate change. Despite not being the territory most hit by disasters, the overlapping of other critical factors determines the insufficient degree of resilience of African communities, which do not dispose of the means to face emergencies and to adapt to changes in their environment²³⁸. Such factors, namely the complex political and social dynamics, the insurgence of conflicts, the violent activity of extremist terrorist groups, and poverty,

²³⁶ Ibid. pp. 2-3.

²³⁷ Corte Interamericana de Derechos Humanos, *Opinión Consultiva OC-23/17, de 15 de Noviembre de 2017, Solicitada por la República de Colombia – Medio Ambiente y Derechos Humanos*, 15 Noviembre 2017, pp. 42-43, 53-54, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf [Accessed 11 October 2018].

²³⁸ ECOSOC Chamber, *Addressing the Climate Change – Migration Nexus and its Implications for Peace and Security in Africa*, New York, 19 October 2017, p. 2.

highly increase the vulnerability of populations already dependent on natural resources for their livelihood, especially in desert regions. Droughts, floods, and coastal erosion are responsible for desertification and land degradation, which compromise agricultural productivity and water availability, consequently threatening food security. These processes are the major causes of displacement, especially in Sub-Saharan Africa and the Horn of Africa. Also, cyclones hitting the coastal areas and the islands displace a significant number of people. The nature of movement is mainly internal and short-term, often involving the return of communities to rebuild and rehabilitate their villages. Nevertheless, the phenomenon can assume also a cross-border dimension, even though movement remains predominantly intra-continental²³⁹.

A critical case is represented by the Lake Chad Basin, in the Sahel region. Since the 1960s over 90 percent of water surface has shrunk, leaving millions of people unemployed, threatened by water and food scarcity, and consequently more vulnerable to violence and conflict. The Lake Chad Basin, in fact, is currently subjugated by the attacks of the extremist terrorist group Boko Haram. The dimension of forced displacement generated by these circumstances has highly impacted the region²⁴⁰.

3.3.1 PROTECTION UNDER THE NOTION OF “REFUGEE”: THE OAU CONVENTION

In the 1960s the States of the African continent were in the middle of a decolonisation process in which many individuals and communities were displaced to escape oppressive and discriminatory governments. As the 1951 Refugee Convention proved inappropriate to deal with the African context, the Organisation of African Unity (OAU) engaged in the study of the refugee situation in the continent which led to the adoption in 1969 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)²⁴¹. By virtue of its legal nature, the Convention

²³⁹ Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, p. 19.

²⁴⁰ ECOSOC Chamber, *Addressing the Climate Change – Migration Nexus and its Implications for Peace and Security in Africa*, New York, 19 October 2017, p. 3.

²⁴¹ International Federation of Red Cross and Red Crescent Societies, *The legal framework for migrants and refugees*, Geneva, 2017, p. 12.

imposes binding obligations on the forty-five states of the fifty-four members to the Organisation which adhered to the regional instrument²⁴².

The most relevant contribution of the Convention is the expanded definition of “refugee”, which inspired the subsequent Cartagena Declaration and the Bangkok Principles. According to article 1(2) of the document, in fact:

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 nationality²⁴³.

Such formulation, unlike the one adopted in the 1951 Refugee Convention, provides protection to people fleeing from indiscriminate violence, and, because it is not compulsory for the asylum seeker to prove the subjective and individualised element of the “fear of being persecuted”, the Convention applies also in circumstances of mass displacement²⁴⁴. In addition, Wood asserts that, operating in case of generalised forms of violence, such definition “depoliticise” asylum, making the element of persecution by a State unnecessary²⁴⁵; therefore, protection could find legal ground in the OAU Convention even in the situation of inability of the State of origin to provide assistance and safety to its citizens. For these reasons, then, some interpreters have argued that “events seriously disturbing public order” include natural disasters caused by climate change. Conversely, other scholars, including Kälin, sustain that it was not in the intentions of the drafters to comprehend the escape in the aftermath of sudden-onset events, and it is unlikely that African states will agree to endorse the expansion of the traditional conception of refugee as it was established in the text of the Convention.

²⁴² African Commission on Human and People’s Rights, *Ratification Table: AU Convention Governing Specific Aspects of Refugee Problems in Africa*, 2018, website: <http://www.achpr.org/instruments/refugee-convention/ratification/> [Accessed 15 October 2018].

²⁴³ Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* (“OAU Convention”), 1001 UNTS, 10 September 1969, article 1(2).

²⁴⁴ T. Wood, *Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention’s Expanded Refugee Definition*, in *International Journal of Refugee Law*, 26: 4, 2014, p. 559.

²⁴⁵ *Ibid.* p. 556.

However, the instrument would apply if an individual seeks refugee from violence surged in the form of conflict or riots as a consequence of a natural disaster, given the unwillingness or inability of the State to assist the population. Indeed, the African refugee regime is not sufficiently adequate to address climate change-related displacement²⁴⁶. Furthermore, as it was true for the Cartagena Declaration, the OAU Convention guarantees protection when the event causing harm and displacement has already occurred, thus not providing a suitable solution in the case of anticipatory displacement in view of expected future harm²⁴⁷.

3.3.2 PROTECTION TO IDPs: THE GREAT LAKES IDP PROTOCOL AND THE KAMPALA CONVENTION

For the first time a legally binding instrument for the protection of Internally Displaced Persons was adopted in Africa in 2006 at sub-regional level. The Pact on Security, Stability, and Development in the Great Lakes Region, which entered into force in 2008, was conceived to bring peace and prosperity to an area that for years had been troubled by conflict causing massive population displacement²⁴⁸. The Pact, which was ratified by ten countries of the Great Lakes Region, includes the Protocol on the Protection and Assistance to Internally Displaced Persons among its ten Protocols²⁴⁹. The IDP Protocol was designed to provide a legal framework for the implementation at regional level of the Guiding Principles on Internal Displacement into national legislations. Not only does it generate the obligation to incorporate the standards established in the Guiding Principles in national law, but also it obliges states to adopt a set of laws and policies to make such standards and principles practicable, starting from the specification of the government's organs responsible for the provision of

²⁴⁶ W. Kälin, *Conceptualising Climate-Induced Displacement*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 88.

²⁴⁷ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 49.

²⁴⁸ The Internal Displacement Monitoring Centre (IDMC), *The Great Lakes Pact and the rights of displaced people: A guide for civil society*, Geneva, Switzerland, 2008, p. 12.

²⁴⁹ The Pact was ratified by Burundi, Central African Republic, Democratic Republic of the Congo, Kenya, Rwanda, South Sudan, Sudan, United Republic of Tanzania, The Republic of Congo, Uganda; see: IDMC, *IDP Laws and Policies*, 2018, website: <http://www.internal-displacement.org/law-and-policy/> [Accessed 16 October 2018].

protection²⁵⁰. The Protocol integrates the definition of IDP provided by the Guiding Principles, adding an element of innovation by including among IDPs also “persons who have been forced or obliged to flee or to leave their homes [...] as a result of or in order to avoid the effects of large-scale development projects”²⁵¹, as for example the construction of dams. The provisions regarding this eventuality are outlined in article 5, which emphasises the governments’ obligation to prevent displacement in the first place, together with the duty to provide extensive information and to engage the population in the relocation process when this is inevitable²⁵². Furthermore, the Protocol incorporates the Guiding Principles’ standards on the primary responsibility of the States towards IDPs but strengthens the principle according to which governments shall accept international assistance when unable to sufficiently provide protection. In fact, article 3(10) underlines: “where Governments of Member States lack the capacity to protect and assist internally displaced persons, such Governments shall accept and respect the obligation of the organs of the international community to provide protection and assistance to internally displaced persons”²⁵³.

In the African continent another regional legally-binding instrument for the protection of IDPs was adopted in 2009. The African Union Convention For The Protection And Assistance Of Internally Displaced Persons In Africa, known as Kampala Convention, entered into force in 2012 and to the present day has been ratified by twenty-seven African countries²⁵⁴. The Convention incorporates the IDP definition contained in the Guiding Principles, and like the Great Lakes IDP Protocol, dedicates some provision to displacement caused by development projects²⁵⁵. Also the Kampala

²⁵⁰ The Internal Displacement Monitoring Centre (IDMC), *The Great Lakes Pact and the rights of displaced people: A guide for civil society*, Geneva, Switzerland, 2008, pp. 12-14.

²⁵¹ International Conference on the Great Lakes Region, *Protocol on the Protection and Assistance to Internally Displaced Persons*, 2006, article 1(5).

²⁵² Ibid. article 5.

²⁵³ Ibid. article 3(10).

²⁵⁴ African Union, List of countries which have signed, ratified/acceded to the African Union Convention For The Protection And Assistance Of Internally Displaced Persons In Africa (Kampala Convention), 2017, available at: https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf [Accessed 17 October 2018].

²⁵⁵ African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention")*, 23 October 2009, article 1 and 10.

Convention stresses the necessity to translate the standards of the Guiding Principle into national legislations, developing concrete policies and actions, and appointing authorities for the coordination and monitoring of the response framework²⁵⁶.

Despite the fact that many countries transposed the provisions of both the Great Lakes IDP Protocol and the Kampala Convention and elaborated their national laws and policies, the implementation of these instruments has been inadequate. This is due to the limited political capacity, the insufficient financial allocations at national level, and the absence of measures for the prosecution of violations to the Convention in the domestic judicial system. The 2018 Report on Internal Displacement highlights the additional difficulties when dealing with displacement induced by natural disasters and development projects, because the actions of the private sector and of multinational investors remain undisciplined, and because the necessity to implement disaster risk reduction practices has not been sufficiently addressed in the instruments²⁵⁷.

3.3.3 COMPLEMENTARY PROTECTION

In 1981 the African Charter on Human and People's Rights was adopted by the States members of the Organisation of African Unity and entered into force in 1986. The instrument has been acceded by fifty-four of the fifty-five state parties to the Organisation²⁵⁸. Subsequently, the African regional system for the protection of human rights adopted its enforcing mechanism through the establishment of the African Commission on Human and People's Rights in 1987, demanded by the Charter, and the African Court on Human and People's Rights with the adoption of the 1998 Protocol (came into effect in 2005)²⁵⁹. Particularly interesting for the purpose of this study are article 12 and article 24 of the Charter. The former entitles individuals to seek and obtain

²⁵⁶ Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, p. 19.

²⁵⁷ Ibid. p. 19.

²⁵⁸ [African Union, List of Countries which have signed, ratified/acceded to the African Charter on Human and People's Rights, 2017, available at: https://au.int/sites/default/files/treaties/7770-sl-african-charter-on-human-and-peoples-rights-2.pdf](https://au.int/sites/default/files/treaties/7770-sl-african-charter-on-human-and-peoples-rights-2.pdf) [Accessed 18 October 2018].

²⁵⁹ African Commission on Human and People's Rights, *African Charter on Human and People's Rights*, 2018, website: <http://www.achpr.org/instruments/achpr/#a24> [Accessed 18 October 2018].

asylum in accordance with the law when persecuted and prohibits the mass expulsion of non-nationals. The latter establishes the right to a general satisfactory environment favourable to the development of all peoples²⁶⁰. The main element of distinction from the conception of the right to a safe environment contained in other regional instruments and in international law is the specification that article 24 does not confer an individual right, but entitles peoples to such right, meaning groups who share common cultural and linguistic traits, as for the indigenous peoples²⁶¹.

To date, such provision has never been invoked for the protection of people displaced by natural disasters or other environmental degradation processes resulted from climate change. However, its violation was alleged in the *Ogoni land case*²⁶², together with the alleged violation of article 2 of the Charter (non-discriminatory enjoyment of rights), article 4 (right to life), article 14 (right to property), article 16 (right to health), article 18 (family rights), and article 21 (right of peoples to freely dispose of their wealth and natural resources). The case, brought in 1996 before the African Commission on Human and People's Rights, alleged that the military government of Nigeria allowed an irresponsible management of the oil business that caused environmental degradation and health disorders to the Ogoni people. In particular, among the several allegations advanced to the government of Nigeria, there was the violation of the above-mentioned human rights through the actions of the military forces at the disposal of the oil companies involved (including the State oil company), and through the lack of monitoring and safety measures. In 2001 the Commission pronounced on the merits of the case, finding the violation of all the articles mentioned above. Among the appeals to the new government of Nigeria, the Commission requested to conduct environmental and social impact assessment to future projects and to ensure the right to information and participation of the populations involved in

²⁶⁰ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 1982, article 12, article 24.

²⁶¹ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 61.

²⁶² *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication No 155/96, 27 October 2001.

such projects²⁶³. Such case demonstrates that the enjoyment of several human rights cannot be detached from a safe natural environment, and that the government has the obligation to preserve it with the means at its disposal.

The linkage between human rights and the environment, and in particular article 24 of the Charter, has been recalled by the Commission in some important resolutions, like Resolution 153 which urges African States to adopt legal measures on the safeguard of human rights and on climate change to prevent forced relocation of individuals and groups²⁶⁴.

3.4 EUROPE

The European continent represents the destination of a great share of migrants, especially from Northern Africa, including those moving as a result of environmental pressures; nevertheless, Europe has not been immune to the effects of climate change²⁶⁵.

Compared to other regions of the globe, Europe has been relatively less exposed to natural disasters so far; economic development, technological capacity, and governance capacity for the implementation of monitoring and preventive measures play a key role in reducing populations' vulnerability²⁶⁶. However, natural hazards such as landslides, floods and wildfires have not spared some European countries, for example France where 22,000 people were displaced in 2017²⁶⁷. Likewise, in Portugal,

²⁶³ F. Coomans, *The Ogoni Case Before The African Commission on Human and Peoples' Rights*, in *International & Comparative Law Quarterly*, 52: 3, 2008.

²⁶⁴ African Commission on Human and People's Rights, *Resolution 153: Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa*, 25 November 2009, available at: <http://www.achpr.org/sessions/46th/resolutions/153/> [Accessed 18 October 2018].

See also *Resolution 271: Resolution on Climate Change in Africa*, 12 May 2014, available at: <http://www.achpr.org/sessions/55th/resolutions/271/>, and *Resolution 342: Resolution on Climate Change and Human Rights in Africa*, ACHPR/Res. 342(LVIII), 20 April 2016, available at: <http://www.achpr.org/sessions/58th/resolutions/342/>.

²⁶⁵ Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, p. 1.

²⁶⁶ Greenpeace Germany, *Climate Change, Migration, and Displacement: The Underestimated Disaster*, Hamburg, Germany, 2017, p. 14.

²⁶⁷ Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, p. 45.

Spain, Italy and the UK thousands of people were forced to move. Storm and floods, in particular, have induced a short-term internal displacement to allow the restoration of the affected areas, and most people have been able to return to their places²⁶⁸.

With regard to incoming fluxes of migrants, it is challenging to identify those people who may be classified as climate migrants because, as it was clarified in chapter one, economic, social and environmental factors inducing mobility are often interconnected and not always discernible. However, it has been recognised that climatic stress is exacerbating displacement. This linkage has been confirmed also by European Union institutions in a series of documents and resolutions. Among the most relevant, the European Parliament resolution on “The Environment, Security and Foreign Policy” of January 1999, the first institutional document recognising the effects of climate change on human mobility; and the 2008 paper on “Climate Change and International Security” elaborated by the High Representative and the European Commission, in which climate change is said to act as a “threat multiplier” inducing migration²⁶⁹.

3.4.1 THE COMMON EUROPEAN ASYLUM SYSTEM AND THE QUALIFICATION DIRECTIVE

A regional legal system for the protection of refugees, namely a new convention, has not been developed in Europe. The reason is rather straightforward: the 1951 Refugee Convention was conceived to specifically address the critical situation that Europe was facing in the aftermath of WWII; despite the subsequent Protocols and amendments, the Refugee Convention remains an instrument with significant Eurocentric character, as it emerged from the analysis of other regional systems.

The European Union, though, has elaborated a structure of policies to harmonise Member States’ legislations in the area of protection under the refugee regime. The

²⁶⁸ Greenpeace Germany, *Climate Change, Migration, and Displacement: The Underestimated Disaster*, Hamburg, Germany, 2017, p. 14.

²⁶⁹ European Commission, *Commission Staff Working Document “Climate Change, environmental degradation, and migration”*, SWD (2013) 138 final, 16 April 2013, p. 6, available at: <https://climate-adapt.eea.europa.eu/metadata/publications/climate-change-environmental-degradation-and-migration> [Accessed 22 October 2018].

Common European Asylum System (CEAS) has been in operation since 1999 with the aim of sharing the responsibility for the assistance of asylum seekers and of establishing common minimum standards with regard to international protection in the EU territory. With the reform of the system in 2008, the Policy Plan on Asylum elaborated by the European Commission identified three pillars at the foundation of CEAS action: further increasing legislative harmonisation, improving effective cooperation among EU States, and incrementing solidarity and sense of responsibility among States²⁷⁰. The system is built on three fundamental legislative instruments: the revised Asylum Procedures Directive (APD) establishing a single and harmonised asylum procedure, with special attention to vulnerable individuals; the revised Reception Conditions Directive (RCD) setting standards with regard to material conditions and access to the labour market; the revised Qualification Directive (QD) determining the grounds for granting refugee status and asylum. In addition, the Dublin Regulation and the EURODAC Regulation set the rules to determine the State responsible for asylum application, and to allow access to asylum seekers' fingerprints database to Member States in case of investigation of serious crimes, respectively ²⁷¹.

In relation to the present study, it is convenient to analyse more deeply the Qualification Directive in order to answer the question whether the CEAS provides grounds of protection for climate migrants. Primarily, it should be made clear that the Qualification Directive in its article 2(d) integrates the definition of refugee of the 1951 Convention²⁷²; additionally, the QD creates subsidiary protection, granting other forms of protection to individuals that do not qualify for refugee protection under the 1951 Convention but are exposed to serious risks for their life or severe violation of their

²⁷⁰ Commission of the European Communities, *Policy Plan on Asylum: An Integrated Approach to Protection across the EU*, COM (2008) 360 final, Brussels, 17 June 2008, p. 4, available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF> [Accessed 23 October 2018].

²⁷¹ Ibid. pp. 4-8.

²⁷² Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 2011/95/EU, 20 December 2011, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32011L0095> [Accessed 23 October 2018].

human rights²⁷³. Ascertained that climate migrants are generally not entitled to international protection under the refugee regime, it has to be investigated whether they can obtain subsidiary protection under the Directive. Article 15 of the QD sets three circumstances under which subsidiary protection is granted.

Firstly, paragraph (a) grants subsidiary protection to individuals at risk of facing death penalty or execution. Clearly, this provision hardly applies to climate migrants who, escaping from sudden natural disasters or degradation, are not in danger of suffering a death sentence but fear for their life and basic human rights because of the effects of the hazard on their territory. The provision would apply only in the exceptional case in which an individual sentenced to death seeks refuge abroad in the aftermath of a natural disaster and his/her return would involve a concrete risk of being executed²⁷⁴. Therefore, in the great majority of cases article 15(a) is not suitable to provide protection in the context of climate change-induced displacement.

