Conceptualising Climate-Induced Displacement

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I Introduction

Discussions about displacement, namely the involuntary movement of people, caused by the effects of climate change are sometimes marred by hasty conclusions: for some, affected persons are ‘refugees’. Others do not hesitate to declare that populations living on islands threatened by submergence with rising sea levels will become ‘stateless’. Still others see a direct relationship between the degree of global warming, the number of disasters causing displacement and the magnitude of the number of people affected by it. Thus, a maximalist school of thought expects hundreds of millions of people, even up to a billion, to be displaced as a consequence of climate change.1 By contrast, a minimalist approach stresses that displacement is triggered by complex and multiple causes, among which climate change is just one, and predicts that the number of cases where displacement can be directly linked to the effects of climate change will be few.2

* This chapter is based on work done by the author in his capacity as Representative of the United Nations (UN) Secretary-General on the Human Rights of Internally Displaced Persons, but reflects his personal opinions only. See generally United Nations High Commissioner for Refugees (UNHCR), supported by the International Organization for Migration (IOM) and the Norwegian Refugee Council, ‘Climate Change and Statelessness: An Overview’ (Submission to the 6th Session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC), 1–12 June 2009, Bonn) (19 May 2009), http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf.

1 See, eg N Myers, ‘Environmental Refugees in a Globally Warmed World’ (1993) 43 BioScience 252, 257 where the author estimated that there would be 150 million displaced persons by 2050. Christian Aid estimates that, ‘unless strong preventative action is taken, between now and 2050 climate change will push the number of displaced people globally to at least 1 billion’: Christian Aid, Human Tide: The Real Migration Crisis (May 2007) 22.

Overall, the phenomenon of people displaced by the effects of climate change is highly complex and in many ways little understood. Nevertheless, there is growing evidence that at least the number of people affected by climate-related sudden-onset disasters is very substantial and likely to increase: the Norwegian Refugee Council’s Internal Displacement Monitoring Centre and the United Nations (UN) Office for the Coordination of Humanitarian Affairs, for instance, found that in addition to 4.6 million people newly displaced within their own country by conflict, at least 36 million people were displaced by sudden-onset natural disasters in 2008. Of those, over 20 million were displaced by climate-related disasters, while almost 16 million were displaced by non-climate-related disasters. Thus, climate-related disasters, that is, those linked to windstorms, heavy rainfall and flooding, have become one of the primary causes of (often short-term) displacement, and their number is likely to grow. This raises the challenge of how to build the necessary financial, operational and legal capacities to respond to the specific protection and assistance needs of those displaced in the context of climate change. These challenges should be seen in the wider context of obligations that states are faced with in the context of climate change. They exist at three levels.

A Addressing the Cause: Mitigating Climate Change

States parties to the UN Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol have committed themselves to reducing the emission of greenhouse gases. These mitigation measures aim to slow down and eventually stop climate change and its disastrous consequences. As such, they have an important preventive effect on displacement.

B Addressing the Effects: Reducing Risks Created by Climate Change and Vulnerabilities Caused by It

Climate change must be accepted to the degree it has developed so far: its environmental and human impacts are already felt today and will be felt in the future. This makes it necessary to take measures to reduce the adverse effects of climate change, such as by reducing the impact of natural hazards by mitigating vulnerabilities, enhancing resilience capacities and strengthening adaptation measures. The Hyogo Framework for Action: Building the Resilience of Nations and
Communities to Disasters, adopted by the 2005 World Conference on Disaster Reduction, provides an important model that states should take into consideration. While legally non-binding, the Framework expresses the acknowledgment by states ‘that efforts to reduce disaster risks must be systematically integrated into policies, plans and programmes for sustainable development and poverty reduction, and supported through bilateral, regional and international cooperation, including partnership’, and identifies priorities for action for the years 2005–15. It is complemented by human rights obligations directly relevant to addressing displacement. Reduction of disaster risks and vulnerabilities, such as by setting up alarm and evacuation systems, has been described by the European Court of Human Rights as a human rights obligation. If a disaster is foreseeable and the state is able to prevent ensuing threats to people’s lives and property, then it must take appropriate action in conformity with its obligations under human rights law to protect life, privacy and property.

C Addressing the Consequences: Protecting and Assisting Individuals Displaced by the Effects of Climate Change

Mitigation and ex ante adaptation measures are often insufficient to prevent individuals from becoming displaced or otherwise being affected by the negative consequences of climate change. Since the challenge of adaptation, properly understood, includes the need to adapt to the humanitarian consequences of climate change, adaptation measures must also cover protection of and assistance for the displaced. States hosting displaced people, as primary duty bearers, are bound by human rights law to respect (that is, refrain from interferences with) the rights of those affected, as well as to actively protect such rights and to take positive measures (necessary legislative and administrative steps) to enable displaced people to fully enjoy their rights. From an operational perspective, protection can be understood as ‘all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law

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7 ibid, para 4.
8 The Hyogo Framework identifies the following priority actions: ‘1. Ensure that disaster risk reduction is a national and a local priority with a strong institutional basis for implementation. 2. Identify, assess and monitor disaster risks and enhance early warning. 3. Use knowledge, innovation and education to build a culture of safety and resilience at all levels. 4. Reduce the underlying risk factors. 5. Strengthen disaster preparedness for effective response at all levels’: para 14.
9 Budayeva and Others v Russian Federation (App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), European Court of Human Rights (20 March 2008).
10 ibid, paras 128–37.
This chapter focuses on the issue of how best to conceptualise climate-induced displacement in order to develop appropriate legal and policy responses with which to address the third of these challenges. In this context, three non-controversial observations serve as a point of departure: (i) climate and climate change per se do not trigger the movement of people, but some of their effects, in particular sudden and slow-onset disasters, have the potential to do so; (ii) such movement may be voluntary, or it may be forced; and (iii) it may take place within a country or across international borders.

