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The international protection regime in the age of climate change

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Table of Contents

Abbreviations

CAF	Cancun Adaptation Framework
CAT	UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Committee for the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
COP	Conference of Parties
CRC	Committee on the Rights of the Child
DHS	Secretary of the Department of Homeland Security
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU QD	European Union Qualification Directive
GHG	Greenhouse gas
HR Council	Human Rights Council
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Law Commission
IPCC	Intergovernmental Panel on Climate Change
IPT	New Zealand Immigration and Protection Tribunal
IRU Convention	Convention Establishing the International Relief Union
NCDs	Nationally determined contributions
NY Declaration	New York Declaration on Refugees and Migrants

OAU Convention	Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa
OHCHR	Office of the UN High Commissioner for Human Rights
RCM	Regional Conference on Migration
RSAA	New Zealand Refugee Status Appeals Authority
RSD	Refugee status determination
THP	Temporary Humanitarian Protection
TPD	Temporary Protection Directive
UDHR	Universal Declaration of Human Rights
UNEP	UN Environment Programme
UNFCCC	UN Framework Convention on Climate Change
UNHCR	UN High Commissioner for Refugees
UNSC	UN Security Council
VCLT	Vienna Convention on the Law of Treaties

Introduction

1. Object and aims of research

This thesis investigates the impact of environmental degradation and disasters, including in the context of climate change, on forced migration from an international law perspective. More specifically, this work aims at analyzing the extent to which the international regime governing the protection of forced migrants can be used as a viable legal tool to accommodate changing realities of forced displacement. Such an analysis finds its underlying premises on the idea that climate change is not only a material phenomenon having far-reaching implications on several aspects of life and society, but represents also a turning moment for international law as a whole. As such, this work is situated amongst a broader international legal scholarship exploring the evolution of international law in times of climate change,[1] and develops in particular a reflection on the capacity of the international protection regime to adapt to the challenges raised by global warming.

Climate change, disasters, international protection, and human rights are amongst the key concepts and thematic areas of this research. In a nutshell, by 'climate change' it is meant 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods';[2] 'disasters' are hydro-metrological,

[1] See generally, *ex multis*, R. Rayfuse, S.V. Scott (eds), *International Law in the Era of Climate Change*, Cheltenham, Edward Elgar Publishing, 2012; B. Mayer, *The International Law on Climate Change*, Cambridge, Cambridge University Press, 2018; S. Humphreys (ed.), *Human Rights and Climate Change*, Cambridge, Cambridge University Press, 2010; S.V. Scott, C. Ku (eds), *Climate Change and the UN Security Council*, Cheltenham, Edward Elgar Publishing, 2018; J. Grote Stoutenburg, *Disappearing Island States in International Law*, Leiden, Brill Nijhoff, 2015.

[2] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, Article 1(2). For the sake of completeness, it should be clarified that the term has a slightly different meaning within the Intergovernmental Panel on Climate Change, where climate change is understood as 'a statistically significant variation in either the mean state of the climate or in its variability, persisting for an extended period', which 'may be due to natural internal processes or external forcings, or to persistent anthropogenic changes in the composition of the atmosphere or in land use'. IPCC, *Climate Change*

geophysical or climatological hazards, of both slow-onset and sudden-onset nature, which can either be linked or not to climate change; 'international protection' refers to the set of international legal instruments and norms that, either by 'designation' or progressive interpretation and practice, provide sanctuary to forced migrants who would be at risk of serious human rights violations upon removal; 'human rights', as is known, are basic entitlements inherent to all human beings, and are protected by a number of international and regional instruments and norms. While the link between the first two (i.e. climate change/disasters) on the one hand, and the second two (international protection/human rights) on the other hand is intuitive, the way in which each of the four elements relate to one another is more complex. Understanding such relationship, however, is crucial to a legal analysis of the environment-migration nexus. In the last decades, in light of the growing awareness about the far-reaching consequences of climate change, particularly regarding its 'humanitarian' dimension, international legal scholarship has dedicated a great deal of attention to the topic. In particular, legal discussions have revolved around a 'normative gap' – i.e., the absence of an international legal framework dedicated to the environment-migration nexus – and the need to fill this gap in order to protect, regulate, or manage persons displaced as a result of climate change and disasters. While this scholarship has significantly contributed to advance the debate on the topic by exploring uncharted territories in international law, the field is still riddled with controversies. The time is ripe for a more systematic engagement with both the limitations and the transformative capacity of the law when it deals with the issues arising at the intersection of climate change, disasters, human rights enjoyment and international protection.

Before turning to outline this thesis' structure and methodology, the following paragraphs provide a brief overview of the contextual, theoretical and empirical background underpinning it. As the topic of this thesis is inextricably linked to scientific findings and understandings of the impacts of human activities on the climate system, some preliminary considerations on the science of climate change will be provided. Afterwards, some comments on the emergence of the environment-migration nexus as an issue of academic interest, and on the empirical findings on the nexus, will be given in order to shed light on some of the field's conceptual tensions, including from a legal perspective.

2001: Synthesis Report. A Contribution of Working Groups I, II, and III to the Third Assessment Report of the Integovernmental Panel on Climate Change, 2001, p. 368 (emphasis omitted).

2. Brief remarks on the science of climate change

While evidence on climate change started to emerge as early as 1960, it was around the 1980s that the scientific community was almost unanimous in recognizing both the reality of the phenomenon and the complex dynamics linked to its manifestations.[3] Much of the scientific interest over the problem revolved around the so-called 'greenhouse effect', and particularly on the role of human activities in intensifying it and altering its natural course. In short, the greenhouse effect is a natural physical process by which gases present in the Earth's atmosphere, such as water vapour, carbon dioxide, methane, ozone and others – the so-called 'greenhouse gases' (GHGs) – trap the Sun's heat, warming the surface of the planet and making life as we know it possible. Throughout millennia, gradual fluctuations in the Earth's climate and global average temperatures have always occurred. However, the turn to the industrial era in the mid-nineteenth century, and the consequent reliance on the combustion of fossil fuels (coal, oil and gas) as a primary source of energy, has significantly altered the natural climate system. This is the result of increased emissions of GHGs in the Earth's atmosphere, which is due both to the combustion of fossil fuels, and to other human activities such as deforestation, agricultural processes, and the decomposition of organic wastes.

As a result of the growing awareness on the issue of climate change, as well as of the need to better understand its broader implications, in 1988 the World Meteorological Organization and the UN Environment Programme (UNEP) established the Intergovernmental Panel on Climate Change (IPCC), which was later endorsed by the UN General Assembly.[4] As the main UN body for assessing the science of climate change, its role is to guide policymakers through periodic assessments which lay out 'the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation'.[5] While in its first Assessment Report[6] the IPCC was rather cautious, over the

[3] See generally S.R. Weart, *The Discovery of Global Warming*, Cambridge, Harvard University Press, 2008.

[4] UNGA, UN Doc A/43/755 (6 December 1988).

[5] Principles Governing IPCC Work, Vienna, 1-3 October 1988, para 2. For analysis on the path to the IPCC's creation, see S. Agrawala, 'Context and Early Origins of the Intergovernmental Panel on Climate Change', in *Climatic Change*, 39, 1998, pp. 605-620.

[6] The Assessment Reports are delivered approximately every seven years (the next Synthesis Report is being expected in 2022). They are elaborated by hundreds of scientists who devote their time to assess the scientific literature on climate change in order to provide a comprehensive overview on the drivers of climate change, its impacts and future risks, and the role of mitigation and adaptation in reducing those risks. The

years increasing evidence and data confirmed that '[i]t is extremely likely that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in GHG concentrations and other anthropogenic forcings together'.[7] While GHG emissions were initially circumscribed to developed states, the pursuit of economic and industrial development, combined with global demographic growth, have progressively involved emerging economies, which have rapidly contributed to amplify the GHG effect. Indeed, the IPCC has described the rapid increase in global average temperatures, due to atmospheric concentrations of carbon dioxide, methane and nitrous oxide, as 'unprecedented' in at least the last 800,000 years,[8] and has reported that human activity has produced approximately 1.0 °C of global warming above pre-industrial level.[9] Most importantly, the consequences of changes in climate are not circumscribed to increasing temperatures, as they have far-reaching implications on the natural system as a whole. This is what is often referred to as 'climate change impacts',[10] which range from alterations of hydrological systems affecting both water resources and the food chain, ocean acidification, sea level rise, and an increased frequency in the occurrence of extreme weather events such as heat waves, droughts, floods and cyclones.[11] Most recent evidence furtherly confirms the attribution of these observed changes in extremes to human influence.[12]

The scenario described above is expected to become an even greater challenge in the decades to come. Although predictions about the severity of climate change impacts are surrounded by uncertainties,[13] there is sufficient confidence amongst scientists that past and present emissions 'will persist for centuries to millennia and will continue to cause further

authors producing the reports are grouped in three groups: Working Group I: the Physical Science Basis; Working Group II: Impacts, Adaptation and Vulnerability; Working Group III: Mitigation of Climate Change.

[7] IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, 2015, p. 5.

[8] Ivi, p. 4.

[9] IPCC, '2018: Summary for Policymakers', in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, 2018, p. 4.

[10] The IPCC speaks of 'impacts' of extreme weather and climate events, as well as of climate change, when referring generally to 'effects on lives, livelihoods, health, ecosystems, economies, societies, cultures, services, and infrastructure due to the interaction of climate changes or hazardous climate events occurring within a specific time period and the vulnerability of an exposed society or system'. IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, 2015, p. 5.

[11] IPCC, *Climate Change 2014: Synthesis Report*, op. cit., pp. 6-8.

[12] IPCC, '2021: Summary for Policymakers' in *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (approved version subject to final copy-editing), 2021, p. 10.

[13] This is mainly because they are dependent on the amount of GHG emissions in the future, which in turn depend upon socio-economic development, land use patterns, population growth, and climate policy.

long-term changes in the climate system'.[14] In 2015, state parties to the UN Framework Convention on Climate Change (UNFCCC) adopted the Paris Agreement, which seeks to limit the increase of global average temperatures to 'well below' 2 °C, and preferably to 1,5 °C above pre-industrial levels.[15] According to the IPCC, current climate mitigation policies adopted by states would result in a global warming of about 3 °C by 2100,[16] thus well above the goal set by the Paris Agreement. This trend has been confirmed by most recent climate models and projections, which overall indicate that '[g]lobal warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in CO2 and other greenhouse gas emissions occur in the coming decades'.[17] It is thus clear not only that mitigation efforts should be much strengthened in the years to come in order to avoid dangerous anthropogenic interference with the climate system,[18] but also that, even in the most optimistic scenario, climate-related risks will need to be dealt with through concerted adaptation measures.[19] The more global warming advances, and with it the risks from climate-related impacts, the more difficult adaptation will be.

2.1. The 'humanitarian' dimension of climate change

As already mentioned, the underlying premises underpinning the creation of the IPCC lied not only on the need to understand climate change from its purely scientific characteristics, but also and particularly from its implications in terms of risks for ecosystems and human societies. In this perspective, the institutionalization of the IPCC turned a marking point for the study of the science of climate change, the scope of analysis of which broadened to encompass the climate system and related alterations, and the way in which human systems react to and cope with them. It is in this connection that the expression 'humanitarian' or 'human' dimension of climate change, which started to take hold especially within scholars in the social sciences, needs to be understood: not simply as a theoretical or even ideological expression driven by the growing politically sensitive nature

[14] IPCC, '2018: Summary for Policymakers', op. cit., p. 5.

[15] Paris Agreement, UN Doc. FCCC/CP/2015/L.9/Rev/1 (12 December 2015), Article 2(1)(a).

[16] IPCC, '2018: Summary for Policymakers', op. cit., p. 18.

[17] IPCC, '2021: Summary for Policymakers', op. cit., p. 17. The climate models considered in the report have been developed in the Coupled Model Intercomparison Project Phase 6 (CMIP6) of the World Climate Research Programme.

[18] The prevention of 'dangerous anthropogenic interference with the climate system' is indeed at the heart of the international climate change regime, as expressly stated at Article 2 of the UNFCCC.

[19] The IPCC defines mitigation as 'an anthropogenic intervention to reduce the sources or enhance the sinks of greenhouse gases' and adaptation as an 'adjustment in natural or human systems in response to actual or expected climatic *stimuli* or their effects, which moderates harm or exploits beneficial opportunities'. IPCC, *Climate Change 2001: Synthesis Report*, op. cit., pp. 365, 379.

of the issue of climate change, but as a term firmly rooted on scientific evidence, which in turn has become increasingly devoted to a comprehensive analysis of climate impacts.

The humanitarian dimension of climate change is linked to two key concepts: exposure and vulnerability. The former is defined as '[t]he presence of people, livelihoods, species or ecosystems, environmental functions, services, and resources, infrastructure, or economic, social, or cultural assets in places and settings that could be adversely affected'.[20] Vulnerability is a much more complex concept, to which we will return later in this thesis.[21] For now, it is sufficient to introduce the way in which the concept is understood within the climate change community, that is '[t]he propensity or predisposition to be adversely affected' by climate-related hazards.[22] The risk of being adversely affected by climate impacts results from the interaction between a given hazard with the exposure and vulnerability of individuals and communities (and the natural system surrounding them): these two factors can thus be considered as 'determinants' of climate-related risk, to which they are linked by a directly proportional relationship. Exposure and vulnerability are dependent upon a number of different non-climatic variables, which create differential risks to climate impacts: for instance, a flood will produce different effects depending on when (timing variable) and where (geographical variable) it occurs. Intuitively, it would not be surprising to observe that the abovementioned flood will most likely have a stronger impact in Dhaka than in Amsterdam.[23] Generally speaking, developing countries with low income, which have contributed the least to GHGs emissions in the atmosphere, are also those where the impacts of climate change are and will be felt the most: their vulnerability is shaped by limited resources to cope with and adapt to climate impacts. However, linking climate-related risks to the 'macro' level only would be reductive, as exposure and vulnerability have a 'multidimensional' and 'intersectional' nature. In other words,

> '[v]ulnerability and exposure are dynamic, varying across temporal and spatial scales, and depend on economic, social, geographic, demographic, cultural, institutional,

[20] IPCC, '2014: Summary for Policymakers', in *Climate Change 2014: Impacts, Adaptation, and Vulnerability*, op. cit., 2014, p. 5.

[21] *Infra*, Chapter 1, para 5.2. ff.

[22] IPCC, '2014: Summary for Policymakers', op. cit., p. 5. A hazard is in turn defined by the IPCC as '[t]he potential occurrence of a natural or human-induced physical event or trend or physical impact that may cause loss of life, injury, or other health impacts, as well as damage and loss to property, infrastructure, livelihoods, service provision, ecosystems, and environmental resources'.

