



JURIDICUM

ENVIRONMENTAL MIGRANTS IN  
INTERNATIONAL LAW

An assessment of protection gaps and solutions

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# Summary

This study approaches the issue of environmental migration and examines to what extent contemporary international law provides protection to people migrating as a result of environmental factors. The research questions thus concerns to what extent current international law protect environmental migrants, and how the protection can be improved.

The purpose of this study is to draw attention to the increasing issue of environmental induced migration, to reveal the protection gaps in contemporary international law, and to stress the urgent need to address this problem adequately. A framework for the theme issue is provided by exploring links between environmental change and cross-border human migration. Evidence is reviewed demonstrating that millions of people have migrated or are likely to migrate as a result of environmental risk and hazard. Environmental change might cause displacement in a variety of manners: For example, migration might result from intensified drought and desertification affecting livelihoods, rising sea levels or intensified acute natural disasters. Accordingly, the different forms of environmentally induced migration require different approaches and actions by the international community.

Through a review of refugee law, environmental law, human rights law, the law on stateless persons and the system of Temporary Protected Status, it is concluded that none of these systems provides adequate protection to this particular group of people. However, these systems offer mixed potential to develop in this regard. Also, it is found that terminological and conceptual gaps exists and that it is crucial to provide a universal definition to this particular group of people in order to adequately address this issue.

Finally, it is concluded that, due to the complexity of the issue, a combination of the solutions examined would most probably be the most effective way of filling the protection gaps. It is argued that international refugee law is an inappropriate forum of addressing environmental migration for several reasons. The system of Temporary Protected Status is instead proven to have the most potential of offering protection to people migrating due to rapid environmental factors. At the same time, it is found that people migrating due to slow onset climate events would be better served by regional conventions drafted for this purpose, which focuses on people's unwillingness or impossibility to return to their state of origin, rather than focusing on the harm and impact already experienced.

# List of abbreviations

1951 Refugee Convention	1951 Convention Relating to the Status of Refugees as modified by the 1967 Protocol
1969 OAU Refugee Convention	1969 Convention Governing the Specific Aspects of Refugee Problems in Africa
EU	European Union
IASC	Inter-Agency Standing Committee
IDLO	International Development Law Organization
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
US	United States

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# Part I: Introduction

## 1.1 Background description

An increasing number of people are being forced from their homes by weather-related disasters, environmental degradation and changing climatic conditions.<sup>1</sup> Growing water scarcity, desertification, and decreased agricultural output are causing people to migrate, either because of a current or anticipated danger, or in order to support livelihoods.<sup>2</sup> Others are forced to move as a result of the increasing number of extreme weather events, such as storms, floods or tropical cyclones, which has resulted in areas of the world becoming inhabitable.<sup>3</sup> In addition, the prospect of entire nations submerging is real for small island states that, due to their large coastal areas and low elevation, will exacerbate the effects of environmentally induced disruptions.<sup>4</sup>

While refugees from persecution and war are protected by international law, it is unclear to what extent international law protects people being internationally displaced as a result of environmental factors. As a first protection gap, there is no universal definition of this particular group of people, and accordingly no agreement concerning who should be protected on reasons of environmentally induced displacement.<sup>5</sup> Articulating a clear definition of persons displaced due to climate change would thus appear to be a crucial starting point for international protection. However, creating a universal definition is problematic due to the difficulties with establishing the causal relationships between environmental changes and migration, and further due to the many different forms that environmentally induced migration may take.<sup>6</sup>

In addition to terminological gaps, there are also significant protection gaps in contemporary refugee law, environmental law, the law on stateless persons and human rights law. Thus, none of these systems adequately address cross-border migration induced by environmental factors. Furthermore, despite the fact that the system of Temporary Protected Status under domestic, regional, and customary international law has the potential of offering protection to the environmentally displaced, the current system has an equal amount of gaps which further leaves this vulnerable group of people in a legal vacuum.

Due to the foregoing causes, this is an issue that the international community has to address urgently, and that this study seeks to provide possible solutions for.

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<sup>1</sup> OHCHR, *Climate Change, Migration and Human Rights: Address* by Kyung-wha Kang Deputy High Commissioner for Human Rights Office of the United Nations High Commissioner for Human Rights at the Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities.

<sup>2</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 52; Renaud, Dun, Warner & Bogardi, *A Decision Framework for Environmentally Induced Migration*, 1; Biermann & Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, p 69.

<sup>3</sup> European Parliament, Kraler, Cernei, & Noack, *Legal and Policy Responses to Environmentally Induced Migration*, p 20.

<sup>4</sup> European Parliament, Kraler, Cernei, & Noack, *Legal and Policy Responses to Environmentally Induced Migration*, p 27.

<sup>5</sup> Warner, *Global Environmental Change and Migration: Government Challenges*, p 403.

<sup>6</sup> Gibb & Ford, *Should the United Nations Framework Convention on Climate Change Recognize Climate Migrants?*, p 2.

## **1.2 Purpose and research questions**

This study aims to draw attention to the increasing issue of environmentally induced displacement, and to stress the urgent need for international law to address this problem adequately. The study thus assesses and evaluates contemporary international law with the purpose of revealing the gaps in its protection of environmental migrants. Further, it aims to provide suggestions for evolution of the legal framework currently in place in order to arrive at more comprehensive responses to environmentally induced migration.

In order to fulfill this purpose, this study focuses specifically on the following questions: To what extent does current international law protect environmental migrants, and how could the protection be improved?

## **1.3 Limitation**

This study addresses environmental migrants who cross, or intend to cross, an internationally recognized border as a result of the adverse effects of diverse environmental events. In addition to this type of cross-border migration, the vast majority of movement because of environmental factors is domestic. However, this will not be the focus for this study because the latter primarily benefit from the protection of their respective government, as well as of the Guiding Principles on Internal Displacement.<sup>7</sup> The adequacy of those protections falls outside the scope of this study.

## **1.4 Method and materials**

This paper initially uses non-legal sources to describe the phenomena of environmental migrants and to identify the need for certain international protection.

The study then uses the legal dogmatic method to describe the current state of international law. Through this method, the paper evaluates contemporary international law and assesses whether it offers sufficient protection for environmental migrants. Then, from the perspective of needs, it identifies gaps in the law with respect to protecting the previously recognized needs of environmental migrants.

After having assessed the current protection under international law, the paper then surveys various proposals that have been made to fill the gaps as well as the author's own reflection on how the gaps could be filled. Thus, the study addresses the question on how international law should be modified in order to adequately protect the environmentally displaced.

The materials chosen are established primary and secondary sources of international law, referring to those laid down in article 38 of the Statute of the International Court of Justice. Specifically international conventions but also international custom has provided the basis for the discussions of the study. Also, as subsidiary means for the determination of rules of law, the teachings of the most highly qualified publicists of the various nations has been utilized, as found in books, articles, and working papers of relevant organizations.

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<sup>7</sup> UNHCR, Guiding Principles on Internal Displacement.

Due to the lack of relevant case law, the author has instead taken advantage of the diversity of literature on the subject. Additionally, a limited extent of domestic legislation has been examined in order to explore to what extent the instrument of Temporary Protected Status, which exists in some domestic systems, has the potential of providing adequate protection to environmental migrants.

## **1.5 Disposition**

Following the introduction, the second part of the study clarifies the urgent need for adequate protection of the environmentally displaced. The issue of environmentally induced migration is described and discussed, in particular its magnitude and complexity. It specifically develops upon three categories of migration that is caused by environmental factors: Namely, migration as a response to sea level rise, rapid onset climate events, and slow onset climate events. This section is crucial in order to create an understanding of in what way, and to what extent, international law needs protect this particular group of people. The second part of the paper additionally surveys the diverse opinions among scholars concerning the definition of this group of people. As will be revealed, the lack of a universal definition constitutes a major gap in the contemporary normative framework, and articulating a clear definition of persons displaced due to climate change thus appears to be a crucial starting point for international protection. After having assessed the complexity of defining environmentally induced displacement, and the different approaches towards it, the paper describes why 'environmental migrant' is the most appropriate term to define this particular group of people, and consequently also the term that will be used throughout the study.

In its third part, the paper analyses the contemporary international law that might relate to environmentally induced migration. Specifically, international refugee law, international environmental law, international human rights law and the law on stateless persons will be examined in further detail, and the existing gaps in their application and protection of environmental migrants will be revealed. The same will be done for the practice of Temporary Protected Status, as it exists in domestic law, EU law, as well as customary international law. The paper will thus examine to what extent the system of Temporary Protected Status currently offers protection to environmental migrants.

The fourth part of the study assesses possible means of filling the gaps identified in the third part, and advantages as well as disadvantages of adapting the respective measures will be further provided. Four different variations of filling the protection gaps will be discussed in further detail: Namely, the extending of the scope of the 1951 Refugee Convention, the creating of a new instrument that encompasses environmental migration, the adding of a protocol to the UNFCCC, and the extending of the system of Temporary Protected Status.

The study then ends with a section of concluding remarks, aiming to summarize the findings provided in the fourth part, and to provide a number of definitive general observations and conclusions on the subject.

## Part II: The issue of environmental migration

This chapter provides an examination of the widespread nature of environmental migration, as well as the different forms of and reasons for this phenomenon. The objective of this chapter is to create a stable platform that the subsequent chapters, concerning protection gaps in the contemporary international law and the proposals for more adequate legal covering of environmentally induced migration, will then be able to build upon.

### 2.1 The magnitude of the issue

The acknowledgment of the increasing issue of environmentally induced displacement has grown considerably during the past decades, and this has led to an awareness and discussion among scholars as well as international organizations concerning the need to protect environmental migrants.<sup>8</sup> For example, the IPCC stated as early as 1990 that: ‘The gravest effects of climate change may be those on human migration as millions are uprooted by shoreline erosion, coastal flooding and agricultural disruption.’<sup>9</sup> Similarly, the OHCHR has acknowledged that climate change may affect hundreds of millions of people in various ways, including through permanent international displacement.<sup>10</sup> In 2008, the Deputy High Commissioner for Human Rights correspondingly provided:

By 2050, hundreds of millions more people may become permanently displaced due to rising sea levels, floods, droughts, famine and hurricanes. The melting or collapse of ice sheets alone threatens the homes of 1 in every 20 people. Increased desertification and the alteration of ecosystems, by endangering communities' livelihoods, are also likely to trigger large population displacements.<sup>11</sup>

Accordingly, experts in environmental communities as well as in human rights communities have expressed their concern in the context of environmentally induced migration. Although the exact calculations of the number of environmental migrants vary between different assessments,<sup>12</sup> there at least seems to be a general agreement concerning the fact that the environmentally induced migration crisis will surpass all known refugee crises in terms of the

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<sup>8</sup> Reeves & Jousel, *Climate Refugees*, p 14; Chimni, *International refugee law – A reader*, p 272.

<sup>9</sup> Myers & Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena*, p 134.