Based on these observations, this chapter addresses the following issues:

- What are the various climate change scenarios that trigger population movements?
- What is the nature of these movements and who is affected?
- To what extent are those affected protected by present normative frameworks, what are the normative gaps, and how can they be addressed? In particular, how should the case of people forcibly displaced across international borders be conceptualised? And should those displaced from ‘sinking’ small island states be classified as ‘stateless persons’?

## II Scenarios

Findings of the Intergovernmental Panel on Climate Change suggest that the main effects of global warming are related to water stress: some regions will be affected by a reduction of water availability, particularly in parts of the tropics, the Mediterranean and Middle Eastern regions and the southern tips of Africa and Latin America. By contrast, water availability may increase in parts of Eastern Africa, the Indian sub-continent, China and the northern latitudes. Due to rising sea levels, the densely populated ‘mega-deltas’, especially in Asia and Africa, as well as small, low-lying islands all over the world, are at the greatest risk from floods, storms, salinisation of groundwater and soils, coastal flooding and eventual submergence.\(^\text{13}\)

In this context, the following typology of possible scenarios is proposed to distinguish situations requiring different legal and policy answers.

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\(^{12}\) Inter-Agency Standing Committee (IASC), ‘Protection of Internally Displaced Persons’, Committee Policy Paper Series No 2 (Geneva/New York, IASC, 2000) 2. This definition was originally agreed in the context of the International Committee of the Red Cross (ICRC) workshop process. See also ICRC, *Strengthening Protection in War: A Search for Professional Standards* (Geneva, ICRC, 2001) which also aptly describes in general terms what, under international law, is expected of states.

(i) **Sudden-onset disasters**, such as flooding, windstorms (hurricanes/typhoons/cyclones) or mudslides caused by heavy rainfalls, can trigger large-scale displacement and incur huge economic costs. However, depending on recovery efforts, the ensuing displacement need not be long-term, and return will remain possible in most cases. While all of these disasters are climate-related, they are not necessarily an effect of global warming and the ensuing change of climate patterns. In fact, many hydro-meteorological disasters triggering displacement would occur regardless of climate change, and even where they are linked to climate change, such causality is difficult, if not impossible, to prove in a specific case. Furthermore, disasters such as volcanoes or earthquakes with similar impacts on people and on their movements are not linked to climate or to climate change,14 but there is no reason why people displaced by those events should be treated any differently from those affected by climate impacts. Therefore, despite the current emphasis on climate change, it is conceptually sounder to look at sudden-onset disasters as a cause of displacement, and not to limit the focus to those triggered by global warming.

(ii) **Slow-onset environmental degradation** caused, inter alia, by rising sea levels, increased salinisation of groundwater and soil, long-term effects of recurrent flooding, thawing of permafrost, as well as droughts and desertification or other forms of reduced water availability, will see a dramatic decrease of water availability in some regions and recurrent flooding in others. This will impact upon economic opportunities and conditions of life will deteriorate in affected areas. Such deterioration may not necessarily cause displacement, but it may prompt people to consider ‘voluntary’ migration as a way to adapt to the changing environment and be a reason why people move to regions with better living conditions and income opportunities. However, if areas become uninhabitable over time because of further deterioration, finally leading to complete desertification, permanent flooding of coastal zones or similar situations, population movements will amount to forced displacement and become permanent.

(iii) So-called *‘sinking’ small island states* present a special case of slow-onset disasters. As a consequence of rising sea levels and their low-lying topology, such areas may become uninhabitable. In extreme cases, the remaining territory of affected states may no longer be able to accommodate their population, and such states may disappear entirely from the surface of the earth. When this happens, the population would become permanently displaced to other countries.

(iv) Governments may designate areas as high-risk zones too dangerous for human habitation on account of environmental dangers. Thus, people may (either with consent or against their will) be evacuated and displaced from

14 In 2008, for example, the Sichuan earthquake alone displaced more than 15 million people (three-quarters of the number of people displaced by the 200 climate-related disasters occurring that year): see Monitoring Disaster Displacement in the Context of Climate Change, above n 4, 8–9.
their lands or, if they have already left, be prohibited from returning, or be relocated to safe areas. This could occur, for example, along rivers and coastal plains prone to flooding, but also in mountain regions affected by an increased risk of flooding or mudslides due to the thaw of permafrost. The difference between this situation and the case of sudden-onset disasters (scenario (i)) is that governmental action makes return impossible. Such cases will affect a relatively low number of people but raise particularly complex legal issues.

(v) Finally, unrest seriously disturbing public order, violence or even armed conflict may be triggered, at least partially, by a decrease in essential resources due to climate change (such as water, arable land or grazing grounds). This is most likely to affect regions that have reduced water availability and cannot easily adapt due to poverty (for example, by switching to economic activities requiring less water). In such situations, there is little room for equitable sharing of the limited resources, making it difficult to reach peace agreements as long as resource scarcity continues.

III Nature of Movements and Affected People

These five scenarios can help to identify the character of the movement—whether it is forced or voluntary—and to describe those who move (are they migrants, internally displaced persons (IDPs), refugees, stateless persons or something else altogether?). They also help to assess whether, and to what extent, present international law is equipped and provides adequate normative frameworks to address the protection and assistance needs of such people. This is further discussed in Section IV.