[23] Bangladesh and the Netherlands have similar characteristics in terms of exposure to flooding and storm surges as they are both densely populated and low-lying countries. However, risks related to flood impacts are sensibly greater in Bangladesh due to poorer infrastructure and other factors such as overcrowding, rapid urbanization and unplanned settlements. For further analysis on flood exposure, see generally J. Rentschler, M. Salhab, *People in Harm's Way: Flood Exposure and Poverty in 189 Countries*, Policy Research Working Paper no. 9447, Washington, World Bank, 2020.

> governance, and environmental factors […]. Individuals and communities are differentially exposed and vulnerable and this is based on factors such as wealth, education, race/ethnicity/religion, gender, age, class/caste, disability, and health status. […] Lack of resilience and capacity to anticipate, cope with, and adapt to extremes and change are important causal factors of vulnerability'.[24]

Within this multi-layered framework of risk, climate change acts as a 'threat multiplier' by amplifying existing vulnerabilities, or even creating new ones.[25] Thus, climate impacts are not only expected to exacerbate poverty in many developing countries, but also to give rise to further inequalities by creating new poverty pockets in both developing and developed countries.[26] The extent to which individuals and communities will be able to cope with the combination of multiple pressures until a 'tipping point' is reached is not clear as yet.[27] One may think, for instance, about the threat posed by sea level rise and related hazards to small island states, which besides being exposed to the (extreme) risk of submergence, may become uninhabitable, and thus reach their 'tipping point', long before that risk materializes. What however has been clearly observed is that climate change impacts 'reveal significant vulnerability and exposure of some ecosystems and many human systems to current climate variability',[28] and that climate-related risk is increasingly becoming an issue of every feature of human societies: from food security in all its aspects, including food access, utilization and price stability, to water availability and supply, as well as to human health and human security. Each of these impacts has ramifications that overlap, are the consequence of, or the cause of the other. Amongst such ramifications, already in its first Assessment Report the IPCC had identified the displacement of people:

> 'The most vulnerable human settlements are those especially exposed to natural hazards, eg coastal or river flooding, severe drought, landslides, severe wind storms and tropical cyclones. The most vulnerable populations are in developing countries, in the lower income groups, residents of coastal lowlands and islands, populations in semi-arid grasslands, and the urban poor in squatter settlements, slums and shanty towns, especially in megacities. In coastal lowlands such as in Bangladesh, China and Egypt, as well as in small island nations, inundation due to sea-level rise and storm surges could lead to significant movements of people. Major health impacts are

[24] IPCC, *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation. A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change*, 2012, p. 67.

[25] IPCC, *Climate Change 2014: Synthesis Report*, op. cit., p. 90.

[26] See IPCC, '2014: Summary for Policymakers', op. cit., p. 20.

[27] The concept of the 'tipping point' refers to an abrupt or irreversible system change, and expresses the moment at which a given system shifts from one state to another (the so-called 'regime shift'). Examples of regime shifts in the natural climate system include the dieback of the Amazon rainforest and the disintegration of the West Antarctic ice sheet, while for socio-economic systems critical threshold are identified in profitability limits in economic activities. IPCC, *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation*, op. cit., pp. 458-459.

[28] IPCC, *Climate Change 2014: Synthesis Report*, op. cit., p. 8.

> possible, especially in large urban areas, owing to changes in availability of water and food and increased health problems due to heat stress spreading of infections. Changes in precipitation and temperature could radically alter the patterns of vector-borne and viral diseases by shifting them to higher latitudes, thus putting large populations at risk. As similar events have in the past, these changes could initiate large migrations of people'.[29]

Subsequent Reports confirmed this finding, highlighting that 'climate change is projected to increase displacement of people'.[30]

3. The environment-migration nexus: between rhetoric and reality

The linkages between environmental changes, including those related to climate change, and human mobility, are today well-established and almost unanimously acknowledged by academics, policymakers, non-governmental organizations, and the media. Nonetheless, despite widespread recognition of the phenomenon, the ways in which the relationship between climate change and human mobility manifest are all but clearly defined. Framing the issue merely in terms of 'push-pull' language, or even of cause-effect, oversimplifies the phenomenon. This is because the environment-migration nexus deals with two very complex processes, pertaining to different areas of knowledge: the natural sciences on the one hand, and the social sciences on the other. The scientific community has made important progress towards a better understanding of the science of climate change; however, the study of the field is often characterized by uncertainties. In other words, climate change, while undoubtably occurring, remains yet to be unraveled in many aspects. Similar observations can be made in respect of human mobility, even though it has established much earlier as a field of study.[31] Indeed, migration too stands as a nuanced, multi-scale, and context-specific process that has always characterized human behavior and societies. In a way, civilization itself, as it exists today, has been shaped by the movement of people throughout centuries. In this connection, the environment-migration nexus goes back millennia: humanity has responded to environmental adversities since it came into existence, and people have always used migration as an adaptation strategy to survive or gain better

[29] IPCC, *Climate Change: The IPCC Impacts Assessment. Report prepared for Intergovernmental Panel on Climate Change by Working Group II,* 1990, p. 3.

[30] IPCC, *Climate Change 2014: Synthesis Report*, op. cit., p. 73.

[31] The origins of contemporary migration studies can be traced back to the theories developed by geographer Georg Ravenstein and published in 'The Laws of Migration' in 1885. For further analysis, see R. McLeman, F. Gemenne, 'Environmental Migration Research: Evolution and Current State of the Science', in R. McLeman, F. Gemenne (eds), *Routledge Handbook of Environmental Displacement and Migration*, London, Routledge, 2018, p. 6 ff.

life, working or health conditions not available in the country of origin because of a hostile environment.

The topic of the environment-migration nexus has emerged and evolved in a very peculiar way for two main reasons. Firstly, for the very fact of being a cross-cutting issue by nature, the study of the relationship between environmental changes and migration is inherently interdisciplinary. Initially circumscribed to a small community of mainly ecologists and geographers, the topic has progressively dragged into its scope of analysis an increasing variety of disciplines and areas of knowledge – from political science, law and international relations, to history, philosophy, medicine, and even computer modelling.[32] Secondly, the climate-migration nexus brings together two global issues of significant topicality and political currency, which in turn belong to distinct fields of governance. The combination of these two factors has favored the flourishing of a rich, multidisciplinary and – perhaps consequently – often conflicting literature in the last few decades. Furthermore, as will be outlined in more detail later, the climate-migration nexus was introduced and gained traction through the term 'environmental refugees'.[33] Far from being a term of art in international law, the expression was aimed at attracting the attention of policymakers on issues of environmental protection, climate change and sustainable development.[34] In this perspective, considering its speculative and rhetoric use, some authors have noted that the notion of environmental refugees was born as a political construct.[35] This 'advocacy' component was later picked up by governance and international law scholars to advance normative arguments on the 'protection gap' towards environmental (and climate) migrants: in this case, the policy objective was no longer, or at least not primarily, the protection of the environment, but rather the reform of asylum and migration laws. The way in which the climate-migration nexus has been conceptualized in the literature has been substantially shaped by what may be framed as a 'militant' attitude on the part of researchers. In other words, scholars, as 'prime providers of ideas', which in turn 'are an important input of the

[32] Ivi, p. 12. With the aim of keeping track of the development of research on the environment-migration nexus, the Institute of Geography at the University of Neuchâtel (Switzerland) initiated the CliMig Database Project, which represents the first and most comprehensive collection of publications on migration, the environment and climate change. For further information, see CliMig's website at https://climig.com/.

[33] *Infra*, para 3.1.

[34] R. Black, *Environmental Refugees: Myth or Reality?*, UNHCR Working Paper no. 34, 2001, p. 12.

[35] See A. Baldwin, F. Gemenne, 'The Paradoxes of Climate Change and Migration', in *World Social Science Report 2013: Changing Global Environments*, Paris, OECD Publishing, Paris/Unesco Publishing, 2013, pp. 265-268.

policy process', have played the role of 'policy entrepreneurs',[36] to the point that research and the policy process have mutually influenced each other.[37]

Having said that, the politically constructed component of the climate-migration nexus as a field of academic inquiry coexists with an empirical dimension. Indeed, understanding the relationship between environmental changes and human mobility is first and foremost an empirical question. The 'knowledge gap', and the consequent need to acquire more empirical evidence on the phenomenon, was soon recognized by many scholars engaged on the topic, and is still one of the key aspects of concern at the current state of the debate. It is in this context, however, that the major challenges arise, to the point that the climate-migration nexus still remains in many aspects inextricable.[38] This is so especially in respect to international migration, regarding which no official estimate in terms of the number of people displaced across borders in the context of climate change and disasters currently exists.[39]

The fact that a comprehensive understanding of the relationship between climate change and human mobility has not yet been achieved is not a reason for dismissing the topic altogether. On the contrary, this uncertainty should function as a stimulus to analyze the issue by actually embracing the controversies that characterize it. This means to be aware of both the limits deriving from the lack of a clear representation of the phenomenon empirically, and of the further (mis)representations, assumptions and contradictions that have emerged from the wide and multidisciplinary literature since the birth of the 'environmental refugee'. In other words, the analysis of the climate-migration nexus, including from a legal perspective, cannot disregard the twofold dimension that the issue has assumed: as both powerful advocacy tool and empirical reality.[40]

[36] F. Gemenne, 'How They Became the Human Face of Climate Change. Research and Policy Interactions in the Birth of the "Environmental Migration" Concept', in E. Piguet, A. Pécoud, P. de Guchteneirepp (eds), *Migration and Climate Change*, Cambridge, Cambridge University Press, 2011, p. 227.

[37] See S.L. Nash, 'Knowing Human Mobility in the Context of Climate Change. The Self-Perpetuating Circle of Research, Policy, and Knowledge Production', in *Journal for Critical Migration and Border Regime Studies*, 4(1), 2018, pp. 67-82.

[38] See *infra*, para 3.2.

[39] The Internal Displacement Monitoring Centre provides data on internally displaced persons only, including those displaced by disasters. For up-to-date displacement data, see https://www.internal-displacement.org/.

[40] Baldwin, Gemenne, 'The Paradoxes of Climate Change and Migration', op. cit., p. 267. Similarly, Farbotko and Lazrus have argued that climate change – and we add, conversely, climate migration – 'is both a discursive and material phenomenon'. C. Farbotko, H. Lazrus, 'The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu', in *Global Environmental Change*, 22(2), 2012, p. 382.

3.1. The birth of the notion of 'environmental refugee': early theoretical conceptualizations

The role of the natural environment in shaping migration patterns was known by early migration scholars, but for a set of reasons, including the development of the specific area of refugee studies, over the course of the twentieth century greater attention has been given to economic and political factors.[41] This started to change almost abruptly in the mid-eighties when, in parallel with the growing worries relating to climate change, the relationship between the environment and human mobility gained a revived interest, particularly from scholars with an ecological or environmental background. In 1985, the UNEP published a report entitled 'Environmental Refugees', defined as people 'who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life'.[42] Against the backdrop of 'the triumphant rise to political saliency'[43] of climate science, which in turn was becoming increasingly open to the analysis of climate change's humanitarian dimension,[44] the UNEP's publication had a significant echo within the academic community and initiated a vibrant scholarship on the topic. The first generation of literature on environmental refugees, formed primarily by environmental scholars, was later labelled as 'maximalist' (also referred to as 'alarmist') school of thought.[45] Its core features were the proposition of massive numbers of future

[41] For analysis see E. Piguet, 'From "Primitive Migration" to "Climate Refugees": The Curious Fate of the Natural Environment in Migration Studies', in *Annals of the Association of American Geographers*, 103(1), 2013, pp. 148-162.

[42] E. El-Hinnawi, *Environmental Refugees*, Nairobi, UNEP, 1985, p. 4. It should be specified that although many scholars attribute the paternity of the term to El-Hinnawi, the notion of 'ecological displaced persons' had already appeared in 1948 in Vogt's 'Road to Survival', while 'environmental refugees' was used by founder of the WorldWatch Institute Lester Brown in the 1970s. See Piguet, 'From "Primitive Migration" to "Climate Refugees"', op. cit., p. 153; Black, *Environmental Refugees*, op. cit., p. 1.

[43] D. Demeritt, D. Liverman, M. Hulme, 'Book review symposium: Hulme M (2009) *Why We Disagree About Climate Change: Understanding Controversy, Inaction, and Opportunity*. Cambridge: Cambridge University Press, 432 pp.', in *Progress in Human Geography*, 35(1), 2011, p. 137.

[44] See *supra*, para 2.1.

[45] A. Suhrke, *Pressure Points: Environmental Degradation, Migration and Conflict*, Cambridge, American Academy of Art and Science, 1993, p. 4. Amongst exponents of the maximalist doctrine, see, *inter alia*, J.L. Jacobson, *Environmental Refugees: A Yardstick of Habitability*, Washington DC, Worldwatch Institute, 1988; N. Myers, J. Kent, *Environmental Exodus. An Emergent Crisis in the Global Arena*, Washington DC, Climate Institute, 1995; D. Bates, 'Environmental Refugees? Classifying Human Migrations Caused by Environmental Change', in *Population and Environment*, 23(5), 2002, pp. 465-477. Within the same doctrine, another strand of literature stressed the nexus between environmental changes, human mobility and insecurity. See for instance T.F. Homer-Dixon, 'On the Threshold: Environmental Changes as Causes of Acute Conflict', in *International Security*, 16(2), 1991, pp. 76-116.

displaced persons,[46] the assumption that environmental disruptions and the effects of climate change in particular are a direct driver of displacement, and the aim to emphasize the dangerous and destructive effects of climate change generally. The use of strong terms and the description of apocalyptic scenarios[47] proved to be effective to that purpose: in a very short period of time, 'environmental refugees', portrayed as 'one of the foremost human crises of our time',[48] became the 'human face' of climate change, as well as the symbol of the gravest consequences of its impacts.[49]

As a result of the growing attention dedicated to environmental refugees, another strand of scholarship started to emerge in response to the maximalist doctrine. Scholars of migration studies, forming the 'minimalist' (or 'skeptical') school of thought, strongly criticized the assumptions and methodologies adopted by maximalists for being simplistic and rudimentary.[50] Indeed, the massive numbers of future environmental refugees estimated by the maximalist school were fundamentally based on a deterministic perspective, long discredited by migration scholars.[51] While raising awareness on a number of world areas particularly vulnerable to climate change impacts, the maximalist doctrine unproblematically assumed that displacements would result directly from the level of environmental disruption. This approach, as pointed out by minimalist scholars, overlooks the fact that population movements are multicausal, and that consequently environmental changes cannot be separated from other 'push factors' that determine people's decision to migrate.[52] It would thus be impossible to provide estimates on the number of individuals

[46] The estimates made by Norman Myers, a well-known maximalist scholar, are the most referred to in the literature: he affirmed that the amount of environmental refugees could be up to 250 millions by 2050. Christian Aid interview, 14 March, 2007, cited in C. Aid, *Human Tide: The Real Migration Crisis-A Christian Aid Report*, 2007, p. 48.

