

**Distinguished Lecture Series - 3**

**CLIMATE CHANGE  
INDUCED  
DISPLACEMENT –  
A CHALLENGE  
FOR  
INTERNATIONAL  
LAW**

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# Climate Change Induced Displacement— A Challenge for International Law

**Dr. Walter Kaelin<sup>1</sup>**

When floods of a hitherto unknown magnitude hit Pakistan during the 2010 Monsoon season, the Pakistani daily “Dawn” reported on 10 August 2010 that “Floods that have devastated Pakistan could be a sign of the future as climate change brings greater extremes of weather to the region.” In Mozambique, local authorities and people who had fled overflowing rivers told me in 2008 that while there always has been flooding with deadly floods once in a decade, such floods now occur almost every second year; they attributed this increase to global warming. During the same year, I met farmers on the east coast of Madagascar who had returned to their villages devastated by a cyclone. They knew how to deal with the yearly wind storms but felt that such storm had become stronger during the past decade, causing much more damage to houses and crops than before; these people, too, attributed this to climate change.

TO speak about climate change induced displacement as a form of forced migration and the challenges such displacement creates for international law is not an easy task. While we know that climate change causes glaciers to melt, sea-levels to raise, deserts to expand and wind-storms to grow stronger and more frequent, lawyers have difficulties to define what climate change is. Still, they may rely on the definition enshrined in Article 1 paragraph 2 of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) stating that „Climate change means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”

A somewhat wider definition of climate change is used by the Intergovernmental Panel on Climate Change (IPCC) which refers “to any change in climate over time, whether due to natural variability or as a result of human activity.”<sup>2</sup> Taking into account that despite convincing scientific evidence<sup>3</sup> to the contrary, some people still doubt whether our greenhouse gas emissions are the main cause of global warming, this definition has the advantage of delinking climate change from its sometimes disputed causes.

Still, the law does not provide an answer as to whether and to what extent the climate is changing, or whether the causes are indeed human-made. And while international law – in the form of the 1998 Kyoto Protocol United Nations

Framework Convention on Climate Change and hopefully more efficiently on the basis of a future strong successor international agreement – may tell States what measures to adopt to fight climate change, it cannot determine whether these measures will have the desired effects. These questions are best left to scientists who have studied the complexities of weather and climate. However, issues of climate change are relevant for students of forced migration as we are increasingly becoming aware that while climate change as such does not cause displacement, certain of its effects already do and are likely to do so even more in the coming decades.

**M**y presentation will first shortly describe three distinct sets of obligations States are confronted with under international law. I then will look at the different scenarios that may trigger displacement as a consequence of the effects of climate change. This will be followed by a discussion of existing normative frameworks to protect persons displaced by effects of climate change and the gaps that exist in this regard. I will end my presentation with some remarks on the way forward and a word of caution.

### **Climate Change: General Obligations of States under International Law**

**L**et us begin with the big picture. In the context of climate change States face three types of challenges under international law, namely *mitigation*, i.e. the task of mitigating the degree of climate change, in particular by reducing greenhouse

gas emissions, *adaptation*, i.e. the challenge of how best to adapt to the threats caused by the effects of climate change, and *protection*, i.e. the obligation to secure the rights and addressing the humanitarian needs of people affected by negative effects of climate change.

- **Addressing the Cause: Mitigating Climate Change.**

State parties to the UNFCCC and its Kyoto Protocol have committed themselves to reducing the emission of greenhouse gases. These mitigation measures aim at slowing down and eventually stopping the change of climate and its disastrous consequences. As such, they have an important preventive effect on displacement. This preventive character hopefully will be strengthened in the successor agreement to the Kyoto Protocol in particular by introducing a more effective climate regime based on comprehensive quantified emission limitations. As a hopeful sign, States participating in the 2010 UN Climate Change Conference in Cancún, Mexico agreed “that countries need to work to stay below a two degree temperature rise.”<sup>4</sup> The specific content of this commitment, however, and the question as to which States should be bound by it in a future legal instrument are still highly contested.

- **Addressing the Effects: Adapting to the Effects of Climate Change by Reducing Risks Created by Climate Change and Vulnerabilities Caused by it**

Environmental and human impacts of climate

change are already felt today. Additional global warming, even if it stays below two degree centigrade, will have substantial additional negative impacts. Faced with this reality, governments are expected to take measures to adapt to these new realities by reducing the adverse effects of climate change, e.g. by addressing the impact of natural hazards through reducing vulnerabilities or enhancing resilience capacities. The 2005 “Hyogo Framework for Action: Building the Resilience of Nations and Communities to Disasters” as well as the “Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention”, adopted as part of the Cancún Agreements in November 2010<sup>5</sup> provide States with guidance on how to approach adaptation measures.