Paragraph (b), instead, contemplates the risk of torture, inhuman or degrading treatment which is derived from article 3 of the European Convention on Human Rights. The Court jurisprudence has identified criteria for the application of this provision, namely when harm is directly and intentionally inflicted by State or non-State actors, when harm derives from natural damages over a certain threshold, and when authorities or non-State actors are the main responsible for the natural disaster. ECtHR case law will be analysed in detail in the following sections and it will be demonstrated how limited the application of provision 15(b) of the QD in the circumstances of natural disasters and environmental degradation is²⁷⁵.

Thirdly, grounded on paragraph (c) is the protection of persons whose life is threatened by indiscriminate violence during international or internal armed conflict. Since the requirements of the subsistence of an armed conflict situation and its causal linkage with the threat for the applicant's life are imperative, article 15(c) may apply only in circumstances in which climate change and disasters exacerbate conflicts;

²⁷³ H. Ragheboom, *The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective*, Brill Nijhoff, Leiden, 2017, pp. 340-341.

²⁷⁴ Ibid. pp. 341-343.

²⁷⁵ G. C. Bruno et al. (Ed. by), *Migration and the Environment: Some Reflections on Current Legal Issues and Possible Ways Forward*, CNR Edizioni, Roma, 2017, pp. 53-54.

however, the majority of people displaced by a sudden-onset events and degradation cannot rely on protection under such provision²⁷⁶.

After this analysis, it becomes clear that subsidiary protection is unlikely to be granted to people displaced by the impacts of climate change, unless the specific and uncommon circumstances above-mentioned verify. Neither does article 15 suggest other situations in which, with evolutive interpretation, subsidiary protection might be extended, as the three criteria enunciated in paragraphs (a), (b) and (c) represent an exhaustive list²⁷⁷.

3.4.2 EU TEMPORARY PROTECTION DIRECTIVE

Since 2001 the EU Temporary Protection Directive (TPD)²⁷⁸ regulates the temporary stay of displaced people in the event of mass influx from third-countries to the Member States territory, when it would be difficult to proceed to individually assess the status of those displaced. It was originally conceived to assist people displaced by conflicts or generalised violence²⁷⁹. In fact, the definition of “displaced persons” contained in article 2(c) of the TPD does not explicitly refer to people displaced by environmental and climatic factors; nevertheless, the definition is not exhaustive. Therefore, according to the Commission, “the Directive leaves wide room for manoeuvre, in the form of open definitions of key words such as «mass influx»”, so that temporary protection under the Directive might be appropriately addressed to populations displaced by sudden-onset disasters to whom the possibility of return in the medium-term is available²⁸⁰.

²⁷⁶ H. Ragheboom, *The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective*, Brill Nijhoff, Leiden, 2017, pp. 347-351.

²⁷⁷ Ibid. p. 341.

²⁷⁸ Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of 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*, OJ L.212-223, 2001/55/EC, 7 July 2001.

²⁷⁹ European Parliament Research Service, *The Concept of “climate refugee”: Towards a Possible Definition*, May 2018, p. 9.

²⁸⁰ European Commission, *Commission Staff Working Document “Climate Change, environmental degradation, and migration”*, SWD (2013) 138 final, 16 April 2013, p. 6, available at: <https://climate->

The TPD sets minimum standards for the protection and the respect of human rights of people temporary residing in EU but leaves to Member States sufficient margin of discretion in its application. Ragheboom criticises the flexible character of the TPD and the partial imprecision of the provisions, which may be the reason why the Directive has never been applied so far²⁸¹. Furthermore, Klein Solomon and Warner observe that the response provided by the TPD would be reactive, making it unsuitable for those moving driven by slow-onset degrading processes of their environment, who, in addition, would necessitate more permanent solutions²⁸².

3.4.3 PROTECTION TO IDPS

Internal displacement is a phenomenon occurring also in Europe. The 2018 Global Report on Internal Displacement states that “three-quarters of the displacement recorded in Europe and Central Asia in 2017 was associated with disasters”²⁸³. The protection of IDPs in Europe is monitored especially by the Council of Europe (CoE). The intergovernmental organisation identifies the UN Guiding Principles on Internal Displacement as the legal instrument to which Member States have to refer. In the 2006 Recommendation on Internally Displaced Persons, not only did the Committee of Ministers of the Council of Europe reaffirm the fundamental provisions of the Guiding Principles, but also it associated the standards for IDP protection to States obligations derived by the European Convention on Human Rights²⁸⁴. Therefore, despite the non-binding legal nature of the Guiding Principles, the CoE was able to ground the protection

adapt.eea.europa.eu/metadata/publications/climate-change-environmental-degradation-and-migration
[Accessed 22 October 2018].

²⁸¹ H. Ragheboom, *The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective*, Brill Nijhoff, Leiden, 2017, pp. 401-402.

²⁸² M. Klein Solomon, K. Warner, *Protection of Persons Displaced as a Result of Climate Change, Existing Tools and Emerging Frameworks*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 277.

²⁸³ Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), 2018 Global Report on Internal Displacement, 16 May 2018, p. 45.

²⁸⁴ Council of Europe, Committee of Ministers, *Recommendation 2006(6) on internally displaced persons*, 5 April 2006, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5aaf> [Accessed 24 October 2018].

of IDPs on the binding commitments undertaken by Member States for the safeguard of human rights.

Likewise, the European Union endorses the Guiding Principles and promotes their integration into national legislations²⁸⁵. The 2016 Communication of the Commission “Lives in Dignity” defines the EU approach to forced displacement, including internal displacement, which aims at improving the legal and policy framework for ensuring the accountability of states towards their citizens, adopting a development perspective and not only crisis-based responses, and addressing the wider context which has produced displacement²⁸⁶. However, implementation of policies for the effective assistance to IDPs remains uneven, and in some States hindered by limited political will or governance, especially in Eastern European countries²⁸⁷.

3.4.4 COMPLEMENTARY PROTECTION: THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights (ECHR), was the first regional legal instrument to confer binding force to the fundamental human rights contained in the Universal Declaration. Elaborated by the Council of Europe, intergovernmental regional organisation to which 47 States are party, the Convention was approved in 1950 and entered into force in 1953. The ratification of the Convention and its Protocols, which is a prerequisite for the accession of States to the organisation, empowers national and non-national individuals in the Member States territory with the possibility to bring complaints of human rights violations against a Member State in front of the Court of

²⁸⁵ European Commission, *Forced displacement: refugees, asylum-seekers and internally displaced people (IDPs)*, 13 April 2018, website: http://ec.europa.eu/echo/what-we-do/humanitarian-aid/refugees-and-internally-displaced-persons_en [Accessed 24 October 2018].

²⁸⁶ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Lives in Dignity: from Aid-dependence to Self-Reliance, Forced Displacement and Development*, COM (2016) 234 final, Brussels, 26 April 2016, available at: http://ec.europa.eu/echo/files/policies/refugees-idp/Communication_Forced_Displacement_Development_2016.pdf [Accessed 24 October 2018].

²⁸⁷ Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, p. 46.

Strasbourg, at the exhaustion of domestic remedies²⁸⁸. The European Court of Human Rights, in fact, was established by the Convention and set up in 1959 in order to provide the European human rights protection system with an enforcing mechanism²⁸⁹.

Considering the moment and historical context in which the Convention was conceived, it is not surprising that the text includes and protects mainly human rights belonging to the first generation, namely civil and political rights; however, to respond to new challenges the jurisprudence has been able to indirectly protect some economic and social rights through the interpretation of other provisions of the Convention, especially article 2, Right to Life, article 3, Prohibition of Torture, and article 8, Right to Respect for Private and Family Life, increasingly recognising the interdependence and indivisibility of all categories of human rights²⁹⁰. Notably, in the case of *Budayeva and others v Russia*²⁹¹ the Court in 2008 assessed that the obligation of States to take positive measures to prevent any threat to the life of citizens arises from article 2 of the Convention, acknowledging that environmental matters affect the enjoyment of the right to life. In particular, the Court found that:

In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use²⁹².

Therefore, a State may be held responsible for its failure to protect life from the impacts of natural disasters when the risk is known.

In December 2008, the necessity to evolve human rights protection towards the safeguard of the environment and of human rights of migrants in the context of environmental and climate change was further highlighted by the Council of Europe. In

²⁸⁸ Council of Europe, *A Convention to protect your rights and liberties*, 2018, website: <https://www.coe.int/en/web/human-rights-convention> [Accessed 26 October 2018].

²⁸⁹ European Court of Human Rights, *General Presentation*, 2018, website: <https://www.echr.coe.int/Pages/home.aspx?p=court&c=> [Accessed 26 October 2018].

²⁹⁰ L. Thornton, *The European Convention on Human Rights: A Socio- Economic Rights Charter?*, in *Ireland and the European Convention on Human Rights: 60 Years and Beyond*, Ed. by S. Egan et. al., Bloomsbury, 2014, pp. 227-228.

²⁹¹ *Budayeva v Russia*, App nos 15339/02, 21166/02, 111673/02, and 15343/02, ECtHR, 20 March 2008.

²⁹² *Ibid.*, para 137.

fact, the Parliamentary Assembly of the organisation issued a report entitled “Environmentally induced migration and displacement: a 21st century challenge” advocating for the elaboration of a Framework Convention for the Recognition of Status and Rights of Environmental Migrants and for the introduction of an additional Protocol on the right to a healthy and safe environment to the European Convention on Human Rights. Furthermore, the document encourages Member States to “interpret and apply the obligation of *non-refoulement* under Articles 2 and 3 of the European Convention of Human Rights in an inclusive manner and grant complementary or temporary protection to environmental migrants”²⁹³.

Also the European Union developed an instrument for the protection of human rights, namely the Charter of Fundamental Rights of the European Union adopted in 2000. The Charter, which since 2007 has acquired the same legally-binding value as the Treaties of the EU, is especially related to the ECHR; in fact, the European Court of Justice can refer to the jurisprudence of the ECtHR with regard to those rights contained both in the Charter and in the Convention²⁹⁴. The novelty introduced by the Charter is the provision on the protection of the environment contained in article 37, according to which not only do Member States have the duty to protect the environment, but also to adopt positive action through the implementation of policies for the improvement of the environment “in accordance with the principle of sustainable development”²⁹⁵. In the context of climate change-related migration and displacement, such provision can be seen as an advancement towards the prevention of forced displacement; the implementation of mitigation and adaptation action derived by the increased responsibility of States for the safeguard of the environment may reduce individuals and communities’ vulnerability and the resort to temporary or permanent displacement.

3.4.5 NON-REFOULEMENT UNDER ARTICLE 3 OF THE ECHR: CASE LAW

²⁹³ The Council of Europe Parliamentary Assembly, Committee on Migration, Refugees and Population, *Environmentally Induced Migration and Displacement: A 21st Century Challenge*, Doc 11785, 23 December 2008.

²⁹⁴ European Union, *Charter of Fundamental Rights of the European Union*, C 364/7, 2000, article 52.

²⁹⁵ *Ibid.*, article 37.

Although no case concerning a person displaced by the effects of climate change has been brought before any courts, it is possible to draw some conclusions applicable to the context of climate change-induced displacement by the examination of relevant jurisprudence of the ECtHR; specifically, it will be investigated whether human rights law could protect such category of displaced persons against *refoulement*, grounding on article 3 of the ECHR, prohibition of torture and inhuman or degrading treatment.

Jurisprudence will be analysed in relation to the three scenarios enumerated in article 15(b) of the Qualification Directive mentioned above, namely when harm is directly and intentionally inflicted by State or non-State actors, when harm derives from natural damages, and when authorities or non-State actors are the main responsible for the natural disaster.

The first scenario is very unlikely to occur in circumstances of climate change-related disasters. In fact, in the majority of cases the authorities of the country of origin cannot be considered responsible for the threat of torture or inhuman treatment, unless the individual had been previously sentenced to death or at risk of suffering torture by authorities regardless of the occurrence of the natural disaster. Nevertheless, the ECtHR case law recognised the absolute nature of the prohibition of expulsion of an individual to countries where the risk to suffer torture by State's authorities is concrete, provision which cannot be derogated nor balanced against the State's interests²⁹⁶.

In the second scenario the authorities of the State cannot be considered directly or indirectly responsible for the harm threatening the individual, which derives from purely natural factors. *D v United Kingdom*²⁹⁷ is the first case in which the principle of *non-refoulement* is applied in circumstances where the threat of harm is not attributable to State's acts or omissions. The case concerned a St Kitts's national whom the British authorities wanted to deport to his country of origin once he had served his sentence in the UK. At the time the applicant was dying because of AIDS, as his condition had reached the most critical stadium. Given the poor conditions of sanitation, housing, and food and medication availability in St Kitts, together with the lack of care by family and

²⁹⁶ See: *Soering v United Kingdom*, App no 14038/88, ECtHR, 7 July 1989. *Chahal v United Kingdom*, App no 22414/93, ECtHR, 15 November 1996. *Saadi v Italy*, App no 37201/06, ECtHR, 28 February 2008.

²⁹⁷ *D v United Kingdom*, App no 30240/96, ECtHR, 2 May 1997.

society, the Court decided that the deportation of the applicant by the UK would have constituted a breach of article 3 ECHR. In fact, D would have suffered “a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment”²⁹⁸. The decision was justified by the “exceptional circumstances” and the critical timing, referring to the imminence of the expectation of death in this case, which set a high threshold for harm deriving from natural phenomena to trigger the non-refoulement obligation under article 3²⁹⁹. Despite such restrictive approach, the judgment was clear in stating that “the Court must reserve to itself sufficient flexibility to address the application of that Article (art. 3) in other contexts which might arise”³⁰⁰, opening the possibility for the effects of climate change-related disasters to amount to inhuman or degrading treatment, activating protection under human rights law³⁰¹. Nevertheless, the high threshold set by this case, according to which the circumstances must be very exceptional, leading to extreme suffering and deprivation, was confirmed in *N v United Kingdom*³⁰². As in the previous case, N, a Ugandan woman, was affected by HIV; however, the Court found that the uncertain circumstances that expected the applicant in Uganda did not meet the threshold to constitute inhuman treatment since N’s life expectancy would have reduced but would not have involved the risk of imminent death³⁰³. Therefore, no violation of article 3 was assessed by the Court.

The third scenario involves cases in which State’s direct or indirect actions are considered the main cause of a critical humanitarian situation. In *Sufi & Elmi v United Kingdom*³⁰⁴ the applicants claimed that they would have suffered inhuman or degrading treatment if deported to their country, Somalia, constituting a breach of article 3 ECHR. Somalia, in fact, was suffering a severe crisis aggravated by drought but primarily

²⁹⁸ Ibid., para 53.

²⁹⁹ M. Scott, *Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?*, in *International Journal of Refugee Law*, 26: 3, 2014, pp. 413-414.

³⁰⁰ *D v United Kingdom*, App no 30240/96, ECtHR, 2 May 1997, para 49.

³⁰¹ H. Ragheboom, *The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective*, Brill Nijhoff, Leiden, 2017, p. 371.

³⁰² *N v United Kingdom*, App no 26565/05, ECtHR, 27 May 2008.

³⁰³ M. Scott, *Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?*, in *International Journal of Refugee Law*, 26: 3, 2014, p. 414.

³⁰⁴ *Sufi & Elmi v United Kingdom*, App no 8319/07, ECtHR, 28 June 2011.

originated by parties of the ongoing conflict. The high level of indiscriminate violence had produced a great number of displaced persons who sought shelter in IDP camps where, though, food and hygiene are poor, and people are vulnerable to exploitation and crime. The Court observed that, if returned, the applicants would have likely been forced to stay in a camp, and that any individual seeking refuge in a camp in Somalia would have faced a “real risk of Article 3 ill-treatment on account of the dire humanitarian conditions”³⁰⁵. With regard to this case, Ragheboom notices that natural disasters are likely to produce similar scenarios in which severe humanitarian conditions could amount to inhuman or degrading treatment under article 3 ECHR. In the *Sufi & Elmi* case, in fact, the Court highlighted the role of the environmental context produced by drought in worsening the humanitarian condition in Somalia. Nevertheless, “to pass the *Sufi & Elmi* test and access protection from *refoulement* in Europe [...] the environmental harm they [environmentally-displaced persons] allege must be linked to an act or omission attributable, either directly or indirectly, to their State of origin”³⁰⁶.

From this analysis it appears that protection from *refoulement* to people displaced by climate change-related disasters or degradation processes is granted in exceptional circumstances, and that it is more likely to be granted under the *Sufi & Elmi* test rather than under the *N v UK* test³⁰⁷. Nevertheless, protection based on human rights law has the advantage of not requiring the personalisation of the persecution nor the establishment of a direct linkage between the cause and the harm itself. Indeed, in this context, the effort to single out climate change as the only cause of displacement would be counterproductive, considering the absence of an absolute obligation upon States deriving from the right to a safe environment and having assessed that protection may only arise from the interpretation of the fundamental underogable provisions, like article 3 ECHR that has just been examined.

³⁰⁵ Ibid., para 292.

³⁰⁶ H. Ragheboom, *The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective*, Brill Nijhoff, Leiden, 2017, p. 385.

³⁰⁷ Ibid., p. 386.

CHAPTER FOUR

ASSESSING ALTERNATIVE PROPOSED SOLUTIONS

Summary: 4.1 Introduction. – 4.2 The Amendment of the 1951 Refugee Convention. – 4.2.1 The limits of recognising refugee status to climate migrants. – 4.3 A new *sui generis* international Convention. – 4.3.1 Biermann and Boas’s Regime for Governing the “Climate Refugee Crisis”. – 4.3.2 Hodgkinson and Young’s Convention for Climate-Change-Displaced Persons. – 4.3.3 Docherty and Giannini Convention for Climate Change Refugees. – 4.3.4 The obstacles to a new treaty. – 4.4 Developing normative and policy solutions at Regional level. – 4.4.1 Addressing the Legal Gap. – 4.4.2 Priority Policy Areas. – 4.4.3 Preventing forced displacement: focus on the food production system. – 4.4.4 Planned migration as an adaptive solution to climate change. – 4.5 The issue of States’ responsibility.

4.1 INTRODUCTION

After having analysed in depth the existing legal framework at international and regional level and having assessed its unsuitability, different measures and instruments addressing the phenomenon of climate change-induced displacement proposed by the academy and governments will be examined. The most shared proposals advanced in the past decade will be considered, namely the amendment of the 1951 Refugee Convention, or alternatively the introduction of a new Protocol to the Convention, and the adoption of a new *ad hoc* legally binding treaty at international level³⁰⁸.

This study argues against both proposed solutions, before drawing the conclusion that the development of soft law regional instruments would be the most appropriate approach to manage the phenomenon, given all the difficulties and obstacles identified in the potential application of the other measures. The effort to fill

³⁰⁸ See: A. Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, in *Law & Policy*, 30: 4, October 2008, pp. 507-510; D. Hodgkinson and L. Young, “*In the Face of Looming Catastrophe*”. *A Convention for Climate-Change-Displaced Persons*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, pp. 307-308.

the legal void should be complemented with the adoption of targeted policies to support adaptation and lower vulnerabilities. A set of priority policy areas will be suggested, supplemented by a focus on two relevant aspects: enhancing resilience of communities through the food production system, and planned migration as an adaptation strategy.