[47] Consider, for instance, Myers' words: '[t]he consequences of large numbers of environmental refugees would be among the most significant of all upheavals entrained by global warming. Refugees arrive with what are often perceived by host communities as alien customs, religious practices, and dietary habits, plus new pathogens and susceptibility to local pathogens. Resettlement is generally difficult, full assimilation is rare. Economic and social upheavals would proliferate, cultural and ethnic problems would multiply, and the political fallout would be extensive'. N. Myers, 'Environmental Refugees in a Globally Warmed World', in *BioScience*, 43(11), 1993, pp. 758-759.

[48] N. Myers, 'Environmental Refugees', in *Population and Environment*, 19(2), 1997, p. 175.

[49] F. Gemenne, 'How They Became the Human Face of Climate Change', op. cit, pp. 225-260.

[50] See G. Kibreab, 'Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate', in *Disasters*, 21(1), 1997, pp. 20-38; R. Black, *Environmental Refugees*, op. cit.; R.E. Bilsborrow, *Rural Poverty, Migration, and the Environment in Developing Countries: Three Case Studies*, World Bank Policy Research Working Paper 1017, 1992, available at https://documents1.worldbank.org/curated/en/777691468767386516/pdf/multi0page.pdf.

[51] See McLeman, Gemenne, 'Environmental Migration Research', op. cit., pp. 8-9.

[52] For the sake of accuracy, it should be mentioned that scholars within the maximalist school acknowledged the problem of multicausality: Myers, for instance, recognized that migrants could theoretically be distinguished in terms of 'no environmental cause', 'weak environmental cause', 'strong environmental cause' and 'overwhelming environmental cause'. However, the author ultimately dismissed the issue by stating

displaced by climate change, and therefore it makes little sense to speak of 'environmental refugees', as this implies the isolation of a single cause of displacement from other interrelated variables.

While early minimalist researchers certainly contributed to provide a more nuanced conceptualization of the environment-migration nexus, their attitude was criticized by later scholars for being too conservative: as it's been noted, 'it is as if this body of literature has had the effect of going beyond being a corrective to earlier emotive proclamations, and instead has *conceptually* evicted the environmental from the scope of refugee policy and research'.[53] Indeed, insofar as the notion of 'environmental refugees' evokes issues relating to increasing environmental pressures linked to the impacts of climate change, it 'cover[s] important and relatively unexplored issues […] amenable to critical analysis'.[54] Building on the growing interest on the environment-migration nexus raised by the concept of 'environmental refugees', several scholars, whom we might identify as 'second generation' minimalists, began to approach the topic by addressing the underlying, more general question about how environmental changes, including in particular those resulting from climate change, affect population movements. A consensus started to emerge amongst scholars on a series of key issues: first, that the role of climate change, albeit increasingly relevant in shaping migration processes, needs to be addressed in conjunction with other migration drivers; second, that human mobility in the context of environmental changes is heterogeneous in terms of dimension (i.e. internal vs. international), time (temporary vs. permanent), and nature (voluntary vs. forced). Though still partial, these conceptual assumptions on the environment-migration nexus anticipated to a large extent what came to be confirmed in subsequent years by a growing body of empirical research on the issue.

3.2. The empirical framework

Empirical research on the relationship between human mobility and climate change saw a rapid growth since the 2000s, reaching a pike in the period 2010-2015.[55] This ample body

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that he 'has exercised judgement on these issues as best as he can', also admitting that '[t]here would also have been a risk of trying to separate what could turn out to be inseparable'. Myers, Kent, *Environmental Exodus*, op. cit., pp. 28-29.

[53] K.E. McNamara, 'Conceptualizing Discourses on Environmental Refugees at the United Nations', in *Population and Environment*, 29(1), 2007, p. 15.

[54] Suhrke, *Pressure Points*, op. cit., p. 7.

[55] See L. Veronis, B. Boyd, R. Obokata, B. Main, 'Environmental Change and International Migration: A Review', in McLeman, Gemenne (eds), *Routledge Handbook of Environmental Displacement and Migration*, op. cit., p. 47.

of literature is composed mainly of case-studies aimed at understanding the extent to which environmental factors drive human mobility. Especially in less recent works, the most used methodology was based on a qualitative approach, to the detriment of quantitative studies as well as of mixed methods of analysis.[56] Some unbalances are also evident in terms of the researched geographical areas and type of environmental events, resulting in a number of blind spots on the one hand, and overstudied areas or hazards on the other hand.[57]

Overall, empirical observations have determined that environmental changes, particularly in the context of climate change, *do* impact human mobility, albeit in a varied, multifaceted, and often unpredictable way. By amplifying pressures to migrate, the combination of climate change impacts with other non-environmental factors will likely result in an increase of future displacements, even though the scope and nature of these movements is far from clear-cut. The empirical knowledge on the environment-migration nexus remains thus fragmented, to the point that universal conclusions on what is frequently taken for a fact in non-empirical literature – i.e. the massive increase of cross-border displacement as a result of environmental pressures – are often not possible to elaborate.[58] Indeed, the results of empirical observations are highly heterogeneous, to the point that even within the same studies, estimates regarding the extent and direction of migration in the context of climate change and disasters vary considerably.[59] That being said, it is also undeniable that empirical research has contributed to advance our understanding of the phenomenon by offering a more nuanced representation of the dynamics that characterize the relationship between environmental changes and human mobility. Some key findings are particularly worth mentioning.

An overarching theme, indeed already stressed by the minimalist school,[60] is the multicausality of migration choices. This implies that only in very rare cases the environment

[56] See F. Gemenne, 'Qualitative Research Techniques: It's a Case-Studies World', in McLeman, Gemenne (eds), *Routledge Handbook of Environmental Displacement and Migration*, op. cit., pp. 117-125.

[57] With the exception of the USA, which have received some attention in respect to the impacts of hurricanes, developing countries are the most represented in the empirical literature. In particular, Africa, Pacific Islands and Bangladesh are amongst the most studied areas, especially in relation to drought, sea level rise and floods respectively. At the same time, the large majority of researchers and funding are linked to developed countries: it has been argued that this is due to the highly evocative figure of the 'climate refugee' to Western imagination, including from a post-colonial perspective. For critical analysis, see E. Piguet, R. Kaenzig, J. Guélat, 'The Uneven Geography of Research on "Environmental Migration"', in *Population and Environment*, 39(4), 2018, pp. 357-383.

[58] As has been recently affirmed in a recent review of empirical evidence in Africa: M. Borderon, P. Sakdapolrak, R. Muttarak, E. Kebede, R. Pagogna, E. Sporer, 'Migration Influenced by Environmental Change in Africa: A Systematic Review of Empirical Evidence', in *Demographic Research*, 41, 2019, p. 492.

[59] R. Hoffman, A. Dimitrova, R. Muttarak, J. Crespo Cuaresma, J. Peisker, 'A Meta Analysis of Country-Level Studies on Environmental Change and Migration', in *Nature Climate Change*, 10, 2020, p. 904.

[60] See *supra*, para 3.1.

can be understood as an autonomous migration driver. More often, if not always, environmental pressures are included in a larger cluster of causes that induce people to migrate. It has been repeatedly observed, for instance, that slow-onset hazards, such as drought, influence people's decision to migrate because of the economic impact at the household level. This is particularly true for households relying on agriculture as their means of subsistence, for which environmental changes combined with the absence of adaptive options may eventually result in a disruption of livelihoods, leading in turn to migration. Other studies focusing on sudden-onset hazards have highlighted the greater role played by the broader political and economic context.[61] Even in highly vulnerable regions like small island states in the Pacific, often portrayed as 'canaries in the coal mine' of climate change,[62] only a small portion of migrants currently identify environmental degradation as their main reason for leaving.[63] The environment and human mobility are thus linked by an *indirect* relationship, where the former interacts with other macro-level conditions of a socioeconomic, cultural and political nature that can altogether induce or suppress migration responses to environmental events.

The multicausality of migration combined with the complex interaction of environmental and non-environmental factors in turn result in migration patterns and decisions with a strong context-specific character. This finding challenges the several attempts made by non-empirical scholarship at conceptualizing the environment-migration nexus through a classification of migration forms and related environmental hazard.[64] Any categorization of migration movements on the basis of the type of environmental event can only be an archetype of the heterogeneous forms that human mobility in the context of

[61] R. Obokata, L. Veronis, R. McLeman, 'Empirical Research on International Environmental Migration: A Systematic Review', in *Population and Environment*, 36(1), 2014, pp. 119-121.

[62] For a critical stance on this label, see C. Farbotko, 'Wishful Sinking: Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation', in *Asia Pacific Viewpoint*, 51(1), 2010, pp. 47-60.

[63] See R. Oakes, A. Milan, J. Campbell, K. Warner, M. Schindler, *Climate Change and Migration in the Pacific: Links, Attitudes, and Future Scenarios in Nauru, Tuvalu and Kiribati, Bonn,* United Nations University Institute for Environment and Human Security, available at https://collections.unu.edu/view/UNU:6515; J. McAdam, 'Refusing Refuge in the Pacific: (De)constructing Climate-Induced Displacement in International Law', in Piguet et al. (eds), *Migration and Climate Change*, op. cit., pp. 102-138.

[64] The categorization developed by Kälin is probably the most well-known. He identified five possible scenarios of 'climate change-induced displacement' deriving from different environmental events: i) the increase of sudden-onset disasters; ii) environmental degradation and slow onset disasters; iii) the case of 'sinking' small island states; iv) areas at high risk zones too dangerous for human habitation on account of environmental dangers designated by governments; v) armed conflicts and violence stemming from a decrease in essential resources due to climate change. Each scenario would determine different forms of movement: many will move internally, others will cross international borders; differences are based also on the time (temporary or permanent) and on the nature (voluntary or forced) of movement. W. Kälin, 'Conceptualising Climate-Induced Displacement', in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Oxford, Hart Publishing, 2010 p. 84 ff.

climate change and disasters may take. In fact, it is usually not the type of natural hazard that determines a particular migration behavior, but rather the overall context. This also relates to the fact that 'what constitutes an environmental hazard is not clear ex ante, without taking the actual local conditions and potential interdependencies into account'.[65] The same type of environmental disturbance will thus have different outcomes depending on the economic, social and political context in which it occurs.[66] Furthermore, amongst the contextual factors influencing migration behaviors, several recent studies highlight the importance of historical relationships between the sending and receiving country, including from a post-colonial perspective. As such, 'the forced displacements […] attributed to environmental factors should instead be seen as the result of a colonial past that had resulted in many conflicts over the unequal distribution of land and property'.[67]

3.3. A legal conundrum?

The empirical framework briefly outlined above makes clear that the relationship between the environment and human mobility is riddled with controversial aspects. It has even been claimed that the vast empirical scholarship on the environment-migration nexus has fundamentally reproduced a pattern of 'inconclusive conclusions', and that, due to its intractability, the topic 'is not, has never been, and will never become a "proper subject of research and governance"'.[68] As provocative as it may sound, such a statement stems from the observation that there will always be uncertainties about the extent to which environmental changes, including in particular those linked to climate change, are and will affect migration patterns. This is because

> '[t]he physical effects of climate change produce series of social effects which, like the concentric circles that an impact produces on a water surface, extend *ad infinitum* and *at absurdum* in time and space. It is hardly an exaggeration to state that the impacts of climate change can have virtually any consequence on any form of migration, and that the decisions to migrate or not to migrate that each of us repeatedly

[65] Hoffman et al, 'A Meta Analysis of Country-Level Studies', op. cit., p. 910.

[66] These macro-scale contextual factors shape and intertwine with other micro-scale factors, such as gender, class, and race, as well as exposure to risk, perception of risk and resilience capacity.

[67] R. Kaenzig, E. Piguet, 'Migration and Climate Change in Latin America and the Caribbean', in F. Laczko, E. Piguet (eds), *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration*, Dordrecht, Springer, 2014, p. 171. See also K. Whyte, J.L. Talley, J.D. Gibson, 'Indigenous Mobility Traditions, Colonialism, and the Anthropocene', in *Mobilities*, 14(3), 2019, pp. 319-335.

[68] C. Nicholson, '"Climate Mobility" is not a Proper Subject of Research and Governance', in B. Mayer, A. Zahar (eds), *Debating Climate Law*, Cambridge, Cambridge University Press, 2021, p. 216.

> makes in the course of our life could always be, in some ways, related to climate change'.[69]

The fact that the environment-migration nexus cannot be simplified into a binary cause/effect phenomenon challenges common assumptions that frequently surround the concept of climate migration and the figure of the climate migrant (or any other alternative denomination). In truth, it challenges the very *essence* of these concepts, if they intend to refer to concrete, identifiable individuals displaced by climate change and other environmental factors.[70] In this perspective, climate migrants, as the 'human faces' of climate change, stand as a representation of the desire to 'reify' the elusive relationship between climate change and migration.[71]

The analytical fallacy of climate migration has repercussions for (international) legal analysis. Indeed, recognizing that environmental and climate changes have an impact on human mobility on the one hand, and identifying climate migrants as the personification of this impact on the other, are two different things – the former having a more solid legitimacy from an empirical standpoint. Placing the 'climate migrant' at the center of the inquiry presupposes the existence of a distinct phenomenon, allegedly capable of being the object of specific norms.[72] It is thus not surprising that much of the international legal debate on the environment-migration nexus has revolved around the so-called 'protection gap' towards climate migrants. With the purpose of filling this gap, several definitions of the concerned category have been proposed, ranging from 'environmentally displaced persons', 'forced climate migrants', 'climate displacees', and the like. However, rather than contributing to clarify the legal implications of the environment-migration nexus, these definitions have often added further semantic and conceptual chaos to what may be described as a legal conundrum.[73] Indeed, the absence of an agreed terminology on what an environmental migrant constitutes is symptomatic of a conceptual rather than a definitional issue, which

[69] B. Mayer, *The Concept of Climate Migration: Advocacy and its Prospects*, Cheltenham (UK), Edward Elgar Publishing, 2016, pp. 24-25.

[70] Ivi, p. 16 ff.

[71] G. Bettini, 'And yet it Moves! (Climate) Migration as a Symptom in the Anthropocene, in *Mobilities*, 14(3), 2019, pp. 336-350.

[72] Mayer, *The Concept of Climate Migration*, op. cit., p. 16.