A Sudden-Onset Disasters

i Internal Displacement

Hydro-meteorological disasters can trigger forced displacement inside a country or across borders. Experience shows that in most cases of sudden-onset disasters, the large majority (or even all) of those displaced remain inside their own country. Thus, they become IDPs and, as such, receive protection and assistance under human rights law and in accordance with the 1998 UN Guiding Principles on Internal Displacement,15 as well as regional instruments such as the 2006 Protocol on the Protection and Assistance to Internally Displaced Persons16 and the 2009

The term ‘internally displaced persons’, according to the Guiding Principles on Internal Displacement, refers to ‘persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of . . . natural or human-made disasters, and who have not crossed an internationally recognized State border.’ The two African instruments, which are binding upon states parties, contain the same definition.

This notion of IDP is broad and sufficiently flexible to cover people evacuated or fleeing from their homes to escape the dangers of a sudden-onset disaster, or who are forced to leave in the disaster’s aftermath because of the degree of destruction. The notion’s particular strength lies in the fact that there is no need to determine whether or not the disaster was caused by the effects of climate change, or whether it was human-made or natural. Therefore, its application does not require a preliminary determination as to whether a specific disaster is linked to climate change.

**ii Cross-Border Displacement**

Sometimes, people displaced by sudden-onset disasters cross borders into other countries, such as when that is their only escape route or the protection and assistance capacities of their own country are exhausted. Others may opt to go abroad instead of staying within their own country simply because they hope for better protection and assistance there.

Such people do not lose the protection of human rights law, which states are obliged to respect in relation to all people within their territory or jurisdiction. However, international law, while under certain circumstances prohibiting rejection at the border, does not provide any entitlements to be granted admission to or continued residence in a foreign country unless a person is a refugee or otherwise protected by the principle of non-refoulement. The term ‘refugee’ refers to legal definitions in relevant international instruments: the 1951

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18 Great Lakes IDP Protocol, Art 1(4); Kampala Convention, Art 1(k).
19 See Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Art 33, which obliges states to examine claims of asylum seekers if rejection at the border would mean that they would have to return to their alleged country of origin.
20 For example, on the basis of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. This is known as ‘complementary’ or ‘subsidiary’ protection: see J McAdam, Complementary Protection in International Refugee Law (Oxford, Oxford University Press, 2007). For an analysis of its applicability in the climate change context, see J McAdam and B Saul, ‘An Insecure Climate for Human Security? Climate-Induced Displacement and International Law’ in A Edwards and C Ferstman (eds), Human Security and Non-Citizens: Law, Policy and International Affairs (Cambridge, Cambridge University Press, 2010) 378ff.
Convention relating to the Status of Refugees, the 1969 OAU Convention, and the 1984 Cartagena Declaration on Refugees. Article 1A(2) of the 1951 Refugee Convention defines a ‘refugee’ as a person who:

- owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or
- who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Climate-induced displacement is neither covered by the wording and purpose of this definition, nor was it considered by the drafters of the treaty. Nonetheless, in situations where the victims of sudden-onset disasters flee abroad because their government has consciously withheld or obstructed assistance in order to punish or marginalise them on one of the five Convention grounds, such displaced people would qualify as refugees. Such cases are likely to be few, and those forcibly displaced across borders by natural disasters are not usually persecuted for any of the relevant reasons listed in the definition. Furthermore, the definition of ‘refugee’, and refugee law as such, is based on the notion that someone who is persecuted ‘is unwilling to avail himself of the protection of that country’—he or she has lost the protection of the government of his or her country of origin or habitual residence, a fact that destroys the bond of trust between the citizen and his or her country, which normally constitutes the fabric of modern societies. It should not automatically be assumed that governments of countries affected by disasters are no longer able or willing to provide protection to their citizens.

The OAU Convention expands the notion of ‘refugee’ to include, inter alia, ‘every person who, owing to . . . events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’. One could argue that sudden-onset disasters per se seriously disturb public order, but it is rather unlikely that the states concerned would be ready to accept such an expansion of the concept beyond its conventional meaning of public disturbances resulting in violence. However, if a person sought refuge because of violence such as riots in the aftermath of a

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21 Read in conjunction with the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (together ‘Refugee Convention’).
26 OAU Convention, Art 1(2).
disaster, triggered by the government’s unwillingness or inability to address certain consequences of the disaster or to provide the necessary assistance to the victims, then this instrument would apply. The same is true for the Cartagena Declaration, which also includes the criterion ‘massive violation of human rights’. Nevertheless, even in the regional contexts of Africa and Central America, cross-border displacement in the majority of climate-related cases will not be covered by refugee law.

This means that a normative gap exists with regard to most people displaced across borders in the aftermath of sudden-onset disasters, in particular with regard to admission, continued stay and protection against forcible return to the country of origin. In some cases, host governments have, for humanitarian reasons, allowed such persons to stay until they could return to their countries in safety and dignity, but this practice has not been uniform. The status of these people remains unclear, and despite the applicability of human rights law, there is a risk that they may end up in a legal and operational limbo.

B Slow-Onset Disasters and Environmental Degradation

General deterioration of conditions of life and economic opportunities as a consequence of climate change may prompt people to look for better opportunities and living conditions in other parts of the country or abroad, before the areas in which they live become uninhabitable. Such people make use of their liberty to choose a new place of residence if they remain within their country, and they become migrants if they go abroad. Their movement can be seen as a particular strategy to cope with and adapt to environmental and ensuing economic changes triggered by the effects of climate change.