<sup>10</sup> OHCHR, United Nations Joint Press Kit for Bali Climate Change Conference: The Human Rights Impact of Climate Change.

<sup>11</sup> OHCHR, Climate Change, Migration and Human Rights: Address by Kyung-wha Kang Deputy High Commissioner for Human Rights Office of the United Nations High Commissioner for Human Rights at the Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities.

<sup>12</sup> According to Myers, in 1995 there were already 25 million environmental refugees. Myers estimates that the total number of people at risk from sea-level rise by 2050 is likely to be 162 million. In addition, 50 million people could become refugees due to droughts and other climate change impacts. In total, Myers expects 212 million climate refugees by 2050. See: Myers, *Environmental Refugees: A Growing Phenomenon of the 21st Century*, p 609, 611. The Stern Review on the Economics of Climate Change maintains that Myers estimate has not been rigorously tested, because climate change will lead to the displacement of ‘hundreds of millions more people without sufficient water or food to survive or threatened by dangerous foods and increased disease.’ See: Stern, N, *The Stern Review on the Economics of Climate Change*, p 77. The UNFCCC offers a more immediate estimate for 2010 of possibly 50 million environmentally displaced people. This figure appears more or less in line with predictions that build on longer timeframes. See: UNFCCC Executive Secretary, Press Release of the Secretariat of the United Nations Framework Convention on Climate Change. In sum, most estimates currently appear to expect an additional number of climate refugees of about 200–250 million by 2050.

number of people affected.<sup>13</sup> Thus, environmental change will fundamentally affect the lives of millions of people who, either already have been forced, or will be forced over the next decades to migrate in order to seek protection in other areas.<sup>14</sup> Yet, as a working paper provided by the IASC has noted:

Neither the UN Framework Convention on Climate Change, nor its Kyoto Protocol, includes any provisions concerning specific assistance or protection for those who will be directly affected by the effects of climate change.<sup>15</sup>

The same goes for the other most relevant regimes of international law: Namely, refugee law, the law on stateless persons, and human rights law.<sup>16</sup> Thus, despite the fact that there is an increasing awareness concerning the issue, international law has not yet provided an answer for it. The reason for this is among other factors the complexity of the issue which will be developed upon in the forthcoming section.

## 2.2 The complexity of the issue

To address environmentally induced migration comprehensively under international law is a complex task because it requires a diversity of different approaches depending on the different types of factors that induces migration in different parts of the world. Some situations may require permanent international displacement, as will be the case of for example submerging states due to rising sea levels, or some cases of desertification or drought. In other situations temporary international protection might suffice, as could be the case of occasional storms or tropical cyclones. In such cases, even internal displacement might sufficiently respond to the needs of the people concerned, especially if the environmental impact is limited to only a portion of an affected state.

Three main categories of climate change effects are expected to contribute most to migration flows: Namely, submerging island states due to rising sea levels, an increasing quantity and intensity of storms, and drought, desertification, and water shortages.<sup>17</sup> In the upcoming section, these events will be divided into subsections of sea level rise and migration, rapid onset events and migration, and slow onset events and migration.

### 2.2.1 Sea level rise and migration

Sea level rise may be characterized as a slow onset gradual environmental change as well as a rapid onset climate event because it is also a contributor to the impact of flooding and storms.

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<sup>13</sup> Biermann & Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, p 61.

<sup>14</sup> Biermann & Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, p 61; Reeves & Jousel, *Climate Refugees*, p 14; Myers & Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena*, p 14; Chimni, *International refugee law – A reader*, p 272.

<sup>15</sup> IASC, *Climate Change, Migration and Displacement: Who will be affected?*, p 1.

<sup>16</sup> Nishimura, 'Environmental migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, p 8.

<sup>17</sup> Bush, *Redefining Environmental Refugees*, p 555; Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, p 355; Biermann & Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, p 69. For a general description of sea level increases, see also: IPCC, *Summary for Policymakers*.

This specific aspect is therefore allocated its own section. Further, given the possible disappearance of island states, and consequently the effective statelessness of inhabitants of the islands in question, sea level rise might be regarded as the most dramatic manifestation of climate change.

There is a genuine risk of complete submergence for small island states that will exacerbate the effects of environmentally induced disruptions because of their large coastal areas and low elevation.<sup>18</sup> The Maldives, for example, could see portions of its capital flooded by 2025, and half of the island is estimated to be flooded by 2100.<sup>19</sup> Further, the islands of Kiribati and Tuvalu, the Marshall Islands, and several Caribbean islands, are urgently threatened and will eventually end up completely submerged.<sup>20</sup> In such cases of complete submergence of states, the island residents are effectively rendered stateless and can consequently neither be displaced internally nor enjoy any other protection of their respective governments.

While some states may cease to exist, others might lose portions of territory, which would in turn spur migration. Especially in regions of Asia major disruptions loom for certain low lying shoreline areas.<sup>21</sup> For example, Bangladesh consist to eighty percent of a delta, and IPCC calculations indicate that a rise in sea levels of 45 centimeters would displace 5.5 million people and submerge over 10 percent of Bangladesh.<sup>22</sup> Increased levels of migration are thus unavoidable.

### **2.2.2 Rapid onset climate events and migration**

There has been much publicity about rising sea levels and potentially submerging states.<sup>23</sup> However, extreme weather events such as storms, floods, earthquakes, volcanic eruptions, and tropical cyclones are examples of rapid onset climate events that equally cause inhabitants to migrate.<sup>24</sup> Often, this kind of migration occurs in an even more urgent manner as the populations have not been able to anticipate and prepare themselves for such events. Such events have nevertheless not received as much attention in the discussion concerning environmental migration. Yet, the number of these kinds of extreme weather events are predicted to grow as a result of environmental changes,<sup>25</sup> and people are thus increasingly

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<sup>18</sup> European Parliament, Kraller, Cernei, & Noack, *Legal and Policy Responses to Environmentally Induced Migration*, p 20, 27.

<sup>19</sup> Mcinerney-Lankford, Darrow & Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions*, p 14; Views Regarding the Work Programme of the United Nations Framework Convention on Climate Change, Ad Hoc Working Group on Long Term Cooperative Action under the Convention, Submission of the Maldives on Behalf of the Least Developed Countries, p 19.

<sup>20</sup> Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, p 356; Bush, *Redefining Environmental Refugees*, p 562; McAdam, *Climate Change, Forced Migration, and International Law*, p 19.

<sup>21</sup> Myers, *Environmental Refugees: A Growing Phenomenon of the 21st Century*, p 611, Biermann & Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, p 72.

<sup>22</sup> Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, p 505.

<sup>23</sup> European Parliament, Kraller, Cernei, & Noack, *Legal and Policy Responses to Environmentally Induced Migration*, p 20.

<sup>24</sup> European Parliament, Kraller, Cernei, & Noack, *Legal and Policy Responses to Environmentally Induced Migration*, p 20.

<sup>25</sup> IPCC, *Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, p 12, 52, 72.

displaced to avoid physical harm or loss of life, and because homes and livelihoods such as crops and productive assets are destroyed.<sup>26</sup>

The occurrence of migration related to rapid onset events is probably the easiest to identify because the impacts of the environmental events are relatively observable.<sup>27</sup> People migrating due to rapid onset climate events should accordingly be less difficult to encompass under international law. However, rapid onset events rarely lead to long-term and long-distance migration but rather short-term internal displacements,<sup>28</sup> unless social factors exacerbate the impact of the disaster, for instance if the affected society is highly dependent on the natural environment in order to support livelihood, and the natural environment is heavily damaged due to the extreme weather event in question.<sup>29</sup> The extent of cross-border migration depends further on the frequency and as well as on the extent of damage, and also on the management of the disaster response.<sup>30</sup>

As previously mentioned, the people that are cross-border migrating as a result of rapid onset climate events requires urgent protection responses by the international community. However, they habitually require only temporary protection as they will most likely be able and willing to return to their state of origin as soon as it is safe and the damage is repaired. The capacity to migrate over long distances is often also limited because of lack of the required resources.<sup>31</sup> What is required of international law in order to provide adequate protection for people migrating due to rapid onset climate events is thus a reliable system that determines where the migrants are entitled at least temporary protection, the extent and content of which might vary depending on the specific needs and circumstances of each case.

### 2.2.3 Slow onset climate events and migration

Drought, desertification and land degradation are the main slow onset events which are exacerbated by climate change and that contribute substantially to the number of environmental migrants.<sup>32</sup>

Globally, 10-20 percent of drylands<sup>33</sup> are already degraded.<sup>34</sup> The more than 2 billion people who live in these degraded areas are particularly vulnerable to loss of essential resources such

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<sup>26</sup> Tacoli, *Crisis or Adaptation? Migration and Climate Change in a Context of High Mobility*, p 518; IPCC, *Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, p 53.

<sup>27</sup> Warner, *Environmental Change and Migration: Issues for European Governance and Migration Management*, p 2.

<sup>28</sup> Kolmannskog & Trebbi, *Climate change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 717.

<sup>29</sup> Kolmannskog & Trebbi, *Climate Change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 717.

<sup>30</sup> Tacoli, *Crisis or Adaptation? Migration and Climate Change in a Context of High Mobility*, p 518.

<sup>31</sup> European Parliament, Kraler, A, Cemei, T & Noack, M, *Legal and Policy Responses to Environmentally Induced Migration*, p 20.

<sup>32</sup> Biermann & Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, p 69; Tacoli, *Crisis or Adaptation? Migration and Climate Change in a Context of High Mobility*, p 517-518; Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, p 504.

<sup>33</sup> Note: 'Drylands include all terrestrial regions where water scarcity limits the production of crops, forage, wood, and other ecosystem provisioning services.' See: Renaud, *A Decision Framework for Environmentally Induced Migration*, p 1.

as water supply.<sup>35</sup> Because water scarcity is anticipated to intensify as an effect of climate change, desertification will correspondingly be further exacerbated.<sup>36</sup> The people living in those areas might be affected economically as it will eventually be more difficult to support livelihoods, for example because of decline in agricultural productivity.<sup>37</sup> Consequently, desertification might cause mobility or at least be a contributing environmental push factor to migration, in addition to the often already existing social and economic factors that induce migration.

Even though a much larger number of people are anticipated to migrate as a result of slow onset climate events rather than rapid onset climate events,<sup>38</sup> the links between drought, land degradation, desertification and migration are multifaceted and more difficult to identify.<sup>39</sup> Because the environmental changes are slow, it is difficult to assess to what extent these factors contribute to migration. Furthermore, these slow impacts lead to more pro-active forms of migration rather than the kind of forced migration occurring during or after sudden-onset events,<sup>40</sup> and this type of environmental migration is therefore particularly difficult to address under the protection framework.<sup>41</sup>

Even so, over time, slow onset change will give environmental push factors an increasingly important position in the migration process.<sup>42</sup> Slow onset climate events thus requires being addressed by international law just as much as rapid onset events, however it is a more complex task.