These frameworks are complemented by human rights obligations directly relevant for addressing displacement. Reduction of disaster risks and vulnerabilities, e.g. by setting up alarm and evacuation systems, has been defined by the European Court of Human Rights as a human rights obligation. If a disaster is foreseeable and the State is able to prevent ensuing threats to the life and property of persons, it has to take appropriate action in conformity with its human rights obligations under the right to life and/or the protection of privacy and property.<sup>6</sup> According to this case law, the right to life and its corresponding state obligation to protect life require that, with regard to natural disasters, including those caused by climate change,

competent authorities must: (i) enact and implement laws dealing with all relevant aspects of disaster risk mitigation and set up the necessary mechanisms and procedures; (ii) take the necessary administrative measures, including supervising potentially dangerous situations; (iii) inform the population about possible dangers and risks; (iv) evacuate potentially affected populations; (v) conduct criminal investigations and prosecute those responsible for having neglected their duties in case of deaths caused by a disaster; and (vi) compensate surviving relatives of victims killed as a consequence of neglecting these duties.<sup>7</sup> While the judgements of the European Court of Human Rights do not apply outside Europe, this case law can and should inspire domestic courts in South Asia and elsewhere to adopt a similar approach on the basis of right to life guarantees as enshrined in national constitutions.

- **Addressing the Impact: Protecting Individuals Displaced by the Effects of Climate Change**

Mitigation and ex-ante adaptation measures are often insufficient to protect individuals from suffering the impact of climate change, including from being displaced by effects such as sudden-onset hydro-meteorological disasters. In a wider sense, adaptation measures must therefore also cover protection of and assistance for persons negatively affected by the effects of climate change. States as primary duty bearers are bound by human rights law to protect the rights of those

affected. *Inter alia*, the 1998 United Nations Guiding Principles on Internal Displacement<sup>8</sup> play an important role in addressing the protection needs of those displaced by the effects of climate change. Another relevant instrument for such settings, the Operational Guidelines on Human Rights and Natural Disasters, has been adopted by the Inter-Agency Standing Committee in 2006 and revised in 2010.<sup>9</sup> They apply to all disaster-affected persons, including displaced persons.

Addressing these three challenges is particularly relevant in the context of forced migrations as mitigation, adaptation and protection contribute to the prevention of displacement, the well-being of affected persons during displacement and the kind of durable solutions that can be found for such people. However, while mitigation and adaptation are on the agenda of the regular conferences of States Parties to the UNFCCC, the protection dimension and with it displacement triggered by the effects of climate change have been largely neglected in international discussions thus far. This is why the Heads of Organizations of the United Nations Inter-Agency Standing Committee – the coordinating body of the UN humanitarian agencies and big international humanitarian NGOs – addressed, in April 2009, a letter to the Executive Secretary of the United Nations Framework Convention on Climate Change calling for acknowledging and addressing the humanitarian consequences of climate change in the envisaged successor agreement to the Kyoto Protocol. They drew attention to the fact that over the past two

decades recorded climate related disasters doubled from approximately 200 to 400 per year and highlighted the tripling of the number of people affected by disasters over the past decade, reaching an average of 211 million people directly affected annually, and the increase of economic losses to more than \$83 billion per year.<sup>10</sup>

### **Understanding Climate Change Induced Displacement: Causes and Magnitude**

**B**efore looking at the protection challenges in the context of climate-induced displacement and examining whether international law provides a sufficient normative framework to address them, we need to get a better understanding of how and in what contexts climate change and its effects may trigger displacement.

**A** good point of departure are findings of the Intergovernmental Panel on Climate Change (IPCC)<sup>11</sup> that are particularly relevant for the issue of displacement:

- (1) Climate change is likely to reduce water availability, particularly in parts of the tropics, the Mediterranean and Middle Eastern regions and the Southern tips of Africa and Latin America. In contrast, water availability may increase in parts of Eastern Africa, South-Asia, China, and the Northern Latitudes. Hundreds of millions of people will experience water stress, whether due to too

little or too much water, i.e. drought or flooding.

- (2) A decrease in crop yields is projected, increasing the likelihood that additional tens of millions of people will be at risk of hunger. The most affected region is likely to be Africa.
- (3) Due to rising sea-levels, the densely populated “mega-deltas,” especially in Asia, including South Asia, and Africa, and small islands are at greatest risk from floods, storms and coastal flooding and eventual submerging, again with a potential impact on tens of millions of people.

According to the Panel, it is likely that the potential for population movements will increase during the second half of the 21<sup>st</sup> century because areas affected by drought, intense tropical cyclone activities and incidences of extreme high sea levels will increase.<sup>12</sup>

Based on this, we can identify at least five scenarios<sup>13</sup> indicating direct or indirect effects of climate change that may trigger displacement:

- (i) *Sudden-onset hydro-meteorological disasters*, such as flooding, cyclones or mudslides can cause large-scale displacement and incur huge economic costs. The 2010 flooding in Pakistan with up to 20 million affected people, many of whom were displaced for shorter or longer periods, is a particularly striking example. Displacement caused by sudden-

onset disasters need not be long-term, depending on recovery efforts, and return remains in the majority of cases possible. Certainly, many hydro-meteorological disasters occur regardless of climate change and to establishing that a particular disaster was caused by climate change is hardly ever possible. However, as outlined above, the overall number of such disasters and their impact has dramatically increased over the past two decades, indicating that the overall negative trend may in fact be due to global warming and the climate change caused by it.