[73] It has been observed that 'the aforementioned terminological chaos, which derives from an overproduction of taxonomic categories (migrant/ displaced person/refugee/environmental refugee), renders the concept actually meaningless [...], confuses the operational references adopted in empirical studies with those concerning projections on the quantity of populations hypothetically involved in the phenomenon [...] and is mainly due to the difficulty in identifying among the different factors of migration a single cause of displacement'. E. Guadagno, 'Movimenti di Popolazione e Questioni Ambientali: una Lettura del Recente Dibattito', in *Bollettino della Società Geografica Italiana*, X, 2017, p. 200 (our translation).

again goes back to the difficulties of attributing migration to environmental hazards.[74] This in turn leads to two main paradoxical results. If, as the empirical observations suggest, it is highly problematic to single out and distinguish 'climate migrants' from other migrants, then it may arguably be concluded that any definition of the former category would ultimately appear arbitrary. At the same time, if climate change functions as a 'threat multiplier' by amplifying pressures to migrate, then it means that any migration could, to a lesser or greater extent, be related to climate change, which in turn would widen the category of 'climate migrants' to an indefinite class of persons.

What has been so far outlined may legitimately lead one to wonder whether, and why, the environment-migration nexus is even worth or feasible as a subject of analysis, particularly from an (international) legal perspective. More specifically, in light of the controversies surrounding the figure of the climate migrant, what justifies the choice of the relationship between environmental disruptions and human mobility as a subject of legal investigation, instead of, for instance, a broader analysis on forced migration and the rights of migrants more generally?

The answers to these questions lie in part in what has been already mentioned about the rhetorical and political traction of the issue at hand. In spite of the uncertainties of empirical observations and of critical stances,[75] the links between climate change, displacement, and human rights are becoming increasingly prominent in the international legal agenda. Language on human mobility in the context of climate change and disasters has been included in a number of international instruments, such as the Sendai Framework for Disaster Risk Reduction 2015-2030 (Sendai Framework),[76] the 2030 Agenda for Sustainable

[74] Mayer, *The Concept of Climate Migration*, op. cit., p. 20.

[75] Critical scholarship on environmental migration has been expanding since the 2010s. Its members have shed light, in particular, on the construction of 'climate refugees' through Eurocentric systems of power and knowledge, which depict these individuals as either hopeless victims or security threats. It has also been claimed that representing climate migration as a problem to be solved runs the risk of pathologizing and depoliticizing the environment-migration nexus. Other authors have pointed out the arbitrariness linked to the identification of climate migrants as subjects in need of protection, while still others have argued that the literature on environmental migration is symptomatic of a technocratic turn in academic research. See generally A. Baldwin, G. Bettini (eds), *Life Adrift: Climate Change, Migration, Critique*, London, Rowman & Littlefield, 2017; Farbotko, 'Wishful Sinking', op. cit., pp. 47-60; G. Bettini, '(In)convenient Convergences: "Climate Refugees" Apocalyptic Discourses and the Depoliticization of Climate-Induced Migration', in C. Methmann D. Rothe B. Stephan (eds), *Interpretive Approaches to Global Climate Governance: (De)constructing the Greenhouse*, New York, Routledge, 2013, pp. 122-136; B. Mayer, 'The Arbitrary Project of Protecting 'Environmental Migrants', in R. McCleman, J. Schade, T. Faist (eds), *Environmental Migration and Social Inequality*, Springer, 2016, pp. 189-200; C. Nicholson, '"Climate-induced Migration": Ways Forward in the Face of an Intrinsically Equivocal Concept', in B. Mayer, F. Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law*, Cheltenham (UK), Edward Elgar, 2017, pp. 49-67.

[76] UN Doc. A/RES/69/283 (23 June 2015), paras 28(d), 33(h).

Development,[77] the 2015 Paris Agreement,[78] and, significantly, the New York Declaration on Refugees and Migrants (NY Declaration)[79] and the resulting two Global Compacts.[80] Furthermore, the recent views adopted by the UN Human Rights Committee (HRC) on the well-known *Teitiota* case[81] have addressed precisely the question whether climate change impacts would constitute life-threatening risks so as to activate states' protection obligations, while a number of national courts have addressed similar issues after the HRC's pronouncement.[82] In addition, climate litigation before human rights monitoring bodies as well as before national courts has increased and is furtherly contributing to reinforce and clarify states' human rights obligations in respect to environmental matters.[83] All these 'incremental steps' have arguably created political momentum on the environment-migration nexus, and may pave the way for international legal development.

It appears also important to recall that, despite uncertain data, consensus on increasing pressures to migrate resulting *also* from climate change impacts is growing. According to the Internal Displacement Monitoring Centre, an annual average of 25 million persons have been internally displaced as a result of natural disasters since 2008.[84] Because of converging drivers and compound risks, displaced persons often end up experiencing a second or even third displacement. In some cases, internal displacement may represent a precursor of cross-

[77] UN Doc. A/RES/70/1 (21 October 2015), para 14.

[78] UNFCCC, Decision 1/CP.21 'Adoption of the Paris Agreement', UN Doc. FCCC/CP/2015/10/Add.1 (29 January 2016), para 49. Within the UNFCCC context, the Cancun Adaptation Framework had already invited Parties to adopt '[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels'. UNFCCC, Decision 1/CP.16 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', UN Doc. FCCC/CP/2010/7/Add.1 (15 March 2011), para II (14)(f).

[79] UN Doc. A/RES/71/1 (3 October 2016), paras 1, 43 (NY Declaration).

[80] Respectively the Global Compact for Safe, Orderly and Regular Migration, and the Global Compact on Refugees: UN Doc. A/RES/73/195 (11 January 2019), Objective 2, para 18; UN Doc. A/RES/73/12 (Part II) (13 September 2018), paras 8, 12, 63.

[81] HRC, *Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016*, UN Doc CCPR/C/127/D/2728/2016 (23 September 2020).

[82] Respectively the Italian Supreme Court, the Higher Administrative Court of Baden-Wuerttemberg (Germany), and the Appeals Court of Bordeaux (France): Corte di Cassazione, court order (ordinanza) no. 5022 of 24 February 2021; VGH Baden-Wuerttemberg, judgement of 17 December 2020 – A 11 S 2042/20; CAA de BORDEAUX, 2ème chambre, 18/12/2020, 20BX02193, 20BX02195, Inédit au recueil Lebon. Note also that Australian and New Zealand judicial authorities have been receiving international protection claims based on climate and environment-related grounds since the mid-nineties. See J. McAdam, 'The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement', in *Migration Studies*, 3(1), 2015, pp. 131-142.

[83] Climate litigation will be discussed in more detail *infra*, Chapter 1, para 3.3.

[84] Internal Displacement Monitoring Centre (IDMC), *Global Report on Internal Displacement 2021*, available at https://www.internal-displacement.org/sites/default/files/publications/documents/grid2021_idmc.pdf.

border displacement, especially if the coping capacities of human and natural systems will reach a tipping point.

While relegated to academic circles, the media and non-governmental organizations until recently, the environment-migration nexus has now entered the realm of policy and law. Although rife with controversies, the relationship between climate change and human mobility may offer a window of opportunity for progress in international law.[85] Increasing acknowledgement of the issue at the international level, combined with evidence on climate change impacts and its 'humanitarian' dimension, prompt reflections that are amenable to critical legal analysis. On the one hand, the environment-migration nexus and related developments, coming at a time characterized by intense migration and refugee flows often accompanied by states' rather lukewarm – if not hostile – responses, invite considerations about the role of the international protection regime in adapting to new realities and on its outer limits. On the other hand, there is scope for broader reflections on the intersections between different branches of law – from refugee and human rights, to environmental and disaster law – and on the extent to which these regimes' interaction may ultimately reinforce each one's application and effectiveness.

4. Structure of the work

The present thesis is composed of three Chapters. Chapter 1 sets the scene by providing the legal and conceptual background relevant to analyzing the environment-migration nexus from an international protection perspective. As already mentioned, a crucial step in this respect is understanding the linkages between climate change, disasters, human rights enjoyment and international protection: Chapter 1's overarching aim is to start to unpack and shed light on these linkages. As such, the Chapter has been divided into two parts: starting with a general overview of the climate change regime and related states' obligations, Part I outlines the way in which climate change issues have transcended the realm of international environmental law consistently with the idea of climate impacts' 'threat

[85] In a similar vein, Mayer argues that '[w]hereas it is important to understand that an individual protection of "climate migrants" cannot and probably should not be established on its own, it remains that there exists a social and political demand for reforms *centred* on the concept of "climate migration." More might after all be lost than gained if a concept with great political currency, hence likely to trigger political reforms in governance fields arguably in dire need for such reforms, was rejected "just" because of its analytical shortcomings. Rather, one ought to identify possible ways to mobilize the concept of climate migration within compelling political arguments that could support progress in international law'. Mayer, *The Concept of Climate Migration*, op. cit., p. 37.

multiplier' effect. After having discussed the latest developments in respect to the controversial concept of 'climate security' by assessing the practice of the UN Security Council *vis-à-vis* climate issues, Part I turns to outline the way in which climate change, disasters and environmental degradation pose several obstacles to human rights enjoyment, and explores how this has been addressed within the human rights system. The main argument is that the practice of human rights bodies in respect to environmental issues reflects an incremental process of 'transformative change' of the human rights regime, which in turn manifests through increasing systemic integration between the human rights and the environmental and climate change regimes. The relevance of this practice can be appreciated in two respects: on the one hand, it helps to disentangle the correlations between climate change and human rights, including from a legal perspective. On the other hand, by advancing international human rights law through evolutionary interpretations that can adapt to the climate crisis, it represents an important point of reference for a similar possible development in the international protection regime.

From here, the analysis moves to Part II of the Chapter, which is aimed at conceptualizing the environment-migration nexus. A first preliminary paragraph discusses the recognition of the issue at the international level by focusing in particular on the way in which it has been addressed by the Global Compacts on Refugees and on Safe, Orderly and Regular Migration. The analysis of these instruments reveals an overall comprehensive understanding of migration realities, as well as of states' protection obligations, which arise both in respect to refugees and to all other migrants in need of international protection, including, in principle, persons displaced in the context of climate change and disasters. On these grounds, Part II introduces the notion of 'disaster' as a key analytical tool to grasp a more nuanced and operative understanding of the dynamics underpinning the environment-migration nexus. In particular, the basic argument here is that the concept of disaster is capable of providing a theoretical framework that can be translated into legal analysis. By outlining the evolution of definitions of disaster in international law practice, and by observing how disasters are conceived of within modern disaster research, the remainder of Part II ultimately aims to shed light on human rights detriment, vulnerability to disasters, and risks giving rise to an international protection need.

After having provided the legal and conceptual background, Chapter 2 gets to the core of the research by assessing the relevance of the refugee regime to the environment-migration nexus. Firstly, the refugee definition provided in the 1951 UN Convention on the

Status of Refugees (Refugee Convention)[86] will be outlined through a thorough review of doctrinal and judicial interpretations of the definition's elements. This is aimed at demonstrating that, despite persons displaced in the context of disasters are often mentioned as an example of individuals to whom the Refugee Convention does not apply, a principled interpretation of the definition arguably supports the integration of disaster-related harms into refugee status determination's analysis. Having established this, the enquiry moves to illustrate the way in which claims to refugee status grounded on the adverse effects of climate change have been approached by the judiciary: for this purpose, the jurisprudence of Australian and New Zealander authorities is taken as a point of reference as it is the most developed in the field. While circumscribed to these jurisdictions, the global resonance of this case-law should not be underestimated not only since it is the most well-established in terms of the number of claims and decisions, but also because it has led to the first-ever international pronunciation on *non-refoulement* and climate change threats.[87] After having shown that the applicability of the Refugee Convention to the environment-migration nexus, while not excluded, is still seen as a remote option by decision-makers, this Chapter assesses refugee law developments in regional contexts. In particular, the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)[88] and the Cartagena Declaration on Refugees[89] are addressed because of their expanded refugee definition. In this case too, and perhaps even more, the definitions' terms do not prevent the application of refugee protection to persons displaced in the context of climate impacts and disasters; however, despite interesting developments and practice, in both regions is apparent a certain reluctance to consider the environment-migration nexus as a refugee issue.

From the analysis of refugee law, Chapter 3 moves to focus on other, complementary forms of protection that through time have developed alongside refugee protection. A preliminary analysis outlines the evolution of the concept of international protection in international law and of the principle of *non-refoulement* as its cornerstone, particularly in

[86] UN Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

[87] The reference is to the HRC's views on the *Teitiota* case, which is discussed *infra*, Chapter 3, para 3.1.

[88] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45. The OAU Convention was the first binding regional refugee instrument after the Refugee Convention and is considered the cornerstone of African refugee protection, functioning as an 'effective regional complement' to the Refugee Convention (Article 8(2), OAU Convention).

[89] Cartagena Declaration on Refugees for Latin America, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 19-22 November 1984 (Cartagena Declaration).

terms of its expanded scope of applicability. On the grounds of the dynamic nature of international protection, the enquiry starts first to assess the relevance of the notion of temporary refuge in respect to the environment-migration nexus: by providing an overview of state practice on disaster displacement, it is investigated whether a general or regional customary norm of temporary refuge from disasters can be identified. Subsequently, the Chapter turns to complementary protection under human rights law. The recent HRC's views on the *Teitiota v. New Zealand* case are analyzed first in light of their ground-breaking recognition that climate change and related effects may constitute life-threatening risks or give rise to a risk of ill-treatment, thus triggering states' protection obligations. Although, as is known, the pronouncements of 'quasi-judicial' bodies are not binding, they nonetheless preserve significant legal authoritativeness as the norms on the basis of which they are adopted do have binding force.[90] Thus, taking into account this important precedent, the last paragraphs look at the *non-refoulement* case-law of the European Court of Human Rights (ECtHR) on Article 3. This is done for two main reasons.

Firstly, while the ECtHR has never had the chance to rule on return cases linked to climate change, it is our opinion that a climate-related claim to protection will soon be brought before the ECtHR. This is because, in a strategic litigation perspective, the views adopted by the HRC in the *Teitiota* case and the ongoing growth of climate litigation have created important political momentum to advance innovative claims and use the judiciary as a means for progressive legal developments.[91] In this connection, it should also be added that claims to international protection based on environmental degradation and disaster impacts have recently emerged before some European domestic courts, the rulings of which support the idea of providing some form of protection grounded on states' *non-refoulement* obligations towards persons displaced in such contexts.

Secondly, the HRC itself made references to some ECtHR's rulings in the *Teitiota* views, which is symptomatic of the Court's well-known and developed jurisprudence in the removal context. After reviewing the ECtHR's most relevant judgements, the Chapter makes some final considerations on possible future scenarios and developments on the environment-migration nexus and international protection under human rights law.