## 2.3 Terminological and conceptual issues

A first gap in the contemporary normative framework is the lack of an agreed terminology. Terms such as migrant, displaced person, and refugee are often used synonymously and interchangeably.<sup>43</sup> However, from a legal perspective, such words have relatively distinct meanings and also describe regulatory brackets under which persons may invoke protection from states.<sup>44</sup>

As long as disagreement exists as to the definition over who may be covered by an instrument protecting the environmentally displaced, no adequate solution to the issue can be reached. Thus, articulating a clear definition of persons displaced due to climate change would appear

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<sup>34</sup> European Parliament, Kraler, A, Cernei, T & Noack, M, Legal and Policy Responses to Environmentally Induced Migration, p 20; IPCC, Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, p 30, 49, 65.

<sup>35</sup> European Parliament, Kraler, A, Cernei, T & Noack, M, Legal and Policy Responses to Environmentally Induced Migration, p 21.

<sup>36</sup> Renaud, Dun, Warner & Bogardi, A Decision Framework for Environmentally Induced Migration, 1.

<sup>37</sup> Tacoli, Crisis or Adaptation? Migration and Climate Change in a Context of High Mobility, p 517.

<sup>38</sup> European Parliament, Kraler, A, Cernei, T & Noack, M, Legal and Policy Responses to Environmentally Induced Migration, p 21.

<sup>39</sup> Warner, Hamza, Oliver-Smith, Renaud & Julca, Climate Change, Environmental Degradation and Migration, p 697.

<sup>40</sup> IOM, Migration, Environment and Climate Change: Assessing the Evidence, p 24.

<sup>41</sup> European Parliament, Kraler, A, Cernei, T & Noack, M, Legal and Policy Responses to Environmentally Induced Migration, p 21.

<sup>42</sup> Warner, Hamza, Oliver-Smith, Renaud & Julca, Climate Change, Environmental Degradation and Migration, p 696.

<sup>43</sup> Warner, *Global Environmental Change and Migration: Government Challenges*, p 403.

<sup>44</sup> Gogarty, Climate-Change Displacement: Current Legal Solutions to Future Global Problems, p 169.

to be a crucial starting point for international protection. Before turning to the adequacy of the current legal framework for the protection of displaced persons, and the proposed means of filling protection gaps, it is therefore important to examine the widespread dissensions concerning suitable terminology.<sup>45</sup> Also, in order to facilitate further discussion concerning the subject, this section will propose the terminology that is considered best suited to adequately cover the phenomena of environmentally induced migration, and that terminology will then be used throughout this study.

### 2.3.1 The difficulties with establishing a universal definition

To define environmental migrants is complex due to a variety of factors. For example, environmental change may be an important factor for the decision to migrate but it does not occur in isolation. While climate change may be the proximate trigger of migration, the impetus to migrate or not is often embedded in underlying and interacting economic, social, religious, cultural, political, and personal factors.<sup>46</sup> Accordingly, climate change often affects most those who are already vulnerable, such as poor persons or persons that depend on agriculture, environmental resources or ecosystems to be able to support their livelihood.<sup>47</sup> Existing political or social tensions may also be exacerbated due to climate change impacts, which could lead to internal conflicts and thereby further induce cross-border displacement.<sup>48</sup> It has thus been difficult to establish the causal relationships and consequences of environmentally induced migration.<sup>49</sup> This heightens the challenge of quantifying such migration and explains the wide range in expert estimates of environmental migrant populations. Further, this complexity makes it difficult to agree on who should be included in the definition, and who should not.

How international law should address different forms of environmental change constitutes another layer of complexity. As provided in previous sections, climate change contributes to both rapid onset events and slow onset events. Due to the diversity of the different types of environmental change, the migration might be forced or voluntary, permanent or temporary, and cross-border or internal. The phenomena may thus be defined with a broad term encompassing all types of migration caused by environmental factors, or the migrants may be divided into subsections more specified according to the different needs of each group. There are important contrasts when it comes to migration as a result of rapid onset events versus migration as a result of slow onset events. Rapid onset events, such as disaster scenarios, often mean that needs are immediate and displacement is large-scaled. In contrast, slow onset events might trigger migration in search of stability, security, opportunities to support livelihoods, and maintainable sources of food and water.<sup>50</sup> Due to these differences, there are

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<sup>45</sup> Khan, *Climate Change Vulnerabilities - Legal Status of the Displaced People*, p 327.

<sup>46</sup> Gibb & Ford, *Should the United Nations Framework Convention on Climate Change Recognize Climate Migrants?*, p 2.

<sup>47</sup> Nishimura, 'Environmental migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, p 6; Hunter, *Migration and Environmental Hazards*, p 287.

<sup>48</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 35; Nishimura, 'Environmental migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, p 6.

<sup>49</sup> Warner, *Environmental Change and Migration: Issues for European Governance and Migration Management*, p 2.

<sup>50</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 18-19.

different opinions concerning whether or not slow and rapid onset events should be separated for protection purposes and, if so, how.<sup>51</sup>

This study suggests that what is required is a flexible definition and a framework capable of including a broad diversity of situations. There might well be a need for different approaches to the different types of environmental migration under international law. However, for the purposes of defining this group of people in order to facilitate discussions, prevent misunderstandings, and be sure to not preclude anyone from legal protection, this study suggests the use of the term ‘environmental migrant’ for reasons provided for in the upcoming section.

### **2.3.2 Proposed terminology**

The lack of an agreement on a formal legal definition of this group of people need not preclude international action. Instead it should permit for more flexible responses. For instance, despite the fact that ‘terrorism’ has no uniform definition, there are many terrorism-focused UN Security Council resolutions and treaties. However, in order to facilitate the discussion concerning legal protection of the group of people in question and to prevent misunderstandings, this study advocates the usage of a universal definition.

This study will avoid terms such as ‘climate refugees’ or ‘environmental refugees’, for reasons that will be more profoundly developed upon later on, and instead make use of the term ‘environmental migrants’, which is a more general term that has the potential to cover all the different types of environmental migration without suggesting that such recognition would grant the group some special status or special rights as would the referring to the group as refugees.

The IOM has correspondingly suggested the use of the term ‘environmental migrants’ defined as follows:

Environmental migrants are persons or groups of persons who, for compelling reasons of sudden or progressive change in the environment that adversely affects 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 abroad.<sup>52</sup>

Such definition is conceivable to cover migrants that are migrating due to slow onset climate events, rapid onset climate events or sea level rise. However, even though the definition is capable of including most forms of environmentally induced migration, it might be preferable that the different types is nevertheless approached and protected differently under international law. That is a factor which will be examined in subsequent sections of this study. A consistent agreed definition of this particular group facilitates the discussion of whether this group of people is currently offered adequate protection under international law and, if not, what measures should be taken to fill eventual protection gaps. It also prevents misunderstandings. Despite the fact that the different forms of environmental migration might require different approaches, they all have need for some form of enforceable protection under international law. A broad, flexible, definition is therefore to prefer.

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<sup>51</sup> Nishimura, ‘Environmental migrants’: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, p 6.

<sup>52</sup> IOM, Migration, Environment and Climate Change: Assessing the Evidence, p 19.

## Part III: Protection gaps in the contemporary legal framework

In addition to lacking a clear definition, environmental migrants do not fit neatly into any international protection regime. As will be provided in this part, the most relevant regimes of international law - refugee law, climate change law, the law on stateless persons, and human rights law - do not address environmentally induced displacement adequately.<sup>53</sup>

The reason for this is that environmental migrants do not usually experience the sort of persecution that is necessary to fulfill the requirement of refugee. Further, the persons in question are not protected under current international environmental law agreements, as these tend to focus on the relationships and rights of states rather than individuals.<sup>54</sup> Environmental migrants cannot be considered completely stateless, even though a *de facto* statelessness is present, because the definition of statelessness in the 1954 Convention Relating to the Status of Stateless Persons is premised on the denial of nationality through the operation of the law of a particular state, rather than through the disappearance of a state altogether.<sup>55</sup> Furthermore, despite the fact that a diversity of human rights are affected by environmentally induced migration, there are today no explicit human rights protections for it and little recourse for potential violations.<sup>56</sup>

With the purpose of identifying a system adequate to cover the issue of environmentally induced migration, this section also examines whether the system of Temporary Protected Status offers protection to environmental migrants under domestic legislations, the EU system, as well as under customary international law.

### 3.1 International refugee law

Common definitions of people displaced due to climate change are ‘environmental refugees’ or ‘climate refugees’. While this terminology might be useful from a political perspective, in that it is a strong and definitive term that emphasizes the serious nature and urgency of the issue,<sup>57</sup> it is legally flawed for several reasons that will be further examined in this section.

The author of this study therefore holds the position that international refugee law is, by and large, an inappropriate normative framework for responding to the needs of those forced to migrate internationally on account of environmental impacts. Nevertheless, it is admitted that refugee law despite this has a useful standard to offer any new protection-oriented instrument, namely the forward-looking assessment of potential, future harm.<sup>58</sup>

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<sup>53</sup> Nishimura, ‘Environmental migrants’: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, p 8.

<sup>54</sup> Nishimura, ‘Environmental migrants’: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, p 8; Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, p 358.

<sup>55</sup> McAdam & Saul, *An Insecure Climate for Human Security? Climate-induced Displacement and International Law*, p 9.

<sup>56</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 54.

<sup>57</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 39.

<sup>58</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 39.

### 3.1.1 The 1951 Refugee Convention

The use of the terms ‘climate refugees’ and ‘environmental refugees’ is inaccurate and misleading from a sociological viewpoint as it presumes a single causality in the migration decision. It is equally misleading from a legal perspective because, under international law, the notion of ‘refugee’ has a distinct meaning.

While environmental factors can contribute to prompting cross-border movements, they are not in and of themselves grounds for the granting of refugee status under the 1951 Refugee Convention. Under the current state of international law, a refugee is someone who:

[O]wing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, 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 of the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>59</sup>

Thus, a migrant that cannot establish persecution based on one these enumerated grounds, such as an environmental migrant, is accordingly not normally provided the protections set out by the convention. Only those migrants fleeing persecution or conflict in addition to climate change impacts, and who cross international borders, will qualify as refugees and receive the protections that this recognition entails.<sup>60</sup> The terms of ‘climate refugee’ or ‘environmental refugee’ accordingly have no legal basis under contemporary international refugee law.<sup>61</sup>

Some authors have indeed argued that environmental migrants are protected under the 1951 Refugee Convention. For example, Cooper argues that because persecution occurs when government action harms individuals, the fact that governments knowingly harm individuals by causing or contributing to the degradation of their environment mean that the criteria of persecution is fulfilled.<sup>62</sup> However, the argument is unconvincing for the reasons presented hereinafter.