- (ii) *Slow onset environmental disasters* such as reduced water availability and droughts, desertification, long-term effects of recurrent flooding, rising sea levels destroying costal zones, or increasing salination of ground-water and soil may also trigger population movements. Costal zones in Bangladesh offer a striking example of such situations. In general, economic opportunities and conditions of life will deteriorate in areas affected by slow-onset disasters. Such deterioration may initially not cause displacement but become one of the reasons why people move to regions with better income opportunities and living conditions. However, if areas become uninhabitable because of complete desertification or “sinking” costal zones, then population movements amount to forced displacement and become permanent.

- (iii) The case of “*sinking*” *Small Island States* caused by rising sea levels constitutes a particular challenge, in particular for the Maldives, States in the Pacific such as Kiribati and Tuvalu, and some countries in the Caribbean sea. As a consequence, such areas risk becoming uninhabitable. In extreme cases, the remaining territory of affected states will no longer accommodate the entire population or even disappear as a whole. In this case, people become permanently displaced to other countries.
- (iv) Disasters will increase the need for governments to *designate areas as high-risk zones* too dangerous for human habitation. This means that people may have to be (forcibly) evacuated and displaced from their lands, prohibited from returning, and permanently relocated to safe areas. This could occur, for example, because of increased risk of flooding or mudslides due to the thaw of the permafrost in mountain regions, but also along rivers and coastal plains prone to flooding.
- (v) A decrease in essential resources such as water or fertile land due to climate change may trigger *unrest seriously disturbing public order, violence and armed conflict*. This is most likely to affect regions that have reduced water availability and that cannot easily adapt (e.g. by switching to economic activities requiring less water) due to poverty. Increased inter-

communal violence has, e.g. been reported from the Lake Chad region where one of Africa's largest sweet water lakes is drying up. Such conflicts are difficult to end as there is little chance to reach peace agreements providing for the equitable sharing resources.

While we can identify the key scenarios that in the context of climate change may trigger displacement, we do not know how many people will be displaced, and when and where this will happen. Already in the 1990s, the IPCC mentioned migration as one of the major effects of climate change. Some see a direct relationship between the degree of global warming, the number of disasters causing displacement and the magnitude of the number of persons affected by it. Thus, a maximalist school of thought expects hundreds of millions, or even up to a billion, people to be displaced as a consequence of climate change.<sup>14</sup> The Stern Review, e.g., estimated that 150-200 million may become permanently displaced due to the effects of climate change by the year 2050.<sup>15</sup> By contrast, a minimalist approach stresses that displacement is triggered by complex and multiple causes among which climate change is just one, and predicts that the number of cases where displacement can be directly linked to the effects of climate change will be few.<sup>16</sup>

Overall, the phenomenon of displacement due to the effects of climate change is highly complex and in many ways little understood. Nevertheless, there is growing evidence that the number of people affected by climate-related disasters

is very substantial and likely to increase. The Norwegian Refugee Council's Internal Displacement Monitoring Centre and the UN's Office for the Coordination of Humanitarian Affairs, for instance, found that, 'at least 36 million people were displaced by sudden-onset natural disasters in 2008. Of those, over 20 million were displaced by climate-related disasters, while almost 16 million were displaced by non-climate-related disasters'.<sup>17</sup>

**D**espite the incertitude regarding the magnitude and dynamics of what will happen, we can conclude that

- (1) Climate change *per se* does not trigger movement of persons, but some of its effects do, including sudden and slow on-set disasters and certain ways of governments or communities to react to such disasters.
- (2) To establish strict causalities between climate change and such events, however, is very difficult or even impossible in most cases; events described in the five scenarios should therefore be the point of reference for discussions about displacement in the context of climate related natural or human-made disasters, not climate change as such;
- (3) Such movement may be voluntary, or it may be forced; and
- (4) It may take place inside a country or across international borders.

## *Protecting People Displaced by Natural Disasters: Normative Frameworks and their Gaps*

The five scenarios outlined above can help (1) to identify the character of population movements, *i.e.*, whether they are forced or voluntary, (2) to qualify those who move: Are they migrants, internally displaced persons (IDPs), refugees, stateless persons, other something else altogether?), and (3) to assess whether and to what extent present international law is equipped and provides adequate normative frameworks to address the protection and assistance needs of such persons. Regarding the five scenarios, I would like to highlight the following:

- (1) *Sudden-onset hydro-meteorological disasters* can trigger forced displacement: Two situations should be distinguished: *First*, cases in which most of the displaced remain inside their country: Such persons qualify as internally displaced persons, *i.e.* “persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of [...] natural or human-made disasters, and who have not crossed an internationally recognized State border”. They are entitled to receive protection and assistance under human rights law and in accordance with the UN 1998 Guiding Principles on Internal Displacement which spell out and make explicit the rights of internally displaced persons as they are inherent in general human rights guarantees. While non-binding as such, the Guiding

Principles are based on and reflect binding international law and are today recognized by the UN General Assembly and the UN Human Rights Council as “important international framework for the protection of internally displaced persons.”<sup>18</sup> For these internally displaced persons, the existing normative framework is sufficient, albeit the challenge of full respect for and implementation of these guarantees remains in many parts of the world.