There is no definition of ‘migrant’ in international law. The only definition that can be found in a universal treaty is that of a ‘migrant worker’, meaning ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national’. The International Organization for Migration uses a working definition of ‘environmental migrants’ which is not, however, generally accepted. Regardless of the terminology, people moving

28 Cartagena Declaration, Art III(3).
29 See section VI.B.ii below.
30 ICCPR, Art 12.
32 'Environmental migrants' are persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad: IOM, ‘Discussion Note: Migration and the Environment’ (1 November 2007) Doc MC/INF/288, para 6.
33 IOM’s definition includes IDPs as defined by the Guiding Principles on Internal Displacement, above n 15, and thus is not compatible with terminology accepted by the UN and regional organisations such as the African Union; see section IV.A below.
abroad by choice as part of their strategy to adapt to the effects of climate change are protected by general human rights law, as well as, where applicable, the specific guarantees provided to them by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. However, such law does not give them any right to be admitted to another country.

If areas start to become uninhabitable because of complete desertification, salinisation of soil and groundwater or ‘sinking’ of coastal zones, movement may amount to forced displacement and become permanent, as inhabitants of such regions no longer have a choice except to leave—or, if they left earlier on a voluntary basis, to stay away permanently. If, in this latter case, people remain within their country, they are IDPs and fall, as outlined above, within the ambit of the Guiding Principles on Internal Displacement. If they go abroad, they have no protection other than that afforded by international human rights law; in particular, they have no right under international law to enter and remain in another country, and thus are dependent upon the generosity of host countries.

This scenario poses two particular challenges: (i) there are no criteria to determine where to draw the line between voluntary movement and forced displacement; and (ii) those forcibly displaced to other countries by the effects of climate change remain without specific protection as they do not, as outlined above, qualify as refugees or, in exceptional cases, for protection against forcible return under human rights law. At the same time, as noted above, there is no legal definition of ‘migrant’ at the international level, and the notion of ‘migrant workers’ as defined by international law does not really fit, since even if such people find a job abroad, they are primarily in search of protection and assistance and their decision to leave is not just triggered by economic considerations.

C People Displaced from Small Island States

The submersion and destruction of entire small island states, anticipated in some climate change scenarios, is likely to be gradual, if it happens at all. In the initial phases, this type of slow-onset disaster may encourage people, as part of individual or household adaptation strategies, to migrate to other islands belonging to the same country (where these exist) or abroad in search of better living conditions and prospects for the future. If they migrate to another country, they are protected generally by human rights law, including guarantees specifically protecting migrant workers and their families.

Later, such movements may assume the character of forced displacement if areas of origin become uninhabitable or disappear entirely, or if the remaining

34 On this protection, see section IV.B.ii.a.a below.
35 See J McAdam, ‘“Disappearing States”, Statelessness and the Boundaries of International Law’, in the present volume.
36 See, eg International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, above n 31.
territory is inadequate to accommodate the whole population. These scenarios would render return impossible, and the population would become permanently displaced to other countries. In this case, normative gaps exist for those who move abroad, leaving them in a legal limbo as (prima facie) they are neither migrant workers nor refugees. In particular, it is unclear whether provisions on statelessness would apply. The government of such countries may try to maintain a symbolic presence (such as on a built-up small island or platform), and their laws which, according to Article 1 of the Convention relating to the Status of Stateless Persons, determine who their citizens are, may continue to be applied (for example to newly born children whose parents register them abroad at consulates of the country of origin).

D Designation of High-Risk Zones Too Dangerous for Human Habitation

Governments may designate particular zones affected by disasters as too dangerous for human habitation. People who are evacuated from, or prohibited from returning to, such zones are IDPs, since they are forced to leave or stay away from their former homes. They cannot return but must be relocated to safe areas or be locally integrated in the areas to which they have been evacuated in a way that allows them to resume normal lives. Without such durable solutions, they remain in protracted displacement situations or may decide to spontaneously return to high risk zones because of a lack of viable alternatives, exposing them to risks to health, limb and even life. International human rights law, the Guiding Principles on Internal Displacement and analogous norms and guidelines on relocation in the context of development projects provide a sufficient normative framework for addressing these situations.

Should people decide to leave their country because they reject relocation sites offered to them, or because their government does not provide them with sustainable solutions in accordance with relevant human rights standards, protection abroad will be limited to that offered by general human rights law, including provisions applicable to migrant workers. Their formal legal status will remain unclear, however, and they may not have a right to enter and remain in the country of refuge.

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38 See section IV.B.C below.
E Climate Change-Induced Unrest, Violence and Armed Conflict

The effects of climate change, in particular dwindling resources, can contribute to social tensions, which in turn may degenerate into violent conflicts—for example, overly scarce vital resources, such as water or arable or grazing land, may trigger forced displacement. People who move within their own countries are IDPs. Those fleeing abroad may qualify as refugees protected by the Refugee Convention or regional refugee instruments, or be people in need of complementary forms of protection or temporary protection available for those fleeing armed conflict. The available normative frameworks are the Guiding Principles on internal displacement, international humanitarian law, human rights law and refugee law. They provide a sufficient normative framework for addressing these situations since those affected are fleeing a breakdown of public order, violence, armed conflict or persecution, rather than the changes brought about by global warming per se.

IV Applicable Protection Frameworks

A Internally Displaced Persons

As the above analysis has shown, the following people qualify as IDPs: those forcibly displaced within their own country by sudden-onset disasters (scenario i); those whose place of origin has become uninhabitable as a consequence of a slow-onset disaster (scenario ii), or has been declared too dangerous for human habitation (scenario iv); and those who flee the dangers of climate-related violence and armed conflict (scenario v).