First, persecution entails violations of human rights that are considered especially grave due to the inherent nature of the violation or because of the repetition of violations.<sup>63</sup> Although adverse climate impacts such as desertification, rising sea levels or the increase in frequency of extreme weather events are harmful,<sup>64</sup> they do not meet the threshold of persecution as required under the 1951 Refugee Convention. This is the case even if the harm caused by climate change would be considered breaches of socio-economic rights, which is far from evident because the one causing the climate change, meaning then the violator of the socio-economic rights, is most often not the government of the state of origin of the migrants.<sup>65</sup>

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<sup>59</sup> The 1951 Convention relating to the Status of Refugees as modified by the 1967 Protocol, Article 1A (2).

<sup>60</sup> Nishimura, ‘Environmental migrants’: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, p 9.

<sup>61</sup> IASC, Climate Change, Migration and Displacement: Who will be affected?, p 4.

<sup>62</sup> Cooper, Environmental Refugees: Meeting the Requirements of the Refugee Definition, p 501-528.

<sup>63</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 43.

<sup>64</sup> OHCHR, Climate Change, Migration and Human Rights: Address by Kyung-wha Kang Deputy High Commissioner for Human Rights Office of the United Nations High Commissioner for Human Rights at the Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities.

<sup>65</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 43.

Further, in refugee law, for deprivation to go from non-realization of human rights to persecution, an element of discrimination is required which is linked to the five grounds recognized in the convention.<sup>66</sup> Thus, even if it would be accepted that the non-realization of human rights that might be the consequence of the effects of climate change would be grave enough to be covered by the 1951 Refugee Convention, it need to be established that the violations were of a discriminatory nature, executed for reasons of race, religion, nationality, membership of a particular social group or political opinions.

As mentioned, there are also difficulties with the defining of a persecutor. Refugees within the Refugee Convention definition migrate as a result of persecution that is either executed by their own government or otherwise by actors that the government is unable or unwilling to protect them from.<sup>67</sup> Contrariwise, an environmental migrant is not escaping his own government. He would be seeking refuge in the states that actually contribute to climate change, which means fleeing towards the persecutor. This de-linking of the persecutor from the territory from which the migration occurs is accordingly unknown to current international refugee law. This, in turn, poses another problem in defining this particular group of people as refugees.

Furthermore, climate change will rarely be the sole reason for displacement but rather exacerbate existing problems. It may provide a ‘tipping point’, but interact with other reasons for displacement.<sup>68</sup> The fact that it is problematic to establish that environmentally displaced persons migrate for the specific reason of environmental changes also makes it difficult to enable environmental refugees to obtain refugee status.<sup>69</sup>

Due to the foregoing causes, international refugee law is an inappropriate normative framework for responding to the needs of those forced to migrate internationally on account of environmental impacts. Migration due to climate change is accordingly not a reason in and of itself for someone to be considered a refugee under the 1951 Refugee Convention. Only those migrants fleeing persecution or conflict in addition to climate change impacts will qualify as refugees and thereby receive the protections this recognition entails.

Nevertheless, the 1951 Refugee Convention has a useful standard to offer any new protection-oriented instrument, namely the forward-looking assessment of potential, future harm.<sup>70</sup> The 1951 Refugee Convention’s definition of a ‘refugee’ is forward-looking in its assessment of harm as it requires the imminence of harm if the refugee in question would return,<sup>71</sup> and this is clearly a prerequisite that environmental migrants would fulfill and a useful tool for evaluating who should be offered protection. Such focus would benefit an instrument encompassing also pre-emptive migration as is often the case with migration due to slow onset events, as it would erase the need to prove that immense harm has already been experienced, and instead focus on the fact that their homes are becoming more and more inhabitable and migration is therefore required.

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<sup>66</sup> Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, p 104-105.

<sup>67</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 45.

<sup>68</sup> Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, p 359; McAdam, *Climate Change, Forced Migration, and International Law*, p 21.

<sup>69</sup> Afifi & Jäger, *Environment, Forced Migration and Social Vulnerability*, p 76.

<sup>70</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 39.

<sup>71</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 50.

However, the 1951 Refugee Convention at the same time requires that persecution has already occurred. This element of timing poses particular difficulties for pre-emptive migration due to slow onset impacts of climate change. Thus, the differentiated characteristics of the reasons for environmentally induced migration make it difficult to label all different forms refugees. In some cases, migration might be the only option because of anticipated sea level rise or increased desertification or drought that is expected to lead to difficulties with supporting livelihoods. Thus, even if the environmental factors in question would be considered persecution which is, as previously described, highly disputed, it is difficult to assess when exactly that persecution would have occurred, and how to address situations where persecution have not yet occurred but is expected to occur in near future and therefore requires out-migration. Also, there would be great difficulties with assessing the cases where environmental push factors has contributed to the migration decision, but is not the only provocation. Thus, the argument that environmental refugees should be considered encompassed under the 1951 Refugee Convention is a highly questionable one.

### 3.1.2 The 1969 OAU Refugee Convention

Under regional law one can find extensions of the definition in the 1951 Refugee convention. For example, the definition of a refugee in the 1969 OAU Refugee Convention builds on the one in the 1951 Convention, but is more plausible to encompass environmental migrants as it is extended to include a person:

[C]ompelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality because of events seriously disturbing public order in either part or the whole of his country of origin or nationality.<sup>72</sup>

Thus, according to this definition of a refugee, it seems likely that cross-border movements which take place as a result of natural disasters may also, depending on the circumstances, be encompassed.

However, when people displaced due to climate change in the past have fallen under the OAU Convention's auspices, other protection had been given by the host state, and therefore no precedent exists to show that this convention would in fact cover such situation.<sup>73</sup> Further, even though people fleeing environmental catastrophes are often granted refugee status in neighboring states,<sup>74</sup> receiving states have not declared that the reason for this would have been their obligations under the OAU convention.<sup>75</sup> Thus, while it might be considered that there is state practice to suggest that 'environmental refugees' is offered protection under the OAU convention, the parties to the convention does not seem to interpret the treaty provision in that way.<sup>76</sup>

Furthermore, even if the environmental factors causing the migration might be considered as 'events seriously disturbing public order', the 1969 OAU Refugee Convention is not forward-looking in its assessment of harm. By contrast to the 1951 Refugee Convention, which

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<sup>72</sup> The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, art 1 (2).

<sup>73</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 49.

<sup>74</sup> Note: For example, the Congolese fleeing the eruption of Mount Nyiragongo in 2002 received refuge in Uganda. See: Edwards, *Refugee status determination in Africa*, p 227.

<sup>75</sup> Edwards, *Refugee status determination in Africa*, p 227.

<sup>76</sup> Edwards, *Refugee status determination in Africa*, p 227.

assesses the risk of potential future harm, the 1969 OAU Refugee Convention requires evidence of an actual threat, and the protection under the convention is accordingly premised on having already been compelled to leave the country of origin because of it.<sup>77</sup> Thus, its utility as a tool for providing pre-emptive protection for environmental migrants is limited.

Accordingly, there are no indications that environmental migrants are in fact offered protection under the OAU convention, despite the fact that the plain language of its articles might be interpreted that way. The convention has not even been applied in cases of pre-emptive migration for other than environmental reasons.<sup>78</sup> Accordingly, the 1969 OAU Refugee Convention offers just as little protection to environmental refugees as the 1951 Refugee Convention. There are thus motives to examine other areas of law to seek protection for people displaced due to environmental factors.

### 3.2 International environmental law

As will be provided in the forthcoming section, international environmental law is, just as the international law on refugees, limited in its application to people migrating as a result of environmental factors.

The UNFCCC focuses mainly on climate change prevention and adaptation,<sup>79</sup> and the obligations under the UNFCCC are held between states. Thus, the convention focuses on interstate relationships rather than individual's rights and protection and does therefore not offer adequate protection to people displaced due to environmental factors.<sup>80</sup> This is clearly displayed in article 1 of the UNFCCC which provides that the ultimate objective of the convention:

[I]s to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>81</sup>

The convention does not mention environmental migration expressly. However, there are several factors that indicate that the convention could be used as an important tool in the strife towards protection of the climate change displaced. For example, article 8 provides that state parties shall give extra consideration to special needs and concerns of developing countries arising from the adverse effects of climate change. This pronouncement is followed by a list of parties in need of such extra consideration: These are among others small island countries, countries with low-lying coastal areas, countries with arid and semi-arid areas, countries with areas prone to natural disasters, and countries with areas liable to drought and desertification.<sup>82</sup> Thus, even though the convention does not mention the rights and needs of the individuals that migrate due to climate change, the convention recognizes that there is a need to take measures and cooperate especially when it comes to those most affected. The

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<sup>77</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 49.

<sup>78</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 49.

<sup>79</sup> UNFCCC; Nishimura, 'Environmental migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, p 10.

<sup>80</sup> Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, p 358.

<sup>81</sup> UNFCCC, art 1.

<sup>82</sup> UNFCCC, art 8.

focus is more of a financial one rather than a rights-based one. However, it might be relevant in the context of preventing and supporting countries affected by environmental migration.

Furthermore, the parties to the convention have actually, during the 2011 Cancun Conference,<sup>83</sup> identified environmentally induced migration as an important issue and even agreed to undertake:

[M]easures to enhance understanding, coordination and cooperation with regard to environmentally induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels.<sup>84</sup>

Notwithstanding the significance of this acknowledgement, these measures are voluntary and lack specificity. The result of this lack of specificity is that subsequent adaptation plans and activities commenced by parties pay little or no attention to environmentally induced migration.<sup>85</sup> Thus, in practice, the agreements have had little to no impact on the situation for environmental migrants.

Although the Cancun agreements neither obliges its signatories to take action, nor stipulates how any such implementation should occur, these agreements should be considered as significant because they embody an international recognition concerning the fact that environmentally induced migration might look very differently and thereby requires diverse responses. Further, it proves that the UNFCCC is a proper forum for taking actions and debating when it comes to at least financing and supporting environmentally induced displacement, and to raise awareness concerning this widespread issue. These agreements further indicate that the international community is receptive to the addressing of climate migration as an issue within the UNFCCC framework, and to cooperate with regard to it. Nevertheless, even though one might interpret this development as an opening for debate concerning the issue within the UNFCCC framework, the contemporary system is not, for the reasons provided for previously, adequate for offering protection for environmental migrants.

### 3.3 International law on stateless persons

Statelessness could be invoked by the population of low lying small island states that are heavily affected by sea level rises to the extent that they will end up completely submerged.<sup>86</sup>

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<sup>83</sup> The Cancun Conference was the 16th Conference held by the Parties to the UNFCCC. The conference was held in Cancun 29 November – 10 December 2011. At the conference, the parties reflected a growing concern of the international community for migrations induced by climate change, and the outcome of this concern was the Cancun agreements.

<sup>84</sup> UNFCCC, The Cancun agreements: Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, in Report of the Conference of the Parties on its sixteenth session, para 14 (f).

<sup>85</sup> Nishimura, 'Environmental migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, p 10.