A brief overview of the issue of responsibility of States towards climate change-displaced persons will be provided in the last section.

4.2 THE AMENDMENT OF THE 1951 REFUGEE CONVENTION

In the attempt to find a solution for the issue of climate change-induced displacement, the proposal for the amendment or the addition of a new Protocol to the 1951 Refugee Convention has been advanced consistently. Over the years these initiatives have advocated for the expansion of the scope of the Convention and of the “refugee” definition to include “environmental” or “climate” refugees³⁰⁹. In 2006 the Maldives called for the elaboration of a Protocol that incorporated among the elements constituting persecution the effects of sudden climate events and degrading processes, without requiring the identification of the actor perpetrating persecution. The proposal did not intend to decrease the threshold establishing the level at which harm becomes persecution; only the most severe disasters, then, would constitute a ground for the grant of the refugee status. The government of Maldives, though, asked that the Protocol applied also to internally displaced persons in the event of serious natural hazards³¹⁰.

In the same year, a resolution adopted by the Belgian Senate instructed Belgium to promote at the UN level the recognition of the refugee status under the 1951

³⁰⁹ M. Ferolla Vallandro do Valle, *Six of One, Half of a Dozen of the Other: The Inefficiency of Recognizing Refugee Status to Environmentally Displaced Persons*, in *Migration and the Environment: Some Reflections on Current Legal Issues and Possible Ways Forward*, G. C. Bruno et al. (Ed. by), CNR Edizioni, Roma, 2017, p. 10.

³¹⁰ Republic of Maldives (Ministry of Environment, Energy and Water), *First Meeting on Protocol on Environmental Refugees: recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol relating to the Status of Refugees*, Male, 14-15 August 2006, as cited by M. Ferolla Vallandro Do Valle, *cit. supra* note 1, pp. 10-11.

Convention regime for persons displaced by environmental factors³¹¹. In 2008 other two resolutions of the Chamber of Representatives encouraged the State to advocate for the recognition of “environmental refugees” and for a Protocol to the Convention³¹². The Belgian proposal only asked to the international community to assemble in a conference to discuss the issue and create the Protocol, without suggesting detailed provisions to be included in the text³¹³.

Similarly, Bangladeshi politicians and non-governmental organisations repeatedly supported the revision of the Refugee Convention to address the problem of “climate refugee”. In 2009, for example, at the Copenhagen climate summit the Bangladeshi Minister of Finance invoked the reform of the international refugee regime for the protection of “climate refugees”³¹⁴.

Previously, in 2007, the Australian Labor Party supported the establishment of a regional coalition to manage the flows of “climate change refugees”, while asking the government to lobby the UN to recognise the climate change refugee status in the existing Convention or, alternatively, through the creation of a new convention on climate refugees³¹⁵.

³¹¹ Sénat de Belgique, *Proposition de résolution visant à la reconnaissance dans les conventions internationales du statut de réfugié environnemental*, Doc 3-1556/3, Belgian Senate, 21 March 2006, as cited by J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 105.

³¹² Chambre des Représentants de Belgique, *Proposition de résolution relative à la prise en consideration et à la création d'un statut de réfugié environnemental par le Nations-Unies et l'Union européenne*, Doc 52-1451/001, 3 October 2008. Chambre des Représentants de Belgique, *Proposition de résolution visant à la reconnaissance dans les conventions internationales du statut spécifique pour les réfugiés climatiques*, Doc. 52-1478/001, 14 October 2008, as cited by J. McAdam, *cit. supra* note 3, pp. 105-106.

³¹³ M. Ferolla Vallandro do Valle, *Six of One, Half of a Dozen of the Other: The Inefficiency of Recognizing Refugee Status to Environmentally Displaced Persons*, in *Migration and the Environment: Some Reflections on Current Legal Issues and Possible Ways Forward*, G. C. Bruno et al. (Ed. by), CNR Edizioni, Roma, 2017, p. 11.

³¹⁴ H. Grant, J. Randerson and J. Vidal, *UK should open borders to climate refugees, says Bangladeshi minister*, The Guardian, 4 December 2009, available at: <https://www.theguardian.com/environment/2009/nov/30/rich-west-climate-change> [Accessed 6 November 2018].

³¹⁵ When the Australian Labor Party obtain the lead of the government it did not deal with the issue, not developing any policies nor issuing any public statements. See: J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 106.

4.2.1 THE LIMITS OF RECOGNISING REFUGEE STATUS TO CLIMATE MIGRANTS

It can be observed that the proposals concerning the amendment of the Refugee Convention were predominantly conceived between 2006 and 2010. At the time, some international actors, especially those States that had already been suffering the impacts of climate change, above all the Pacific small islands, realised the urgency of the phenomenon and sought to draw the attention and the interests of politicians at global level on the matter calling for the protection of “climate refugee” under the regime established in Geneva in 1951. However, later such claim was abandoned as it had been progressively acknowledged that protection for climate change-displaced persons under the refugee regime would not have provided the most appropriate solution to the problem; conversely, a number of reasons reveals the limits and the counterproductive effects that the expansion of the scope of the Convention would generate.

On the one hand, one of the greatest limits to the amendment of the Refugee Convention is the lack of political will of State Parties. In fact, especially considering the refugee crisis that the international community is currently experiencing, it is unlikely that States would agree to negotiate a new Protocol to the Convention or the revision of the “refugee” definition contained in article 1A(2). Since the refugee regime does not establish a norm for the distribution of refugees between States, being the system based on international cooperation, governments have always sought to reduce their responsibilities³¹⁶; therefore, States are not inclined to commit to new obligations as they fear that the extension of the Convention to climate change-displaced persons would open the “floodgates” of refugees implying a political and economic overburden on their resources³¹⁷. Conversely, observers have warned about the negative consequences that the expansion of the scope of the Convention would have on the current refugee regime, devaluating protection for refugees³¹⁸. Expecting an increasing

³¹⁶ J. McAdam, *The Enduring Relevance of the 1951 Refugee Convention*, in *International Journal of Refugee Law*, 29:1, 2017, pp. 4-5.

³¹⁷ L. Nishimura, *“Climate Change Migrants”: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies*, in *International Journal of Refugee Law*, 27: 1, 2015, pp. 118-119.

³¹⁸ A. Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, in *Law & Policy*, 30: 4, October 2008, p. 509.

number of asylum-seekers entering their territory, governments would harden their policies and hinder the access to refugee programmes; according to UNHCR, this “could result in a lowering of protection standards for refugees and even undermine the international refugee protection regime altogether”³¹⁹. Such resistances from States are also explained by the fact that the phenomena of migration and displacement are seen in geopolitical terms rather than as a human rights issue; in other words, States address human mobility as a threat to national security³²⁰.

On the other hand, amending the Refugee Convention presents a series of issues that would make protection to climate change-displaced persons ineffective under a reformed refugee regime. As it has already been emphasised, movement induced by climate change impacts occurs predominantly within the country of origin. Therefore, a system of protection founded on the Refugee Convention would not apply to the larger number of IDPs but only to those who have crossed an international border³²¹. Moreover, since the refugee status implies the element of coerced movement, protection may be granted to persons fleeing natural disasters, but it is unlikely that it would be conferred to those moving driven by slow processes degrading their environment³²². It has to be noticed, also, that the individualised approach pursued by the 1951 Convention is flawed if applied to the case of persons displaced by the effects of climate change. Since families and communities tend to move together, solutions would result more efficient if applied at group level rather than individually³²³. With regard to these observations, Jayawardhan underlines that, by addressing the phenomenon through the refugee regime, States fail to recognise and focus their action on the root causes of displacement in the context of climate change; in particular, the

³¹⁹ UNHCR, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, 2009, as cited by M. Ferolla Vallandro do Valle, *cit. supra* note 2, p. 16.

³²⁰ L. Nishimura, “*Climate Change Migrants*”: *Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies*, in *International Journal of Refugee Law*, 27: 1, 2015, p. 120.

³²¹ V. Mence, A. Parrinder, *Environmentally related international migration: Policy challenges*, in *A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-making*, ed. by M. McAuliffe and al., ANU Press, 2017, p. 327.

³²² *Ibid.* p. 328.

³²³ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 87.

author suggests the “risk of accepting an uncritical link between climate change and population displacement”, instead of intervening to reduce communities’ vulnerability and to enhance adaptation³²⁴. Biermann and Boas agree on the fact that the needs of climate change-displaced persons have to be specifically addressed, as they differ greatly from those of refugees defined by the Convention; for example, rather than providing only reactive assistance, there would be a margin to organise legal and participative migratory plans as a pre-emptive and adaptive measure³²⁵. Whereas, if protection is bound to the rules set by the Convention “the issue remains framed in either a security agenda or a humanitarian one”³²⁶. Alternatively, it has been proposed by some scholars to elaborate a new Protocol to the United Nations Framework Convention on Climate Change (UNFCCC). However, it is believed that, in spite of being an environmental law treaty focused on adaptation and mitigation of climate change, the instrument is not suitable to address displacement. Its institutional architecture and mandate were not conceived to deal with such issue; in particular, the Framework Convention on Climate Change establishes duties and regulates relations between States and does not discipline obligations of States towards individuals or populations. Besides, as it was designed to coordinate pre-emptive action, the UNFCCC does not contain programmes to provide protection and assistance in a context of displacement in the aftermath of disasters or environmental degradation³²⁷. For these reasons the UNFCCC does not represent the best framework on which founding protection for climate change-displaced persons.

4.3 A NEW SUI GENERIS INTERNATIONAL CONVENTION

³²⁴ S. Jayawardhan, *Vulnerability and Climate Change Induced Human Displacement*, in Consilience, 17, Columbia University, 2017, p. 104.

³²⁵ F. Biermann, I. Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, in Global Environmental Politics, 10: 1, 2010, p. 74.

³²⁶ F. Gemenne, *Climate-induced population displacements in a 4°C+ world*, in Philosophical Transaction of the Royal Society, A, 369, 2011, p. 190.

³²⁷ B. Docherty and T. Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, in Harvard Environmental Law Review, 33, 2009, p. 358.

Several scholars have focused on the proposition of a model Convention to provide an *ad hoc* solution to the problem of climate change-induced displacement: a new universal *sui generis* treaty that creates a specific framework of obligations upon States and rights to which displaced individuals and communities are entitled. For example, a group of academics from the University of Limoges elaborated a Draft Convention on the International Status of Environmentally-Displaced Persons. It has to be noticed that the label of “refugee” associated with climate change-displaced persons is not used by the authors, and that a broader definition of “environmentally-displaced persons” is provided, which includes persons forcibly displaced by both sudden-onset and slow-onset events³²⁸. The Convention sets a series of fundamental principles, like the principle of common but differentiated responsibilities and the principle of non-discrimination, and a list of rights granted to individuals, as the right to information and participation. Then, the Limoges Convention proposes the institution of an annual Conference of Parties and the creation of an international fund to finance the action of the permanent agencies and offices³²⁹.

It has also been suggested to create a new instrument to deal with cross-border displacement modelled on the Guiding Principles on Internal Displacement, organising State action according to the phases of displacement (prevention, movement, relocation) and integrating existing human rights obligations³³⁰.

Three projects of new Conventions elaborated by Biermann and Boas, Hodgkinson and Young, and Docherty and Giannini, respectively, will be analysed in detail and confronted below.

4.3.1 BIERMANN AND BOAS’S REGIME FOR GOVERNING THE “CLIMATE REFUGEE CRISIS”

As anticipated in the first chapter, Biermann and Boas adopt the expression “climate refugee” to define a specific category of persons displaced by climate change

³²⁸ University of Limoges, *Draft Convention on the International Status of Environmentally-Displaced Persons*, Third version, Limoges, 13 May 2013, article 2.

³²⁹ *Ibid.*, art. 5, art. 7, art. 9, art. 20, art. 21.

³³⁰ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 118.

that would be entitled to recognition and protection according to the international legal instrument they propose. Such definition includes persons who displace both across borders and internally, impacted by three types of climate change-related hazards, namely sea-level rise, extreme weather events, and drought and water scarcity³³¹. The two scholars present the model of a *sui generis* regime for the protection of climate refugees based on five core principles: firstly, *the Principle of Planned Relocation and Resettlement* focuses on the idea that responses to displacement induced by climate change must not be only reactive and based on emergency assistance; conversely, migration and relocation can be planned over the long term. Secondly, *the Principle of Resettlement instead of Temporary Asylum* invokes laws and policies that favour the residence of displaced persons in the receiving country, since most climate refugees will not be able to return to their country of origin. Moreover, *the Principle of Collective Rights for Local Populations* draws the attention on the necessity to formulate policies that consider the collective dimension of the phenomenon, targeting communities, populations, social groups. In fourth place, *the Principle of International Assistance for Domestic Measures* supports the intensification of assistance to the affected countries to provide protection and finance resettlement programmes at the domestic level. Lastly, *the Principle of International Burden-Sharing* calls for the assumption of common but differentiated responsibilities by States; in addition, it suggests compensating the most affected countries to cover the expenses of implementing resettlement programmes and advocates for the equal political clout in international institutions of developing and developed countries³³².

The authors believe that, rather than through the creation of a new stand-alone convention, these principles would obtain more political support and work more effectively if framed in a Protocol to the UNFCCC. They design an institutional architecture based on an executive committee tasked with administrative and coordinating duties, and scientific advisory bodies, whereas the concrete implementation would be delegated to existing UN agencies. The cooperation with

³³¹ F. Biermann, I. Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, in *Global Environmental Politics*, 10: 1, 2010, pp. 63-64.

³³² *Ibid.*, pp. 75-76.

other international agencies and organisations, such as the World Bank, would be fundamental. Furthermore, the creation of a new Climate Refugee Protection and Resettlement Fund with independent governance is suggested³³³.

4.3.2 HODGKINSON AND YOUNG'S CONVENTION FOR CLIMATE-CHANGE-DISPLACED PERSONS

Hodgkinson and Young have conceived an interesting model convention which would introduce some innovative principles but could also raise some problematic issues. The scholars propose a stand-alone, multilateral Convention, not embedded in any existing regime; although, cooperation with other organisations, governments and civil society is considered fundamental³³⁴.

Firstly, in the definition of Climate Change-Displaced Persons (CCDPs) formulated by the authors both individuals who were displaced within their country and those who have crossed international borders are included. Contrary to the Refugee Convention, the status of CCDP would be conferred not according to an individualised process of designation but with an “*en masse* designation”, which better responds to the dimension of climate change-induced migration. Furthermore, the specificity of their proposal is the introduction of a new criterion for the identification of CCDPs based on the principle of the “very likely standard”. Hodgkinson and Young assert that the current state of science is able to define the degree of probability that a climate event is caused by anthropogenic climate change. The “very like standard”, according to the authors, would be met for those communities who suffered the impacts of a natural hazard whose probability to be caused by human-induced climate change exceeds 90 percent³³⁵. Concurrently, it is suggested to create a fund for climate change-induced displacement financed by developed State Parties to the Convention through “mandatory financial contributions” in favour of developing State Parties, according to the principle of common but differentiated responsibilities. Such funding would provide

³³³ Ibid. pp. 77-81.

³³⁴ D. Hodgkinson and L. Young, “*In the Face of Looming Catastrophe*”. *A Convention for Climate-Change-Displaced Persons*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 309.

³³⁵ Ibid., p. 312-314.

assistance to developing countries to guarantee protection to IDPs as well as aliens displaced by climate change in their territory, and to implement programmes and policies of adaptation or planned resettlement. From this perspective, the Convention would seek to avoid migration and displacement where possible, and at the same time would legitimise displacement as an adaptive solution to climate change impacts, thus addressing also the needs of communities living in the context of slow degrading processes. Moreover, the level of protection granted to CCDPs would not be strictly differentiated depending on the nature of displacement, namely temporary or permanent; instead, the scholars have conceived a principle according to which rights should be “gradually accrued based on the duration of the displacement”. To manage such a complex framework, the authors propose an institutional architecture headed by a Council and an administrative body and supported by scientific committees and regional committees³³⁶.

Lastly, the Convention envisages a specific framework for populations of States becoming uninhabitable, like low-lying islands, which focuses particularly on the principles of self-determination, proximity, and the protection of intangible cultural heritage³³⁷.

4.3.3 DOCHERTY AND GIANNINI’S CONVENTION FOR CLIMATE CHANGE REFUGEES

The framework proposed by Docherty and Giannini in certain respects is similar to the Convention designed by Hodgkinson and Young but differs with regard to some key areas.

Firstly, in their instrument, which would be developed in the form of a stand-alone binding treaty, Docherty and Giannini adopt the definition of “climate refugee”; however, it does not encompass environmental refugees and is limited to displaced persons that have crossed international borders. Thus, this regime would not provide protection to IDPs. Conversely, no distinction would be applied with regard to

³³⁶ Ibid., pp. 316-324.

³³⁷ Ibid., p. 325.

displacement induced by sudden or slow degrading climate events and displacement that assumes a temporary or permanent nature, as in all these circumstances protection and assistance are necessary³³⁸.

Like in Hodgkinson and Young's treaty, the scholars propose the criterion of group determination to assign the status of "climate refugee" and establish the requirement of a causal nexus between natural hazards and anthropogenic activity. Nevertheless, it is not required to prove a legal causation between the two phenomena, but rather to demonstrate the high degree of scientific probability that the disasters (or the gradual degradations) are caused by human-induced climate change³³⁹.

Protection under the aegis of the Climate Refugee Convention would be founded on the respect of human rights – with particular attention to the rights related to mobility and to the socio-economic and cultural dimension – and on the delivery of humanitarian assistance. Lastly, the authors conceived an articulated structure to govern the new regime, composed of a coordinating agency, a body of scientific experts, and an international fund to which State Parties would be compelled to contribute. All the State Parties would share the costs and obligations imposed by the treaty according to the principle of common but differentiated responsibilities³⁴⁰.

4.3.4 THE OBSTACLES TO A NEW CONVENTION

Not surprisingly, the three proposals presented above adopt three different definitions to identify "climate refugees" or "climate change-displaced persons". For Biermann and Boas, and Hodgkinson and Young the definition would encompass both internal and cross-border displacement, while Docherty and Giannini believe the regime should only address displaced persons who crossed international borders³⁴¹. This

³³⁸ B. Docherty and T. Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, in *Harvard Environmental Law Review*, 33, 2009, pp. 367-370.

³³⁹ *Ibid.*, pp. 370-371.

³⁴⁰ *Ibid.*, 377, 385-386.

³⁴¹ M. Klein Solomon, K. Warner, *Protection of Persons Displaced as a Result of Climate Change, Existing Tools and Emerging Frameworks*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, pp. 272-273.

reflects the lack of consensus among scholars and governments for the numerous reasons emphasised in the first chapter and leads to consider whether it would be a productive effort to continue seeking to elaborate a legal definition. At the same time, some principles shared by the three model Convention are particularly interesting and are worth to be taken in consideration when addressing the issue of climate migration, namely the principle of group designation of the status, the reference to human rights law and humanitarian law, the principle of common but differentiated responsibilities, and the principle of preventing forced displacement and implementing programmes to reduce vulnerabilities.