[90] For discussion see D. Shelton, 'The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies', in H. Hestermeyer, D. König, N. Matz-Lück, V. Röben, A. Seibert-Fohr, P. Stoll, S. Vöneky (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, Boston, Martinus Nijhoff, 2012, pp. 553-575; M. Tignino, 'Quasi-Judicial Bodies', in C. Brölmann, Y. Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking*, Cheltenham (UK), Edward Elgar Publishing, 2016, pp. 242-261.

[91] See M. Scott, 'A Role for Strategic Litigation', in *Forced Migration Review*, 49, 2015, pp. 47-48.

5. Methodology and terminology

It has already been mentioned that the topic of the environment-migration nexus is inherently multidisciplinary, and that as such it can be studied from a variety of different perspectives. In this work, the topic is approached from an international law perspective, and thus the traditional methods and sources of the discipline – i.e. international instruments and norms, state practice, case-law, doctrinal commentary – are used as primary tools of enquiry. That being said, this thesis does not refrain from integrating an interdisciplinary approach when such an approach may enrich the topics under discussion, and ultimately contribute to the construction of a more accurate legal analysis. Indeed, a common call in scholarship on the environment-migration nexus is the use of interdisciplinarity.[92] In embracing this call, a caveat is however in order: while certainly useful in providing a more comprehensive account of the topic, interdisciplinarity is also a slippery slope, not only because it may broaden or distort the scope of the enquiry to the point of depriving it of scientific value, but also, in respect to international legal analysis, because it risks watering down the discipline's own 'relative autonomy'.[93] As such, the use of interdisciplinary analysis in this thesis serves the purpose of filling some 'knowledge gaps' that an exquisite legal perspective would erase from view. For instance, legal understandings of disaster, which is a crucial concept in this work, provide only a limited representation of what this phenomenon really entails, and of how individuals are differentially exposed and vulnerable to its effects. Insights from other disciplines, such as social anthropology and political ecology, are thus helpful in shedding light on disaster-related dynamics and displacement occurring in disaster contexts. Such insights, in turn, can be used by the legal scholar when he or she is called to interpret the law in an innovative way, or as a benchmark for reviewing judicial reasoning. In doing so, this thesis aims at developing a legal analysis that, while not exceeding the boundaries of law, is sensible to the contextual and conceptual framework on the basis of which it is constructed.

Before moving on, a final premise is necessary regarding the use of terminology. Throughout this thesis, the term(s) 'environment/climate-migration/displacement nexus' will be usually employed to refer to the empirical dimension of the phenomenon: this formulation in fact better expresses the different layers of complexity inherent in the

[92] See for instance J. McAdam, 'Introduction', in McAdam (ed.), *Climate Change and Displacement*, op. cit., p. 3.

[93] J. Klabbers, 'The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity', in *Journal of International Law and International Relations*, 1(1-2), 2005, pp. 35-48.

relationship between environmental changes and human mobility.[94] The expression 'environmental/climate migration' or 'environmental/climate refugee/migrant' will instead be used to refer to an idea or concept, built not only on reliable observations of the phenomenon, but also and particularly on its rhetorical force as the 'human face' of climate change.

It should also be clarified that the prefix 'climate' refers to climate change-related effects (e.g. sea level rise, heat waves, storm surges and other hazards of both slow and sudden onset nature),[95] while 'environment' refers more broadly to environmental conditions and phenomena, whether or not linked to climate change. For instance, thus, an 'environmental refugee' is a person fleeing the effects of an earthquake – a natural hazard that is unrelated to climate change –, while a 'climate refugee' would seek protection from the consequences of sea level rise. Having said that, these prefixes will often be used interchangeably – in other words, by employing one prefix or the other we do not mean to refer to distinct concepts or phenomena. This is because this thesis focuses primarily on 'natural' hazards and their effects on individuals and communities: as such, whether the hazard is linked or not to climate change is fundamentally irrelevant.[96] In other words, from a protection-oriented perspective, drawing a distinction between hazards that are climate change-related and those that are not is unhelpful, if not arbitrary.[97] Moreover, this approach also avoids complex issues of causality that such a distinction would imply.[98] At the same time, the thesis does not intend to dismiss the importance of climate change as a process exacerbating other preexisting vulnerabilities: as outlined earlier,[99] climate change has and will continue to increase the frequency and severity of extreme weather events, which in turn

[94] Other expressions, such as 'displacement', 'migration', or 'human mobility' in the context of climate change and disasters are equally intended to signify the relationship between the two phenomena from an empirical standpoint.

[95] 'Slow onset' hazards refer to environmental events characterized by a gradual process of environmental degradation (such as rising sea levels, desertification, drought, ocean acidification, salinization etc); 'sudden' or 'rapid onset' hazards are events emerging quickly and with little warning, creating an immediate physical impact (such as tsunamis, hurricanes, floodings, earthquakes, and the like). Both types of hazards can either be linked to climate change or simply be geophysical hazards.

[96] The interchangeable use of the prefixes 'climate' and 'environment' is frequent in the literature, which reflects 'the implicit assumption that conclusions reached with regard to climate change hold true for other kinds of environmental disruptions, largely because the impacts of global warming, such as droughts or floods, do not seem to be fundamentally different in nature from other environmental disruptions'. Gemenne, 'How They Became the Human Face of Climate Change', op. cit., p. 226.

[97] J. McAdam, 'Displacement in the Context of Climate Change and Disasters', in C. Costello, M. Foster, J. McAdam (eds), *The Oxford Handbook of International Refugee Law*, Oxford, Oxford University Press, 2021, p. 833.

[98] Current scientific knowledge can only attribute an increased frequency and severity of certain hazards to climate change, while it cannot determine with certainty whether a given hazard is directly caused by global warming. See Kälin, 'Conceptualising Climate-Induced Displacement', op. cit., 2010, p. 85.

[99] See *supra*, para 2, 2.1.

will make it progressively more difficult for affected individuals and communities to cope and will amplify other pressures of a non-climatic nature. Thus, while this work looks at ‘disasters’ and at their relationship with the displacement of people, it does so within a framework where the impact and threat multiplier effect of climate change is fully acknowledged.

Chapter 1
Setting the scene: legal and theoretical foundations of the environment-migration-protection nexus

Part I: Zooming out

1. State obligations in respect to climate change and evolution of the international climate change regime

A few years after the creation of the IPCC, states gathered in Rio de Janeiro for the United Nations Conference on Environment and Development (commonly known as the 'Earth Summit'), one of the outcomes of which was the UNFCCC. The UNFCCC sets the institutional forum[100] dedicated to the fight against 'dangerous anthropogenic interference with the climate system',[101] which shall be pursued 'for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'.[102] A key principle in this endeavor is that of international cooperation, the underlying rationale of which, in the context of climate negotiations, relates both to the fact that climate change is a 'common concern of humankind',[103] and that no effective remedy would be possible without the participation of all states.[104] In this connection, thus, the UNFCCC supports and reflects the idea that the need to act in respect to climate change is a 'collective' responsibility of the international community in order to achieve the common goal of avoiding climate change's direst effects.

While the need to address climate change is indeed almost undisputed, as reflected by the widespread ratification of the UNFCCC, the ways in which climate action and related goals should be pursued remain far from clear. The diverging views amongst states regarding international cooperation on climate change, often rooted on the highly contentious and opposite interests at stake, have creeped into almost thirty years of international negotiations, which have regularly taken place in a general *milieu* of urgency but have notoriously failed

[100] By establishing the Conference of Parties, a Secretariat, and a subsidiary body for scientific and technological advice.
[101] UNFCCC, Article 2.
[102] Ivi, Article 3(1).
[103] Preamble to the UNFCCC, Recital 1.
[104] Ivi, Recital 6.

to put forward concrete results. Such uncertainties and lack of consensus on the issue indeed clearly emerge from the way in which the UNFCCC approaches mitigation and adaptation duties, which form the two main blocks under which the fight against climate change should be carried out. In accordance with the principle of common but differentiated responsibilities, Article 4 makes reference to the commitments agreed upon by developed states, which should 'take the lead' on climate action by adopting, *inter alia*, 'national policies and take corresponding measures on the mitigation of climate change' with the aim of 'limiting [their] anthropogenic emissions of greenhouse gases and protecting and enhancing [their] greenhouse gas sinks and reservoirs'.[105] Similarly, in respect to adaptation, it is recognized that developed countries should assist developing countries and particularly those most vulnerable to meet the costs of adaptation,[106] while generally all Parties shall cooperate in order to promote adaptation measures.[107] The rather broad and vague language used in these provisions suggests that instead of imposing specific targets of emission reduction, the UNFCCC introduces some general obligations of conduct, including, for instance, the obligations to develop national inventories of anthropogenic emissions and to formulate and update programmes for climate change mitigation. It is thus clear that, while the UNFCCC provides the general normative framework on climate change, it is left to the Conference of Parties (COP) to further clarify the extent and scope of state obligations on the matter through other legal instruments.

The issue was indeed addressed at the first COP through the establishment of the Ad Hoc Group on the Berlin Mandate,[108] the work of which led to the adoption of the Kyoto Protocol in 1997.[109] On the basis of a strict reading of the principle of common but differentiated responsibilities, the Kyoto Protocol defined binding emission reduction targets for developed countries only. The absence of emission reduction obligations on large emerging economies such as India and China contributed to create further room for resistance on the part of a number of states in a sort of chain reaction: notoriously, the United States, which at the time represented the greatest emitter, chose not to ratify the Protocol, while Canada withdrew from it. The compliance of the remaining states to the targets set in the Kyoto Protocol was not enough to compensate the combination of the instrument's major

[105] UNFCCC, Article 4(2)(a).
[106] Ivi, Article 4(4).
[107] Ivi, Article 4(1)(e).
[108] UNFCCC, Report of the Conference of the Parties on its First Session, UN Doc. FCCC/CP/1995/7/Add.1 (6 June 1995).
[109] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

flaws: as the IPCC reported in 2007, global GHG emissions have only increased since the entry into force of the UNFCCC.[110]

In light of the disappointing outcomes related to the Kyoto's experience,[111] states became progressively less interested in a second commitment period under the Protocol, and started instead to engage in negotiations for a new instrument under the UNFCCC.[112] The seeds to this endeavor were planted in 2007 with the adoption of the Bali Action Plan, which launched 'a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012',[113] with the aim of reaching an 'agreed outcome' at the COP's fifteenth session, held in Copenhagen in 2009. While commonly considered as a failure, given the impossibility to reach such agreed outcome through a decision, the negotiations in Copenhagen marked a shift on a number of aspects pertaining to climate action:[114] firstly, the static differentiation between developed and developing countries, and the related consequences in terms of emission reduction obligations, was abandoned. Secondly, a bottom-up system based on country pledges, rather than on fixed targets, was envisaged.[115] Thirdly, it was recognized that, in accordance with the most authoritative and updated scientific findings, the increase in global average temperatures should be maintained below 2 degrees Celsius.[116] The consensus amongst states on these elements was confirmed in subsequent COPs and were ultimately incorporated in the Paris Agreement.

Adopted in December 2015 and entered into force only a year later, the Paris Agreement is premised upon a number of compromises, to the point that it has prompted vivid discussions amongst scholars about its legal form and nature.[117] Indeed, while formally

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[110] IPCC, *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 2007, p. 2.

[111] For further analysis on the Kyoto Protocol's critical issues, see A.M. Rosen, 'The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change', in *Politics & Policy*, 43(1), 2015, pp. 30-58.

[112] The first commitment period under the Kyoto Protocol lasted from 2008 to 2012. It should be clarified that negotiations for a second commitment period running from 2013 to 2020 actually took place and resulted in the Doha Amendment, which entered into force on 31 December 2020.

[113] UNFCCC, Decision 1/CP.13, UN Doc FCCC/CP/2007/6/Add.1 (14 March 2008).

[114] See D. Bodansky, 'The Paris Climate Change Agreement: A New Hope?', in *American Journal of International Law*, 110(2), 2016, p. 292.

[115] UNFCCC, Decision 2/CP.15, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010), paras 4-5.

[116] Ivi, paras 1-2.

[117] See, for instance, J. Pauwelyn, L. Andonova, 'A "Legally Binding Treaty" or Not? The Wrong Question for Paris Climate Summit', in *EJIL: Talk!*, 2015, available at https://www.ejiltalk.org/a-legally-binding-treaty-or-not-the-wrong-question-for-paris-climate-summit/; S. Oberthür, R. Bodle, 'Legal Form and Nature of the Paris Outcome', in *Climate Law*, 6, 2016, pp. 40-57; D Bodansky, 'The Legal Character of the Paris Agreement', in *Review of European, Comparative & International Environmental Law*, 25(2), 2016, pp. 142-150; M.M.T.A. Brus, 'Soft Law in Public International Law: A Pragmatic or a Principled Choice?

a treaty, the Paris Agreement combines both binding and non-binding elements, using hortatory language for *substantive* contents – namely, the plans and actions to be pursued by parties to achieve the 'well below 2 degrees Celsius' goal, which are to be set by 'nationally determined contributions' (NDCs)[118] –, while setting *procedural* obligations – that is, for instance, the obligation to prepare, communicate and update NDCs, which should be progressively more ambitious.[119] Such a 'hybrid' structure was indeed strategically adopted in order to grant the highest participation of states, especially in view of the U.S.'s notorious refractory attitude regarding climate politics.[120] This strategy proved effective: with 193 Parties, the Paris Agreement reflects widespread support for climate action – in terms of both mitigation and adaptation measures –, and represents a milestone for climate negotiations as well as a triumph of multilateralism more generally. With a bottom-up structure based on voluntary pledges from all state parties and a strong transparency and review system, it clearly departs from the Kyoto model by setting out a long-term architecture premised on collective efforts towards a common goal. Yet, not surprisingly, this structurally and normative-appealing system is counterbalanced by a weak compliance mechanism,[121] leaving in turn perennial issues about accountability and effectiveness open to debate.[122] In other words, in the absence of a strong enforcement system, the Paris Agreement's concrete impact in the years to come rests fundamentally on the extent to which the collective awareness on climate change and the willingness to act against its harshest effects will remain strong and widespread.[123]

This brief survey has provided a general overview of the birth and evolution of the climate change regime by focusing on the main developments occurred within the UNFCCC

Comparing the Sustainable Development Goals and the Paris Agreement', in P. Westerman, J. Hage, S. Kirste, A.R. Mackor (eds), *Legal Validity and Soft Law*, Cham (Switzerland), Springer, 2018, pp. 243-266.

[118] According to Article 3, '[a]s nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts […] with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement'. The NDCs are determined unilaterally by each state and communicated to the UNFCCC Secretariat.

[119] Paris Agreement, Article 4(2), 4(3).

[120] As is known, the U.S. briefly withdraw from the Paris Agreement as a result of Trump administration's decision to do so in June 2017. The U.S. rejoined the Paris Agreement on February 2021.