<sup>86</sup> IDLO, Mayer, *Sustainable Development Law and Climate Change: International Law And Climate Migrants: A Human Rights Perspective*, 6. For a general description of the alarming situation concerning the Maldives and Tuvalu, see: McInerney-Lankford, Darrow & Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions*, p 14; UNFCCC, Views Regarding the Work Programme of the United Nations Framework Convention on Climate Change, Ad Hoc Working Group on Long Term Cooperative Action under the Convention, Submission of the Maldives on Behalf of the Least Developed Countries, p 19; Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, p 356; Bush,

This is the future for example in the cases of the islands of Kiribati and Tuvalu, the Marshall Islands, the Maldives, and several Caribbean islands.<sup>87</sup>

However, application of the law on stateless persons would require that a state's territory, population or government disappear.<sup>88</sup> It does not extend to the situation of *de facto* statelessness, namely where a person formally has a nationality, but which is ineffective in practice.<sup>89</sup> Yet, the territories of these low lying islands will become uninhabitable long before the total submersion of the islands.<sup>90</sup> Thus, people will be forced to migrate where there still exist a government in practice. Therefore, the first gap when it comes to the application of the law on stateless persons to environmental migration is that there is a need for protection before there being a complete statelessness and such cases of pre-emptive migration would thus not be covered by the law on stateless persons.

Further, even if pre-emptive environmental migrants would have been considered as stateless, the 1961 Convention on the Reduction of Statelessness provides only that it is: '[D]esirable to reduce statelessness by international agreement'.<sup>91</sup> Thus, the convention does not provide any enforceable right to a nationality and cannot be materialized into some concrete right to protection under international law.

Similarly, the Convention relating to the Status of Stateless Persons cannot be considered to offer adequate protection to environmental migrants. The convention only prohibits expulsion of stateless persons *lawfully* staying on the territory, except on ground of national security or public order.<sup>92</sup> This provision might be contrasted with the provision of the 1951 Refugee Convention that instead provides that states:

[S]hall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization.<sup>93</sup>

Thus, the law on stateless persons does not offer any right of protection to persons environmentally displaced, even if this group of people would have been defined as stateless. It only provides that persons that are already lawfully present in a receiving state cannot be expelled if they have no state to return to.

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Redefining Environmental Refugees, p 562; McAdam, *Climate Change, Forced Migration, and International Law*, p 19.

<sup>87</sup> Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, p 356; Bush, *Redefining Environmental Refugees*, p 562; McAdam, *Climate Change, Forced Migration, and International Law*, p 19.

<sup>88</sup> IDLO, Mayer, *Sustainable Development Law and Climate Change: International Law and Climate Migrants: A Human Rights Perspective*, p 6.

<sup>89</sup> McAdam & Saul, *An Insecure Climate for Human Security? Climate-induced Displacement and International Law*, p 9.

<sup>90</sup> IDLO, Mayer, *Sustainable Development Law and Climate Change: International Law and Climate Migrants: A Human Rights Perspective*, p 6.

<sup>91</sup> The 1961 Convention on the Reduction of Statelessness, preamble, recital 2. See also: The Universal Declaration on Human Rights, art 15.

<sup>92</sup> The 1954 Convention relating to the Status of Stateless Persons, art 31.

<sup>93</sup> The 1951 Refugee Convention, art 31.

Additionally, according to McAdam and Saul, the island citizens would not be protected under the 1954 Convention Relating to the Status of Stateless Persons,<sup>94</sup> because the definition of statelessness in that convention is premised on the denial of nationality through the operation of the law of a particular state, rather than through the disappearance of a state altogether.<sup>95</sup> Thus, for a person to be considered stateless under the 1954 Convention Relating to the Status of Stateless Persons, a government must actively have withdrawn the citizenship of the person concerned, or denied the person citizenship initially, and that person would therefore be considered stateless because he or she is not considered a national by any state under the operation of its law. A person that is rendered *de facto* stateless, because the state in which this person was considered a national has disappeared, is consequently not covered by the definition of a stateless person in the 1954 Convention Relating to the Status of Stateless Persons.

Thus, even in the case where an environmentally displaced person would have become *de facto* stateless due to the submerging of an island where this person was a resident, the law on stateless persons would not apply. Further, if the definition would have included *de facto* statelessness, the convention does not offer adequate protection because it is not rights-oriented and requires that the person is already *lawfully* staying on the territory of the receiving state. The instruments' narrowness leaves little scope for arguing for a broader interpretation through which people whose State disappears would be encompassed.<sup>96</sup> This would be the case only if the submerging state formally withdrew nationality and thereby brought them within the legal concept of statelessness.

### 3.4 International human rights law

Climate change has an impact upon people's enjoyment of their human rights.<sup>97</sup> Slow onset environmental events such as desertification, sea level rise, coastal erosion, and drought as well as rapid onset environmental events such as storms, floods, and tropical cyclones affect agriculture, infrastructure and habitability of certain areas of the world.<sup>98</sup> In turn, these events might threaten socio-economic human rights as for instance the right to life, food, water, health, housing or culture.<sup>99</sup>

International human rights law provides minimum standards of treatment that states are obliged only to afford persons within its jurisdiction,<sup>100</sup> or within its territory.<sup>101</sup> A handful of human rights principles are also recognized as giving rise to a duty for the receiving state not

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<sup>94</sup> Note: According to Article 1 of the 1954 Convention Relating to the Status of Stateless Persons, a stateless person is 'not considered as a national by any State under the operation of its law'.

<sup>95</sup> McAdam & Saul, *An Insecure Climate for Human Security? Climate-induced Displacement and International Law*, p 9.

<sup>96</sup> McAdam & Saul, *An Insecure Climate for Human Security? Climate-induced Displacement and International Law*, p 9.

<sup>97</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 52.

<sup>98</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 52.

<sup>99</sup> UNFCCC, The Cancun agreements: Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, in Report of the Conference of the Parties on its sixteenth session, para 18; McAdam, *Climate Change, Forced Migration, and International Law*, 52; Nishimura, 'Environmental migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, p 11.

<sup>100</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, art 1.

<sup>101</sup> The International Covenant on Civil and Political Rights, art 2 (1); McAdam, *Climate Change, Forced Migration, and International Law*, p 52.

to expel persons from its territory.<sup>102</sup> Human rights could accordingly offer some protection as it would prevent expulsion of the environmental migrant through the principle of *non-refoulement*.<sup>103</sup> Yet, even though *non-refoulement* under contemporary treaty law and customary international law includes non-return to persecution, torture, or cruel, inhuman, or degrading treatment or punishment,<sup>104</sup> it is far from evident that the principle would assist a person displaced by environmental factors.<sup>105</sup> On the contrary, it seems like this principle would not be of assistance at all.

Environmentally induced displacement does not meet the international definition of torture, which is defined as the intentional infliction of severe pain or suffering by a public official for an enumerated purpose such as punishment or obtaining a confession.<sup>106</sup> Environmental migration clearly does not meet any of the prerequisites of intentional infliction, public official or enumerated purpose. It is equally difficult to define the environmental events that are causing people to migrate as cruel, inhuman, or degrading treatment or punishment. This is because inhuman treatment requires actual bodily injury or intense physical or mental suffering, and degrading treatment means the humiliating or debasing of an individual and his or her human dignity.<sup>107</sup> There must accordingly be a risk that the person in question would be subjected to these kinds of acts by the public authorities in the state of origin if expelled, or else by people that the government in question is not capable of protecting the person from.<sup>108</sup> If there is no such risk, as in the case of environmental migration, the principle of *non-refoulement* does not apply.

Furthermore, despite the fact that environmental migration indeed jeopardizes a plurality of economic and social human rights, current jurisprudence put forward that violations of such rights would be inadequate to find a protection claim.<sup>109</sup>

When socio-economic human rights are violated as a result of climate change, there are difficulties as to holding anyone responsible for these violations.<sup>110</sup> For the principle to apply there is the pre-condition of the existence of a persecutor. Here, the same issue arises as arose in the attempt to label environmental migrants as refugees: Namely, the lack of a persecutor. If anyone would be considered a persecutor in this context, it would be the industrialized countries that most affect the global warming. In this case, the receiving countries would then be considered persecutors, as opposed to traditional protection which responds to flight from harm that is inflicted or sanctioned by the home state.<sup>111</sup> Accordingly, international human rights law does not have much to offer in the context of migration induced by environmental factors.

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<sup>102</sup> Edwards & Ferstman, *Human Security and Non-Citizens: Law, Policy and International Affairs*, p 378.

<sup>103</sup> Note: The principle of *Non-refoulement* in international law prohibits the returning of a victim of persecution to his or her persecutor. Generally, the persecutor in mind is a state actor. See: Goodwin-Gill & McAdam, *The Refugee in International Law*, p 344-345; IASC, *Climate Change, Migration and Displacement: Who will be Affected?*, p 11.

<sup>104</sup> Goodwin-Gill & McAdam, *The Refugee in International Law*, p 347-348.

<sup>105</sup> IASC, *Climate Change, Migration and Displacement: Who will be affected?*, p 12.

<sup>106</sup> The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art 1.

<sup>107</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 64.

<sup>108</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 65.

<sup>109</sup> IASC, *Climate Change, Migration and Displacement: Who will be affected?*, p 12.

<sup>110</sup> IASC, *Climate Change, Migration and Displacement: Who will be affected?*, p 10.

<sup>111</sup> IASC, *Climate Change, Migration and Displacement: Who will be affected?*, p 12.

### 3.5 The system of Temporary Protected Status

As will be provided in this section, there exists some domestic and regional law, and potentially even customary international law, that may allow for temporary protection of certain groups of people environmentally displaced.

Numerous countries have encompassed provisions in their disaster management legislation concerning assistance and protection for people that are affected by natural disasters in their country.<sup>112</sup> The EU has similarly developed a system that has the potential of offering temporary protection to some people displaced due to environmental factors.<sup>113</sup> There is also circumstantial evidence that states in the past have allowed for and actually received displaced persons on their territory as a temporary measure on an ad hoc basis, such as in the context of a flooding or storm.<sup>114</sup> In these situations, such measures have been taken on humanitarian grounds, not to adhere to obligations held under a particular domestic law or international treaty.<sup>115</sup> Thus, there are grounds for examining whether there might be a customary international law based obligation to offer temporary protection to people fleeing environmental disasters

#### 3.5.1 Temporary Protected Status in domestic systems

Several states have enacted a legislative system of temporary protection for disaster-induced cross-border displaced persons.<sup>116</sup> For example, the US Immigration and Nationality Act provides for the possibility to grant Temporary Protected Status 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>117</sup>

At a first glance, this provision seems suitable to provide protection to people displaced due to rapid onset environmental events, and the system has indeed been used for that purpose. For example, Temporary Protected Status was granted in the case of Hurricane Mitch that affected large parts of Central America in 1998.<sup>118</sup> Yet, in other situations of similar severity, such as the floods in Haiti in 2008, this system was not activated.<sup>119</sup> The system is thus discretionary and unreliable. Temporary Protected Status is thus not a strong, legal obligation to protect the

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<sup>112</sup> UNHCR, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, p 45.