*Second*, cases in which some of the displaced cross an internationally recognized state border, *e.g.*, because the only escape route leads there, because the protection and assistance capacities of their country are exhausted, or because they hope for better protection and assistance abroad. Such persons have no particular protected (legal) status – they neither qualify as refugees<sup>19</sup> as they do not flee persecution on account of their race, religion, ethnic origin, political opinion or other similarly relevant reasons, nor are they economic migrants as defined by human rights law, *i.e.* persons “engaged in a remunerated activity in a State of which they are not nationals”.<sup>20</sup> In some cases in the past, host governments have, for humanitarian reasons, allowed such persons to stay until they could return to their countries in safety and dignity<sup>21</sup>, but practice has not been uniform. The status of these persons remains unclear and despite the applicability of human rights law there is a risk that these persons will end up in a legal limbo.

- (2) *Situations of slow onset environmental disasters trigger several types of movements of persons:* General deterioration of conditions of life and economic opportunities as a consequence of slow-onset disasters may prompt persons to look for better opportunities and living conditions in other parts of the country or abroad before the areas they live in become uninhabitable. These persons are protected by human rights law, including, if they move to a foreign country, guarantees specifically protecting migrant workers. However, they do not possess a right to be admitted to a particular country or to remain there.

If areas start to become uninhabitable, because of complete desertification, widespread salination of soil and ground-water or coastal zones becoming permanently submerged by rising sea levels, movements may amount to forced displacement and become permanent as inhabitants of such regions no longer have a choice except to leave – or if they left earlier on a voluntary basis, stay away – permanently. If in this latter case the people remain within their country, they are internally displaced persons and fall within the ambit of the Guiding Principles on Internal Displacement. If they go abroad, they are not primarily economic migrants as defined by the Convention on the Human Rights of Migrant Workers and their Families even though they may fall within the ambit of this convention if they engage in an economic activity in one of the relatively few countries that have ratified this instrument.<sup>22</sup> In general, however, they have no protection other than that afforded by

international human rights law; in particular, they have no right under international law to enter and remain in another country, and thus are dependant upon the generosity of host countries. This scenario poses two particular challenges: There is a lack of criteria to determine where to draw the line between voluntary movement and forced displacement. Furthermore, those forcibly displaced to other countries remain without *specific* protection as they do not qualify as refugees for the reasons indicated above.

- (3) The “*sinking*” of *Small Islands States will be gradual*: In the initial phases, this slow-onset disaster will incite persons to migrate to other islands belonging to the same country or to other countries in search of better opportunities. If they migrate abroad, these persons are protected by human rights law, including guarantees specifically protecting economic migrants but they neither possess a right to be admitted nor to remain there. Later, such movements take the character of forced displacement if the remaining territory is too small to accommodate the whole population or becomes uninhabitable or disappears entirely. Then, return will become impossible and the population becomes permanently displaced to other countries. Those moving abroad will be left in a legal limbo as they are neither economic migrants nor refugees. It is also unclear as to whether provisions on statelessness would apply. Article 1 of the Convention relating to the Status of Stateless Persons of 6 June 1960 defines “stateless person”

as “a person who is not considered as a national by any State under the operation of its law.” The governments of such countries may try to maintain a symbolic presence on their State territory (e.g. on a built up small island or platform) and their laws on citizenship may continue to be applied, e.g., to newly born children whose parents register them abroad at consulates of the country of origin. It is most unlikely that such governments would declare their State as no longer existing or that an organization such as the United Nations would make such a declaration. Rather, we can expect that relevant stakeholders would cling to the notion of statehood<sup>23</sup> of such entities even once it becomes fictitious and such fiction may continue to exist for a prolonged period of time.

- (4) *The designation of high risk zones too dangerous for human habitation* may trigger (forced) evacuations and displacement: Affected persons are internally displaced persons unless they are provided with durable solutions at relocations sites in accordance with international standards. Such solutions must be sustainable in order to avoid permanent and protracted displacement situations or even return to high risk zones exposing the lives of returnees to high risks. International human rights law, the Guiding Principles on Internal Displacement and analogous norms and guidelines on relocation in the context of development projects<sup>24</sup> provide a sufficient normative framework for addressing these situations.

Should people decide to leave their country because they reject relocation sites offered to them or because they are not offered any sustainable solutions in accordance with relevant human rights standards by their own government, protection will be limited to that offered by general human rights law, including provisions applicable to migrant workers. Nevertheless, their status remains unclear and they have no guaranteed right to enter and remain in the country of refuge.

- (5) *“Climate change-induced” unrest, violence and armed conflict* trigger forced displacement: Those remaining inside their own country are internally displaced persons. Those fleeing abroad may qualify as refugees protected by the 1951 Convention on the Status of Refugees or regional instruments or are persons in need of subsidiary forms of protection or temporary protection available for persons fleeing armed conflict. Thus, the available normative frameworks are the Guiding Principles on internal displacement, international humanitarian law, human rights law and refugee law. They provide a sufficient normative framework for addressing these situations since affected persons are fleeing a break down of public order, violence or armed conflict, rather than the changes brought about by climate change.