[121] Article 15 of the Paris Agreement establishes a 'mechanism to facilitate implementation […] and promote compliance' which shall be 'facilitative in nature […], transparent, non-adversarial and non-punitive'.

[122] See, for instance, the debate between M. Doelle, 'In Defence of the Paris Agreement's Compliance System: The Case for Facilitative Compliance' and A. Huggins, 'The Paris Agreement's Article 15 Mechanism: An Incomplete Compliance Strategy', in B. Mayer, A. Zahar (eds), *Debating Climate Law*, Cambridge, Cambridge University Press, 2021, pp. 86-110.

[123] See G. Sciaccaluga, *International Law and the Protection of "Climate Refugees"*, Cham (Switzerland), Palgrave Macmillan, 2020, pp. 92-94.

process. As has been shown, the approach to climate action has progressively moved from a top-down, strictly-differentiated structure of emission reduction obligations for developed countries, to a bottom-up, voluntary-based system supported by a strong transparency mechanism and premised upon the idea of a common goal to be pursued by the entire international community, without prejudice to the principle of common but differentiated responsibilities. It has also been suggested that, while states *do* have obligations to tackle climate change, these are poorly defined and most importantly fall short of addressing crucial questions regarding, *inter alia*, climate (historical) responsibility and compensation.[124] This 'legal uncertainty' attached to the climate change regime has led some scholars to argue that 'climate change agreements can be understood as a transitory regime of collective emulations and collaboration, but not as the definitive determination of States' rights and obligations with regards to their usage of the atmosphere'.[125] Moreover, coupled with the problem regarding the climate regime's vagueness in terms of legal obligations is the complex nature of climate change governance itself. As a 'super wicked problem',[126] climate change cuts across different realms of policy and has implications for multiple branches of international law. While initially circumscribed within the area of international environmental law, climate change has in time moved considerably beyond this particular field. This is not surprising: the multiple implications linked to climate impacts suggest in fact that it would be naïve to think that the climate change regime operates in isolation from other regimes.[127] Significantly, this is reflected within the Preamble of the Paris Agreement which, after recalling that climate change is 'a common concern of humankind', calls on states to

> 'respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to

[124] These questions, and the way in which they are (not) dealt with within the climate change regime, have been voiced for decades by developing countries in climate negotiations and represent the heart of the climate justice movement. For a critical appraisal of climate justice claims, see S. Caney, 'Cosmopolitan Justice, Responsibility, and Global Climate Change', in *Leiden Journal of International Law*, 18, 2005, pp. 747-775. For discussion on the role of the law of state responsibility in the context of climate change governance, see B. Mayer, 'State Responsibility and Climate Change Governance: A Light through the Storm', in *Chinese Journal of International Law*, 13(3), 2014, pp. 539-575.

[125] B. Mayer, 'Climate Change, Migration and the Law of State Responsibility', in B. Mayer, F. Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law*, Cheltenham (UK), Edward Elgar Publishing, 2017, p. 244.

[126] R.J. Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future', in *Cornell Law Review*, 94(5), 2009, pp. 1153-1234.

[127] See Rayfuse, Scott (eds), *International Law in the Era of Climate Change*, op. cit., p. 5 ff.

development, as well as gender equality, empowerment of women and intergenerational equity'.[128]

Climate change features today amongst the agenda of several institutions and organs. Within the UN system, in 2007 and 2008 the UN Security Council (UNSC) and the Human Rights Council (HR Council) respectively have discussed for the first time the security and human rights implications of climate change. The 'securitization'[129] of climate change on the one hand, and the association of climate impacts with human rights detriment on the other hand have walked along parallel lines, to the point that the framing of climate change as either a security or a human rights issue has raised some debate in scholarship.[130] In both contexts, however, is evident a perceived urgency and need to understand the ways in which well-established tools and rules of international law may contribute to address the enormous and far-reaching challenges that climate change impacts entail. The following paragraph analyses first the approach of the UNSC to such challenges and ultimately argues that its role will be at most marginal, if not even undesirable, in so far as a coercive intervention following the characterization of climate change as a threat to international peace and security is concerned. Then, the subsequent paragraphs examine more in depth the emerging and progressively strengthening interactions between human rights and environmental protection, making the case for an increasing, and welcomed, cross-fertilization between the two fields.

2. The 'securitization' of climate change: what role for the UN Security Council?

Given the 'threat multiplier' characterization often associated with climate change impacts, it is not surprising that the climate-security nexus soon gained traction in academia

[128] Recital 11, Preamble to the Paris Agreement. The inclusion of such language in the Paris Agreement marked the first-ever reference to human rights in an environmental treaty.

[129] The concept of 'securitization' was developed by the Copenhagen school of security studies and refers, in short, to a process by which a given issue of any nature is designed as an existential threat in order to be treated with the urgency and exceptionality characterizing the field of security. For discussion on the securitization of climate change, see S.V. Scott, 'The Securitization of Climate Change in World Politics: How Close have We Come and would Full Securitization Enhance the Efficacy of Global Climate Change Policy?', in *Review of European Community & International Environmental Law*, 21(3), 2012, pp. 220-230.

[130] More precisely, this debate has often been centered around the controversies related to the securitization of climate change as well as on the UNSC's contested legitimacy to act on climate issues. For discussion, see S. Caney, 'Climate Change, Human Rights and Moral Thresholds', in S. Humphreys (ed.), *Human Rights and Climate Change*, Cambridge, Cambridge University Press, 2009, pp. 69-90; F. Sindico, 'Climate Change: A Security (Council) Issue?', in *Carbon & Climate Law Review*, 1(1), 2007, pp. 29-34; K. Conca, J. Thwaites, G. Lee, 'Climate Change and the UN Security Council: Bully Pulpit or Bull in a China Shop?', in *Global Environmental Politics*, 17(2), 2017, pp. 1-20.

and policy circles.[131] The security implications of climate change were already recognized at the 1988 Toronto World Conference on the Changing Atmosphere,[132] but it was only in 2007 that this connection entered the international agenda when the UNSC held its first thematic debate on the topic. Climate change was again discussed in 2011 in an open debate initiated by Germany, while since 2018 the UNSC has held six thematic meetings dedicated to the climate-security nexus.[133] So far, however, the only outcome of such debates has been a 2011 presidential statement which, in a rather cautious language, expressed concerned that the 'possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security'.[134] At the time of writing, a draft resolution on climate-related risk as a central aspect of conflict-prevention has just been rejected,[135] confirming the long-lasting tensions amongst UNSC members about the appropriateness of linking climate change to security and of identifying the UNSC as the competent organ to address such issue.

To better understand the origins and reasons of such tensions, however, it is first necessary to address what, exactly, the role of the UNSC could be in this specific area. The most discussed, and potentially controversial option, would be for the UNSC to address climate change as such, thus characterizing it as a threat to international peace and security. As the organ invested with the primary responsibility for the maintenance of international peace and security by the UN Charter,[136] the UNSC has at its disposal a vast array of tools, including coercive enforcement measures under Chapter VII of the UN Charter, to achieve such objective. Given the authority and powers conferred to the UNSC, and considering the shortcomings related to the climate change regime particularly in terms of enforcement,

[131] The 'climatization' of security and conflict studies – or, conversely, the 'securitization' of climate change – dates back to the late 1970s, when Lester Brown argued that threats to the security of nations were becoming increasingly non-military. This also connects with the concept, mainstreamed by the UN Development Programme, of 'human security', the scope of which goes beyond a traditional conflict-based understanding of security. See L.R. Brown, 'Redefining National Security', Worldwatch Paper 14, 1977, available at https://eric.ed.gov/?id=ED147229.

[132] Toronto World Conference on the Changing Atmosphere, *The Changing Atmosphere: Implications for Global Security* (Conference Proceedings), 1988, p. 292.

[133] In addition, climate change issues have been debated through Arria-formula meetings, the last of which has focused on sea-level rise and implications for international peace and security in October 2021. For a detailed overview of the UNSC's practice on the climate-security nexus, see Security Council Report, *The UN Security Council and Climate Change*, June 2021, available at https://www.securitycouncilreport.org/research-reports/the-un-security-council-and-climate-change.php.

[134] UNSC, Statement by the President of the Security Council, UN Doc S/PRST/2011/15 (20 July 2011).

[135] UN Meetings Coverage and Press Releases, *Security Council Fails to Adopt Resolution Integrating Climate-Related Security Risk into Conflict-Prevention Strategies*, 13 December 2021, https://www.un.org/press/en/2021/sc14732.doc.htm. Specifically, the draft received 12 votes in favor, 2 against (India and Russia), and 1 abstention (China).

[136] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 24.

securing climate change into the UNSC agenda might elevate the problem from one of politics to a security concern, thus arguably offering a much greater choice of concrete instruments to address it.[137] In this perspective, the UNSC could be used to fill the obligation gaps under the climate change regime through, for instance, the imposition of sanctions against 'climate-unfriendly' states. Not surprisingly, the strongest advocates of such approach are small-island developing states which, besides recalling their particular vulnerability to a problem that they did not contribute to create, have regularly claimed that climate impacts raise an existential threat to their inhabitants and as such should be acted upon as seriously as traditional security threats.[138]

Non-traditional threats to international peace and security are not a novel issue within the UNSC.[139] While initially circumscribed to interstate armed conflicts, in the post-Cold War era the notion of 'threat to international peace and security' started to be applied also to civil wars and other humanitarian crises, in light of the acknowledgement that 'non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'.[140] After the terrorist attacks of 11 September 2001, the UNSC furtherly expanded the scope of the notion to a general international threat without temporal or geographical limitations.[141] Furthermore, in 2011, the UNSC addressed for the first time the impacts of a health crisis on international peace and security, affirming that the HIV/AIDS epidemic represented 'one of the most formidable challenges to the development, progress and stability of societies', and urging enhanced international cooperation to curb the epidemic's impact.[142] More so, in 2014, Resolution 2177 considered the unprecedented outbreak of the Ebola virus in Africa as a threat to international peace and security itself, and called on Member states to provide the necessary resource and assistance to the affected

[137] See A. Murphy, 'The United Nations Security Council and Climate Change: Mapping a Pragmatic Pathway to Intervention', in *Carbon and Climate Law Review*, 13(1), 2019, p. 54.

[138] For instance, at the 2007 Council debate, Papua New Guinea affirmed that '[t]he dangers that small islands and their populations face are no less serious than those faced by nations and peoples threatened by guns and bombs'. More recently, Saint Vincent and the Grenadines has stated that '[o]ur fellow islanders in low-lying States are faced with a clear and present existential threat that poses significant concerns for their sovereignty and, by extension, international peace'. Similar views were expressed at a 2015 meeting on the peace and security challenges facing small island developing states. See respectively UNSC, 5663rd meeting, UN Doc S/PV.5663 (17 April 2007), p. 28; UNSC, Statement by the Prime Minister and Minister for Foreign Affairs of Saint Vincent and the Grenadines, Ralph Gonsalves (Annex 10), UN Doc S/2021/198 (1 March 2021), p. 24; UNSC, 7499th meeting, UN Doc S/PV.7499 (30 July 2015).

[139] For analysis, see C.K. Penny, 'Greening the Security Council: Climate Change as an Emerging "Threat to International Peace and Security"', in *International Environmental Agreements: Politics, Law and Economics*, 7, 2007, pp. 35-71.

[140] UNSC, Note by the President of the Security Council, UN Doc S/23500 (31 January 1992), p. 3.

[141] UNSC, Resolution 1373, UN Doc S/RES/1373 (28 September 2001).

[142] UNSC, Resolution 1983, UN Doc S/RES/1983 (7 June 2011).

countries.[143] Finally, most recently, the UNSC has considered the security ramifications of the COVID-19 pandemic.[144]

This practice suggests that the recognition of climate change as a threat to international peace and security would not constitute a complete reversal of the existing legal paradigm. Arguably, the phenomenon of climate change presents a number of analogies with other non-traditional threats already addressed by the UNSC, both as an open-ended, global security threat not circumscribed by temporal or geographical limitations, and because of its potentially serious cross-border implications. Amongst the international community, there seems to be quite a strong support for such a characterization of climate change, or at least for a more systematic engagement of the UNSC in light of the 'threat multiplier' character of the issue. This can be inferred by the fact that 113 UN member states have co-sponsored the recently-rejected draft resolution on climate and security, where it was affirmed that climate adverse effects can 'lead…to social tensions…, exacerbating, prolonging, or contributing to the risk of future conflicts and instability and posing a key risk to global peace, security, and stability'.[145]

Notwithstanding this, the climate-security nexus remains a contentious issue on several aspects. A 'muscular' intervention on climate matters by the UNSC presents the risk of shifting international climate action on an international peace and security logic while obfuscating other, more comprehensive strategies that the multidimensional nature of climate change requires.[146] A number of proposals advanced by some actors on specific measures that the UNSC could take on the issue have indeed been criticized on these grounds,[147] and the potential 'interference' of the UNSC into climate politics continues to be raised by key states such as China, Russia and India.[148] Furthermore, it should also be

[143] UNSC, Resolution 2177, UN Doc S/RES/2177 (18 September 2014).

[144] UNSC, Resolution 2532, UN Doc S/RES/2532 (1 July 2020).

[145] Security Council Report, *Climate Change and Security: Vote on a Resolution*, December 2021, available at https://www.securitycouncilreport.org/whatsinblue/2021/12/climate-change-and-security-vote-on-a-resolution.php.

[146] See P. Villarreal, 'The Security Council and COVID-19: Towards a Medicalization of International Peace and Security', in *ESIL Reflections*, 9(6), 2021, p. 8. The author raises similar observations in respect to the UNSC's role in managing health crises.

[147] Such as, for instance, the development of a 'climate' responsibility to protect. See K. Conca, 'Is There a Role for the UN Security Council on Climate Change?', in *Environment: Science and Policy for Sustainable Development*, 61(1), 2019, p. 12 ff.