<sup>113</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, Article 2 (e).

<sup>114</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 106.

<sup>115</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 106.

<sup>116</sup> UNHCR, High Commissioner's Dialogue on Protection Challenges, *Protection Gaps and Responses*, p 4.

<sup>117</sup> The Immigration and Nationality Act (USA) 8 USC, section 244.

<sup>118</sup> UNHCR, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, p 45.

<sup>119</sup> UNHCR, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, p 45.

individual, but rather an optional measure to take.<sup>120</sup> It is therefore an insufficient system as it is not first and foremost a duty towards the individual.<sup>121</sup> Further, the contemporary system in the US is inadequate as it is only available to designated nationals already in the US at the time of the disaster, and not to those fleeing subsequent to an environmental event.<sup>122</sup>

There are similar systems that offer temporary protection for people displaced due to environmental disaster in the Finnish Aliens Act,<sup>123</sup> as well as in the Swedish Aliens Act.<sup>124</sup> The Finnish legislation is the only domestic legislation in the EU explicitly granting temporary protection.<sup>125</sup> The Finnish legislation could thus serve as a model for filling the protection gap at the domestic level to persons who cannot return safely to their home country or country of permanent residence because of an environmental disaster. However, other domestic progress can similarly be seen. Argentina recently adopted legislation that provides for the possibility of access to provisional residence permits for those who do not have the opportunity to return to their country of origin as a result of an environmental disaster.<sup>126</sup>

Even though these models have the potential of covering migration due to rapid onset events, their common problem is that their granting of protection depends on the discretion of competent authorities rather than being based on a legal entitlement of persons concerned.<sup>127</sup> Thus, the models do not provide any predictable protection. Further, even if applied, the system is only capable of covering those displaced due to rapid onset events such as environmental disasters. Those displaced due to slow onset events or other sorts of permanent environmental harm is still left without protection.

### 3.5.2 Temporary Protected Status within the EU system

The EU Directive on ‘minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof’<sup>128</sup> would have had the potential of providing protection for at least certain environmentally displaced. However, this system has never been activated.<sup>129</sup> Even if it would be, the directive requires qualified majority of the council to be implemented, and it is unlikely for that to happen apart

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<sup>120</sup> Kolmannskog & Trebbi, *Climate change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 727.

<sup>121</sup> Kolmannskog & Trebbi, *Climate change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 727.

<sup>122</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 101.

<sup>123</sup> The Aliens Act 2004 (Finland) 301/2004, Section 88 (1): ‘Aliens residing in the country are issued with a residence permit on the basis of a need for protection if the requirements for granting asylum under section 87 are not met but the aliens are in their home country or country of permanent residence under the threat of death penalty, torture or other inhuman treatment or treatment violating human dignity, or if they cannot return there because of an armed conflict or *environmental disaster*. (emphasis added)

<sup>124</sup> The Aliens Act 2005 (Sweden), 716/2005, Chapter 4, Section 2 (3) & Chapter 5, Section 1.

<sup>125</sup> Kolmannskog & Trebbi, *Climate change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 728.

<sup>126</sup> UNHCR, High Commissioner’s Dialogue on Protection Challenges, *Protection Gaps and Responses*, p 4.

<sup>127</sup> UNHCR, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, p 46.

<sup>128</sup> Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof.

<sup>129</sup> Goodwin-Gill & McAdam, *The Refugee in International Law*, p 342.

from under very exceptional circumstances.<sup>130</sup> Also, the directive would not take effect unless the Council of the EU designates a particular flow as constituting a ‘mass influx’.<sup>131</sup> Thus, individuals will not be covered under this system, unless they arrive as part of a ‘mass influx’, which must be considered as a great weakness of this system if the goal is protection for displaced individuals.<sup>132</sup>

Another EU directive, namely the one ‘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>133</sup> has as its main objective to make member states apply an uniform criteria when identifying individuals that should be offered international protection and to provide them certain benefits. The directive grants subsidiary protection to a:

[T]hird country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering *serious harm* [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.<sup>134</sup>

There is an uncertainty in this definition concerning whether the term ‘serious harm’ is capable of covering an environmental disaster. Kolmannskog and Myrstad maintain that people displaced due to environmental reasons could be protected by applying this regime of temporary protection in the case of a sudden influx of people due to an environmental disaster.<sup>135</sup> This is because there is no exhaustive list as to who may be covered. However, the system has not yet been applied in such way.<sup>136</sup> Further, even if people displaced as a result of an environmental crisis would be covered under this system, the same issue arises as with the Temporary Protected Status as provided by domestic systems,<sup>137</sup> namely that people displaced due to permanent or long-lasting environmental damage would still not receive any protection.

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<sup>130</sup> IDLO, Mayer, *Sustainable Development Law and Climate Change: International Law And Climate Migrants: A Human Rights Perspective*, p 14; Kolmannskog & Trebbi, *Climate change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 727.

<sup>131</sup> Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, arts 15 (2), (3).

<sup>132</sup> Kolmannskog & Trebbi, *Climate change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 727.

<sup>133</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>134</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, Article 2 (e). (Emphasis added)

<sup>135</sup> Kolmannskog & Myrstad, *Environmental displacement in European asylum law*, p 317.

<sup>136</sup> Kolmannskog & Myrstad, *Environmental displacement in European asylum law*, p 317.

<sup>137</sup> Note: As described in sub-section 3.5.1.

### 3.5.2 Temporary Protected Status under customary international law

Even in the absence of legislation, some countries have the practice of granting some form of temporary protection to people who have been displaced due to a natural disaster.<sup>138</sup> This temporary protection is especially offered by neighboring states.<sup>139</sup> In some cases, state practice is guided by human rights considerations, while in other cases practice explicitly refers to natural disasters.<sup>140</sup> The general practice of states to protect people fleeing due to environmental events may be seen as a contribution to the developing of a right of temporary protection on humanitarian grounds under customary international law.<sup>141</sup>

For various reasons, states may prefer ad hoc humanitarian responses, that permit them to discretionary determine on a case-by-case basis whether or not to offer protection to migrants fleeing due to environmental causes, and also what kind of protection that may be offered in each case.<sup>142</sup> However, this practice is an unpredictable protection tool due to this discretionary ad hoc approach. Further, this practice of ad hoc protection seems to exist only as a response to environmental disasters rather than covering also pre-emptive migration for projected longer-term impacts. Thus, even if this practice would turn into a more reliable basis of protection it would only cover certain types of environmental migration. Also, it is dominated by humanitarian considerations rather than a rights-based approach and might therefore not be the best solution to cover the issue of environmentally induced displacement.

Besides, even if some countries offer this kind of protection to environmental migrants fleeing environmental disasters, article 38 of the Statute of the International Court of Justice defines international custom as ‘evidence of a general practice accepted as law’.<sup>143</sup> The protection offered by states responding to environmental disasters has differed in its application and extent. There seems to be dissenting opinions concerning whether such a right to protection exists at all, in what cases the protection should be offered, and how the protection should be construed. Thus, it is hard to define this practice as ‘evidence of a general practice’ which is one of the two elements required for customary international law to be created. It is likewise widely uncertain whether the second element of *opinio juris*<sup>144</sup> exists. For a customary international law norm to be created:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.<sup>145</sup>

Accordingly, despite the fact that some people that have migrated cross-border due to environmental disaster seem to have enjoyed at least some kind of temporary protection, there

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<sup>138</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 106.

<sup>139</sup> Note: For example, the Congolese fleeing the eruption of Mount Nyiragongo in 2002 received refuge in Uganda. See: Edwards, *Refugee status determination in Africa*, p 227.

<sup>140</sup> The Nansen Conference: *Climate Change and Displacement in the 21st Century*, Chairperson’s summary, para 22.

<sup>141</sup> Edwards, *Refugee status determination in Africa*, p 227.

<sup>142</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 106-107.

<sup>143</sup> Statute of the International Court of Justice, art 38 1 (b).

<sup>144</sup> Note: Under customary international law, *opinio juris* is the second element, along with state practice, necessary to establish a legally binding custom. *Opinio juris* denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question. Article 38 1 (b) of the Statute of the International Court of Justice requires that the general practice is ‘accepted as law’ for it to constitute customary international law, and it is this element that shows *opinio juris*.

<sup>145</sup> *North Sea Continental Shelf Cases*, para 77.

is not enough support to conclude that there is a norm under customary international law to grant such protection. Even if not considered binding as custom, the practice is commendable, but needs to be carried out in a systematic and less discretionary way.

### 3.6 A synopsis of the protection gaps reviewed

Having reviewed current international law, there is an evident lack of protection for environmental migrants. There are accordingly several protection gaps under all studied legislations as well as under the system of Temporary Protected Status.

First, environmental migrants are not protected under international refugee law because they do not usually experience the sort of persecution that is necessary to fulfill the requirement of refugee. Further, the de-linking of the persecutor from the territory from which the migration occurs, as would be required to cover environmental migrants by the refugee concept, is unknown to current international refugee law. Second, environmental migrants are not protected under current international environmental law agreements, as these tend to focus on the relationships and rights of states rather than individuals.<sup>146</sup> This system may thus be capable of preventing environmental migration and perhaps of supporting the protection of environmental migrants economically, but does not address the protection of individuals displaced due to environmental factors. Third, the concept of statelessness does not extend to the situation of *de facto* statelessness as would be required in order to encompass environmentally induced displacement. The definition of statelessness in the 1954 Convention Relating to the Status of Stateless Persons is premised on the denial of nationality through the operation of the law of a particular state, rather than through the disappearance of a state altogether.<sup>147</sup> Fourth, there are today no explicit human rights protections for environmentally induced displaced and little recourse for potential violations.<sup>148</sup> Also, it seems farfetched that the principle of *non-refoulement* would assist a person displaced by environmental factors,<sup>149</sup> especially since current jurisprudence put forward that violations of socio-economic rights would be inadequate to find such a protection claim. Fifth, the system of Temporary Protected Status is discretionary and varies significantly among different domestic systems, EU legislation and customary international law. Another major concern with the US system of Temporary Protected Status is that it is only available to migrants that are already in the US at the time of the disaster, and not to those fleeing subsequent to an environmental event. The EU system requires ‘mass influx’ in order to be applied, and are thus not available to individual situations. Even if this system were to be applied, people displaced due to permanent or long-lasting environmental damage would still not receive any protection.

In the next chapter, the most prominent protection gaps will be addressed further, and different means of filling these gaps will be provided and discussed in detail.

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<sup>146</sup> Nishimura, ‘Environmental migrants’: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies, p 8; Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, p 358.

<sup>147</sup> McAdam & Saul, *An Insecure Climate for Human Security? Climate-induced Displacement and International Law*, p 9.