IDPs are protected by all human rights guarantees binding upon the state concerned because they remain citizens or residents of their own country and continue to be entitled to the full range of guarantees available to the general population. Human rights that are specifically relevant for the displaced are listed and further specified in the Guiding Principles on Internal Displacement. This important document covers all phases of displacement—protection from displacement, protection during displacement and protection during the return and recovery phase. They state, for instance, that forced evacuations in cases of disasters are prohibited ‘unless the safety and health of those affected require’ such measures (Principle 6), and that evacuations, if they become necessary, must be carried out

in a manner that does not violate ‘the rights to life, dignity, liberty and security of those affected’ (Principle 8). As regards protection during displacement, Principle 16 primarily addresses situations of armed conflict but also covers the needs of families separated by sudden-onset disasters, providing that ‘[a]ll internally displaced persons have the right to know the fate and whereabouts of missing relatives’, and authorities concerned are obliged, in this regard, to ‘endeavour to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organisations engaged in this task. They shall inform the next of kin on the progress of the investigation and notify them of any result.’ As regards humanitarian aid, IDPs have, at a minimum, the right to be provided with and have safe access to essential food and potable water, basic shelter and housing, appropriate clothing and essential medical services (Principle 18). Regarding the recovery phase, the Guiding Principles state the important principle that IDPs have the right to choose between voluntary return to their former homes, integrating where they have been displaced to, or moving to another part of the country (Principle 28). They also have the right to have their property that they left behind restituted to them (Principle 29).

The Guiding Principles, even though not a binding treaty, gain their authority from the fact that they reflect and are consistent with binding human rights law. Today, they are recognised by states as an ‘important international framework for the protection of internally displaced persons’. Several states have integrated them into their domestic law. In Africa, the Great Lakes IDP Protocol and the Kampala Convention specifically address displacement by natural disasters and reference the Guiding Principles.

An important tool for identifying and implementing the human rights of people affected by natural disasters, whether or not displaced, is the Operational Guidelines on Human Rights and Natural Disasters. These were adopted in June 2006 by the UN’s Inter-Agency Standing Committee (IASC)—the coordinating body of the humanitarian agencies, including big international non-governmental organisations—in order to enhance the protection capacities of humanitarian actors. They are based on the Guiding Principles but go beyond them insofar as they also cover non-displaced populations affected by natural disasters. They are a tool aimed at sensitising humanitarian workers to typical human rights challenges in such situations, and highlighting activities that should be undertaken to respond to such problems.


42 They were initially developed by the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons and submitted to the UN Human Rights Council in March 2007: see Human Rights Council, ‘Operational Guidelines on Human Rights and Natural Disasters’ (20 March 2007) UN Doc A/HRC/4/38/Add.1 (‘Operational Guidelines’). A Field Manual suggesting practical steps for the implementation of the Operational Guidelines was published by the Brookings-Bern Project on Internal Displacement and disseminated in March 2008. After being tested in the field, the Operational Guidelines and Manual are currently being revised (May 2010).
Thus, for people forcibly displaced by the effects of climate change within their own country, the existing human rights framework codified in the Guiding Principles is sufficient. The challenge is to incorporate this framework into domestic law and to strengthen the capacities of national and local authorities to implement and apply it, including those responsible for disaster management, as well as communities at the grassroots level.

B People Displaced across International Borders

i Refugees

As outlined above, people displaced across international borders may qualify as refugees in some instances, particularly if the authorities refuse to assist and protect them on account of their race, religion, nationality, membership of a particular social group or political opinion in the context of disasters, violence or armed conflict triggered by the effects of climate change.43 In such cases, the full protection of international and regional refugee law will apply.

Particularly important in this regard is the principle of non-refoulement. Article 33(1) of the Refugee Convention prohibits returning in any manner whatsoever a refugee 'to the frontiers of territories where his life or freedom would be threatened'. This prohibition is generally regarded as including rejection at the border and non-admission. While this prohibition does not provide a basis for permanent admission in another country, it obliges states at least to admit temporarily people fleeing dangers amounting to persecution. However, such protection deals with dangers emanating from agents of persecution and is not available to persons directly displaced by disasters.44 As mentioned above,45 in the two regions covered by the OAU Convention and the Cartagena Declaration, where events seriously disturbing public order may lead to refugee protection, the group of potential beneficiaries of such protection could be expanded by developing doctrine and guidance to states on the interpretation of this notion (but it remains open whether states would be ready to accept such an expansion of refugee protection).

ii Other People

The main challenge is to clarify, or even develop, the normative framework applicable to people crossing international borders in the wake of sudden-onset disasters (scenario i), as a consequence of slow-onset disasters (scenario ii), in the aftermath of the 'sinking' of small island states (scenario iii), or in the wake of designation of a place of origin as a high-risk zone that is too dangerous for human habitation (scenario iv). In these cases, different sets of issues need to be addressed.

43 See section III.A.ii above.
44 For a detailed examination of the application of refugee law in the climate change context, see McAdam, ‘From Economic Refugees to Climate Refugees?’, above n 24.
45 See section III.A.ii above.
Identifying People in Need of Protection Abroad

First, should those moving voluntarily and those forcibly displaced across borders be treated differently, not only with respect to assistance and protection while away from their homes, but also with respect to their possibility (or even right) to be admitted to other countries and remain there, at least temporarily, and how should the distinction between the two categories be drawn? The answer seems obvious: present international law, while recognising that all human beings are entitled to the full enjoyment of human rights, does in fact differentiate between people who move voluntarily and have no specific legal protection, and those forcibly displaced, for whom special normative regimes (refugee law, and the Guiding Principles on Internal Displacement) have been developed at least in some cases.

In general, state sovereignty in the area of admission and removal of foreigners is more limited where forced migrants are concerned, compared to the situation of people who migrate voluntarily. In the case of internal movement, the right to freedom of movement and choice of residence provides individuals with the possibility to go to other locations within their own country, regardless of whether or not they initially leave their place of residence voluntarily. But the right to freedom of movement as such does not provide a right to be admitted to another state, even if forced movement was involved. While states should accept that voluntary migration may be part of individual adaptation strategies to respond to the negative effects of climate change and, depending on the circumstances, be facilitated as a contribution to adaptation in general, international law, with the exception of refugee law and the principle of non-refoulement prohibiting under certain circumstances rejection at the border of the country of refuge, provides no general entitlement to be admitted to another country.