## ***Addressing the Gap: People Displaced Across International Frontiers***

The above analysis allows the following conclusions:

**First:** Existing human rights norms and the Guiding Principles on Internal Displacement provide sufficient protection for those *forcibly displaced inside their own country by sudden-onset disasters* (scenario i) or because their *place of origin has become uninhabitable* as a consequence of a *slow-onset disaster* (scenario ii), or been declared too dangerous for human habitation (scenario iv). The challenge here is proper implementation, not the lack of appropriate norms.

**Second:** Existing international law (international humanitarian law, human rights norms, Guiding Principles on Internal Displacement, refugee law) is, if properly implemented by all States concerned, sufficient to protect *persons displaced by a breakdown of law and order, violence or armed conflict triggered by the effects of climate change*, regardless of whether they cross an internationally recognized state border (scenario v).

**Third:** Normative gaps in present international law exist for persons crossing borders due to the effects of climate change. In general, State sovereignty in the area of admission and removal of foreigners is more limited where forced migrants are concerned than with regard to people migrating voluntarily. While States should accept that voluntary migration may be part of individual adaptation strategies to respond to negative effects of climate change and, depending on the circumstances, be facilitated as a contribution to adaptation in general, international law, with the exception of refugee law which prohibits under

certain circumstances rejection at the border of the country of refuge, provides no general entitlement to be admitted to another country.

**Fourth:** The main challenge is to clarify or even develop the normative framework applicable to persons crossing internationally recognized state borders in the wake of sudden-onset disasters (scenario i), as a consequence of slow-onset disasters (scenario ii), in the aftermath of the “sinking” of Small Island States (scenario iii), or in the wake of designation of their place of origin as high risk zone too dangerous for human habitation (scenario iv). In these cases, questions to be addressed include the following issues:

1. Should those moving voluntarily, on the one hand, and those being forcibly displaced across borders, on the other hand, be treated differently not only as regards assistance and protection while away from their homes but also as regards their possibility to be admitted to other countries and remain there at least temporarily? The answer seems obvious: Present international law, while recognizing that all human beings are entitled to the full enjoyment of human rights, does in fact differentiate between persons who move voluntarily and those forcibly displaced for whom special normative regimes (refugee law; Guiding Principles on Internal Displacement) have been developed at least in some cases.
2. Therefore, what criteria would be appropriate to distinguish, in the context of climate change, between those who voluntarily leave their homes

or places of habitual residence and those who are forced to leave or – even if they left voluntarily in the first place - can no longer return because of the effects of climate change and therefore need protection abroad? What would be the respective entitlements to assistance and protection of those leaving voluntarily and those forcibly displaced?

As regards the second question, there are different ways to develop criteria to determine when a movement across borders is no longer voluntary, but happens under compulsion. Let us look at a moment to refugee law to see whether it provides us with an answer. Except in certain cases described above, people displaced by effects of climate change are not refugees as defined by international law. While this suggests a different approach, some inspiration, nevertheless, can be taken from the three key elements of the refugee definition in article 1A(2) of the 1951 Refugee Convention. These are: (i) being outside the country of origin, (ii) because of persecution on account of specific reasons (race, religion, nationality, membership of a particular social group or political opinion), and (iii) being unable or unwilling to avail oneself of the protection of one's country.

People displaced across borders by the effects of climate change obviously fulfill the first criterion of having crossed a border. It is also obvious that, except in the case of scenario (v) and some other cases that will be rather exceptional, such people are not refugees because they do not fulfill the criterion of being persecuted on account of any of the relevant

reasons. However, similar to persecution, climate change related disasters and the unavailability of adequate food, drinking water or health services in their aftermath may constitute serious threats to life, limb and health. In this broader sense, refugees and those displaced by the effects of climate change face similar dangers as refugees, albeit for different reasons. The third criterion may also help to conceptualize solutions for these people. Exactly as we do for refugees, we should ask: Under what circumstances should those displaced across borders by negative effects of climate related disasters not be expected to go back to their country of origin, and therefore remain in need of some form of surrogate international protection, whether temporary or permanent? In general, the answer will, as for refugees, depend on the elements of inability or unwillingness of the authorities in the country of origin or habitual residence to provide the necessary protection—and in the case of natural disasters, assistance to the people concerned. There is, however, a difference between the two situations: in the case of persecution, the prima facie assumption is that the authorities of the country of origin are unwilling to protect the person concerned. In the case of disasters, the assumption should be a continued willingness of these authorities to provide protection and necessary assistance, but in many cases it will be clear that the ability to do so is at least temporarily limited or even non-existent. From the perspective of protection needs of affected people, the inability to obtain necessary protection and assistance from the country of origin must be the primary consideration

in the context of displacement caused by climate related disasters.

I would like to suggest that these criteria adequately help to determine who should be admitted at the border of another State and allowed to remain, at least temporarily. For instance, it seems obvious that at least in the case of arrival at a border of a neighboring country in the immediate aftermath of a sudden-onset, life-threatening natural disaster, those forced to flee should be initially admitted on the basis that their movement was forced at the moment of departure and they decided, to the best of their knowledge at the time of the disaster, that fleeing across a nearby border was the best option to reach safety.