<sup>148</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 54.

<sup>149</sup> IASC, *Climate Change, Migration and Displacement: Who will be affected?*, p 12.

## Part IV: Possible means of filling the protection gaps

In the prior chapter this paper concluded that current international law does not adequately address the protection needs of environmental migrants. This section consequently explores possible ways of doing so.

Some academics have proposed an extension of the scope of the 1951 Refugee Convention in order to encompass environmental migrants in the refugee definition.<sup>150</sup> Other academics have instead proposed a protocol to the UNFCCC, or drafting of a new convention similar to the 1951 Refugee, in order to increase the protection under international law of people displaced due to environmental factors.<sup>151</sup> Despite the different approaches as to the solution of the issue, the scholars seem to agree on the fact that some kind of drastic action is warranted due to the scale of the problem and the lack of effective response to the problem.<sup>152</sup>

The advantages and disadvantages of these proposed means of filling the protection gaps will be examined hereinafter. Furthermore, the prospects of filling protection gaps by extending the system of Temporary Protected Status will similarly be examined.

### 4.1 Extending the scope of the 1951 Refugee Convention

As has previously been provided, the current regime for protection of refugees does not cover environmentally induced migrants. This is, among other factors discussed under previous sections,<sup>153</sup> because the international definition of a refugee requires the element of persecution. However, it might be argued that the definition of refugee could be extended in order to provide this needed protection.

However, such solution is problematic for several reasons. The greatest problem with this solution is that the existing refugee regime is already overstretched and it is difficult to compel states to adhere to its principles. Due to the scale of the problem, many states are unwilling to extend the protection to such an extent or even to protect the people already covered by the convention.<sup>154</sup>

Additionally, there is institutional resistance with regard to an extending of the refugee concept to cover environmental migration. UNHCR as well as other international agencies are of the position that the terms ‘climate refugee’ and ‘environmental refugee’ should be avoided as the terms are misleading and undermines the international legal regime for the protection of refugees.<sup>155</sup> The 2011 Nansen Conference similarly stressed that misleading and inaccurate terms such as ‘climate refugee’ or ‘environmental refugee’ should be avoided. However, the

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<sup>150</sup> Biermann & Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, p 296.

<sup>151</sup> Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, p 350.

<sup>152</sup> Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, p 350.

<sup>153</sup> See section 3.1.

<sup>154</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 199; Piguet & Pécoud, *Migration and Climate Change*, p 141.

<sup>155</sup> UNHCR, *Climate Change, Natural Disasters and Human Displacement: a UNCHR Perspective*, p 7.

need to clarify terminology was clearly emphasized.<sup>156</sup> There seems to be an agreement that term ‘refugee’ as defined under the Refugee Convention might lose some of its significance if environmental migrants would be covered by the definition.

Another essential argument is that the concepts and mechanisms set out in the 1951 Refugee Convention, such as the persecution concept, is not suitable in the context of climate change and natural disaster. This is because of three main reasons. First, persecution entails human rights violations that are especially grave owing to the inherent nature of the violation or because of repetition of violations.<sup>157</sup> There are great difficulties with covering environmental changes under this perception first and foremost because no violations of human rights have usually occurred in the context of environmentally induced migration. If any human rights violations have occurred it would be violations of socio-economic rights, and such violations have not previously been held to amount to persecution. The second issue is the defining of the persecutor. Refugees within the Refugee Convention definition migrate as a result of persecution either executed by their own government or by actors that the government is unable or unwilling to protect them from.<sup>158</sup> Such a persecutor is challenging to define when it comes to environmental migration. Third, the underlying idea of the refugee regime is that refugee status substitutes for protection from the home states. Such perception is not suitable for environmentally induced migration.

As the prerequisite of ‘persecution’ cannot be met by environmental migrants, an extension of the definition of refugee under the 1951 Refugee Convention to include environmental migrants would mean a total transformation of the refugee concept. Critics including the UNHCR have therefore pointed out that any initiative to extend the refugee definition in the 1951 Convention would mean risking a full renegotiation of the Convention. In the current political climate, such renegotiation could undermine the international refugee protection regime altogether.<sup>159</sup> Any such weakening should be avoided and therefore other options must be explored.

## **4.2 Creating a new framework that encompasses environmental migration**

As contemporary refugee law has been shown to be unsuitable in the context of protecting environmentally displaced persons, it might seem appropriate to negotiate a new agreement more suitable for this purpose. The advantages as well as disadvantages of such solution will consequently be examined hereinafter. More specifically, this section will survey whether international treaties, regional treaties, or soft law treaties would best serve the needs of environmental cross-border migrants.

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<sup>156</sup> The Nansen Conference on Climate Change and Displacement in the 21st Century was an important step in creating a closer dialogue between climate change scientists, humanitarian actors and policy makers, and brought together 230 delegates from national governments, civil society, the humanitarian community and the scientific community to explore the pressing need for policies and operational capacities to manage climate-change-induced displacement.. See: The Nansen Conference: Climate Change and Displacement in the 21st Century, Chairperson’s summary, para 21.

<sup>157</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 43.

<sup>158</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 45.

<sup>159</sup> Kolmannskog & Trebbi, *Climate change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 720; UNHCR, *Climate Change, Natural Disasters and Human Displacement: a UNCHR Perspective*, p 9.

#### 4.2.1 Creating a broad international hard law convention

Several authors argue that the protection gaps would be best filled by creating a new international convention.<sup>160</sup> The largest problem with this approach is the complexity of environmental migration. As was shown above, environmental change will rarely be the sole reason for flight and several factors that lead to displacement interact with each other.<sup>161</sup> Thus, it is a difficult task to determine whether a person has fled due to environmental factors rather than economic or other factors and a one-size fits all approach may therefore be unviable. For the operation and application of a new environmentally-induced-displacement-convention that would cover all different types of environmental migration, one must be able to prove that environmental factors has caused the displacement in question, thus many would be left in a legal vacuum.

Further, it seems probable that states will be reluctant to sign a treaty that encompasses all different types of environmental migration. In fact, states presently seem to lack the political will to negotiate a new instrument requiring them to provide international protection to additional groups of people,<sup>162</sup> and a group of people encompassing all environmental migrants will be a particularly big group of people requiring protection. Thus, such a convention would probably experience difficulties when it comes to getting signature states.

Another related problem is the question of definition. As previously provided,<sup>163</sup> there is no current universal definition covering the environmentally induced displaced. A convention encompassing the complete group of 'environmental migrants' as defined in this study would be a very wide convention, requiring states to offer protection to a large amount of people. For all these reasons, it seems more likely that a different approach would lead to a successful outcome, such as the creating of regional treaties more specified on the different needs and impacts of environmental change in different regions.

#### 4.2.2 Creating regional customized conventions

As most displacement will occur regionally and every region will be affected differently,<sup>164</sup> a single worldwide convention might not be an optimal solution. There might therefore be a greater possibility of developing regional treaties than international treaties to fill protection gaps in the context of environmental migration. Environmental changes will certainly affect different areas of the world in different ways, and there may be more political will at the regional level to deal with the impact of it.<sup>165</sup>

Furthermore, in the present context, it is likely that negotiating an international convention on environmental cross-border migration would be problematic due to incompatible interests of the prospective countries of origin and the receiving countries of migration. It is imaginable

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<sup>160</sup> Kolmannskog & Trebbi, *Climate Change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 721.

<sup>161</sup> Docherty & Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, p 359; McAdam, *Climate Change, Forced Migration, and International Law*, p 21.

<sup>162</sup> UNHCR, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, p 70.

<sup>163</sup> See section 2.3.

<sup>164</sup> Myers, N, *Environmental Refugees: A Growing Phenomenon of the 21st Century*, p 609.

<sup>165</sup> Kolmannskog & Trebbi, *Climate change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 722.

that the former would push for the maximum of rights for the migrants in question while the latter would probably not accept more than minimal obligations. This is highly probable taking into account the general restrictive attitude towards the protection of refugees.<sup>166</sup>

For instance, Glazebrook contends that a regional approach in the Asia-Pacific area is crucial for adaptation measures and for the organizing of disaster recovery, meaning among other factors the responsibility for relocating displaced people in the region and making sure that their rights are both promoted and protected.<sup>167</sup> Thus, in so far as legal gaps would be capable of being filled with drafting new conventions, these conventions should be regional rather than international in order to more specifically direct the specific needs and interests of different regions. However, an important factor that may not be forgotten is the differences as to resources and economic means of different regions. Therefore, it is crucial that the instruments in question include economic support or that other instruments, such as the UNFCCC, provides obligations concerning economic and humanitarian assistance. These instruments may in turn not always benefit from being regional rather than international.

Further, the focus of the convention or conventions in question should be on the migration due to slow onset events. Migration as a result of rapid onset events has greater prospects of being covered by the system of Temporary Protected Status or receiving humanitarian assistance. People affected by slow onset climate events, on the other hand, has less prospects of being covered by such system as there are difficulties with assessing to what extent the environmental changes contribute to migration and if the migration is voluntary or not.

Nevertheless, over time, slow onset change will accelerate environmental push factors an increasingly important position in the migration process, and the people affected by slow onset climate events may be just as much in need of protection. Therefore, there is a need for conventions that encompasses people migrating due to slow onset climate events. The definition of what situation that is covered under the respective convention could differ due to the different needs of different regions. However, as desertification, drought, or the rising of sea levels for example could lead to the impossibility of return to the state of origin, the protection offered by the conventions must be more than temporary.

#### **4.2.1 Creating soft laws that may eventually lead to hard law treaties**

Hard law treaties have the obvious advantage of being legally binding and to some extent, depending on available legal remedies, enforceable. Treaties are especially useful to fill legal gaps where international law does not provide an answer for important questions, as in the case of cross-border movement resulting from environmental factors.

However, especially in such situations, it may be particularly difficult to reach a consensus and it would probably take a very long time to negotiate a complete new instrument encompassing environmental migration. Such lack of consensus at the negotiating stage might lead to ratification gaps which undermine the effectiveness of the treaty. Such sequence of events might consequently leave the persons in need of protection back in the legal vacuum where they were initially. Therefore, a soft law approach might be a more feasible solution. As indicated by the Cancun agreements,<sup>168</sup> political will to negotiate such an instrument may

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<sup>166</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 199.

<sup>167</sup> Glazebrook, *Human Rights and the Environment*, p 293.

<sup>168</sup> See section 3.2.

exist to some extent. Also, a soft law approach might be more appropriate where there are factual uncertainties, as it is more flexible and can consequently adapt to the diversity of environmental factors that might induce migration.<sup>169</sup>

### 4.3 Adding a protocol to the UNFCCC

A climate-change agreement within the UNFCCC framework could be important with the view of preventing environmental disasters and displacement. However, in the context of protection of environmental migrants, the UNFCCC process has less to offer.