Voluntary and forced movements often cannot be clearly distinguished in real life, but rather constitute two poles of a continuum, with a particularly grey area in the middle where elements of choice and coercion mingle. However, because of its binary, bipolar nature, law must always draw clear lines, and must

46 The relevant human rights guarantee, contained in ICCPR, Art 12, is not an absolute guarantee but, according to its para 3, can be subjected to restrictions 'which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.'


49 See G Hugo, ‘Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific’, in the present volume.


51 For example, between 'legal' and 'illegal', 'guilty' and 'not guilty', 'refugee' and those not qualifying as such.
therefore necessarily qualify movement as either voluntary or forced. Thus, it is necessary to define the criteria relevant for distinguishing between those who voluntarily leave their homes or places of habitual residence because of the effects of climate change, and those who are forced to leave by such effects or—even if they left voluntarily in the first place—can no longer return and therefore should be entitled to protection abroad.

In order to draw this line, one could use a vulnerability analysis to assess when vulnerabilities have reached such a degree that a person is forced to leave his or her home. However, it would obviously be extremely complex to develop generic criteria on this basis and to apply them individually, in particular in situations of slow-onset disasters.

The author, while maintaining that, except in certain cases described above, people displaced by certain effects of climate change are not normally refugees as defined by international law, suggests a different approach, one that takes inspiration from three elements of the refugee definition in Article 1A(2) of the Refugee Convention. These are: (i) being outside the country of origin, (ii) because of persecution on account of specific reasons (race, religion, nationality, membership of a particular social group or political opinion), and (iii) being unable or unwilling to avail oneself of the protection of one’s country.

People displaced across borders by the effects of climate change obviously fulfil the first criterion of being outside the country of origin. It is also obvious that, except in the case of scenario (v) and some other cases that will be rather exceptional, such people are not refugees, because they do not fulfil the criterion of being persecuted on account of any of the relevant reasons. However, similar to persecution, the effects of climate change (such as windstorms, salinisation of groundwater and soils, and so on) as well as conditions in their aftermath (such as unavailability of adequate food, drinking water or health services after a sudden-onset disaster) may constitute serious threats to life, limb and health. In this broader sense, refugees and those displaced by the effects of climate change are faced with similar dangers, albeit for different reasons. The third criterion may also help to conceptualise solutions for these people. Exactly as we do for refugees, we should ask: under what circumstances should those displaced across borders by the effects of climate change not be expected to go back to their country of origin, and therefore remain in need of some form of surrogate international protection, whether temporary or permanent? In general, the answer will, as for refugees, depend on the elements of inability or unwillingness of the authorities in the country of origin or habitual residence to provide the necessary protection—and in the case of disasters, hence the assumption should be a continued willingness by these authorities to provide protection and assistance.

See sections III.A.ii, III.E and IV.B.i above.
but in many cases it will be clear that the ability to do so is limited or even non-existent. Looking at it from the perspective of the people affected, the inability to obtain such protection and assistance must be the primary consideration in the context of climate-induced displacement.

Table 1: Comparison of refugees and persons displaced by climate change

<table>
<thead>
<tr>
<th>Refugee as person in need of international protection.</th>
<th>Person displaced across borders by the effects of climate change as person in need of international protection.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outside the country of origin or habitual residence.</td>
<td>Outside the country of origin or habitual residence.</td>
</tr>
<tr>
<td>Persecution, ie danger to life, limb or liberty, on account of race, religion, nationality, membership of a particular social group or political opinion.</td>
<td>Danger to life, limb or health as a consequence of the effects of climate change or the nature of the response, or the lack thereof, by competent authorities in the country of origin or habitual residence.</td>
</tr>
<tr>
<td>Unable or unwilling to avail oneself of the protection of the country of origin or habitual residence.</td>
<td>Unable or unwilling to avail oneself of the assistance and protection of the country of origin or habitual residence.</td>
</tr>
</tbody>
</table>

These criteria help to determine who should be admitted at the border of another state and allowed to remain, at least temporarily. It seems to be obvious that in the case of arrival at a border of a neighbouring country in the immediate aftermath of a natural disaster, those forced to flee should be initially admitted on the basis that their movement was forced at the moment of departure and they decided, to the best of their knowledge at the time of the disaster, that fleeing across a nearby border was the best option to reach safety.

The question whether such people can be obliged to return to their country of origin once the immediate danger is over is relevant and more complex. Here, the point of departure should not be the subjective motives of individuals or communities behind their decision to move, but rather whether, in light of the prevailing circumstances and the particular vulnerabilities of those concerned, it would be unreasonable, and thus inappropriate, to require them to return to their country of origin. This 'returnability' test helps to better identify those in need of international protection. It covers not only those who actually flee to another country, but also those whose initial movement was voluntary but who now cannot be expected to return because the situation has deteriorated to such an extent that return is no longer an option. Unlike the test used to determine who is an IDP, which focuses primarily on the forced nature of departure, this test, like the one

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53 However, someone can be an IDP who left voluntarily but is later unable to return to his or her home, for example owing to the breaking out of an armed conflict: see W Kälin, *Guiding Principles on Internal Displacement: Annotations*, 2nd edn (Washington DC, American Society of International Law, 2008) 5.
to determine refugee status, emphasises the prognosis—whether it would be safe to return.