However, especially two aspects are questionable. On the one hand, the “very likely standard” identified by Hodgkinson and Young, and Docherty and Giannini poses a controversial issue about its effectivity and acceptability by States; concerns that, basing on such a criterion, the designation of the protected status would be unaccountable and could change in a relatively short period of time due to the evolution of science may be raised³⁴². A similar mechanism could “create an onerous burden of proof” that may reveal unpracticable³⁴³. On the other hand, the creation of a new funding mechanism specific for this framework, which also demands to State Parties (in the case of Hodgkinson and Young only to developed State Parties) mandatory contribution, is unlikely to be supported by States at the present time. These objections are linked to one of the main criticism McAdam addresses to the project of a new universal treaty: the lack of political will. It is improbable that the international community would be inclined to negotiate a new legal regime of protection imposing additional political and economic obligations on States; even though the text of a convention would be agreed, the ratification process may be rather uncertain and long. Therefore, the risk is that the entry into force of the regime would be delayed by lengthy

³⁴² According to this observation the requirements to obtain the status of climate refugee or displaced person could vary within few years or decades. Would it be acceptable, or would a revision procedure of the previous applications be necessary? Would it be sustainable in terms of effective protection?

³⁴³ M. Klein Solomon, K. Warner, *Protection of Persons Displaced as a Result of Climate Change, Existing Tools and Emerging Frameworks*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, p. 273.

negotiations, while the extent of the problem requires rapid and effective solutions³⁴⁴. Furthermore, there is also the risk that, to achieve a consensus, the provisions contained in the new convention would be excessively general, hardly convertible in concrete policies; this is one of the aspects of the Guiding Principles on Internal Displacement that is often lamented, for example³⁴⁵. Besides, since climate change impacts and the deriving phenomenon of displacement can assume very different nature depending on the geographical area of the globe (due to different levels of vulnerability, to the conformation of the territory and infrastructures, to cultural diversities, etc...), a universal treaty would not be the most suitable solution to address the problems of communities at local level³⁴⁶.

4.4 DEVELOPING NORMATIVE AND POLICY SOLUTIONS AT REGIONAL LEVEL

Due to the complexity of the issue and the significant impediments, mainly of political nature, highlighted in the previous paragraphs, it is suggested to abandon – at least in the foreseeable future – the projects of amending the Refugee Convention or creating a new *ad hoc* binding regime. In fact, engaging in the process of designing a solution at the highest political level in the current international context may lead to an impasse, while risking depriving of resources the research and development of concrete policies enforceable in accordance with the existing international legal frameworks. It would be wiser, thus, to change the focus towards the improvement of regional soft law mechanisms, like resolutions and declarations, together with the elaboration of long-term practicable policies³⁴⁷.

On the one hand, the advantages of adopting a regional approach are multiple. Cooperation through bilateral or regional negotiations is more likely to be seriously undertaken by States, which would have a genuine interest in engaging in discussions

³⁴⁴ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 197.

³⁴⁵ *Ibid.*, p. 210.

³⁴⁶ *Ibid.*, p. 188.

³⁴⁷ *Ibid.*, pp. 221-222.

with neighbouring countries and countries with standing geopolitical and economic relationships. State Parties, then, would be more committed to fulfil their obligations established by the resulting regional agreements. At the same time, as demonstrated by the process started by the Nansen Initiative, the organisation of a series of consultations, in which affected communities, civil society and NGOs would be directly called to participate, appears more feasible; a bottom-up boost, in parallel with the intergovernmental activity, is essential to design appropriate norms and policies for the protection of climate change-displaced persons³⁴⁸.

On the other hand, three relevant outcomes are likely to stem from the adoption of a regional approach. Firstly, many scholars advocating for this solution argue that, as movement will be predominantly internal or across neighbouring countries, regional systems would provide targeted solutions able to respond to the needs of local communities. In fact, it has been already emphasised how patterns of displacement differ in nature, timeframe, scale and distance according to the geo-political and social context in which they emerge³⁴⁹. In addition, focusing on the local and regional dimension, norms and policies would be more sensitive to specific cultural and identity issues, especially in those scenarios in which climate change migration could disrupt social and cultural integrity. These considerations are particularly appropriate in the context of climate change-induced displacement³⁵⁰. Secondly, it has been proven by existing frameworks of human rights protection that monitoring mechanisms supervising the implementation of the legal instruments are more effective at regional level rather than at international level. This is especially true for binding Conventions, such as the European Convention on Human Rights enforced by the European Court and the bodies of the Council of Europe, or the African Charter of Human and Peoples' Rights enforced by the African Court on Human and Peoples' Rights. In fact, in these cases the

³⁴⁸ A. Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, in *Law & Policy*, 30: 4, October 2008, p. 518.

³⁴⁹ J. McAdam, *"Disappearing States", Statelessness and the Boundaries of International Law*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 107.

³⁵⁰ J. Blocher, *Lessons from the UNU Panel Series on Academic Thinking on Migration. Report from five panels co-organised by the United Nations University (UNU) Migration Network and the UNU Office in New York*, United Nations University Migration Network, December 2017, p. 10.

judgments have a greater sanctioning power over State Parties³⁵¹. However, in some contexts also soft law declarations – as for example the San Pedro Sula Declaration in Central America – have been substantially implemented, despite some inconsistencies and difficulties, due to the expectations of the regional community of States generated by the signature of the instrument³⁵². Thirdly, as Kälin observes, it is necessary to transcend the domestic dimension and to “harmonise legal approaches”. Such harmonisation has better chances to be achieved at the regional level, through a multi-stakeholder dialogue³⁵³. In the long-run, other geographical areas would be stimulated to elaborate and adopt successful regional systems of prevention and protection based on soft law mechanisms that, eventually, could lead to the emergence of norms of customary international law³⁵⁴.

4.4.1 ADDRESSING THE LEGAL GAP

Having discarded the idea of negotiating a new universal *sui generis* regime, it remains to be considered how to fill the gap in the international law for the protection of climate change-displaced persons.

Firstly, it is suggested to adjust existing international migration and human rights legal and policy frameworks, without any amendment or renegotiation, to assist climate change migrants³⁵⁵. As no international regime grants protection on the ground of threats and damages stemming from climate change impacts, nor on the ground of an absolute right to a safe and healthy environment, it would be necessary to dissociate protection from the causes of displacement and assess the condition and the needs of

³⁵¹ European Parliament, Directorate-General for External Policies, Policy Department, *The Role of Regional Human Rights Mechanisms*, EXPO/B/DROI/2009/25, November 2010, p. 12.

³⁵² Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *2018 Global Report on Internal Displacement*, 16 May 2018, p. 39.

³⁵³ W. Kälin, *Conceptualising Climate-Induced Displacement*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 100.

³⁵⁴ A. Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, in *Law & Policy*, 30: 4, October 2008, p. 512.

³⁵⁵ G. Hugo, *Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 33.

those displaced³⁵⁶. It has been understood that such practice is not possible under the 1951 Refugee Convention, but it may be viable under human rights legal instruments. Through the evolutive interpretation of regional Courts, complementary protection may be conferred to persons who have suffered serious physical and psychological distress, and who have been deprived of their means of subsistence to achieve a decent standard of living referring to the provisions for the protection of the right to life and against inhuman and degrading treatment. In fact, these are the non-derogable human rights that establish the absolute obligation of *non-refoulement* upon States. In those regional contexts where jurisprudence has already applied these adjustment – see the ECtHR cases analysed in the third chapter – the attempt should be that of lowering the threshold beyond which harm amounts to inhuman and degrading treatment.

Secondly, the transposition into national legislation of existing international and regional norms protecting human rights that may benefit climate change-displaced persons should be encouraged by regional institutions and organisations. In particular, the integration of the Guiding Principles on Internal Displacement should be urged through the elaboration of concrete and practicable policies on assistance and protection throughout all the phases of displacement³⁵⁷. In this regard, given the inconsistencies detected in the implementation at national level of the Guiding Principles derived norms and policies, the establishment of regional working groups with the task of defining a concrete policy framework to which States could refer might represent a step forward towards the protection of IDPs. Indeed, it has been already underlined that a better governance of the internal displacement phenomenon would have a positive impact on international displacement limiting cross-border outflows³⁵⁸.

Thirdly, from the analysis conducted in the third chapter, it appears that the norms on temporary stay and the corresponding mechanisms are inadequate. Therefore, cross-border displacement of groups of people affected by climate change

³⁵⁶ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 23.

³⁵⁷ F. Gemenne and P. Brücker, *From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration can learn from the Governance of Internal Displacement*, in *International Journal of Refugee Law*, 27: 2, 2015, p. 251.

³⁵⁸ *Ibid.*, pp. 259-260.

impacts could be better addressed through the application of clear and practicable temporary schemes to supply initial assistance, while permanent options should be envisaged in the case return is not feasible in the long-term³⁵⁹. In fact, seeking to fit climate change-displaced persons into existing international protection instruments does not preclude the negotiation of new regional soft law or binding instruments specifically addressing the issue of climate change-induced displacement. With regard to this, a set of principles or pillars that have to be included in the instrument can be inferred from the analysis conducted in this study, namely the acknowledgment of the multicausality of the phenomenon and the plurality of patterns that climate change-induced displacement can assume; the assessment of context-specific variables and vulnerabilities, for the development of targeted and culturally appropriate norms; the adoption of a group-based rather than an individualised approach; the adoption of a human rights-based approach. In fact, in the context of climate change-induced displacement the right to human dignity, to information and participation, the right to obtain identity documents, cultural rights, and socio-economic rights should be particularly valued. In addition to these principles, a focus on pre-emptive action, to be integrated to only reactive solutions, and provisions on voluntary return, should be incorporated. The latter should contain obligations upon States contributing to reconstruction and rehabilitation of services, and to reintegration of communities, that have to be consulted and engaged in the process. More detailed and practicable provisions should be derived from these general and straightforward principles, depending on the geographical context of reference.

Lastly, even though it has been stated that a regional approach would be more successful, it would be necessary to address a specific matter at the international level: more coordination should be achieved between different international organisations and institutions dealing with the issue of human mobility and environment. In fact, no organisation has explicitly declared in its mandate to assume responsibility for climate change-displaced persons, although in practice some institutions like UNHCR and IOM

³⁵⁹ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 109.

have elaborated operational definitions and implemented actions for their assistance. Despite the absence of a binding legal definition of individuals displaced by the impacts of climate change, the development of effective coordination between organisations would provide an international “umbrella” able to assist regional institutions with the provision of funds, consultancies and for the sharing of best practice between the different systems. At the same time, inefficiencies and overlapping of competences would be reduced³⁶⁰.

4.4.2 PRIORITY POLICY AREAS

To prevent the burst of climate change-induced displacement, it is not sufficient to address legal issues regarding protection; intervention limited to the post-displacement phase, in fact, would not contain the extent of the phenomenon, unless it is complemented with preventive action through the implementation of a set of policies intended to reduce vulnerabilities, increase adaptation and facilitate pre-emptive migration where it is unavoidable. A long-term policy framework focusing on such matters can be elaborated within existing legal regimes, without the need of formulating new norms. Therefore, no legal impediments would interfere with the application of policies related to the priority areas identified below, even though at the national level other obstacles of political or economic nature may hinder their introduction. This is why also in the field of policies regional cooperation and assistance is crucial.

The priority areas of intervention highlighted are the following: *data collection* to overcome the insufficiency and inaccuracy of data on climate change effects and their impacts on populations is the starting point towards the enhancement of policies addressing climate change and displacement. While there is the need to improve data collection techniques, reliable indicators, and analytical models, it is also necessary to exchange information and expertise at regional level. In fact, many countries alone do not have the capacity to conduct research, nor the technology to monitor climate change phenomena and migrations. Besides, under a common regional coordination,

³⁶⁰ Ibid., p. 236.

the compared analysis of data would be useful to produce more reliable, long-term estimates. In addition, partnerships with universities and research institutes should be strengthened³⁶¹. Secondly, among adaptation strategies, *disaster risk reduction* is essential to increase environmental resilience against the impacts of climate change-related sudden-onset and slow-onset hazards. Resilience can be achieved through better urban planning, infrastructure adjustment, wiser management of land, and development of early warning systems³⁶². States should be encouraged to integrate the directions elaborated by the initiatives on disaster displacement, the Platform of disaster displacement and the Sendai Framework. Thirdly, *reducing vulnerabilities* is fundamental. Together with environmental resilience, populations' resilience should be enhanced. Policies aimed at reducing disparities, empowering local communities, and promoting the equitable enjoyment of human rights – in particular cultural and socio-economic rights – and access to services are necessary, especially those targeting particularly vulnerable categories such as women, minorities, indigenous communities³⁶³. Among actions to reduce vulnerabilities access to healthcare, education and training, and the diversification of livelihood options are two important strategies to pursue³⁶⁴. Furthermore, *microcredit* constitutes another important measure to ease the access to financial tools to low-income communities of developing countries, especially through the instruments of micro-insurance. Thanks to these facilities, households and communities would have the possibility to obtain loans and insurances at concessional terms to secure their homes and productive activities, usually related to agriculture and, thus, particularly vulnerable to disaster risk³⁶⁵. Some scholars suggest creating international insurance companies, which, however, implies the institution of

³⁶¹ Asian Development Bank, *Addressing Climate Change and Migration in Asia and the Pacific*, Mandaluyong City, Philippines, 2012, pp. 53-54.

³⁶² The Nansen Initiative Global Consultation, *Conference Report*, Geneva, 12-13 October 2015, p. 18.

³⁶³ S. Jayawardhan, *Vulnerability and Climate Change Induced Human Displacement*, in Consilience, 17, Columbia University, 2017, p. 135.

³⁶⁴ University of Oxford, Refugee Studies Centre, *Environmentally displaced people. Understanding the linkages between environmental change, livelihoods and forced migration*, Oxford, United Kingdom, November 2008, p. 18.

³⁶⁵ Embassy of Italy in Wellington, *Enhancement of the Italian Development Cooperation Policy in the South Pacific*, Wellington, New Zealand, 21 March 2018.

an international fund through financial investments by developed countries³⁶⁶. It is believed, instead, that these services could be provided by private companies under suitable regulatory frameworks, to circumvent political obstacles regarding the establishment of an international insurance company³⁶⁷. Enhancing the partnership between the public and private sector, in fact, could be a successful strategy. This measure should be combined with the *reduction of transaction costs of remittances*. Among the strategies of households to cope with poverty, uncertainty and vulnerability to climate impacts there is the differentiation of their livelihood by sending a member of the family to work in another country. Remittances from the workers to their family at home constitute a valuable source of income to provide basic needs, education and other investments to increase their resilience³⁶⁸. For this reason, policies that incentivise transaction services at lower prices are necessary. Ultimately, *anticipatory migration* should not be neglected. Legal and organised pre-emptive migration is often viewed as an adaptation strategy. Policies facilitating lawful anticipatory migration, through planned schemes, would reduce forced displacement. This issue will be more deeply investigated in paragraph 4.4.4.

4.4.3 PREVENTING FORCED DISPLACEMENT: FOCUS ON THE FOOD PRODUCTION SYSTEM

A great number of individuals and communities forcibly displaced come from rural contexts, especially belonging to developing countries. Agriculture and climate change are mutually interlinked: on the one hand, the former is responsible for a large share of emissions of greenhouse gases released in the atmosphere – about a quarter of all anthropogenic emissions – that contributes to induce climate change; on the other hand, climate change impacts on agriculture through changes in temperatures and

³⁶⁶ S. A. Pourhashemi et al., *Analyzing the individual and social rights condition of climate refugees from the international environmental law perspective*, in *International Journal of Environmental Science and Technology*, 9, 2012, p. 66.

³⁶⁷ Asian Development Bank, *Addressing Climate Change and Migration in Asia and the Pacific*, Mandaluyong City, Philippines, 2012, p. ix.

³⁶⁸ Greenpeace Germany, *Climate Change, Migration, and Displacement. The Underestimated Disaster*, Hamburg, Germany, May 2017, p. 31.

precipitation, sea-level rise and sudden-onset natural hazards damaging assets and production. This results in land degradation, declining yields, and food insecurity. Moreover, the poor management of land and resources exacerbate the effects of climate change on food production, increasing the vulnerability of farming communities who often migrate as a coping strategy³⁶⁹.

Therefore, sustainable agricultural development and rural populations' resilience play an important role in adapting to climate change, and consequently in containing forced displacement and migration. A shift in perspective is pivotal in this sense. Firstly, governments should encourage a community-based approach, and reform the food production system with the aim of empowering local family businesses and small and medium agricultural firms, through increased decision-making power and participation in the multi-stakeholder processes that constitutes the food production system. Policies preventing oligopolies and unfair competition should be adopted, while local producers should be engaged in all the phases of production, from cultivation to distribution, in order to benefit from the profits fairly³⁷⁰. In fact, the report "Food and Migration" by MacroGeo and the Barilla Centre for Food and Nutrition Foundation clearly states: "Without a fair distribution of profitability, the weaker partners, usually the rural ones, will not survive. In order to make the leader of the FVC [Food Value Chain] accept such fair distribution, goals, initiatives and operations must be shared and decided together. A new way of doing business needs to be defined, able to produce a higher added value, so that everyone can be given the right return on his investments and efforts."³⁷¹ Secondly, the role of women in agriculture should be supported by institutions and policies. Often in developing countries women are particularly vulnerable because, in spite of being increasingly present in the sector as labour force, they are not corresponded with greater rights, access to land and resources, and they are constrained by social and economic tights³⁷².

³⁶⁹ Food and Agriculture Organisation of the United Nations (FAO), *Agriculture and Migration in the context of Climate Change*, 2017, p. 4.

³⁷⁰ MacroGeo and Barilla Centre for Food and Nutrition Foundation, *Food and Migration, Understanding the geo-political nexus in the Euro-Mediterranean*, 2017, p. 74.

³⁷¹ *Ibid.*, p. 79.

³⁷² Food and Agriculture Organisation of the United Nations (FAO), *Migration, Agriculture and Climate Change, Reducing vulnerabilities and enhancing resilience*, 2017, p. 13.

Concretely, then, a number of measures should be introduced to enhance rural resilience. For example, biodiversity is an essential resource; therefore, the diversification of crops, by choosing crop varieties more resilient to temperature variation or water scarcity, may prevent draining the soil while raising productivity. Furthermore, disaster risk reduction measures should be implemented in order to provide farmers with early warning systems to anticipate forthcoming hazards and environmental changes so to adjust techniques and production to the new conditions³⁷³. These actions should be complemented with the introduction of technological advancements and more responsible practices not only in agriculture but in all the phases of the Food Value Chain, in order to make processes efficient but sustainable and to avoid food losses³⁷⁴. At the same time, insurance mechanisms should be available to farming communities to increase also their resilience against climate change impacts. Lastly, it is fundamental to improve education and training of young rural people for the development of agricultural skills, but also of administrative skills, climate change awareness, and – not least – of the human rights they are entitled to³⁷⁵.

Reform in the food production system requires substantial investments, but it represents a fundamental step towards the reduction of poverty and vulnerabilities of developing countries' populations and the potential stabilisation of migration flows.