The UNFCCC has in the past had little focuses on remedies, and there has also been vast unwillingness to incorporate human rights issues within the system.<sup>170</sup> Even so, a climate-change agreement that focus on the economic prevention of environmental change and disaster could indeed play an important role in protecting people migration as a result of environmental factors, as it may reduce the amount of migration. Further, activities that are linked to migration qualify for funding in the latest draft texts.<sup>171</sup> Despite the importance of this kind of systems of recognizing displacement and ensuring funding and co-operation, the UNFCCC will not provide an adequate solution when it comes to the protection of people migrating due to environmental factors.

### 4.4 Extending the system of Temporary Protected Status

The contemporary system of Temporary Protected Status is not adequate to completely cover environmentally induced migration.<sup>172</sup> However, it might have the potential of developing into a system more adequate of protecting at least those migrating as a result of rapid onset climate events.

Today, the system does not provide a strong, legal obligation to protect the individuals migrating due to environmental factors. It is rather an optional measure that is discretionary granted nationals of a certain state.<sup>173</sup> The contemporary system in the US is further inadequate as it is an agreement between the US and a state affected by a crisis, rather than a duty to the individual. Also, a major concern with the US system of Temporary Protected Status is that it is only available to designated nationals already in the US at the time of the disaster, and not to those fleeing subsequent to an environmental event.<sup>174</sup> Therefore, the contemporary system would have little relevance to citizens of many affected countries. The system does not offer protection to citizens of countries such as Kiribati, Tuvalu, the Maldives and Bangladesh,<sup>175</sup> that would be part of a pre-emptive migration due to slow onset events.

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<sup>169</sup> UNHCR, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, p 71.

<sup>170</sup> Kolmannskog & Trebbi, *Climate change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 721.

<sup>171</sup> Kolmannskog & Trebbi, *Climate change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 721.

<sup>172</sup> See section 3.5.

<sup>173</sup> Kolmannskog & Trebbi, *Climate change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps*, p 727; UNHCR, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, p 46.

<sup>174</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 101.

<sup>175</sup> McAdam, *Climate Change, Forced Migration, and International Law*, p 101.

Neither does the system offer protection to those migrating as a result of rapid onset events such as storms or floods, as they would be present in the state of origin at the time of the disaster. Thus, in order for the system to at least be capable of protecting people migrating due to rapid onset events, the prerequisite that the person must be present in the receiving state already, at the time when the environmental disaster occur, must be erased.

Further, the contemporary system in the EU is inadequate as it requires a qualified majority of the council to vote for the decision that an environmental disaster requires the invoking of the Temporary Protection Directive mechanisms. Additionally, the unconditional linking of Temporary Protected Status to 'mass influx' is a tremendous weakness of the EU system if it aims at protecting displaced individuals. An individual might be in just as much need of protection even though that person is not part of a 'mass influx'.

Additionally, Temporary Protected Status may provide some protection for certain groups but does not meet the needs of people who need to stay longer or permanently. That is one of the reasons why the system ought to be developed to serve the needs of people migrating due to rapid onset events. People migrating as a result of slow onset events are more probable of requiring permanent protection as desertification, drought, or sea level rise for example is most probably permanent procedures.

Despite its many weaknesses, the system of Temporary Protected Status has a great potential of covering people migrating due to rapid onset climate events. It provides an opportunity to protect people fleeing due to environmental disasters, which is a broad term capable of being interpreted differently and thus adapt to a diversity of situations and needs, and it has in fact proven to be flexible in the past. It has the potential of granting protection to people in need, who does not have the opportunity to return to his or her state of origin for different reasons. A great advantage, which also to some extent can be found in the refugee regime, is that the regime is forward-looking in its assessment of who should be granted protection. Rather than focusing on the question of why people moved, a more relevant approach in the context of environmentally induced displacement is the focus on whether the migrants has the opportunity to return to the state of origin or if there is a need to stay where they have relocated. With regard to the assessment of the capability of return, such assessment should concern the determining of the extent to which the area that the migrant left are habitable, whether any sustainable source of livelihood remains, the extent to which national and local governments continue to function effectively, whether their rights would be protected at home, and other similar issues. If these prerequisites are replied in the negative, there is an apparent need for the migrant in question to stay where relocated, and this need should also mirror a right to do so until the time that this changes. This focus might eliminate some of the difficulties of assessing slow onset disasters, including the voluntary-forced continuum.

The system of Temporary Protected Status also lack the prerequisite of persecution, which is a requirement that is not met by environmental migrants, unless they have been exposed to persecution in addition to the environmental push factor that caused the migration.

However, under the contemporary system of Temporary Protected Status, there is a widespread discretion concerning who receives protection and who does not. The system consequently needs to develop into a more reliable system under which people fleeing rapid onset environmental events unquestionable are granted protection. To accomplish this, there must be legal obligations requiring states to offer Temporary Protected Status to those in need. One option might be the construction of a new convention, alternatively a soft law instrument that provides guidelines on the subject.

Accordingly, the current system of Temporary Protected Status has a vast amount of gaps in its protection of environmental migrants under EU legislation, domestic legislation, and state practice respectively. However, the system would most probably be capable of covering those displaced due to rapid onset events if it would be developed into a more comprehensive system with clear obligations for the receiving states. As the contemporary system has been shown to be discretionary and vary significantly, there is a great need to address this issue at a regional and global level. A more systematic approach to Temporary Protected Status such as a binding international framework is first and foremost envisaged, though it would require concerted action and political will among States.

However, it would most probably be difficult to establish consensus concerning a hard law instrument in the context, especially since this study has revealed that there is a vast amount of different approaches and practice regarding the offering of protection to people migrating due to rapid onset climate events. A soft law approach might therefore be more viable. A soft law approach might also be more appropriate because there are factual uncertainties in the context of environmental migration, and such instrument is often more flexible and would thus be capable of adapting to the diversity of environmental factors that might induce migration. A first step might be limited to systematic Temporary Protected Status for nationals of countries recently affected by natural disasters who are already present in a given country, which is comparable to the system already existing in the US, despite the fact that the US system has proven to be rather discretionary than systematic. However, the international community should in the long run aim for a more ambitious approach that would include the granting of systematic Temporary Protected Status also to those arriving at national borders following natural disaster in their home countries.

## Part V: Concluding remarks

This paper has examined the rising phenomena of environmental migration. It has found that environmentally induced migration is a widespread and complex issue that accordingly requires reliable and flexible responses. It has examined sea level rise, rapid onset climate events and slow onset climate events respectively, as people migrating due to these diverse environmental factors have different protection needs under international law.

Next, the paper has examined the extent to which current international law provides international protection in such cases. It has found that none of the existing treaties specifically deal with the protection needs of such migrants.

Inter alia, it has been provided that environmental migrants are not protected under international refugee law because they have usually not been exposed to persecution. Further, environmental migrants are not protected under current international environmental law agreements, as these tend to focus on the relationships and rights of states rather than individuals. The law on stateless persons does not cover environmental migration because the concept of statelessness does not extend to the situation of *de facto* statelessness. Also, the definition of statelessness in the 1954 Convention Relating to the Status of Stateless Persons is premised on the denial of nationality through the operation of the law of a particular state, rather than through the disappearance of a state altogether. Human rights law cannot be considered to adequately cover environmentally induced migration as there are no explicit human rights protections for this specific group, and the principle of *non-refoulement* does not seem to assist a person displaced by environmental factors, as current jurisprudence put forward that violations of socio-economic is insufficient to find such a protection claim. The paper thus concluded that current international treaty law does not address the protection needs of this population.

The paper also explored the ad hoc practice of some states to provide temporary humanitarian protection. This practice, defined as Temporary Protection Status in some domestic legislation as well as in EU law, has been proven to be discretionary and to vary significantly in application and content. Another major concern with the US system of Temporary Protected Status is that it is only available to migrants that are already in the US at the time of the disaster, and not to those fleeing subsequent to an environmental event. The EU system requires ‘mass influx’ in order to be applied, and are thus not available to individual situations. Further, even if this system were to be systematically applied, it would only offer temporary protection and people displaced due to permanent or long-lasting environmental damage would thus still not receive any protection.

The paper next explored a multitude of potential means of filling the identified legal gaps. However, choosing a combination of the solutions examined in the previous chapter would probably prove to be the most effective way of filling the protection gaps. Such complex issue as environmental migration needs to be dealt with in several forums and at several levels.

The system of Temporary Protected Status has proven to be the system with the highest potential of providing building blocks for new means of offering protection to environmental migrants that migrate due to rapid onset climate events. This system primarily offers protection to those that cannot return to their state of origin because a return is not possible, permissible, or reasonable owing to circumstances in their state of origin and possibly to

personal conditions. Accordingly, the system is flexible and therefore capable of adapting to a diversity of situations, as is necessary for a protection system in this context. Yet, the system benefits primarily those who migrate due to rapid onset events and therefore require temporary protection until being able to return to their state of origin. This system thus has great potential to offer protection to people migrating as a result of environmental disasters, especially if it would be developed into a less discretionary and more systematic and reliable system. This paper therefore suggests that the system of Temporary Protected Status would be converted into an international treaty system.

This paper has further provided that some kind of permanent protection status would be necessary in some cases in addition to temporary protection. Thus, there needs also to be adequate protection to those migrating due to slow onset climate events. The creation of an instrument capable of addressing the needs of people migrating as a result of slow onset climate events needs to start at numerous levels and in a number of forums. First, states must adapt their domestic legislation in order to better respond to environmentally induced displacement. In this regard, the Finnish legislation might serve as a good model because it focus more on the impossibility or unwillingness to return to the state of origin, rather than on the harm and impacts already experienced. The paper has then envisaged a soft law document is as a first initiative, or at least an initiative that might work as a substitute during the negotiation phase of a new convention or new conventions. Such a document would advantageously outline the existing law as interpreted in a context oriented and dynamic way, and also list examples of recommended practice and domestic legislation that at least put political pressure on states to follow good practice. The instrument needs must be forward-looking in its assessment of harm because, in the context of slow onset climate events, the already experienced harm might not be severe. However, there might still be an impossibility of return to the state of origin due to a variety of factors.

Independently of what means are chosen to address this widespread and complex issue, there is a fundamental challenge with regard to the implementation and access to protection in the current political climate. Thus, even if there would be appropriate instrument in place to address this issue, the concern is that the people in the most need might nevertheless not receive the protection offered. In Europe, for example, there is already elaborate asylum legislation. Despite this, many prospective asylum seekers never gets the opportunity to file an application because of strict visa regimes, agreements between certain European and North African countries on the Mediterranean, and security forces at sea or on land. Access may become even more difficult if the quantities of legitimate asylum seekers increase further. This is an issue beyond law, and a hot topic in politics, especially during economic downturns. It is also a matter of how people perceive their moral duties. A necessity in order to solve this issue is consequently public communication and the rising of awareness concerning environmentally induced migration.

Hopefully, such awareness will remind us of that we are all vulnerable and this will give rise to a new solidarity.

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