The returnability of the person concerned should be analysed on the basis of three elements: permissibility, feasibility (factual possibility) and reasonableness of return. This test only asks whether it is legally permissible, factually feasible and morally reasonable to oblige the person concerned to return to his or her country of origin or permanent residence. It does not automatically exclude the return of those who cannot go back to their homes and therefore would become IDPs. Rather, returnability would depend on the conditions such returnees would encounter, as outlined below.

aa Legal Impediments: The Criterion of Permissibility
There are certain cases where human rights law, by analogy to the refugee law principle of *non-refoulement*, provides that return is impermissible. The first example is the prohibition against returning someone to a situation where there are substantial grounds for believing that an individual would face a real risk of torture or cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life. This prohibition was derived by the European Court of Human Rights\(^54\) and the UN Human Rights Committee\(^55\) from Article 3 of the European Convention on Human Rights and Article 7 of the ICCPR respectively, but has not yet been applied to disaster situations. The second example is the prohibition on collective expulsion, that is, the collective return of people that is not based on an individual assessment.\(^56\)

bb Factual Impediments: The Criterion of Feasibility
Return may be factually impossible due to temporary technical or administrative impediments, such as when roads are cut off by floods or airports in the country of origin are closed. Return is also impossible for practical reasons if the country of origin refuses readmission for technical or legal reasons: during an emergency, a country may lack the capacity to absorb large return flows, or it may prevent readmission of persons whose travel documents or proof of citizenship was destroyed, lost or simply left behind when they left.


Humanitarian Impediments: The Criterion of Reasonableness

Even where return would be lawful and possible, people should not, on the basis of compassionate and humanitarian grounds, be expected to go back if the country of origin does not provide any assistance or protection, or if what is provided falls far below international standards of what would be considered adequate. The same is true where authorities do not provide the displaced with any kind of durable solutions that are in line with international standards and would allow them to resume normal lives, especially where areas of land have become (or have been declared) uninhabitable, and people’s return to their homes is therefore no longer an option and they have been unable to find an acceptable alternative themselves. If the answer to one of these questions—is return permissible? is it feasible? can it reasonably be required?—is ‘no’, then individuals concerned should be regarded as victims of forced displacement in need of protection and assistance in another state. In such cases, they should be granted at least a temporary stay in the country where they have found refuge until the conditions for their return are fulfilled. Permanent solutions on the territory of other states must be found where either such vast parts of a country have become uninhabitable that it can no longer host its entire population, or in the particular circumstances of the individual case, return cannot reasonably be expected in the long term.

Closing the Normative Gap

What is the best strategy to close the existing normative gap and provide protection to those who are forced to cross an international border due to the effects of climate change and cannot be returned (at least temporarily) because such measure would be either inadmissible under international human rights law, not feasible, or could not reasonably be expected from those displaced? Such protection regimes can be developed either at the domestic, regional or the international level.

Domestic laws may draw inspiration from existing provisions in some states addressing complementary (subsidiary) or temporary protection that provide for—or may be interpreted in such a way as to provide for—protection for people displaced by the effects of climate change and other environmental factors. For example, the US Immigration and Nationality Act provides for the possibility of granting Temporary Protected Status (TPS) for nationals of a foreign state who are already in the US 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.

TPS was granted in the aftermath of the 1998 Hurricane Mitch that affected large

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58 Immigration and Nationality Act, 8 USC § 244.
parts of Central America, but denied in the case of the devastating 2008 floods in Haiti. Finland’s Aliens Act also provides temporary protection (for up to three years) in situations of mass displacement as a result of an environmental disaster. The law also provides for a residence permit where a person cannot return to his or her home country or country of permanent residence because of an ‘environmental disaster’. A similar provision is contained in Sweden’s Aliens Act. The provisions in the Swiss asylum law dealing with subsidiary as well as temporary protection may be interpreted to cover climate-related scenarios, even though the law does not expressly mention natural or environmental disasters.

Since these approaches are haphazard, discretionary and vary from one country to another, there is a clear need to go beyond domestic solutions to harmonise legal approaches. This is most likely to start at the regional level. In 2008, the Economic and Social Committee of the European Union suggested identifying areas where European law could play a useful part in adapting to the impacts of climate change. EU law on the protection of forced migrants includes provisions on temporary and subsidiary protection that might be able to be interpreted as providing protection to those displaced cross-border by natural disasters. While the Temporary Protection Directive was designed to deal with the mass influx of people displaced by the effects of armed conflict or generalised violence, it cannot be excluded that it could also cover instances of mass influx due to the effects of climate change, since the definitional provision in art 2(c) is not exhaustive.

Examples also exist in the area of internal displacement: the Great Lakes IDP Protocol covers people displaced by disasters. Article 3 obliges states ‘to the extent possible, [to] mitigate the consequences of displacement caused by natural disasters and natural causes’ and to ‘establish and designate organs of Government responsible for disaster emergency preparedness, coordinating protection and assistance to internally displaced persons’. Furthermore, states must ‘enact national legislation to domesticate the Guiding Principles fully and to provide a legal framework for their implementation within national legal systems’ and, in this context, ensure that such legislation specifies the governmental organs responsible not only ‘for providing protection and assistance to internally dis-

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59 Aliens Act 2004 (Finland) s 109.
60 ibid, s 88.
61 Aliens Act 2005 (Sweden) c 4, s 2.
62 This was the conclusion of an inter-departmental roundtable discussion by the Swiss Ministry of Foreign Affairs on 13 January 2009, in which the author participated.
64 It refers to people displaced ‘in particular’, rather than ‘only’, by armed conflict etc. See V Kolmannskog and F Myrstad, ‘Environmental Displacement in European Asylum Law’ (2009) 11 European Journal of Migration and Law 313, 316ff. The UK Home Office stated in 2004 that ‘[t]he European temporary protection directive . . . will enable all European Member States to act quickly and in a coordinated manner in the rare event that people from another country need to be offered temporary assistance because of armed conflict or natural disasters in their home country’: ‘UK Plans in Place to Protect Victims of Humanitarian Disasters’ (Press Release, 20 December 2004).
placed persons’ but also for ‘disaster preparedness’. The Kampala Convention obliges states to ‘take measures to protect and assist persons who have been internally displaced due to natural or human-made disasters, including climate change’, and provides that ‘States Parties shall devise early warning systems, in the context of the continental early warning system, in areas of potential displacement, establish and implement disaster risk reduction strategies, emergency and disaster preparedness and management measures and, where necessary, provide immediate protection and assistance to internally displaced persons’. These examples may provide inspiration for similar regional instruments on disaster-induced cross-border displacement.