The question whether people admitted in the aftermath of sudden- or slow-onset disasters can be obliged to return to their country of origin once the immediate danger is over is more complex. Here, the point of departure should not be the subjective motives of individuals or communities behind their decision to move, but rather whether, in light of the prevailing circumstances and the particular vulnerabilities of those concerned, they can be required to return to their country of origin. This 'returnability' test helps to better identify those in need of protection in another country. It covers not only those who actually flee to another country, but also those whose initial movement was voluntary but who now cannot be expected to return because the situation has deteriorated to such an extent that return is no longer an option. Unlike the test used to

determine who is an internally displaced person, which focuses primarily on the forced nature of departure, this test, like the one to determine refugee status, emphasizes the prognosis—whether it would be possible and safe to return.

The returnability of the person concerned should be analyzed on the basis of a three-pronged test that asks whether it is legally permissible, factually feasible and morally reasonable to oblige the person concerned to return to his or her country of origin or permanent residence.

**(1) *Legal Impediments: The Criterion of Permissibility***

There are certain cases where human rights law, by analogy to the refugee law principle of *non-refoulement*, prohibits return of certain persons. Such prohibition exists where there are substantial grounds to believe that an individual would face a real risk of torture or cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life if sent back to a particular country.<sup>25</sup> Arguably, this prohibition could be made fruitful for cases where rejection at the border or return would expose an individual to an imminent danger for life and limb related to the disaster causing their displacement.

**(2) *Factual Impediments: The Criterion of Feasibility***

Return may be factually impossible due to temporary technical impediments, such as when

roads are cut off by floods or airports in the country of origin closed. Return is also impossible for administrative reasons if the country of origin refuses readmission for technical or legal reasons: during an emergency, a country may lack the capacity to absorb large return flows, or it may prevent readmission of persons whose travel documents or proof of citizenship was destroyed, lost or left behind when they fled.

(3) ***Humanitarian Impediments: The Criterion of Reasonableness***

Even where return would be lawful and reasonable, people should not, on the basis of compassionate and humanitarian grounds, be expected to go back if the country of origin does not provide any assistance or protection, or if what is provided falls far below international standards of what would be considered adequate. The same is true where authorities do not provide any kind of durable solutions to the displaced that are in line with international standards and would allow them to resume normal lives, especially where areas of land have become (or have been declared) uninhabitable and people have been unable to find an acceptable alternative themselves.

If the answer to one of these questions—is return *permissible?* is it *feasible?* can it *reasonably be required?*—is ‘no’, then individuals concerned should be regarded as victims of forced displacement in need of protection and assistance in another State. In this case, they should be granted at least a

temporary stay in the country where they have found refuge until the conditions for their return are fulfilled. Permanent solutions on the territory of other States must be found particularly where vast parts of a country have become uninhabitable that it can no longer host its entire population or where, as in the case of “sinking” small island states the whole state territory disappears.

### *The Way Forward: Normative Frameworks*

A next step would consist of developing proposals for protection regimes applicable to those who were forced to seek refuge inside their own country or across an international border due to the effects of climate change. Their entitlements to assistance and protection, as well as their obligations, should also be elaborated. This can be done at different levels.

At the *domestic level*, we may look at existing provisions in domestic law addressing subsidiary or temporary protection that provide for or may be interpreted in a way to provide for such protection in the case of persons displaced by the effects of climate change and other environmental factors. For example, the US Immigration and Nationality Act provides for the possibility to grant Temporary Protection Status (TPS) for nationals of a foreign state if (i) there has been an environmental disaster in the foreign state resulting in a substantial, but temporary, disruption of living conditions; (ii) the foreign state is unable,

temporarily, to handle adequately the return of its own nationals; (iii) and the foreign state officially has requested such designation<sup>26</sup>. TPS was granted in the case of Hurricane Mitch that affected large parts of Central America in 1998. The Finnish Aliens Act also provides temporary protection to aliens in need of international protection and unable to return due to massive displacement as a result of an environmental disaster. Temporary protection is limited to three years<sup>27</sup>. As subsidiary protection – subsidiary to granting asylum - the law also foresees the issuance of residence permits based on the need for protection if a person cannot return to his or her home country or country of permanent residence because of an environmental disaster<sup>28</sup>. A similar provision for subsidiary protection is contained in the Swedish Aliens Act<sup>29</sup>. A recent expert meeting in Switzerland I attended concluded that the provisions in the Swiss asylum law dealing with subsidiary protection may be interpreted to cover relevant cases even though the law does not expressly mention natural or environmental disasters. More generally, States should include into their disaster management laws provisions addressing displacement as one effects of natural disasters.