4.4.4 PLANNED MIGRATION AS AN ADAPTIVE SOLUTION TO CLIMATE CHANGE

Migration is a human phenomenon that can be controlled but cannot be detained. In certain circumstances mobility represents a relevant adaptive solution to the impacts of climate change³⁷⁶. The role of migration as adaptation strategy has been already recognised at international level in the Cancún Adaptation Framework adopted

³⁷³ Ibid., p. 14.

³⁷⁴ MacroGeo and Barilla Centre for Food and Nutrition Foundation, *Food and Migration, Understanding the geo-political nexus in the Euro-Mediterranean*, 2017, p. 78.

³⁷⁵ Food and Agriculture Organisation of the United Nations (FAO), *Migration, Agriculture and Climate Change, Reducing vulnerabilities and enhancing resilience*, 2017, p. 14

³⁷⁶ Greenpeace Germany, *Climate Change, Migration, and Displacement. The Underestimated Disaster*, Hamburg, Germany, May 2017, p. 31.

at the COP16 in 2010, and in the final draft of the Global Compact for Safe, Orderly and Regular Migration. Nevertheless, this strategy can be successful and can generate opportunities for both countries of origin and recipient countries if it is adequately governed. Currently, the major resistances stem from the political discourse which tends to depict migration, especially flows originating from developing countries, in terms of security rather than as a natural phenomenon that can be organised to respond to the interests of all the parties involved³⁷⁷. This barrier may be more easily overcome at the regional level; in fact, under a regional framework, bilateral agreements between countries that share economic interests and cultural affinities could be the starting point for the establishment of legal and regulated patterns of migration to alleviate the conditions of populations living in contexts of environmental degradation or recurring natural disasters. For the countries of origin, migration of a part of the population can ease the pressure on natural resources advantaging the rest of the community. Besides, it is a way for households to differentiate their livelihood; in fact, remittances of workers constitute a significant source of income for the families and communities remained in the country of origin, who may have been unable to displace due to high level of poverty and vulnerability. They can benefit from the remittances for financing education, adaptation activities and access to services, increasing their resilience. Those who return, moreover, carry knowledge and skills that can potentially be shared with the community³⁷⁸. In turn, host countries may have interests in receiving migrants to be employed in those sectors in which at national level there is a shortage of labour force. Regular immigrant workers, then, contribute to the financial system of the host country paying taxes and services. Cultural contribution and exchange can also derive from planned migration³⁷⁹. Clearly, bilateral agreements have to ensure the respect of human rights of both those who migrate and host communities, in particular those rights

³⁷⁷ L. Nishimura, *“Climate Change Migrants”: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies*, in *International Journal of Refugee Law*, 27: 1, 2015, p. 110.

³⁷⁸ J. Barnett, M. Webber, *Migration as Adaptation: Opportunities and Limits*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom 2012, p. 45.

³⁷⁹ Greenpeace Germany, *Climate Change, Migration, and Displacement. The Underestimated Disaster*, Hamburg, Germany, May 2017, pp. 33-34.

already emphasised in the previous sections, such as the right to information and participation, and property rights.

In practice, to facilitate planned migration, existing or new migration schemes can be adopted. Seasonal agricultural employment schemes can be promoted in sensitive areas, for example by countries at the borders with Bangladesh. In addition, annual quotas for the provision of labour force could be reserved to citizens from countries highly impacted by climate change sudden and slow-onset hazards. Moreover, new schemes facilitating the access of specific categories of workers could be established to supply employees to those sectors that require labour force in the host countries, at the same time favouring migration from hotspot areas. These measures should be supported by programmes offering training courses and opportunities to improve sectorial skills in order to increase the chances of applicants to be eligible for job offers in the recipient countries. For example, in 2007 Australia created the Kiribati-Australia Nursing Initiative, which provided 30 young inhabitants of Kiribati with the possibility to follow a nursing training at Griffith University in Queensland; at the end of the training period, the programme envisaged the grant of visas at favourable terms in order to obtain a permanent sponsorship for a job³⁸⁰. To manage at best the opportunity to turn migration into an adaptation strategy, a comprehensive intervention should be envisioned through the coordination and cooperation of institutions. In fact, these schemes and programmes could be more effective if educational institutions of both sending and recipient countries are involved in joint projects; furthermore, the partnership with the private sector of host countries is fundamental to match labour demand and offer.

4.5 THE ISSUE OF STATES' RESPONSIBILITY

One final thought should be dedicated to the issue of who bears the responsibility for assisting climate change-displaced persons and communities.

³⁸⁰ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 206.

Scientifically, it has been proved that the emissions of carbon dioxide are the primary cause of global warming, and thus climate change³⁸¹. From a moral perspective, climate change is acknowledged to be a common burden of the international community, given the transboundary extent of the phenomenon. However, industrialised countries of the Global North are considered responsible for the greater part of such emissions, since for decades they have based their unrestrained development on productive activities that released uncontrolled emissions in the atmosphere; therefore, their cumulative contribution has played a major role in giving rise to climate change. In addition, it occurs that the impacts of climate change hit predominantly and harder developing countries, which are the least responsible for it, as their development has started only recently, or small countries whose emissions are so low that can be disregarded, like the Small Island nations of the Pacific³⁸².

Many scholars, then, have formulated theories and models on states' accountability for climate change in order to provide compensation to the victims, namely the people and communities who have been forced to displace and suffered material and moral losses. A "Climate Justice" framework was also proposed at the UN World Summit on Sustainable Development in Bali in 2002, whose 27 principles call for the recognition of industrialised countries' responsibility and for their assumption of obligations towards climate change-displaced persons³⁸³. Ahmed, for example, has elaborated an equation that takes in consideration several indicators, such as per capita CO₂ emissions, per capita resource consumption, per capita gross national income (GNI), and human development index (HDI), to rank the most polluting countries and calculate the number of displaced persons that each one should receive and assist³⁸⁴. Nevertheless, one of the principles endorsed to ensure States' accountability is the "Polluter pays principle" (PPP), according to which States should provide compensation to displaced persons "on the basis of each state's relative causal contribution to the loss

³⁸¹ IPCC, *Climate Change 2014: synthesis report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC)*, Geneva, Switzerland, 2014.

³⁸² R. Eckersley, *The common but differentiated responsibilities of states to assist and receive "climate refugees"*, in *European Journal of Political Theory*, 14: 4, 2015, p.486.

³⁸³ B. Ahmed, *Who takes responsibility for the climate refugees?*, in *International Journal of Climate Change Strategies and Management*, 10: 1, 2018, pp. 9-10.

³⁸⁴ *Ibid.*, pp. 16-19.

and damage suffered”³⁸⁵. This principle has been discussed in the intergovernmental negotiations of the UNFCCC but rejected both by developed countries for the legal problems that it raises, and by developing countries, as this method fails to take in consideration the historical contributions of industrialised States. Therefore, another principle has been proposed, the “Beneficiary pays principle” (BPP), based on a “paying back” from developed countries which, without the need to assess fault, consists of giving up some profits they have gained at the expenses of other international actors and populations, employing these profits in the assistance of displaced persons and their resettlement³⁸⁶.

However, there are many problematic issues that arise in assessing States’ legal responsibility for climate change in court. The first one regards the non-retroactivity of international law. If the act causing damage was not illegal at the time it was done, legal liability is difficult to assess³⁸⁷. In addition, until the 1990s there was no shared understanding of the implications of greenhouse gases emitted in the atmosphere; therefore, asserting that the resulting damages would have been “reasonably foreseeable” is equally problematic³⁸⁸. Secondly, as it has been repeatedly emphasised, the requirement of causality is challenging. It would be very difficult to demonstrate a direct causal link between particular actors producing emissions and applicants’ act of displacement in a specific temporal and geographical context; moreover, it has been underlined how climate change may not be the single or major factor inducing displacement but also vulnerabilities, governments’ actions or omissions in the country of origin, and other cultural and social variables play an important role in displacement. Therefore, determining the right amount to be compensated by emitting countries to displaced persons would be even more complicated³⁸⁹. The same kind of reasoning

³⁸⁵ R. Eckersley, *The common but differentiated responsibilities of states to assist and receive “climate refugees”*, in *European Journal of Political Theory*, 14: 4, 2015, p. 485.

³⁸⁶ *Ibid.*, pp. 485-487.

³⁸⁷ M. Lister, *Climate change refugees*, in *Critical Review of International Social and Political Philosophy*, 17: 5, 2014, p. 628.

³⁸⁸ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 93.

³⁸⁹ F. Thornton, *Compensatory Justice for Climate Change Displacees under International Law: Fault-based and No-Fault Approaches*, in *The Irish Book of International Law*, 6: 25, 2011, p. 35.

applies when considering that emissions become harmful because of their cumulative effect; therefore, according to which criteria would it be possible to identify the threshold beyond which States' and corporations' emissions causing climate change are directly inducing displacement?³⁹⁰ Ultimately, without an effective framework of protection and the entitlement to human and legal rights, the single action of compensation would not address the needs of displaced persons and communities that, beyond the material losses of assets and properties, suffer a moral, cultural and identity damage. Moreover, considering the timing of judicial processes, compensation would not be immediately available to the victims of natural hazards to restore their livelihood and to rebuild their homes³⁹¹.

Considering all these obstacles and adding the political difficulties that would arise especially among developed countries, another principle on which determining States' responsibilities towards climate change-displaced persons was conceived. The "Ability to pay principle" (APP) would prescribe to all states the obligation to assist climate change-displaced persons but according to their respective capacities. The advantage of this method is avoiding the assessment of blame and causality; however, states would be more inclined to accept such principle if the level of capacity to receive and assist is decided internally by each state, and not determined by an objective model. Eckersley argues that the adoption of this discretionary approach "would effectively convert state responsibility into a charitable responsibility to provide human relief"³⁹².

After these considerations, it seems unlikely that people displaced by climate change would obtain compensation through fault-based approaches; therefore, Thornton proposes to consider the instrument of insurance to provide victims with means to reduce vulnerabilities and risk, and also financial resources when migration becomes unavoidable. Overcoming the impediments of causality and individualised responsibility, "collectivised no-fault schemes of compensation" represent a valuable tool in terms of timing and resources needed; governments could take advantage of the

³⁹⁰ Ibid., p. 30.

³⁹¹ Ibid., p. 36.

³⁹² R. Eckersley, *The common but differentiated responsibilities of states to assist and receive "climate refugees"*, in *European Journal of Political Theory*, 14: 4, 2015, p. 488.

partnership with private entities for the provision of microinsurance services³⁹³. Changing perspective towards the phenomenon of climate change-induced displacement will enable to deploy successful strategies from which all the parties involved may benefit.

³⁹³ F. Thornton, *Compensatory Justice for Climate Change Displaces under International Law: Fault-based and No-Fault Approaches*, in *The Irish Book of International Law*, 6: 25, 2011, pp. 38-46.

CHAPTER FIVE

CASE STUDY: THE PACIFIC SMALL ISLAND DEVELOPING STATES AND NEW ZEALAND ACTION PLAN

Summary: 5.1 Southern Pacific Small Island Developing States. – 5.1.1 Tuvalu and Kiribati: the exceptionality of this case. – 5.2 The prospect of disappearing States and community relocations. – 5.2.1 The issue of statehood. – 5.2.2 The issue of self-determination. – 5.2.3 The issue of land and identity. – 5.2.4 Past and present resettlement projects. – 5.3 New Zealand’s regional approach. – 5.3.1 Jurisprudence of New Zealand’s Courts: *Teitiota v The Chief Executive of Ministry of Business, Innovation and Employment*. – 5.3.2 New Zealand action plan on Pacific climate change-related displacement.

5.1 SOUTHERN PACIFIC SMALL ISLAND DEVELOPING STATES

The PSIDS, Pacific Small Islands Developing States, are a group of small countries formed by volcanic islands and coral atolls located in a large expanse of the South Pacific Ocean. The States can be grouped in three sub-regions: Melanesia, Polynesia and Micronesia. Although the Islands are inhabited by a great variety of indigenous populations which differ in cultural traits, languages and socio-political structures, they share some common features. The PSIDS are characterised by a limited land area, while their Exclusive Economic Zones (EEZs) cover several thousands, or millions, of square kilometres³⁹⁴. The islands and atolls forming the archipelagos vary from very low-lying territories to larger and higher surfaces. Apart from Papua New Guinea, which is the largest and most populated Island State, the PSIDS count relatively small populations – less than one million – that, though, tend to concentrate in the urban areas with consequent problems of overcrowding, unemployment, and high rate of resource consumption. As far as the economic development is concerned, the isolation from the

³⁹⁴ World Bank, *Pacific Possible: long-term economic opportunities and challenges for Pacific Island Countries (English)*. Pacific possible series. Washington, D.C.: World Bank Group, 2017, p. 16. The total land area of the eleven PSIDS member of the World Bank (Tuvalu, Palau, the Marshall Islands, the Federated States of Micronesia, Kiribati, Tonga, Samoa, Vanuatu, the Solomon Islands, Fiji, and Papua New Guinea) covers only about 517,000 km², while the sum of their EEZs is 16.8 million km².

international markets, the fragmentation and the lack of adequate infrastructure, together with the limited capacity of transformation of natural resources, are common features that determine the low or modest levels of development of the PSIDS. Their economies, predominantly based on fisheries and subsistence agriculture, are highly dependent on imports, since the manufacturing sector is underdeveloped due to the morphological nature of the Islands; whereas, exports remain low or medium. Therefore, considering also the lack of skilled labour and the high unemployment rates, the Island States' income is bound to migrant remittances and foreign aid³⁹⁵.

The geographical and economic conditions of PSIDS increase the level of vulnerability of Pacific communities to the impacts of climate change. The delicate equilibrium of the coastal ecosystem is particularly threatened by sea level rise; in fact, salt water intrusion causes the salinisation of the soil which hinders the capacity to cultivate, while the rising tides erode portions of arable and inhabitable land. In addition, the acidification of the ocean compromises the entire functioning of the ecosystem sustained by mangroves, sea grasses and coral reefs which may be no longer able to provide habitat for marine species and defence against natural disasters. The concentration of greenhouse gases, in fact, is responsible for the variation of temperatures and precipitation patterns, which may jeopardise the availability of fresh water, and for the intensification of extreme weather events such as cyclones³⁹⁶. These environmental changes have implications also on human health. Not only would mortality increase due to the greater frequency and severity of sudden-onset events, but also the spread of diseases, such as malaria and dengue fever, would be favoured by the insufficient access to freshwater, sanitation and inadequate nutrition, especially in the aftermath of cyclones³⁹⁷. Degradation and natural disasters related to climate change are likely to increasingly induce displacement, that for the major part will be internal and intra-regional, as it happened in 2015 in the aftermath of Cyclone Pam,

³⁹⁵ Information derived from the consultation of Country Profiles of PSIDS by the Central Intelligence Agency, *The World Factbook*, website: <https://www.cia.gov/library/publications/the-world-factbook/> [Accessed 4 December 2018].

³⁹⁶ K. E. McNamara, C. Gibson, "We don't want to leave our land": Pacific ambassadors at the United Nations resist the category of "climate refugees", in *Geoforum*, 40, 2009, p. 475.

³⁹⁷ A. Costi and N. Ross, *The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future*, in *Small States in a Legal World*, ed. by C. Morris and P. Butler, Springer Publishing, Heidelberg, 2017, p. 105.

when the estimates suggested that 70 percent and 45 percent of Vanuatu's and Tuvalu's populations, respectively, were temporarily displaced³⁹⁸. However, with the intensification of extreme weather events and the acceleration of degrading processes, it is also likely that communities' existing vulnerabilities will be further exacerbated, with a consequential expansion of cross-border displacement towards destinations other than neighbouring Pacific islands – especially New Zealand and Australia – and pre-emptive permanent migration. Nevertheless, migration is not a new response of Pacific societies to other challenges, such as overpopulation in urban areas and lack of job opportunities. For the governments of the other countries of the Pacific region it is fundamental to acknowledge the existence of already established patterns of migration when formulating responses to climate-change induced displacement³⁹⁹.

5.1.1 TUVALU AND KIRIBATI: THE EXCEPTIONALITY OF THIS CASE

Among the PSIDS, the Islands which are most critically affected by climate change impacts are Kiribati and Tuvalu. They are listed among the Least Developed Countries, as their geography, the low elevation of their territory, and the lack of resources severely limit their economic development. In fact, these States are especially subject to sea level rise and coastal erosion, and their low-lying territory is unsuitable for agriculture due to the salinisation of the soil; in addition, since freshwater supply depends on precipitations, they are particularly vulnerable to drought and climatic variations. Consequently, the condition of sanitation is poor, whereas the level of pollution is high. Furthermore, the morphology of the territory hinders the building of infrastructure to sustain economic activities and adaptation⁴⁰⁰. Tuvalu, in particular, is one of the smallest countries in the world, constituted of only 26 km² divided in nine atolls. The maximum

³⁹⁸ J. McAdam, *Building International Approaches to Climate Change, Disasters, and Displacement*, 33 in Windsor Yearbook of Access to Justice, 1, 2016, p. 2.

³⁹⁹ New Zealand, Office of the Minister of Foreign Affairs, *Pacific Climate Change-related displacement and migration: a New Zealand Action Plan*, May 2018, p. 3. Received via email on the 29 November 2018 by Alexandra Pierard, Senior Policy Officer, Pacific Division of the New Zealand Ministry of Foreign Affairs and Trade.

⁴⁰⁰ S. Shen and F. Gemenne, *Contrasted Views on Environmental Change and Migration: the Case of Tuvaluan Migration to New Zealand*, in *International Migration*, IOM, 49, 2011, p. 226-228.

elevation of its land reaches 4.5 metres above sea level, and its population counts only 11,000 inhabitants who are concentrated in the main atoll hosting the capital Funafuti⁴⁰¹. Kiribati, instead, is composed of 33 atolls, separated by large portions of ocean, of which only 21 are inhabited. However, the outer islands are increasingly depopulating as inhabitants displace towards the urban centre in the main island of Tarawa, where half of the country's population resides⁴⁰².

Literature often refers to these countries as “sinking islands” or “disappearing states”. Although Tuvalu's and Kiribati's populations reject these labels – in the same way as they reject the label “climate refugees” – refusing to surrender to deterministic narratives about climate change and displacement, it is evident that, considering the existing high vulnerabilities, climate change is constituting an “existential threat” to these Island States⁴⁰³. In fact, with the progressive degradation of the environment and the growing incidence of cyclones and inundations, in the long-term they may become uninhabitable or even lose their entire territory due to sea level rise, event that has never occurred in the history of the international community.

Clearly, the scientific community does not dispose of sufficient data and definitive projections to establish whether this scenario is going to happen and within what timescale. Moreover, this discourse does not take into consideration the possibility of adaptation nor the desires of the Pacific peoples. The Islands' governments and their populations wish to be able to stay in their homeland for as long as possible; as Pacific indigenous populations are connected by a strong spiritual bond to their land, leaving their homes would imply the risk of losing their identity⁴⁰⁴. Thus, they do not aim at receiving humanitarian protection in foreign countries, since they believe this measure does not address the root causes of the problem; on the contrary, they claim that,

⁴⁰¹ Central Intelligence Agency, *The World Factbook*, website: <https://www.cia.gov/library/publications/the-world-factbook/> [Accessed 4 December 2018].