[148] For instance, in a 2019 thematic debate, India stated: 'can the needs of climate justice be served by shifting climate law-making from the inclusive United Nations Framework Convention on Climate Change (UNFCCC) to decision-making by a structurally unrepresentative organization? The disruptive spillover of such a change, made through a mere decision of the Council, on the UNFCCC processes and the Paris Agreement, as well as on the other multilateral organs currently engaged in cooperatively tackling climate change, and indeed on multilateral law-making, is real'. UNSC, 8451st meeting, UN Doc S/PV.8451 (25 January 2019) p. 43.

remarked that the link between conflicts, security and climate change keeps being debated within empirical studies, where the explanatory value of climate change is regularly called into question given the multicausal nature of conflicts.[149]

In light of the controversial aspects of the complex climate-security nexus, including in respect to the persisting tensions within UNSC membership, one is left to wonder to what extent the UNSC will be involved in climate action in the years to come. It has been suggested that the 'securitization' process is not devoid of perils, and that uncertainties emerge as to what would be the most appropriate responses were the UNSC to characterize climate change as a threat to international peace and security. Given the recent failure to incorporate climate change firmly into the UNSC through a resolution, it seems that, at least for the near future, a full 'securitization' of climate change is off the table.[150] This does not however mean that the UNSC will play no role at all. It should in fact be clarified that, despite the absence of a dedicated resolution, the UNSC has not refrained from referring to climate-related risks when addressing situations of national and regional security: for instance, in dealing with the security situation in the Lake Chad Basin region, Resolution 2349

> '[r]ecognises the adverse effects of climate change and ecological changes among other factors on the stability of the Region, including through water scarcity, drought, desertification, land degradation, and food insecurity, and emphasises the need for adequate risk assessments and risk management strategies by governments and the United Nations relating to these factors'.[151]

In subsequent years the UNSC, using very similar language, has included climate change considerations into a number of resolutions regarding Africa, and more recently on Cyprus[152] and Iraq.[153] While in these occasions climate impacts have been taken into account only to the extent that they relate to the UNSC's general mandate on conflict situations, such resolutions represent an interesting development of the UNSC's practice, as they clearly reflect the Council's willingness to engage in the issue by recognizing the climate change dimensions of conflict management. Moreover, climate change language regularly appears during debates on related topics, confirming the development of a steady climate agenda

[149] For an overview of this scholarship, see C.M. Scartozzi, 'Reframing Climate-Induced Socio-Environmental Conflicts: A Systematic Review', in *International Studies Review*, 23(3), 2021, pp. 696-725.

[150] For discussion, see M.K. Dewi, 'Failure of Securitizing the Climate Change Issue at the United Nations Security Council (2007-2019)', in *Andalas Journal of International Studies*, 9(2), 2020, pp. 168-184.

[151] UNSC, Resolution 2349, UN Doc S/RES/2349 (31 March 2017), para 26.

[152] UNSC, Resolution 2561, UN Doc S/RES/2561 (29 January 2021); UNSC, Resolution 2587, UN Doc S/RES/2587 (29 July 2021).

[153] UNSC, Resolution 2576, UN Doc S/RES/2576 (27 May 2021).

within the UNSC. Some have suggested that this practice, rather than a securitization of climate change, reflects a 'climatization' of security – that is, a process through which the 'existing security practices are applied to the issue of climate change and […] new practices from the field of climate policy are introduced into the security field'.[154] It remains to be seen, especially in light of the recent setback on a climate security resolution, the extent to which such process will be further implemented in the UNSC's future practice.

Having outlined the approach of the UNSC in relation to the security implications of climate change, which suggests that the case for action within the security field is fraught with difficulties, it is now possible to address the way in which climate change has been tackled within the human rights system. As has been anticipated, a year after climate change was discussed for the first time at the UNSC, the HR Council too turned its attention to the human rights implications of climate impacts. Since then, the relationship between human rights enjoyment and climate change has become increasingly prominent in the practice of human rights bodies, the evolution of which underlines interesting dynamics of cross-fertilization and, more generally, international human rights law development. The following paragraphs provide an overview of this ongoing process and reflect on its significant implications.

3. The 'environmentalization' of human rights in the practice of human rights bodies

Discussions about the interlinkages between environmental degradation caused by climate change and human rights might be seen as an evolution of debates originated in the aftermath of major man-made disasters in the 1980s.[155] Such events plastically exemplified the 'indivisibility' of humanity and the environment, and evidenced that '[i]f the effects of disasters on the environment are issues of international environmental law, the effects on humans belong to human rights law'.[156] Against the backdrop of increasing worries about

[154] A. Oels, 'From "Securitization" of Climate Change to "Climatization" of the Security Field: Comparing Three Theoretical Perspectives', in J. Scheffran, M. Brzoska, H.G. Brauch, P.M. Link, J. Schilling (eds), *Climate Change, Human Security and Violent Conflict: Challenges for Societal Stability*, Berlin, Springer, 2012, p. 185. See also L. Maertens, 'Climatizing the UN Security Council', in *International Politics*, 58, 2021, pp. 640-660.

[155] Namely, the Bhopal and the Chernobyl incidents. See D. Cubie, 'Human Rights, Environmental Displacement and Migration', in McLeman, Gemenne (eds), *Routledge Handbook of Environmental Displacement and Migration*, op. cit., p. 334. For a brilliant critical appraisal on the 'discursive' relationship between environmental protection and human rights in historical perspective, see M. Petersmann, 'Narcissus' Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame', in *Journal of Environmental Law*, 30(2), 2018, pp. 235-259.

[156] M. Prieur, 'Draft Convention on the International Status of Environmentally-Displaced Persons', in *Urban Lawyer*, 42, 2010-2011, p. 247.

the humanitarian dimension of climate change, the issue gained particular topicality in 2005, when a petition on behalf of the Inuit peoples of the Arctic regions of the United States and Canada was filed with the Inter-American Commission on Human Rights. The petition held that the U.S.' failure to limit GHG emissions causing climate change resulted in a violation of Inuit's human rights, such as in particular the right to culture, but also the right to life, health, property, physical integrity and security.[157] Although the Inuit petition was eventually rejected, it prompted significant debate in the academic community and beyond, constituting the first ever litigation that considered climate change impacts under the lens of human rights.[158]

In the wake of the Inuit's petition echo, a first intergovernmental statement expressing concern that 'climate change has clear and immediate implications for the full enjoyment of human rights' was made by the Male' Declaration of the Human Dimension of Global Climate Change in 2007.[159] The Declaration also called on the Office of the UN High Commissioner for Human Rights (OHCHR) to take up a detailed study on the effects of climate change for human rights enjoyment, and on the HR Council to organize a debate on human rights and climate change.[160] As a result, in 2008, the HR Council adopted the first[161] of a series of subsequent resolutions on the topic.[162] On such occasions, the idea that climate change and disasters have an all-encompassing impact on human rights enjoyment was generally confirmed:

> 'the adverse effects of climate change have a range of implications, which can increase with greater warming, both direct and indirect, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the enjoyment of highest attainable standard of physical and mental health,

[157] S. Watt-Cloutier, Inuit Circumpolar Conference, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 2005.

[158] For discussion, see S. Jodoin, A. Corobow, S. Snow, 'Realizing the Right to Be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming', in *Law & Society Review*, 54(1), 2020, pp. 168-200.

[159] Preamble to the Male' Declaration of the Human Dimension of Global Climate Change, adopted at the Conference of the Alliance of Small Island States on Preparing for Bali and Beyond: The Human Dimension of Global Climate Change, 14 November 2007. For analysis on the Male' Declaration's role in catalyzing recognition of the relationship between human rights and climate change, see D. Magraw, K. Wienhöfer, 'The Malé Formulation of the Overarching Environmental Human Right', in J.H. Knox, R. Pejan (eds), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, pp. 215-235.

[160] Male' Declaration, paras 4-5.

[161] HR Council, Resolution 7/23, UN Doc A/HRC/RES/7/23 (28 March 2008).

[162] See, for instance, HR Council, Resolution 10/04, UN Doc A/HRC/RES/10/4 (25 March 2009); HR Council, Resolution 18/22, UN Doc A/HRC/RES/18/22 (17 October 2011); HR Council, Resolution 26/27, UN Doc A/HRC/RES/26/27 (15 July 2014); HR Council, Resolution 29/15, UN Doc A/HRC/RES/29/15 (22 July 2015).

> the right to adequate housing, the right to self-determination, the right to safe drinking water and sanitation and the right to development',[163]

In addition, the HR Council also noted that such effects will be experienced even more acutely 'by those segments of the population that are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status, national or social origin, birth or other status and disability',[164] thus endorsing the view that natural hazards exacerbated by climate change have a differential impact depending on territorial and individuals' specific conditions.[165]

In light of the recognized impacts of climate change on all aspects of life, it is through a 'holistic' approach that threats to human rights should be understood in this context, which, along the lines of the interdependence and indivisibility of rights' doctrine,[166] brings into view the right to a healthy environment. Though not developed in direct relationship with the issue of climate change, the right to a healthy environment has a clear relevance for the linkages between climate change, disasters, and human rights enjoyment. The status and content of this right in international law has been uncertain for a long time, although recent developments strongly suggest that a self-standing right to a healthy environment is emerging as a general principle or customary international law.[167] Leaving aside issues about

[163] HR Council, Resolution 32/33, UN Doc A/HRC/RES/32/33 (18 July 2016).

[164] Ibid.

[165] As was anticipated *supra*, Introduction, para 2.1.

[166] Recognized in the *Vienna Declaration and Programme of Action*, adopted at the World Conference on Human Rights, 1993, para I(5): 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms'. This has been subsequently endorsed in several international declarations and documents. For a critical analysis of the doctrine, see generally D.J. Whelan, *Indivisible Human Rights: A History*, Philadelphia, University of Pennsylvania Press, 2010.

[167] The first formal recognition of the link between the environment and human rights dates back to the 1972 Stockholm Declaration, which stated that '[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself'. Report of the UN Conference on the Human Environment, A/CONF.48/14/rev.1, 5-16 June 1972, Chapter I(1). A stand-alone right to a healthy environment is enshrined in Article 11(1) of the San Salvador Protocol to the American Convention on Human Rights and in Article 24 of the African Charter on Human and Peoples' Rights, while a majority of states recognize a right to the environment, or state duties to protect the environment, in their Constitutions. Furthermore, several soft-law instruments provide for environmental rights, while other instruments contain references to the environment in relation to other rights. For a recollection of relevant documents, see S. McInerney-Lankford, M. Darrow, L. Rajamani, *Human Rights and Climate Change. A Review of the International Legal Dimensions*, World Bank, 2011, p. 36 ff. and particularly footnotes 356-358. For discussion on the problematic nature of so-called 'third generation' rights, including the right to a healthy environment, see C. Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edition), Oxford, Oxford University Press, 2014, p. 149 ff., who defines this category 'not as true rights, but rather as agreed objectives which the international community has pledged to pursue' (p. 154). For analysis on the right's status in international law, see, *ex multis*, L. Collins, 'Are We There Yet? The Right to Environment in International and European Law', in *McGill International Journal of Sustainable Development Law and*

the right's nature and status, its conceptual foundations are undisputed and lie in the idea that the realization of human rights is possible to the extent that the environment is capable of sustaining humans as rights-bearers. In this perspective, thus, the right to a healthy environment should be understood as a fundamental component of various human rights. This was recognized by the ICJ as early as 1997, when it was affirmed that

> '[t]he protection of the environment is [...] a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.'[168]

Most recently, the HR Council has significantly advanced the right's normative value by explicitly recognizing 'the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights', affirming also that the promotion of this right 'requires the full implementation of the multilateral environmental agreements under the principles of international environmental law'.[169] Furthermore and remarkably, on the same day, the HR Council decided to appoint a Special Rapporteur on the promotion and protection of human rights in the context of climate change with the mandate to, *inter alia*,

> 'study and identify how the adverse effects of climate change, including sudden and slow onset disasters, affect the full and effective enjoyment of human rights and make recommendations on how to address and prevent these adverse effects, in particular ways to strengthen the integration of human rights concerns into policymaking, legislation and plans addressing climate change'.[170]

These two HR Council's resolutions on climate change and the right to a healthy environment represent only the most recent developments of an incremental process towards increasing institutionalization of the relationship between environmental protection and human rights.[171] Such process has been ongoing for decades, with several actors within the wider human rights system, including the OHCHR, UN Special Procedures, and treaty

Policy, 3(2), pp. 119-153; L.J. Kotzé, 'In Search of a Right to a Healthy Environment in International Law', in Knox, Pejan (eds), *The Human Right to a Healthy Environment*, op. cit., pp. 136-154.

[168] ICJ, *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia.)*, ICJ Reports 7 (25 September 1997), pp. 91-92 (separate opinion of Vice-President Weeramantry).

[169] HR Council, Resolution 48/13, UN Doc A/HRC/RES/48/13 (18 October 2021), paras 1-3.

[170] HR Council, Resolution 48/14, UN Doc A/HRC/RES/48/14 (13 October 2021), para 2(a).

[171] See A. Savaresi, 'The UN HRC Recognizes the Right to a Healthy Environment and Appoints a New Special Rapporteur on Human Rights and Climate Change. What Does it All Mean?', in *EJIL: Talk!*, 2021, available at https://www.ejiltalk.org/the-un-hrc-recognizes-the-right-to-a-healthy-environment-and-appoints-a-new-special-rapporteur-on-human-rights-and-climate-change-what-does-it-all-mean/.

bodies, contributing to clarify the impacts of environmental degradation for general human rights enjoyment as well as in respect to specific rights.[172] Clearly, the most difficult legal issue arising in this respect regards the extent and scope of states' human rights obligations in the context of climate change and increased incidence of disasters. In this connection, a 2019 report prepared by the Special Rapporteur on Human Rights and Extreme Poverty, in lamenting the 'conservative' attitude of human rights actors on climate issues, stressed that

> '[h]uman rights treaty bodies and others should weigh in on questions that are already hotly contested in courthouses and parliaments, including how human rights obligations can be used to define States' legal duties to reduce greenhouse gas emissions individually and at a global level, what are the minimum actions that States must take in line with the latest scientific guidance, and whether human rights law gives rise to a certain threshold of action below which a State is in violation of its obligations'.[173]

The approach advocated by the Special Rapporteur points towards the need of a 'transformative change'[174] through which human rights mechanisms should be used not only in an aspirational manner, but most importantly with a practical, constructive spirit that provides meaningful guidance as to what is required from states. Clearly, this is an extremely challenging path, the consolidation of which will need further engagement on the part of the human rights community. At the same time, however, recent developments on the climate change-human rights nexus, which in turn build on a series of principles and judicial findings related to the right to a healthy environment and the environmental dimension of other rights, provide scope to argue that a 'transformative change' in the human rights regime is in the developmental stages. To illustrate this process, the following paragraphs analyze the approach adopted by judicial and quasi-judicial treaty bodies in addressing the environmental dimension of human rights, including in the context of climate change. Starting from the so-called 'environmental jurisprudence' of the ECtHR and of the Inter-American Court of Human Rights (IACtHR), the analysis moves then to illustrate the groundbreaking approach adopted by the HRC in its 2018 General Comment 36 on the right to life. Being considered 'basic to all human rights',[175] the right to life well illustrates the far-ranging implications of environmental degradation, climate change and disasters, and

[172] Such as the right to life, the right to health, the right to food, the right to water and sanitation, and the right to housing.