C People Displaced from Submerged Small Island States

This leaves the case of the so-called ‘sinking’ small island states that may cease to exist. The question arises whether their populations will become stateless and should be treated as such under the Convention relating to the Status of Stateless Persons. However, it remains to be seen whether those affected will really become ‘stateless’ as a matter of international law.

According to Article 1 of that treaty, the term ‘stateless person’ means ‘a person who is not considered as a national by any State under the operation of its law’. Statelessness thus means being without a nationality, not without a state. Citizens of small island states do not become ipso facto stateless as long as there is some remaining part of the territory of their state and their government continues to exist. As highlighted by McAdam and Saul, the notion of ‘statelessness’ in international law ‘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’. Even where the whole territory of a country disappears, it is far from certain that its laws ‘sink’ with it.

In such cases, people from such states may become de facto stateless, but to treat them as de jure stateless persons would be problematic. While states, according to a traditional understanding, come into existence when they have a permanent population, a defined territory, a government and the capacity to enter into relations with other states, they do not automatically disappear when one element falls away. Rather, in modern international law, there is, as has been stressed by Crawford, ‘a strong presumption against the extinction of States once firmly established’. In

65 Great Lakes IDP Protocol, Arts 6(3) and 6(4)(c) respectively.
66 Kampala Convention, Arts 5(4) and 4(2) respectively.
67 See UNHCR, ‘Climate Change and Statelessness’, above n 57.
69 Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, Art 1, which is said to represent the position under customary international law.
the case of small island states, it is probable that their governments would try to retain at least a symbolic presence on their former lands, such as by building up a small island or surrounding it by dykes (even if that land would be too small or under-resourced to host any significant part of the population) and would continue to grant citizenship. Some states, such as the Maldives, have discussed the possibility of obtaining new territory where the state could continue to exist. Such governments would therefore be unlikely to declare their extinction and withdraw their membership from the UN as long as they maintained a symbolic presence or continued to operate in exile. It is also difficult to imagine that any other UN member state would want to tarnish its own reputation by being seen as lacking any compassion for the dire fate of such island states by asking for their exclusion from that or other international organisations.

Thus, it cannot be excluded that small island states will continue to exist as a legal entity as long as they possess a government and a population maintaining citizenship, even if their territory has disappeared and nobody is ready to formally terminate their statehood. International law would be flexible enough to provide for the continued existence of such states as non-territorial entities, as evidenced by the Sovereign Order of Malta, a subject of international law that continues to survive to this day, even though it lost its territorial base in Malta when Napoleon Bonaparte occupied the island on 12 June 1798. All that is needed is a consensus by the international community in this regard.

The key issue, therefore, is not the question of statelessness, but rather how it can be ensured that citizens of submerged island states are admitted to other countries on a permanent basis where they can keep their nationality of origin, even if they or their descendants acquire the nationality of that country, and how their rights can be guaranteed in a way to avoid marginalisation. In this context, the question of the responsibility of the international community, in particular regarding relocation of whole communities, must be clarified as well. In other words, new law will be required if we are to avoid these populations becoming marginalised and disenfranchised inhabitants of their countries of refuge. The biggest challenge, however, concerns the issue of how to ensure that populations of affected small island states can continue to retain their identities as communities, and to exist as viable communities, even after the loss of most or all of their territory, an issue that goes beyond the scope of this contribution. Unfortunately, as of today, effective responses to this challenge seem to be non-existent.

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72 State practice, as evidenced by the cases of Kuwait under Iraqi occupation 1990–91 or Somalia since 1991 until the creation of a (largely ineffective) Transitional Federal Government in 2004, does not readily assume extinction of a state because a government does not exist at a given moment or is in exile. See further McAdam, ‘Disappearing States’, above n 35.
73 F Gazzoni, ‘Malta, Order of’ in Max Planck Encyclopedia of Public International Law, above n 70.
V Outlook

Displacement caused by the effects of climate change raises many complex issues that need to be addressed.\textsuperscript{74} As a first step, it is important to reach a global consensus that displacement is an important aspect of adaptation, and that affected states need to be supported in their efforts to prevent climate change-induced displacement, address the protection and assistance needs of the displaced and find durable solutions for them. Taking into account the realities of present and future displacement caused by the effects of climate change, such adaptation efforts must complement any efforts to mitigate global warming. The 2009 UN Climate Change Conference in Copenhagen would have provided an opportunity to reach such consensus but, at the time of finalising this chapter, states parties to the UNFCCC had failed to negotiate and adopt any new legal framework to replace and further develop the present climate change regime. However, the issues discussed here are too pressing and important to be dropped from the climate change agenda and must be revisited in future rounds of negotiations.

\textsuperscript{74} For a discussion of possible fora in which this might occur, see J McAdam, ‘Environmental Migration Governance’, \textit{University of New South Wales Faculty of Law Research Series}, Working Paper No 1 (2009), http://law.bepress.com/unswwps/flrps09/art1.