⁴⁰² Ibid.

⁴⁰³ Radio New Zealand, *Tuvalu reminds UN of existential threat of climate change*, 21 September 2018, available at: <https://www.radionz.co.nz/international/pacific-news/367014/tuvalu-reminds-un-of-existential-threat-of-climate-change> [Accessed 5 December 2018].

⁴⁰⁴ T. Glasgow, *Being Climate Change refugee in NZ “a last resort” for Pacific People*, Radio New Zealand, 20 October 2018, available at: <https://www.radionz.co.nz/international/pacific-news/369044/being-climate-change-refugees-in-nz-a-last-resort-for-pacific-people> [Accessed 6 December 2018].

assuming the commitment to protect, pollutant States may circumvent their obligation to mitigate climate change. In fact, at the UN, in international fora and in bilateral talks, the Pacific leaders primarily demand to implement a substantial reduction of greenhouse gases emissions to slow down the effects of climate change, while providing funds to finance *in situ* adaptation⁴⁰⁵. Therefore, resettlement is the last option for Tuvalu' and Kiribati's peoples.

However, many scholars fear that the margin for adaptation is limited and that, ultimately, it will be necessary to explore migration options. In fact, given the absence of high land, the possibility of internal relocation may become unavailable in the long-run; therefore, even if the States do not disappear but adaptation efforts fail, and the habitability of their territory is jeopardised, forced relocation in other countries would be inevitable⁴⁰⁶. To prevent this scenario, pre-emptive and planned migration of at least a part of the population can make the difference. In fact, it would reduce the problems of overpopulation and the associated pressure on resources; migrants abroad would provide an income through their remittances to be invested in adaptation projects and education and, to their return, they would bring knowledge and skills to share with their society. It should be acknowledged, indeed, that the Pacific communities' history has been always related to mobility, before the emergence of the climate change issue⁴⁰⁷. Therefore, pursuing pre-emptive migration strategies, while developing adaptation strategies at home, would provide the opportunity to design well-managed plans with due regard to the fundamental rights of the communities involved, so that migrating will be a matter of choice and not a forced outcome.

⁴⁰⁵ C. Farbotko and H. Lazrus, *The first climate refugees? Contesting global narratives of climate change in Tuvalu*, in *Global Environmental Change*, 22: 2, 2012.

⁴⁰⁶ See: J. Campbell, *Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 65. A. Costi and N. Ross, *The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future*, in *Small States in a Legal World*, ed. by C. Morris and P. Butler, Springer Publishing, Heidelberg, 2017, pp. 105-106.

⁴⁰⁷ C. Farbotko and H. Lazrus, *The first climate refugees? Contesting global narratives of climate change in Tuvalu*, in *Global Environmental Change*, 22: 2, 2012.

5.2 THE PROSPECT OF DISAPPEARING STATES AND COMMUNITY RELOCATIONS

Since the possibility of the small Island States' disappearance was contemplated, academics have started wondering about the novel legal issues that such event would imply. In fact, the potential dissolution of a State due to the effects of climate change is an unprecedented scenario, and norms regulating this contingency are not contained in any international legal instrument, nor new norms of customary international law have emerged. From the international law perspective, the disappearance of the entire territory of a State involves questions regarding the continuity and extinction of states and the forced displacement of its entire population⁴⁰⁸. On the one hand, it has to be investigated whether the sinking State would retain its legal status or acquire a new form of status, given the loss of one of the requirements of statehood, namely territory. This issue has a number of serious implications on citizens, which would be further explored in the next section. On the other hand, the loss of territory would force the State's population to relocate abroad. Another series of relevant concerns would arise with regard to the matter of self-determination, the sense of identity, and the respect of human rights of both migrating and hosting communities. All these issues will be analysed in detail in the following sections.

5.2.1 THE ISSUE OF STATEHOOD

As it has been anticipated, international law does not envisage any norms regarding the retention of statehood in the case of disappearance of a State's entire territory due to climate change. In fact, the element of territory, which in international law is defined as the aggregate of land territory, internal waters, territorial sea and air space corresponding to this territory, is one of the requirements of statehood established by the 1933 Montevideo Convention on the Rights and Duties of States⁴⁰⁹.

⁴⁰⁸ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 119.

⁴⁰⁹ International Conference of American States, *Montevideo convention on the Rights and Duties of states*, 26 December 1933.

Nevertheless, due to the presumption of continuity of States of customary international law, the lack of one or more elements of statehood does not automatically imply the end of a State. Then, it has to be investigated whether disappearing islands would maintain their statehood, or what new kind of legal status they would assume⁴¹⁰.

Statehood is a central issue to be resolved since it has important implications on the State's sovereignty and over its population. Firstly, the full capacity to act under international law derives from statehood. This means that a State as subject of international law can negotiate and ratify treaties and agreements with other States, can exercise its power within its jurisdiction, and, for example, can bring cases before the International Court of Justice. Moreover, States exercise diplomatic functions, including diplomatic protection and consular assistance⁴¹¹. Secondly, a State has the right to dispose of the natural resources present in its territory; this consideration is particularly relevant to PSIDS as it implies the capacity to exploit the abundant maritime resources of their vast Exclusive Economic Zones (EEZs), which otherwise could be claimed by other States or become high sea if the islands disappear. Thirdly, the State's population, especially, would be affected by the cessation of statehood; in fact, islanders might lose citizenship and the rights connected to it⁴¹². In addition, the peoples' culture and identity would suffer great impacts in the eventuality of having to abandon their islands permanently and relocating in a foreign country due to uninhabitability or loss of the entire territory⁴¹³.

Even losing completely their territory, the premises for low-lying Island States to maintain statehood are positive and are related to the issue of recognition. In fact, PSIDS

The Montevideo Convention has been the foundation of customary international law related to statehood. Article 1 of the Convention contains the criteria that establish statehood: *a.* a permanent population, *b.* a defined territory, *c.* government, and *d.* capacity to enter into relations with other states.

⁴¹⁰ L. Yamamoto and M. Esteban, *Atoll Island States and International Law: Climate Change and Sovereignty*, Springer, 2014, p. 176.

⁴¹¹ A. Costi and N. Ross, *The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future*, in *Small States in a Legal World*, ed. by C. Morris and P. Butler, Springer Publishing, Heidelberg, 2017, p. 109.

⁴¹² In the event of a State ceasing to exist, its people may become stateless, unless they acquired another nationality. Although nationality is a fundamental human right attested by the Universal Declaration of Human Rights, States' duties to preserve it are not clearly defined. In 1961 the Convention on Reduction of Statelessness was adopted but received few ratifications. Therefore, there is a vacuum in state practice. See: UN General Assembly, *Convention on the Reduction of Statelessness*, UNTS 989, 30 August 1961.

⁴¹³ L. Yamamoto and M. Esteban, *Atoll Island States and International Law: Climate Change and Sovereignty*, Springer, 2014, p. 176.

have been existing not merely thanks to the meeting of statehood's requirements, but especially because they obtained recognition from the rest of the international community. Moreover, PSIDS have been accepted into the UN as full members, and they actively participate in the life of the organisation, which is an important forum for these small Island States to make their voices heard. Furthermore, recognition is "unconditional and irrevocable" according to Article 6 of the Montevideo Convention⁴¹⁴. Yamamoto and Esteban, then, observe that "not only recognition is irrevocable according to Art. 6 of the Montevideo Convention, but the presumption of continuity of a State [...] claims that once a State has its statehood tested, there is the presumption that it continues to exist even without meeting all the requirements", noting that "the continued existence of a sovereign entity is also linked to the question of its effectivity"⁴¹⁵. At this point, a series of possible means of retaining sovereignty and effectivity without a defined territory or through the acquisition of new territory can be explored.

The first one is the *government in exile*. The government of the disappeared Island State may be domiciled in the territory of a host country. Historically, it has occurred that some States resorted to this option in case of armed occupation; it was meant to be a temporary solution, in order to be able to exercise governmental and representative functions outside their territory. These functions include the power to negotiate and adopt treaties, exercise diplomatic activities, exercise jurisdiction over their citizens, and issue identity documents, preventing nationals to become stateless. In the context related to the object of this study, however, such solution does not appear to be the most suitable. In fact, the majority or the entire population would reside in other States, being subject to their jurisdictions. Therefore, the Island State would only be able to provide to its people the kind of assistance that can be guaranteed to nationals abroad. In the long term, the acquisition of the nationality of the host country

⁴¹⁴ International Conference of American States, *Montevideo convention on the Rights and Duties of states*, 26 December 1933, art. 6.

⁴¹⁵ L. Yamamoto and M. Esteban, *Atoll Island States and International Law: Climate Change and Sovereignty*, Springer, 2014, pp. 184-186.

is a likely eventuality, meaning that the *raison d'être* and effectivity of the government in exile will fade⁴¹⁶.

Another possibility is the constitution of a *Non-State Sovereign entity* or a *Sui generis legal personality*. It has been proposed that low-lying States could be succeeded by a Non-State Sovereign entity, as it historically happened for the Sovereign Military Hospitaller Order of Saint John of Jerusalem, of Rhodes and of Malta (the Sovereign Order of Malta). According to Costi and Ross, the recognition by the international community in the case of PSIDS could be achieved for historical reasons, considering also that the loss of their territory would not have depended on their actions, but on the cumulative emissions of greenhouse gases of developed countries⁴¹⁷. A Non-State Sovereign entity would maintain its membership as observer at the UN and membership in other international organisations, would have the capacity to conclude treaties, would be able to issue passports. Alternatively, low-lying de-territorialised States could assume a *sui generis* legal personality, as for the case of international organisations which are entitled to rights and duties under international law. Similarly to the case of Non-State entities, the consent and recognition of other States is prior to the acquisition of such kind of status. However, this condition would limit the functions and powers of the successors to the Island States. In fact, they would not be able to vote in international fora, provide full diplomatic protection, conclude treaties and issue identity documents⁴¹⁸.

Thirdly, the *Political Trusteeship* has also been proposed. The Political Trusteeship was conceived during decolonisation in the second half of the Nineteen century in order to administer territories under UN Mandate System and territories controlled by defeated powers of World War II. It has been advanced the possibility to elaborate an *ad hoc* form of Trusteeship to represent the de-territorialised States and provide assistance to their citizens in the host States. These authorities, that would have to be created by the UN Security Council or General Assembly, would be able to maintain

⁴¹⁶ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, pp. 135-138.

⁴¹⁷ A. Costi and N. Ross, *The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future*, in *Small States in a Legal World*, ed. by C. Morris and P. Butler, Springer Publishing, Heidelberg, 2017, p. 124.

⁴¹⁸ *Ibid.*, pp. 126-127.

control over maritime natural resources of their EEZs in the interests of their people, and could provide diplomatic functions to their citizens⁴¹⁹. However, Yamamoto and Esteban note that some practical questions would arise, starting from the fact that, as the Trusteeship in origin was a decolonising instrument and is established by external actors, this mechanism may challenge the sovereignty of the disappearing Island States⁴²⁰.

Solutions that allow the threatened Island States to have a territory, and therefore maintain statehood, even after the disappearance of their own homeland, have been considered, too. On the one hand, the *cession of territory* is a modality of acquisition of land agreed between the two States involved which would occur with the transfer of sovereignty over a territory from the owner State to the disappearing Island State. The process implies a careful assessment of many aspects concerning the chosen territory in order to plan a successful relocation and requires the consent and participation of the populations involved. Nevertheless, in the case of Pacific low-lying Island States it would be challenging to find a resource-rich territory in the region capable to sustain the relocation of the entire population of a State⁴²¹. Some PSIDS have actively sought means to secure a portion of land not at risk of being submerged. For instance, in 2014 the President of Kiribati Anote Tong purchased a portion of land in Fiji, the Natoavatu Estate on the Island of Vanua Levu, to “enhance the economic and social resilience of Kiribati in the face of climate change”. The current objective is to use such territory to conduct economic activities involving fisheries, farming and cultivation to address the issue of food security and to sustain Kiribati’s development⁴²². Though, some believe the government may have also intended to acquire the land for relocating its population in the event that the worst climate change scenario occurs. Nevertheless,

⁴¹⁹ M. A. Burkett, *The Nation Ex-Situ*, in *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate*, ed. by Gerrard M. B. and Gregory E. W., Cambridge University Press, 2013, pp. 108-114.

⁴²⁰ L. Yamamoto and M. Esteban, *Atoll Island States and International Law: Climate Change and Sovereignty*, Springer, 2014, pp. 206-207.

⁴²¹ *Ibid.*, pp. 187-188.

⁴²² Radio New Zealand, *Kiribati completes Fiji land purchase*, 28 May 2014, available at: <https://www.radionz.co.nz/international/pacific-news/245690/kiribati-completes-fiji-land-purchase> [Accessed 7 December 2018].

unlike the case of cessation of land, the act of purchasing a territory does not automatically imply the transfer of sovereignty over that territory to the purchasing State⁴²³.

On the other hand, the *merger of territory* has been proposed. In this case, the threatened Atoll Island States would merge with another State, either by being incorporated into that State or by establishing a new State. The advantage of this process is that the EEZ of the disappearing State would continue to exist; however, exploitation and management of its maritime zones would be ceded to the host State, as well as the protection of its population. In other words, “the disappeared state would basically have purchased its relocation with its maritime zones”⁴²⁴, even though the maintenance of a form of autonomy for the relocated communities may be negotiated between the two States, as it is for federated States. Nevertheless, this solution is particularly problematic because it raises serious issues related to self-determination of the relocating population and the respect of the rights of the hosting communities, together with questions regarding culture and identity which could bring tensions and even conflict among the populations in the new State. In case the pre-existing Atoll Island State had achieved a satisfactory degree of autonomy in negotiations with the host State, it might be able to maintain its self-government and self-determination, but the loss of independence on the control over the maritime zones and their resources may hinder the success of such process⁴²⁵.

A proposal involving the merger of States was advanced by Lopeti Senituli, Political and Media Adviser to the Hon. Prime Minister of Tonga, Hon. Samuela ‘Akilisi Pohiva, during a conference on Pacific climate change held at Canterbury University, New Zealand, on the 18th October 2018. Mr. Senituli, highlighting the importance of

⁴²³ L. Yamamoto and M. Esteban, *Atoll Island States and International Law: Climate Change and Sovereignty*, Springer, 2014, p. 178.

The aspects related to self-determination and administration of the purchased territory will be investigated in the next section.

⁴²⁴ R. Rayfuse, *International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma*, University of New South Wales Faculty of Law Research Series, paper 52, 2010, p. 9.

⁴²⁵ L. Yamamoto and M. Esteban, *Atoll Island States and International Law: Climate Change and Sovereignty*, Springer, 2014, pp. 201-202.

seeking alternatives to climate change migration that involve relocation to other Pacific countries, suggested the creation of the federated states of Tuvalu, Kiribati and Fiji, that would be named *Federated States of Vituki*. He believes the already consolidated relations between Fiji, Kiribati and Tuvalu, referring to I-Kiribati settlers on the Fijian island of Rabi and Tuvaluans settled on Kioa, and their geographical proximity and continuity of EEZs constitute a solid foundation for a federation of states between the three countries⁴²⁶. Moreover, he recalled the relationship of self-government in free association that Niue, Cook Islands and Tokelau have established with New Zealand, to provide a precedent and prove the viability of a similar solution among Pacific Island States. Additionally, Mr. Senituli argued that such solution would be preferable to preserve cultural identity and the strong bond of Pacific peoples with their land. With regard to the issue of sovereignty over maritime zones, he is confident that the leaders of Pacific countries “are keen to ensure that international law will continue to recognise the existing boundaries”⁴²⁷, as they declared in the Forum Communiqué of the 2017 Forum Leaders’ Summit in Apia, at paragraph 10: “Leaders called for a united regional effort that establishes and secures international recognition of the permanent protection and integrity of the maritime zones and sovereignty from the impacts of climate change and sea-level rise”⁴²⁸.

5.2.2 THE ISSUE OF SELF-DETERMINATION

Each of the possibilities explored above raises concerns about the right to self-determination of the communities that would have to migrate and relocate in another State or settle in a new territory, despite acquiring the sovereignty or self-government over it.

⁴²⁶ Email by Lopeti Senituli of 19 December 2018.

⁴²⁷ T. Glasgow, *Being climate change refugees in NZ “a last resort” for Pacific people*, Radio New Zealand, 20 October 2018, available at: <https://www.radionz.co.nz/international/pacific-news/369044/being-climate-change-refugees-in-nz-a-last-resort-for-pacific-people> [Accessed 9 December 2018].

⁴²⁸ Forum Communiqué, Forty-Eight Pacific Islands Forum, Apia, Samoa, 5-8 September 2017, available at: <https://cropict.usp.ac.fj/images/papers/ForumCommuniqué/2017-48th-Pacific-Islands-Forum-Communiqué.pdf> [Accessed 14 January 2019].

On the one hand, the right to self-determination does not entitle peoples to claim the maintenance of statehood nor the cessation of land from another government in their favour, even if their own territory disappears. In fact, self-governance and self-determination may be realised also in federation or association with another State which conducts certain state functions, while leaving the definition of internal policy to the communities⁴²⁹. On the other hand, any bilateral or regional negotiations engaged to decide the legal status of the PSIDS at risk of being submerged should take into consideration the fulfilment of the right to self-determination of the Pacific communities, which might be fragmented in different foreign countries and become a minority in the new State, in the eventuality of relocation⁴³⁰.

The right to self-determination is the inalienable right of peoples, established by the International Covenant on Civil and Political Rights, to “freely determine their political status and freely pursue their economic, social and cultural development”⁴³¹. This formulation implies that the government under which a community lives reflects the characteristics of the group itself; moreover, the right of self-determination is directly related to the enjoyment of civil and political rights, economic and cultural rights. Unless the process is pre-emptively and carefully planned, “relocation could threaten the social fabric that enables I-Kiribati and Tuvaluans to manifest their national identities through culture, language, norms, customs, and so forth”, argues Nathan Ross, PhD researcher at Victoria University of Wellington, New Zealand⁴³². Therefore, addressing in particular New Zealand’s government, he suggests that self-determination may be accomplished only if a number of issues are jointly settled, namely the acquisition of land, the legal personality that should represent the Pacific communities in the host State and internationally, and the ability to practice their own cultural habits, language, and national identity⁴³³.

⁴²⁹ J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford University Press, United Kingdom, 2012, p. 154.

⁴³⁰ A. Costi and N. Ross, *The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future*, in *Small States in a Legal World*, ed. by C. Morris and P. Butler, Springer Publishing, Heidelberg, 2017, p. 130.

⁴³¹ UNGA, *International Covenant on Civil and Political Rights*, UNTS 999, 16 December 1966, article 1.

⁴³² N. Ross, *Climate migrants will need more than “dignity”*, 20 November 2017, available at: <https://nathanross.co.nz/> [Accessed 12 December 2018].