The *regional level* would allow harmonizing differing domestic approaches. Examples already exist in the area of internal displacement. In Africa, the so called Great Lakes IDP-Protocol<sup>30</sup> covers those displaced by disasters. Article 3 obliges States “to the extent possible, [to] mitigate the consequences of displacement caused by natural disasters and natural causes” and to “establish and designate organs of

Government responsible for disaster emergency preparedness, coordinating protection and assistance to internally displaced persons”. Furthermore, States must “enact national legislation to domesticate the Guiding Principles fully and to provide a legal framework for their implementation within national legal systems” (Article 6, para. 3) and, in this context, to ensure that such legislation specifies the governmental organs responsible not only “for providing protection and assistance to internally displaced persons” but also for “disaster preparedness” (Article 6, paragraph 4(c)). The 2009 African Union Convention for the Protection and Assistance for Internally Displaced Persons in Africa (Kampala Convention) obliges States Parties to devise early warning systems in areas of potential displacement as well as establish and implement disaster risk reduction strategies, emergency and disaster preparedness and management measures (Article 4). Article 5, paragraph 4 provides, inter alia, that “States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change.” Furthermore, according to Article 12, paragraph 3, a “State Party shall be liable to make reparation to internally displaced persons for damage when such a State Party refrains from protecting and assisting internally displaced persons in the event of natural disasters.” As regards cross-border displacement, European Union law on the protection of persons forced to flee abroad includes provisions on temporary<sup>31</sup> and subsidiary protection<sup>32</sup> that could be interpreted in a way that would provide protection to those displaced cross-border by natural disasters.<sup>33</sup>

At the *international level*, besides the Guiding Principles on Internal Displacement no normative framework exists yet that would address cross-border displacement. Nevertheless, a first step towards a discussion of such framework was made at the 2010 Cancún Conference on Climate Change. The agreement on Long-term Cooperative Action under the Convention invites in paragraph 14 “all Parties to enhance action on adaptation under the Cancun Adaptation Framework, taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances, by undertaking, inter alia, [...] (f) Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels.”

This agreement is relevant in several regards. First, the international community recognizes for the first time the humanitarian consequences of climate change as an adaptation challenge. Second, displacement can be expected to become part of national adaptation plans foreseen by the agreement,<sup>34</sup> thus providing an entry point for protection issues. Finally, the agreement recognizes that efforts addressing displacement need to be undertaken not only at the national but also regional and international levels, thus putting internal as well as cross-border displacement on the international agenda. This is an important, albeit still limited step that needs to be

followed up by discussions on appropriate normative regimes closing current protection gaps. Besides cross-border displacement in the aftermath of sudden- or slow-onset disasters such discussions must, in particular, address the case of “sinking” Small Island States that cease to exist: The question of the responsibility of the international community, in particular regarding relocation, must be clarified. In other words, new law will be required if we are to avoid these populations becoming marginalized and disenfranchised inhabitants of their countries of refuge.

### ***Conclusion: A Word of Caution***

Let me conclude with a word of caution: despite its relevance for all those affected by climate change, laws and policies addressing climate related displacement should not ask whether climate change has triggered the movement. Why? At least now and in the near future, it is impossible to determine whether a *particular* disaster would or would not have happened without climate change. Moreover, an exclusive focus on climate change may incite us to neglect other causes of natural disasters and environmental changes such as volcano eruptions, tsunamis or earthquakes and thus amount to discrimination against persons having equally urgent protection needs. Just as we do not ask for the root causes behind the persecution of refugees (nationalism? ideologies? dissatisfaction within the army leading to a coup?), we should not ask what has caused relevant disasters. In determining whether and how to provide temporary or permanent international

protection for persons fleeing their country of origin in the aftermath of a disaster, it is enough instead to consider the environmental factors combined with the temporary or permanent unwillingness or inability of the country of origin to protect affected persons. We should therefore stop talking about “climate refugees”. If we need to coin a term, referring to *persons forcibly displaced internally or across international borders by environmental factors* would be more appropriate.

## Notes

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<sup>1</sup> Professor of Constitutional and International Law, Faculty of Law, University of Bern/Switzerland. Former Representative of the United Nations Secretary General on the Human Rights of Internally Displaced Persons (2004 – 2008). This valedictory lecture is based on Walter Kälin, Conceptualizing Climate-Induced Displacement, in: Jane McAdam (ed.), *Climate Change & Displacement – Multidisciplinary Perspectives*, Hart Publishing, Oxford 2010, pp. 81 -103 and id., *Climate Change, Migration Patterns and the Law*, IARLJ 8th World Conference 2009

<sup>2</sup> See Intergovernmental Panel on Climate Change, Fourth Assessment Report, Synthesis, Geneva 2007, p. 30 (available at: [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf))

<sup>3</sup> Id., pp. 36 -41.

<sup>4</sup> Framework Convention on Climate Change – Secretariat, Press Release: UN Climate Change Conference in Cancún delivers balanced package of decisions, restores faith in multilateral process, Cancún 11 November 2010.

<sup>5</sup> 2010 UN Climate Change Conference in Cancún, Mexico, Decision\*/CP.16, Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention, available at [http://unfccc.int/files/meetings/cop\\_16/application/pdf/cop16\\_1ca.pdf](http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_1ca.pdf) (last visited 27 December 2010).

<sup>6</sup> European Court of Human Rights, *Budayeva and others v. Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008.