⁴³³ *Ibid.*

The same risk of undermining the right of Pacific communities to self-determination may emerge in case of transfer to a new national territory whose characteristics are dissimilar to their land of origin. Pacific people, in fact, retain a strong connection with their land and the other members of the community, which compose their Pacific social and cultural identity, as it was also affirmed in the 2008 Niue Declaration on Climate Change adopted by the Parties to the Pacific Islands Forum (PIF)⁴³⁴. This aspect will be further investigated in the next section.

5.2.3 THE ISSUE OF LAND AND IDENTITY

Pacific indigenous populations are linked to their land by an unbreakable bond, which is threatened by the effects of climate change and the prospect of permanent community relocation. Although the meaning of land is unique and assumes different features for each of the Pacific Island countries, it can be affirmed that for all of them the connection to their land assumes a sacred and spiritual nature and constitutes the core of Pacific peoples' identity. This aspect can be captured observing how, from a linguistic perspective, the term identifying the land refers also to the afterbirth. For example, the term *whenua* in the New Zealand Maori means both land and placenta⁴³⁵. Likewise, many populations of Polynesia and Melanesia link land to placenta in their creation myths and in the terminology, seeing their territory as a womb that nourishes its babies⁴³⁶. Nevertheless, it has to be noticed that this strong connection has never precluded Pacific Island peoples to migrate, even for long periods, since this link should not be interpreted only as a physical attachment to their place of origin. Many migrants,

⁴³⁴ The Leaders of PIF recognise “the importance of retaining the Pacific’s social and cultural identity, and the desire of Pacific peoples to continue to live in their own countries, where possible”. The Niue Declaration on Climate Change, 39th Pacific Islands Forum, Forum Communiqué, Annex B, 20 August 2008.

⁴³⁵ New Zealand Ministry for Culture and Heritage, Te Ara The Encyclopedia of New Zealand, *Story: Papatūānuku – the land*, website: <https://teara.govt.nz/en/papatuanuku-the-land/page-4> [Accessed 13 December 2018].

⁴³⁶ In Cook Island the Maori term *enua* means “land, territory, country, afterbirth”; in Tonga *fonua* means “island, territory, estate, the people of the estate, placenta”. See other examples in J. Campbell, *Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, p. 61.

in fact, retain their spiritual bond with the land even though they reside in other countries, as long as they are able to periodically return to their homeland and are supported by family and other members of the community who stayed in the Island⁴³⁷.

However, if Pacific communities will have no other option than permanently resettling in other countries, there is another aspect related to land that should be taken into consideration when planning relocation. The peculiar bond with the land is reflected also in the management of land tenure: in the Pacific Islands the acquisition and use of land is regulated under customary norms, and agreements regarding boundaries and rights deriving from land ownership are often transmitted orally. Such system of customary ownership forms part of the islanders' social and cultural identity but clashes with different economic systems based on property law rather than traditional forms of tenure, like in New Zealand and Australia⁴³⁸.

Therefore, the loss of identity consequential to the abandon of land and traditional social structures is the greatest concern of Pacific communities who are now confronted with the possibility of leaving their islands indefinitely⁴³⁹.

5.2.4 PAST AND PRESENT RESETTLEMENT PROJECTS

Community relocation is not unprecedented in the Pacific region. A couple of examples will be analysed to derive considerations and anticipate the challenges that would arise in the eventuality of climate change migration and resettlement of communities.

The case of Banaban displacement, since it occurred in colonial times, for some aspects differs from potential future cases of relocation; however, important lessons

⁴³⁷ J. Campbell, *Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, pp. 63-65.

⁴³⁸ C. Corendea, T. Mani, *Deriving a Legal Framework to address Climate Change Induced Migration in the Pacific*, in *Klima und Umweltbedingte Migration*, 107, Hanns-Seidel-Stiftung, Munich, 2017, p. 81.

⁴³⁹ T. Glasgow, *Being climate change refugees in NZ "a last resort" for Pacific people*, Radio New Zealand, 20 October 2018, available at: <https://www.radionz.co.nz/international/pacific-news/369044/being-climate-change-refugees-in-nz-a-last-resort-for-pacific-people> [Accessed 13 December 2018].

can be derived observing the effects that such event still has on the interested populations. Under the British Empire, throughout most of the 20th century, Banaba island (currently part of Kiribati) was exploited for phosphate extraction, activity that progressively caused the degradation of the island. Banabans were suggested to relocate to another territory until, after the 1942 Japanese occupation, the British authorities resettled the entire population to Rabi island, in Fiji, 2,400 km away from their homeland. Banaba's population was contrary to relocation, fearing to lose sovereignty on their homeland and their sacred bond with their land, as it happened. Banabans lost their revenues from royalties and their rights on the island, which became Kiribati's territory at the time of its independence, whereas they became part of a disadvantaged and marginalised minority in the new island in Fiji. In fact, they could not acquire the same legal status as Fijians, consequently enjoying only limited civil and political rights⁴⁴⁰. This case was managed in a colonial context, when forced transfers of people were easier to organise, without the need of negotiations between independent States and the issue of travel and residency documents. However, its consequences are ongoing and demonstrate the detrimental effects that unplanned relocation can have on populations and States, namely the inability to achieve self-determination, loss of identity, marginalisation, tensions between migrant and host communities⁴⁴¹.

The second case relates to the Carteret Islands, an archipelago of six small islands in the Autonomous Region of Bougainville in Papua New Guinea. Similarly to Tuvalu and Kiribati, the Carteret Islands elevate only 1.2 metres above sea level and their territory covers an area of less than a square kilometre. In the last twenty years, almost half of the entire territory has been eroded or submerged as a consequence of sea level rise. Since the 1980s, some government-driven projects of relocation were attempted, unsuccessfully, due to poor planning and the civil war that exploded in Bougainville at the end of the 1980s. The most recent and ongoing project started in 2006 on the

⁴⁴⁰ To be precise, according to 1970 Fiji Constitution Banabans in Rabi were given equal status as citizens of Fiji. However, they lost this status in the Constitutions that were adopted after the military coups of 1987 and 2000. See *Fiji Independence Order 1970 and Constitution of Fiji and Schedule to the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990*.

⁴⁴¹ J. Campbell, *Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land*, in *Climate Change and Displacement, Multidisciplinary Perspectives*, ed. by J. McAdam, Hart Publishing Ltd, United Kingdom, 2012, pp. 71-75.

initiative of the Carteret Islands' community that created a local NGO, Tulele Peisa, to coordinate the relocation project in the interests of migrant and host populations. Some Carteret Islands' families in 2009 started to resettle to other Bougainville atolls on land donated by the Roman Catholic Church of Bougainville⁴⁴². Without reporting all the phases of the project, highlighting the challenges that arose may serve as case study for future relocation projects. First of all, despite the efforts to engage the host communities in the relocation project and in the attempt to generate benefit to both communities from the new economic activities and education initiatives, difficulties in harmonising two different ways of living, especially for what concerns the acquisition of land, have emerged. Under customary land tenure, buying and selling land is not a straightforward process. Therefore, one of the major impediments to successful relocation in this case is the purchase of land where to build houses and conduct economic activities. Secondly, also in this case, the inhabitants of the Carteret Islands are reluctant to leave their homeland, as they retain a strong spiritual connection with their land which is seen as one with its people. In addition, the population fears to lose the sense of their personal history and the bond with their ancestors who passed on the land from generation to generation. Thirdly, despite being part of the same autonomous region of Papua New Guinea, the environment of the atolls of destination is substantially different from the Carteret Islands' conformity. The type of soil, vegetation, and access to sea has relevant implications on the diet of its population, on the type of housing and economic activities that can be engaged. Moving to a territory that consistently differs in these characteristics may be particularly stressful for migrant communities and may be the cause of rising tensions. Moreover, the particular political situation going on in Papua New Guinea, and especially the Autonomous Region of Bougainville, has left the project with no political and financial support from the central government, increasing the difficulties for the successful realisation of the relocation of the Carteret Islands' population⁴⁴³.

⁴⁴² J. Connell and N. Lutkehaus, *Environmental Refugees? A tale of two resettlement projects in coastal Papua New Guinea*, in *Australian Geographer*, 48: 1, 2017, pp. 86-89.

⁴⁴³ S. Pascoe, *sailing the waves on our own: Climate change migration, self-determination and the Carteret Islands*, in *QUT Law Review*, 15: 2, 2015, pp. 79-80.

Both the cases investigated present severe critical issues that are likely to arise in potential future community relocation processes. Climate change challenges particularly the enjoyment of human rights and the fulfilment of communities' self-determination.

5.3 NEW ZEALAND'S REGIONAL APPROACH

From a meaningful conversation with Alexandra Pierard, Senior Policy Officer for the Pacific division of the Ministry of Foreign Affairs and Trade⁴⁴⁴, and the keynote speech of the Prime Minister Honourable Jacinda Arden held on the 27th February 2018⁴⁴⁵, it has been possible to understand and appreciate the new pathway towards the Pacific undertaken by the New Zealand government, called the "Pacific Reset", announced in February 2018 by the Minister of Foreign Affairs Winston Peters⁴⁴⁶.

The "Pacific Reset" is complemented by two typologies of approach, namely the classic way of conducting diplomatic relations through missions, meetings and dialogue between the stakeholders, and the increase in capacity and efficiency of New Zealand's financial support to the Pacific region, prioritising the action against climate change, the spread of common values – such as "good governance and transparency, human rights and women's political and economic empowerment" –, and funding to multilateral institutions. The manoeuvre acknowledges the commonality of identity and interests between New Zealand and the Pacific partners, founding such renewed vision on the mutual respect between New Zealand and the Pacific peoples⁴⁴⁷.

This new path undertaken by the New Zealand external action has interesting implications on the subject of this study, which will be investigated in the next sections,

⁴⁴⁴ Interview with Alexandra Pierard Senior Policy Officer for the Pacific division of the Ministry of Foreign Affairs and Trade, New Zealand Ministry of Foreign Affairs and Trade, Wellington, 8 March 2018.

⁴⁴⁵ New Zealand Institute of International Affairs, Conference "The Law of the Jungle. How can New Zealand Navigate Global Disruption?", Michael Fowler Centre, Wellington, 27 February 2018.

⁴⁴⁶ New Zealand Foreign Affairs and Trade, Pacific, 2018, website: <https://www.mfat.govt.nz/en/countries-and-regions/pacific/> [Accessed 21 December 2018].

⁴⁴⁷ New Zealand Government, "Shifting the dial" Speech of Rt Hon. Winston Peters, 1 March 2018, available at: <https://www.beehive.govt.nz/speech/shifting-dial> [Accessed 2 January 2019].

after having analysed a significant court case regarding an application for “climate refugee” status.

5.3.1 JURISPRUDENCE OF NEW ZEALAND’S COURTS: TEITIOTA V THE CHIEF EXECUTIVE OF MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT

The Teitiota case was one of the first court cases in which the appellant applied for refugee status based on the effects of climate change. The proceeding was held in New Zealand and involved two citizens of the State of Kiribati.

The facts concern Mr. Teitiota and his wife, inhabitants of Tarawa, main island and capital of Kiribati. In 2007 they moved to New Zealand where, afterwards, they had three children who were born in New Zealand’s territory but were not entitled to receive New Zealand citizenship under the Citizenship Act 1977. At the expiry of their visas in October 2010, the applicant and his family continued to reside in New Zealand unlawfully and applied for refugee status under section 129 of the Immigration Act 2009 and for protected person status under sections 130 and 131 of the same Act. Mr. Teitiota based his claim on the fact that his homeland was threatened by severe sea level rise caused by climate change, exposing him and his family to threats to their life and to the risk of forced displacement in the medium-term, if returned to Kiribati⁴⁴⁸.

The case was initially turned down by a Refugee and Protection Officer. The Officer’s decision was brought by the applicant before the Immigration and Protection Tribunal (IPT), an independent body in which the decisions of Immigration New Zealand – a section of the Ministry of Business, Innovation and Employment – can be appealed. The IPT issued its final decision in June 2013 rejecting Mr. Teitiota’s application for refugee status⁴⁴⁹. The applicant, subsequently, appealed the Tribunal’s judgment to the High Court on questions of law under section 245 of the Immigration Act 2009⁴⁵⁰. His application was declined by the High Court in 2013 and also by the Court of Appeal in

⁴⁴⁸ AF (Kiribati) [2013] NZIPT 800413, New Zealand: Immigration and Protection Tribunal, 25 June 2013.

⁴⁴⁹ Ibid.

⁴⁵⁰ *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment*, CIV-2013-404-3528 [2013] NZHC 3125, New Zealand: High Court, 26 November 2013.

2014⁴⁵¹. The case was definitely dismissed in 2015 by the Supreme Court of New Zealand, which corroborated the ruling of the lower Courts⁴⁵².

Although it was eventually dismissed, *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment*, which received high media coverage internationally, is particularly interesting because it provides a practical application of the reasoning that has been presented on the theoretical level in the first part of this study, and because New Zealand Courts' decisions leave a margin for evolutive interpretation on the issue.

The Immigration and Protection Tribunal, after having collected evidence and meaningful documents, had to demonstrate whether the appellant could be recognised: (i) a refugee under section 129 of Immigration Act 2009, which incorporates article 1A(2) of 1951 Refugee Convention, (ii) a protected person under section 130 of Immigration Act 2009, which incorporates the law of 1984 Convention Against Torture, (iii) a protected person under section 131 of Immigration Act 2009, which incorporates the law of 1966 International Covenant on Civil and Political Rights⁴⁵³.

First of all, with regard to the claim of refugee status under section 129 of Immigration Act 2009, the Tribunal proceeded assessing two decisive issues, namely whether the applicant was facing a real risk of being persecuted if returned to his home country, and whether there was a Convention ground for persecution. The reasons to dismiss the first point were the following: on the one hand, New Zealand law adopts the interpretation of the concept of "being persecuted" as "sustained or systemic violation of core human rights, demonstrative of a failure of state protection", citing the jurisprudence of *Refugee Appeal No 74665 (7 July 2004)* and *BG (Fiji) [2012] NZIPT 800035*⁴⁵⁴; on the other hand, according to the approach adopted in *Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379*, the fear of being persecuted is "well-founded" when the risk of persecution is real, according to the standard of objectivity

⁴⁵¹ *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment*, CA50/2014 [2014] NZCA 173, New Zealand: Court of Appeal, 8 May 2014.

⁴⁵² *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC 107, New Zealand: Supreme Court, 20 July 2015.

⁴⁵³ *AF (Kiribati) [2013] NZIPT 800413*, New Zealand: Immigration and Protection Tribunal, 25 June 2013, [36].

⁴⁵⁴ *Ibid.*, [53].

established in *Refugee Appeal No 76044 (11 September 2008)*. In addition, the legal concept of “being persecuted” depends on human agency which can be interpreted as deriving from the conduct of the State, namely its inability or unwillingness to protect its citizens, or the action of non-state actors, from which the State fails to protect its people. Nevertheless, it is particularly interesting to observe how the Tribunal specified that:

[55] [...] this requirement of some form of human agency does not mean that environmental degradation, whether associated with climate change or not, can never create pathways into the Refugee Convention or protected person jurisdiction⁴⁵⁵.

To decide on the second point, it was recalled the jurisprudence asserting that persons displaced by natural disasters cannot obtain protection under the Convention because the effects of natural disasters are indiscriminate, and because in the occurrence of natural disasters complex pre-existing situations involving multiple factors, such as poverty, vulnerability and social tensions, can underlie⁴⁵⁶.

Therefore, the refugee claim under section 129 of Immigration Act 2009 failed in both the issues raised: in fact, on the one hand, the applicant did not face a real risk of being persecuted because he was not involved in any legal dispute on land in Kiribati, because in Kiribati he would have received the support of his family in finding housing and resources, and because the level of environmental degradation was not enough severe to constitute a real risk for life; on the other hand, the claim failed under the Refugee Convention lacking the personalisation of the threat, and because the government of Kiribati was not unwilling to provide assistance to its citizens⁴⁵⁷. To support the decision, reference to the previous refugee jurisprudence was made. In 2000 a number of similar cases involved applicants from Tuvalu who claimed the status of refugee on the basis of environmental processes such as inundation, coastal erosion, salinisation of the water, jeopardising their livelihood. The cases were dismissed

⁴⁵⁵ Ibid., [55].

⁴⁵⁶ Ibid., [57].

⁴⁵⁷ Ibid., [72]-[75].

“because the indiscriminate nature of these events and processes gave rise to no nexus to a Convention ground”⁴⁵⁸.

Secondly, continuing the reasoning of the Tribunal with regard to the application of section 130 of the Immigration Act 2009 for the recognition of the status of protected person to the applicant, the Tribunal briefly assessed that there were no substantial grounds for believing the applicant would have risked being subjected to torture, if deported from New Zealand⁴⁵⁹.

Thirdly, the Tribunal proceeded to assess whether the applicant would have faced a real risk of deprivation of life or cruel and degrading treatment under section 131 of Immigration Act 2009, if deported from New Zealand. From the interpretation of article 6 of ICCPR, threats to the right to life occur only when the applicant is at risk of being arbitrarily deprived of his life, where the expression of “arbitrary deprivation” is intended as not prescribed by law, not proportional to the ends sought, and not necessary in the particular circumstances of the case⁴⁶⁰. Moreover, the right to life imposes positive obligations to provide basic protection and necessities for life upon states. In this case, the Tribunal concluded that the government of Kiribati was not responsible for any act or omission that might have led to the “arbitrary deprivation” of life under article 6 of ICCPR. On the contrary, it was recognised that the government of Kiribati had taken steps to protect its inhabitants and their properties according to its capacity⁴⁶¹. Therefore, the decision of the Tribunal was based on the conclusion that the applicant failed to prove that there was a sufficient risk to his life under section 131 of Immigration Act 2009, as the risk was not imminent and did not meet the threshold amounting to risk of arbitrary deprivation of life. For these reasons, there were no substantial grounds justifying the danger of being subjected to arbitrary deprivation of life for the applicant. Similarly, Mr. Teitiota failed to establish the existence of substantial grounds for believing that he was in danger of being subjected to cruel treatment, due to some act or omission that would have occurred in Kiribati⁴⁶².

⁴⁵⁸ Ibid., [67].

⁴⁵⁹ Ibid., [78].

⁴⁶⁰ Ibid., [84].

⁴⁶¹ Ibid., [88].

⁴⁶² Ibid., [95].

The other Courts confirmed the preceding ruling of the IPT. In particular, the Supreme Court in 2015 was clear in reasserting that the specific circumstances of this case did not meet the grounds established by the Refugee Convention nor by the other instruments of international protection, but that such outcome did not prevent the possibility that environmental degradation and climate change may found “a pathway into the Refugee Convention or protected person jurisdiction [...] in an appropriate case”⁴⁶³.

Ms. Pierard, at the colloquium of the 8th March 2018, commented on this case highlighting the importance of keeping the categories of refugee and environmental or climate migrant separated in order to provide the most suitable and effective response to each phenomenon⁴⁶⁴.

5.3.2 NEW ZEALAND ACTION PLAN ON PACIFIC CLIMATE CHANGE-RELATED DISPLACEMENT

At the time of the interview with the Senior Policy Officer for the Pacific division Ms. Pierard, the news was speculating about the government’s proposal for the creation of an experimental humanitarian visa for climate refugees, announced in October 2017⁴⁶⁵. Pierard clarified that the announcement of the PM Jacinda Arden and the Minister of Climate Change James Shaw on the issuing of the visa was meant to give to the international community the signal that New Zealand is genuinely willing to engage in humanitarian and climate change-related issues. Nevertheless, the cabinet had not taken in consideration the proposal at the time, nor an agenda had been set for discussing such proposal.

Conversely, Pierard explained how the New Zealand government was intending to face the issue of climate change-induced displacement through a comprehensive

⁴⁶³ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107, New Zealand: Supreme Court, 20 July 2015, [13].

⁴⁶⁴ Interview with Alexandra Pierard Senior Policy Officer for the Pacific division of the Ministry of Foreign Affairs and Trade, New Zealand Ministry of Foreign Affairs and Trade, Wellington, 8 March 2018.

⁴⁶⁵ See for example: C. Anderson, *New Zealand considers creating climate change refugee visas*, The Guardian, 31 October 2017, available at: <https://www.google.it/amp/s/amp.theguardian.com/world/2017/oct/31/new-zealand-considers-creating-climate-change-refugee-visas> [Accessed 2 January 2019].

approach that combines a set of multi-pronged responses to assist the Pacific neighbours. On the one hand, she asserted that at the international level New Zealand aimed at positively influencing the discussions regarding the adoption of the Global Compact on Safe, Orderly and Regular Migration, being aware, though, that its impact was limited. Therefore, New Zealand's efforts will be concentrated on leading the action to assist the PSIDS in the sustainable management of their EEZs under the framework of the UN Convention of the Law of the Sea. On the other hand, Pierard focused on the regional approach, through which New Zealand can aspire at assuming a more significant and impacting role.

Firstly, New Zealand wishes to engage all the regional partners in the dialogue on the issue of climate change-related displacement, even though negotiations might take years to lead to an agreement. Since the government is committed to work in the interests and needs of the Pacific Islands, as declared in the "Pacific Reset", much of the agenda will focus on comprehensive measures to assist adaptation, reduce vulnerability to disasters and build resilience among the Islands' populations, which have clearly expressed the will of staying in their land for as long as possible. As for migration specifically, the first phase involves inaugurating the regional dialogue presumably using the platform already provided by the Pacific Islands Forum, the most important Pacific regional organisation. At this stage, the priorities are studying the phenomenon through the acquisition of data on climate change and displacement and favouring future cross-border migration through the provision of training for building capabilities and skills among the Pacific Islands' populations. At the same time, the government will try to improve existing migration opportunities for Pacific communities towards New Zealand, favouring the access to the Pacific Access Category (PAC), the Samoan Quota (SQ), and policies on seasonal migration. Although these categories have been designed for economic purposes, the Officer underlines how they can provide concrete possibilities to pursue labour mobility in the context of climate change; the PAC, in fact, is a residence class visa that annually allows 75 i-Kiribati, 75 Tuvaluans, 250 Tongan and 250 Fijian citizens to settle and work in New Zealand. Similarly, the SQ grants access for up to 1,100 Samoan citizens per year. Instead, the elaboration of a specific category of visa or other

measures regarding climate migration will be explored in the second phase of the New Zealand regional action plan, when the discussions with the partners will have produced relevant results.

With regard to the strategy employed by the government, the process of building dialogue and cooperation between the partners will be led by the Ministry of Foreign Affairs, while a close partnership with scholars and academic advisors will be established to investigate all the possibilities and challenges of environmental migration, as for example the issue of statehood presented above⁴⁶⁶.

These declarations have been confirmed by two papers issued by the Office of the Minister of Foreign Affairs, and the Ministry of Business, Innovation and Employment, respectively.

PACIFIC CLIMATE CHANGE-RELATED DISPLACEMENT AND MIGRATION: A NEW ZEALAND ACTION PLAN

The “Pacific climate change-related displacement and migration: a New Zealand action plan” is the first document approved by the Cabinet Environment, Energy and Climate Committee on the 23rd May 2018. The paper acknowledges the severity of the threat posed by climate change, especially on the Pacific Islands, and proposes a set of actions designed to demonstrate the commitment of New Zealand to act as a global leader in the fight against climate change. The document recognises, also, that migration is not an unprecedented response to human challenges in the Pacific region and asserts that there are already established routes of displacement, in particular towards New Zealand, Australia and the United States. Three main points derived from regional consultations constitute the premises on which the action plan is founded: (i) the Pacific peoples retain a strong sense of social and cultural identity which implies the desire to remain in their native lands for as long as possible, as it was stated in the 2008 Niue Declaration; (ii) the Pacific peoples will not accept to “trade” large-scale migration from

⁴⁶⁶ Interview with Alexandra Pierard Senior Policy Officer for the Pacific division of the Ministry of Foreign Affairs and Trade, New Zealand Ministry of Foreign Affairs and Trade, Wellington, 8 March 2018.

the Islands in exchange for the reduction of the commitment to mitigate climate change from the other States; (iii) if the eventuality of displacement cannot be averted, the Pacific peoples demand a planned and coordinated process, based on community participation.

Committed to respect the Pacific Islands' desires, sovereignty and right to self-determination, New Zealand articulates its plan as follows: firstly, the government aims at increasing the funds of the Official Development Assistance (ODA) directed to the Pacific for the building of resilient infrastructure, the enhancement of disaster preparedness and recovery, the improvement of education and health services, and the promotion of sustainable economies, starting from New Zealand. Secondly, it promotes a regional inclusive dialogue through the Pacific Islands Forum mechanism with the involvement of all the stakeholders at any social level, suggesting the possibility of creating a Pacific legal instrument in response to climate displacement in the region. Thirdly, support to the development of international responses inside multilateral organisations through the exchange of data, information and best practice will be provided; in addition, New Zealand seeks to strengthen the role of Pacific countries in international fora. In fourth place, promoting the development of international law, especially with regard to the protection of coastal state rights related to maritime zones is a further measure proposed in the action plan. Lastly, the government stresses particularly the necessity of filling the data gap by funding research to identify the future possibilities for climate migration and the social and economic impacts on the actors involved.

These propositions will have to be conducted within a limited timeframe, in order to obtain from the regional consultation and early investments the necessary information and responses on which to base the longer-term action from 2024. The evaluation of complex issues, such as the possibility of creating an *ad hoc* humanitarian visa category, are postponed to this second phase⁴⁶⁷.

⁴⁶⁷ Office of the Minister of Foreign Affairs, *Pacific climate change-related displacement and migration: a New Zealand action plan*, New Zealand, May 2018.

PROPOSED IMMIGRATION WORK PROGRAMME TO IMPROVE PACIFIC MIGRATION POLICIES

In parallel the Ministry of Business, Innovation and Employment released on the 15th May 2018 a final paper focused on the increasing of migration options for Pacific Islands' citizens towards New Zealand, as part of the renewed comprehensive approach of the government towards the Pacific partners based on the principles of "understanding, friendship, mutual benefit, collective ambition, and sustainability". This second document identifies a set of objectives guiding the operational programme. One of the priorities is to ensure that the policies result in good settlement outcomes for the migrants and that provide assistance to their specific needs. This includes also considering the different perspectives of the Pacific communities, conducting consultations with the economic actors and the society, and avoiding the depletion of their domestic labour markets. Furthermore, New Zealand immigration policies should be conceived in a manner that favours development objectives, as for example facilitating the sending of remittances. The programme, moreover, has to ensure the accessibility to both migrants and New Zealand's employers. Lastly, the framework has to guarantee security and minimise the risks related to trafficking and exploitation.

In light of these principles, the document proposes an agenda that should be developed in the period 2018-2020, and that is composed of the following operations, namely the recognition of climate change displacement in the Pacific under existing policy mechanisms; the review of Pacific-focused migration policies and residence permits in light of the "Pacific Reset", making sure they are accessible, respond to the necessities of migrants, and avoid the risk of exploitation for migrants; the review of temporary migration schemes, in particular the Recognised Seasonal Employer (RSE) to guarantee transparency and reduce bureaucratic hurdles; the review of the residence categories, including PAC, SQ and the Family categories, exploring the possibility to improve them; the improvement of labour mobility, matching the skills required by New Zealand labour market with the skills of migrants offering labour force; in view of the development of a subsequent longer-term action, the commission of research on the impacts of existing migration mechanisms elaborating the results on the basis of five

measurable indicators, namely Employment, Education and Training, English Language, Inclusion, Health and Well-Being⁴⁶⁸.

⁴⁶⁸ Ministry of Business, Innovation and Employment, *Final Cabinet paper – Proposed immigration work programme to improve Pacific migration policies*, New Zealand, 15 May 2018.

CONCLUSIONS

This research was driven by two preliminary questions: how can the phenomenon of migration induced by the effects of climate change be defined? Are climate change-displaced persons protected by any instruments of international law? The investigation started with the analysis of the existing international and regional frameworks for the protection of displaced persons: from the refugee framework and the 1951 Convention related to the Status of Refugees, to the Guiding Principles on Internal Displacement, and to the instruments of complementary protection. After having ascertained that climate change impacts influence human mobility, constituting a driver of voluntary and forced displacement, trying to answer the first question has proven to be problematic. The issue of climate change-induced displacement has not been unambiguously recognised by the international community nor defined in a multilateral legally binding treaty, yet. The difficulties in reaching an international consensus are due to a set of characteristics of the phenomenon which hinders the capacity to outline a clear and unequivocal category of persons displaced by climate change. In fact, in most cases it is not possible to clearly identify climate change as the single cause of displacement, because of the cumulative nature of its effects and because it is only a concurrent factor adding up to existing vulnerabilities and socio-economic problems, which are often hard to disentangle. Also, context-specific variables play a great role in shaping the phenomenon. Despite the absence of a legal definition, the most relevant definitions advanced by scholars and international agencies, such as the UNHCR and the International Organisation for Migration, have been examined. However, all the proposals appeared inappropriate and unsatisfactory, especially the reference to “climate refugees” deployed by many scholars. Since achieving consensus on a definition appears to be such a complicated and time-consuming process, would it not be more effective to focus on the problems and needs that push individuals and communities to migrate rather than requiring the identification of climate change as the single or main driver of displacement?

Notwithstanding the absence of an international treaty addressing directly the issue of climate-change induced displacement, the analysis of international frameworks for the protection of displaced people has been conducted in order to assess whether climate change-displaced persons could receive protection based on different legal grounds. It emerged that, generally, these frameworks are not applicable to the context of climate change displacement. In particular, the 1951 Refugee Convention proves to be unsuitable because the definition of “refugee” encountered in article 1(A)2 contains specific and exhaustive elements, resulting unextendable to other categories⁴⁶⁹. In fact, the Convention protects people who have crossed an international border and have been persecuted on an individual basis by actions emanating from a state or non-state actor because of one of the five grounds of race, religion, nationality, social group or political opinion listed in the definition. Having assessed that climate change-induced displacement, on the contrary, generates predominantly internal flows of migration, and that climate change impacts hit individuals and communities indiscriminately, in most cases climate change-displaced persons do not meet the requirements imposed by the 1951 Convention and, thus, would not be granted refugee status.

With regard to the Guiding Principles on Internal Displacement⁴⁷⁰, the international soft law instrument for the protection of individuals and communities displaced inside the borders of their country of origin, scholars recognise their potential in providing protection to persons internally displaced by climate change, as the definition of IDP includes natural and human-made disasters as drivers of displacement, and because they adopt a strong human rights-based perspective. However, many observers are still doubtful about the efficacy of the Guiding Principles in protecting persons displaced by slow-onset climate events, fearing that these people may not be recognised as IDPs. As a matter of fact, being the guidelines non-legally binding but based on voluntary commitment of States, and in the absence of an enforcing mechanism, the Principles might not be sufficient to guarantee protection to climate

⁴⁶⁹ UN General Assembly, *Convention and Protocol relating to the Status of Refugees*, 189 UNTS 137, 28 July 1951, article 1(A)2.

⁴⁷⁰ UN High Commissioner for Refugees (UNHCR), *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 1998.

migrants. In fact, in their transposition into domestic legal systems the Guiding Principles are differently interpreted and adjusted, often remaining impracticable and unimplemented.

Subsequently, it has been investigated to what extent human rights legal instruments may widen State's obligations to protect persons displaced by climate change. It has been concluded that complementary protection grounded on the *non-refoulement* principle emanating from the Right to Life and to the Prohibition of Cruel, Inhuman and Degrading Treatment⁴⁷¹ has the advantage of not necessitating a proof of causal link between climate change and the breach of human rights, provided that the severity of conditions amounts to violations of fundamental rights. In fact, in practice it has been assessed that the requirements of imminence and degree of the violation compromise the effectiveness of such instrument in the context of climate change, especially when dealing with people displaced by slow-onset processes.

Lastly, non-binding instruments for Disaster Risk Reduction, like the Platform on Disaster Displacement and the Sendai Framework⁴⁷², have been mentioned for their potential to provide an operational response with concrete actions that can be implemented at national and local level to address adaptation to climate change and protection of the rights of those displaced. However, also in this case much criticism has been advanced on the efficacy of such instruments.

The same exercise has been conducted on binding and non-binding legal instruments for the protection of refugees or other categories of displaced persons, as well as on human rights instruments, adopted at regional level. For example, evidence on the limited effectiveness of regional human rights frameworks has been provided by the analysis of jurisprudence of the ECtHR; it emerged that protection from *refoulement*

⁴⁷¹ UNGA, *International Covenant on Civil and Political Rights*, UNTS 999, 16 December 1966, article 6. UNGA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNTS 1465, 10 December 1984, article 3.

⁴⁷² Platform on Disaster Displacement, *Report – Advisory Committee Workshop*, Geneva 13-14 October 2016. UNISDR, *Sendai Framework for Disaster Risk Reduction*, available at: <https://www.unisdr.org/we/coordinate/sendai-framework> [Accessed 25 September 2018].

grounded on article 3 of the ECHR to people displaced by climate-change related disasters or degradation processes is granted only in exceptional circumstances⁴⁷³.

Based on these findings, another central question arose. Given the insufficiency of means for the legal protection of climate change-displaced persons and the unsuitability of existing international and regional frameworks, which should be the most appropriate approach to adopt to address the legal gap? The fundamental premise to provide an answer to this question was the acknowledgment that, even though regional instruments have not proven to be sufficient for the protection of climate change displaced persons, at the regional level there is a greater potential for developing legislation and policies addressing the issue, thanks also to the presence of more effective enforcing systems and to lower obstacles at the political level.

Therefore, in the first instance, solutions advanced by governments and academy in the last decade proposing the amendment of the 1951 Refugee Convention or the creation of a *sui generis* universal convention have been dismissed for the number of political and financial obstacles that, from an in-depth analysis, appeared against their feasibility. Subsequently, supported by literature and evidence, it has been proposed to focus the perspective on the regional level, where it is more likely to establish a state cooperation between neighbouring countries and nations with standing geopolitical and economic relationships, which, therefore, would be more committed to fulfil their obligations established by regional agreements. The argumentations in support of such approach include the greater practicability of the organisation of series of consultations, in which affected communities, civil society and NGOs would be directly called to participate, as a bottom-up boost, in parallel with the intergovernmental activity, is essential to design appropriate norms and policies for the protection of climate change-displaced persons. In addition, since movement will be predominantly internal or across neighbouring countries, regional systems would provide targeted solutions able to respond to the needs of local communities. Moreover, focusing on the local dimension, norms and policies would be more sensitive to specific cultural and identity issues,

⁴⁷³ *D v United Kingdom*, App no 30240/96, ECtHR, 2 May 1997. *N v United Kingdom*, App no 26565/05, ECtHR, 27 May 2008. *Sufi & Elmi v United Kingdom*, App no 8319/07, ECtHR, 28 June 2011.

especially in those scenarios in which climate change migration could disrupt social and cultural integrity.

These considerations lead to the core of the dissertation. States' effort should be focused on a twofold objective: on the one hand, regional consultations should be started in order to establish the foundations of a new soft law legal instrument for the protection of climate change-displaced persons. At the same time, existing international migration and human rights legal and policy frameworks should be adjusted, without the need of any amendment or renegotiation, to assist climate change migrants in the short term. Then, the transposition into domestic legislations of international or regional frameworks, such as the Guiding Principles on Internal Displacement, should be encouraged and assisted. Also, mechanisms to grant temporary stay and protection should be enhanced. On the other hand, the effort to fill the legal void should be complemented with the adoption of targeted policies to support adaptation and lower vulnerabilities in order to prevent the burst of climate change-induced displacement. A long-term policy framework focusing on such matters can be elaborated within existing legal regimes, without the need of formulating new norms. A set of priority policy areas have been suggested: these concern the improvement of data collection, measures targeting disaster risk reduction together with measures for the reduction of communities' vulnerabilities, access to microcredit, reduction of transaction costs of remittances, and policies facilitating anticipatory migration. These priorities are supplemented by a focus on two relevant aspects: enhancing resilience of communities through the food production system, and planned migration as an adaptation strategy.

In order to support such conclusions with evidence, the case of the Pacific Small Island Developing States and New Zealand has been selected. Firstly, from the analysis of New Zealand refugee jurisprudence, in particular the *Teitiota* case, the inapplicability of the 1951 Refugee Convention in the context of climate change-induced displacement has been substantiated, although the Courts left open the possibility of evolutive interpretations of existent legal frameworks in favour of the protection of such category

of migrants in the future⁴⁷⁴. Secondly, the Action Plan enacted by New Zealand, one of the principal state actors in the Pacific region, follows exactly the approach that has been proposed in this research. In fact, to assist Pacific countries' adaptation to climate change and to manage migration flows from the islands, the New Zealand government intends to adopt a comprehensive approach that combines two main goals: on the one hand, the revision of existing national norms, including those concerning migration programmes, to facilitate anticipatory migration from the Pacific Island States and protection of migrants' human rights; on the other hand, the leading of a regional process of negotiations for understanding the issue in the medium-term, with the long-term purpose of developing regional legislative and policy responses to the phenomenon.

To conclude, it has been possible to provide an answer to the initial enquiries which, in their turn, expanded the scope of the investigation. Climate change-induced displacement is a complex and problematic international issue. Literature often dwells on speculations about the most ideal legal solutions that could be achieved on a theoretical level, neglecting their lack of practicability and losing sight of the real victims of the phenomenon, the vulnerable persons with limited resources and limited options for improving their human conditions. This is the reason why this study advocates for an approach that appears more prudent but has a greater feasibility, considering also the adverse historic time that the international community is currently living in respect of human mobility and human protection.

Undoubtedly, further investigation will be required in order to assist the States in implementing the proposed approach. It will be fundamental to work on addressing the data gap, while it might be appropriate to monitor the progress that the New Zealand government's strategy will gradually achieve and the results that will emerge in two-year time, when the preliminary phase of the Action Plan will be completed.

⁴⁷⁴ *AF (Kiribati)* [2013] NZIPT 800413, New Zealand: Immigration and Protection Tribunal, 25 June 2013. *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC 107, New Zealand: Supreme Court, 20 July 2015.

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