<sup>7</sup> Walter Kälin/Claudine Haenni, Disaster risk mitigation – why human rights matter, in: *Forced Migration Review*, Issue 31, October 2008, pp. 38-39, at 39.

<sup>8</sup> UN Doc E/CN.4/1998/53/Add.2.

<sup>9</sup> IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, December 2010, available at <http://www.brookings.edu/projects/idp.aspx>.

<sup>10</sup> Letter dated 30 April 2009, on file with the author.

<sup>11</sup> See Intergovernmental Panel on Climate Change, Fourth Assessment Report, Synthesis, Geneva 2007, pp. 48 – 53.

<sup>12</sup> *Id.*, p. 53.

<sup>13</sup> These scenarios are a typology. In reality, they may coincide and overlap.

<sup>14</sup> N Myers, 'Environmental Refugees in a Globally Warmed World' (1993) 43 *BioScience* 252, at 257 estimated 150 million displaced persons by 2050. Christian Aid estimates 'that, unless strong preventative action is taken, between now and 2050 climate change will push the number of displaced people globally to at least 1 billion'; see Christian Aid, *The Human Tide: The Real Migration Crisis*, (May 2007) at 22.

<sup>15</sup> Stern, N., *The Economics of Climate Change – The Stern Review*, Cambridge, Cambridge University Press 2006, p. 77.

<sup>16</sup> On these two schools of thought, see J Morrissey, 'Environmental Change and Forced Migration: A State of the Art Review', Background paper for Refugee Studies Centre Workshop on Environmental Change and Displacement (January 2009)

[www.rsc.ox.ac.uk/PDFs/Environmental%20Change%20and%20Forced%20Migration%20Review%20-%20Morrissey.pdf](http://www.rsc.ox.ac.uk/PDFs/Environmental%20Change%20and%20Forced%20Migration%20Review%20-%20Morrissey.pdf)

<sup>17</sup> Office for the Coordination of Humanitarian Affairs, Internal Displacement Monitoring Centre and the Norwegian Refugee Council, *Monitoring Disaster Displacement in the Context of Climate Change: Findings of a Study by the United Nations Office for the Coordination of Humanitarian Affairs and the Internal Displacement Monitoring Centre* (Geneva, September 2009) 8–9.

<sup>18</sup> 2005 World Summit Outcome, General Assembly resolutions 60/1, para. 132; 62/153, para. 10; and 64/162, para. 11; and

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Human Rights Council resolutions 6/32, para. 5; and 14/6, para. 9.

<sup>19</sup> The term ‘refugee’ refers to the legal definition of the 1951 Convention on the Status of Refugees, the 1969 African Convention governing the specific aspects of Refugee problems in Africa as well as the 1984 Cartagena Declaration on Refugees. Art. 1A(2) of the 1951 Refugee Convention defines “refugee” as 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” The African Convention expands this notion to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.” The Cartagena Declaration on Refugees adds the criterion of “massive violation of human rights”.

<sup>20</sup> International law defines the term “migrant” only in the context of economic migration. According to Art. 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, a migrant is “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”

<sup>21</sup> See below, text accompanying footnote 28.

<sup>22</sup> See the definition of “migrant” above in footnote 20.

<sup>23</sup> Under general international law a state is defined by the three elements of permanent population, defined territory, and government able to enter into relations with other states. See the 1933 Montevideo Convention on the Rights and Duties of States, Article 1.

<sup>24</sup> See for example, World Bank Operational Policy 4.12 of 2001.

<sup>25</sup> This prohibition was derived by the European Court of Human Rights from article 3 of the European Convention on

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Human Rights (e.g., case of *Soering v United Kingdom*, 1989 and case of *Chahal v United Kingdom*, 1996, para 74) and the UN Human Rights Committee from article 7 of the ICCPR (see, e.g., case of *C v Australia*, Comm No 900/1999 [2002] para. 8.5; *Byaburanga v Denmark*, Comm No 1222/2003 [2004], para. 11.3).

<sup>26</sup> US Immigration and Nationality Act, Section 244

<sup>27</sup> Aliens Act of Finland 301/2004 with amendments up to 973/2007, Section 109.

<sup>28</sup> Aliens Act of Finland 301/2004 with amendments up to 973/2007, Section 88.

<sup>29</sup> Aliens Act of Sweden (2005:716), of 29 September 2005, Chapter 4, Section 2.

<sup>30</sup> Protocol on the Protection and Assistance to Internally Displaced Persons to the Declaration on Peace, Security, Democracy and Development in the Great Lakes Region of 14 and 15 December 2006

<sup>31</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons.

<sup>32</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

<sup>33</sup> The UK Home Office Minister stated in 2004 that “[t]he European temporary protection directive (...) will enable all European Member States to act quickly and in a co-ordinated manner in the rare event that people from another country need to be offered temporary assistance because of armed conflict or *natural disasters* in their home country” (emphasis added). Press release, UK Plans In Place To Protect Victims Of Humanitarian Disasters, 20 December 2004.

<sup>34</sup> See Long-term Cooperative Action under the Convention, paras. 14[a], 15 and 16 (available at <http://unfccc.int/2860.php>).



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***Kolkata, 15 December 2010***