[173] HR Council, 'Climate Change and Poverty. Report of the Special Rapporteur on Extreme Poverty and Human Rights', UN Doc A/HRC/41/39 (25 June 2019), para 80.

[174] Ivi, para 2.

[175] HRC, *General Comment no. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life*, (9 November 1984), para 1.

thus represents a solid point of reference for the legal issues connected to the 'environmentalization' of human rights. Subsequently, further developments in the context of 'climate litigation' will be addressed in order to tease out the intersections between human rights, environmental protection and climate change and to assess its role in the progressive 'cross-fertilization' between these areas of law.

3.1. State human rights obligations in the context of environmental protection: insights from the 'environmental jurisprudence'

Although the International Bill of Rights does not contain any explicit reference to a quality environment, human rights treaty bodies and courts have progressively undergone a process of 'greening general rights',[176] by which duties of environmental protection have been derived from the rights protected by the treaty. This has occurred in particular at the regional level. The ECtHR, for instance, has discussed on several occasions the impacts of environmental harm on human rights, especially with regards to the right to life. From its extensive case-law, a number of key principles have emerged. Bearing in mind that the protection of the right to life also entails positive obligations, states have 'a primary duty [...] to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.[177] This is all the more evident with regards to hazardous activities, which require preventive measures, including their licensing, setting up, operation, security and supervision, to ensure the effective protection of individuals whose lives might be endangered by the inherent risks of such activities.[178] Moreover, the Court has applied a similar line of reasoning also in respect to natural hazards, especially when they are clearly identifiable or recurring, and the related risks are foreseeable.[179] Even though in this scenario states enjoy a wider margin of discretion as to the means adopted to fulfill their positive obligations,[180] the Court emphasized that in light of the fundamental importance of the right to life, states must 'do everything within [their] power in the sphere

[176] G. Adinolfi, 'The Right to a Healthy Environment. Delineating the Content (and Contours) of a Slippery Notion', in F. Zorzi Giustiniani, E. Sommario, F. Casolari, G. Bartolini (eds), *Routledge Handbook of Human Rights and Disasters*, New York, Routledge, 2018, p. 215.

[177] ECtHR, *Öneryildiz v Turkey*, Application no. 48939/99, 30 November 2004, para 89.

[178] Ivi, para 90.

[179] ECtHR, *Budayeva and Others v. Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, paras 137, 158; ECtHR, *M. Özel and al. v Turkey*, Application nos. 14350/05, 15245/05 and 16051/05, 17 November 2015, para 173 ff.

[180] Ivi, paras 134-135. This is because natural hazards are beyond human control; the scope of the obligations owned by states 'depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation' (para 137).

of disaster relief for the protection of that right'.[181] In addition, the ECtHR has also identified a number of other procedural obligations, which include available information to the public, participation in the decision-making process,[182] and judicial remedies.[183]

In the Americas, the case law of the IACtHR, while more limited in size than that of the ECtHR,[184] has taken a similar interpretative approach and went even further with its 2018 Advisory Opinion 23 on the environment and human rights. On that occasion, in fact, the Court not only expanded on the environmental obligations arising from the protection of the right to life and physical integrity, but also recognized the existence of an autonomous right to a healthy environment with both an individual and collective dimension.

Regarding the former point, the Court affirmed that the underlying basis of environmental obligations arising in respect to the rights to life and personal integrity is the principle of due diligence,[185] and that in order to comply with their obligations to ensure and respect under the American Convention,[186] these obligations must be interpreted in light of the international environmental law principles of prevention, precaution, cooperation, and procedural standards.[187] The Court then went on to clarify the application of these principles in the American Convention's human rights context[188] and found that, overall, 'States have the obligation to prevent significant environmental damage within or outside their

[181] Ivi, para 175.

[182] ECtHR, *Taskin v. Turkey*, Application no. 46117/99, 10 November 2004, para 119.

[183] ECtHR, *Budayeva and Others v. Russia*, cit., para 138 ff.

[184] For a comparative analysis of the IACtHR's and the ECtHR's environmental jurisprudence, see R. Pavoni, 'Environmental Jurisprudence of the European and Inter-American Courts of Human Rights', in B. Boer (ed.), *Environmental Law Dimensions of Human Rights*, Oxford, Oxford University Press, 2015, pp. 69-106.

[185] IACtHR, Advisory Opinion OC-23/2017, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention of Human Rights)*, 15 November 2017, para 123. Due diligence is a well-established general principle in international law: in short, it concerns the issue regarding the state's responsibility for harmful conducts committed by private individuals. Developed within the law of diplomatic protection, it was later transposed into other legal contexts such as international environmental law, the law of the sea, and international human rights law. For analysis, see generally R. Pisillo Mazzeschi, *"Due Diligence" e responsabilità internazionale degli Stati*, Milano, Giuffrè, 1989.

[186] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

[187] IACtHR, Advisory Opinion OC-23/2017, para 125.

[188] Ivi, paras 127-242. Thus, for instance, states must 'regulate, supervise and monitor the activities within their jurisdiction that could produce significant environmental damage; conduct environmental impact assessments when there is a risk of significant environmental damage; prepare a contingency plan to establish safety measures and procedures to minimize the possibility of major environmental accidents, and mitigate any significant environmental damage that may have occurred, even when it has happened despite the State's preventive actions'.

territory'.[189] This touches upon extraterritorial human rights obligations,[190] in respect to which the IACtHR has gone further consolidated interpretations of 'effective control' over territory or persons by establishing that, when transboundary harm occurs, another jurisdictional link operates when 'the State of origin [i.e. 'the State under whose jurisdiction or control the activity that caused environmental damage originated, could originate, or was implemented'] exercises effective control over the activities that caused the damage and the consequent human rights violation'.[191] It follows that, according to the Court, 'a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory'.[192]

As for the Court's assessment about the right to a healthy environment, this was the first time that an international human rights court took the stance that, besides the environmental implications of other rights, such a right exists also autonomously. What is more interesting is that the Court held that the right to a healthy environment finds its legal basis not only in the San Salvador Protocol on Economic, Social and Cultural Rights,[193] but also in Article 26 of the American Convention which provides for the progressive development and realization of economic, social and cultural rights: in particular, the right to a healthy environment

> 'is included among the economic, social and cultural rights protected by Article 26 of the American Convention, because this norm protects the rights derived from the economic, social, educational, scientific and cultural provisions of the OAS Charter, the American Declaration of the Rights and Duties of Man […] and those resulting from an interpretation of the Convention that accords with the criteria established in its Article 29'.[194]

The Court grounded its reasoning on the interdependence of rights doctrine, which was reaffirmed by reiterating that civil and political rights and economic, social and cultural

[189] Ivi, para 242.

[190] For more on the topic, see generally K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties*, Leiden, Martinus Nijhoff, 2012.

[191] Ivi, para 104(h).

[192] Ibid. For analysis, including about the critical issues raised by this broadened understanding of jurisdiction and extraterritorial obligations, see A. Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR', in *EJIL: Talk!*, 2018, available at https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/; S. Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!', in *ESIL Reflections*, 9(1), 2020, pp 1-9; M.L. Banda, 'Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm', in *Minnesota Law Review*, 103(4), 2019, pp. 1879-1960.

[193] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) OASTS no. 69, Article 11.

[194] IACtHR, Advisory Opinion OC-23/2017, para 57.

rights 'should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities'.[195] What the Court thus points towards is the recognition of the direct justiciability of social, economic and cultural rights in general before the Inter-American human rights system under the American Convention and, as a right flowing from Article 26, of the right to a healthy environment in particular.

The IACtHR had already affirmed the direct justiciability of socio-economic rights under Article 26 in the 2017 case of *Lagos del Campo v. Peru*.[196] In 2020, the Court confirmed this approach in *Lhaka Honhat Association v. Argentina*[197] by stating that Argentina violated indigenous communities' rights to food, water, cultural identity and, for the first time in a contentious case, the right to a healthy environment, recalling the reasoning adopted in Advisory Opinion 23. These cases, as well as the Advisory Opinion on human rights and the environment, reflect a rather expansive approach on the part of the IACtHR, which is increasingly interpreting human rights protection and related obligations through a 'holistic' lens. Indeed, by recognizing the direct justiciability of socio-economic rights and the existence of an autonomous right to a healthy environment under Article 26 of the American Convention, the Court is clearly broadening the scope of its jurisdiction beyond traditional rights.[198] This is justified both by the indivisibility of rights doctrine, and by the recognition that 'the full enjoyment of all human rights depends on a suitable

[195] Ibid.

[196] IACtHR, *Lagos del Campo v. Peru*, Judgment of 31 August 2017 (Preliminary Objections, Merits, Reparations and Costs) no. 340.

[197] IACtHR, *The Indigenous Communities of the Lhaka Honhat (Our Land) Ass'n v. Argentina*, Judgment of 6 February 2020 (Merits, Reparations and Costs) no. 400.

[198] See M.A. Tigre, 'Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina', in *American Journal of International Law*, 115(4), 2021, p. 711 ff.; P. Patarroyo, 'Justiciability of "Implicit" Rights: Developments on the Right to a Healthy Environment at the Inter-American Court of Human Rights' in *EJIL: Talk!*, 2020, available at https://www.ejiltalk.org/justiciability-of-implicit-rights-developments-on-the-right-to-a-healthy-environment-at-the-inter-american-court-of-human-rights/. This expansive approach has not come without opposition: both *Lagos del Campo v. Peru* and *Lhaka Honhat Association v. Argentina*, as well as Advisory Opinion 23, have been accompanied by separate opinions highlighting that the direct justiciability of socio-economic rights would exceed the Convention's purpose and the Court's jurisdiction, which is limited to the protection of civil and political rights. According to these opinions, while well-intended, this holistic view of human rights protection under the American Convention may be problematic in terms of legal certainty and legitimacy: as Judge Sierra Porto observed, 'the legitimacy of the Inter-American Court derives from the rigor of its arguments and legal constructs, as well as from the justice achieved through its decisions. Consequently, the intention of trying to get it right is not enough – is insufficient – because what this may generate is an important factor for the delegitimization of the Court. Indeed, ultimately, decisions such as this one create a vision, a project of integration and transformations arising autonomously from the organs of the inter-American human rights system, moving away from the main function of the Inter-American Court, which is to administer justice, ensuring the protection of human rights while strictly respecting its jurisdiction. Indeed, it is not possible to create transformational law that runs counter to the law in force'. IACtHR, *Lagos del Campo v. Peru*, Partially Dissenting Opinion of Judge Humberto Antonio Sierra Porto, para 48.

environment'.[199] Although the IACtHR has not dealt with cases involving climate change yet, its recent environmental jurisprudence leaves a door open to climate-related claims, not only in light of the Court's recognition that 'environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights',[200] but also in consideration of its broadened interpretation of jurisdiction under the American Convention and consequent human rights obligations on an extraterritorial basis.

Just a year after the adoption of Advisory Opinion 23 by the IACtHR, the HRC adopted its new General Comment 36 on the right to life.[201] The HRC has made some remarkable statements on the environmental dimension of this right and has also embraced the notion of a 'dignified life'. Similarly to the IACtHR, General Comment 36 also seems to approach the obligations flowing from the protection of the right to life through a 'holistic' perspective, especially in light of the wide-ranging effects of climate change.[202]

3.2. Climate change and the right to live with dignity: The UN Human Rights Committee's General Comment 36 on the right to life

While the HRC had already recognized that the right to life should not be interpreted narrowly, and that its protection entails also positive obligations upon states,[203] until recently it had not addressed the implications of environmental degradation and other climate impacts for the enjoyment of this right.[204] Premising that the right to life constitutes a 'fundamental right whose effective protection is the prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights',[205] General Comment 36 dedicates two paragraphs to the scope of states' obligations to ensure and respect the right to life in the context of environmental issues. Remarkably, it also expands on the substantive content of the right to life by introducing the notion of a 'dignified life', which is of particular relevance in the area of environmental matters:

[199] IACtHR, Advisory Opinion OC-23/2017, para 64.

[200] Ivi, para 47.

[201] HRC, *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc CCPR/C/GC/36 (30 October 2018).

[202] For discussion about the 'judicial dialogue' between the IACtHR and the HRC, see M. Feria-Tinta, 'Climate Change as a Human Rights Issue: Litigating Climate Change in the Inter-American System of Human Rights and the United Nations Human Rights Committee', in I. Alogna, C. Bakker, J. Gauci (eds), *Climate Change Litigation: Global Perspectives*, Leiden, Brill Nijhoff, 2021, pp. 310-342.

[203] HRC, *General Comment no. 6: Article 6 (Right to Life)*, 30 April 1982, para 5.

[204] Earlier, the HRC had considered environmental protection primarily in the context of Article 27 ICCPR, thus in relation to the protection of cultural minorities. General Comment 36 replaces two previous General Comments on the right to life, namely General Comment 6 and General Comment 14 adopted in 1982 and 1984 respectively.

[205] HRC, *General Comment 36*, para 2.

> '[t]he duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include high levels of criminal and gun violence, pervasive traffic and industrial accidents, *degradation of the environment*, deprivation of land, territories and resources of indigenous peoples, the prevalence of life-threatening diseases, such as AIDS, tuberculosis or malaria, extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness'.[206]

By referring to the 'general conditions in society', the first sentence of the paragraph focuses on the causes of the violation of the right to life,[207] including a life with dignity. This draws attention to the general social context in which violations of such a right occur, and reflects the idea that in order to implement their obligations, states need to address underlying, structural conditions which might enable, or increase, direct threats to life or prevent individuals from enjoying such a right with dignity.[208] In that connection, the inclusion of environmental degradation[209] amongst such conditions is in line with scientific characterizations of climate change as a 'threat multiplier',[210] and reflects as well consistency with the idea of environmental pressures' contributing role to human rights threats and deprivations.[211] Further on, the HRC elaborates more specifically on climate change and related effects, characterizing them as 'some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'. On these grounds, similarly to the reasoning adopted by the IACtHR, the HRC highlighted that '[o]bligations of States parties under international environmental law should [...] inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law'. Finally, the

[206] Ivi, para 26 (emphasis added).

[207] See G. Le Moli, 'The Human Rights Committee, Environmental Protection and the Right to Life', in *International and Comparative Law Quarterly*, 69(3), 2020, p. 742 ff. As the author documents, Special Rapporteur Yuval Shany observed that, in addition to negative and ordinary positive obligations, General Comment 36 needed to lay out also a third category of obligations of special character, which would indeed concern the conditions of the causes of the violation.

[208] During discussions on the draft text, Special Rapporteur Yuval Shany noted that 'the idea is that the duty to protect the right to life or the duty to ensure the right to life also require states to address these more structural long-term challenges. This is how we try to deal with it. The language used is sometimes 'should', because we are realizing that sometimes we walk on the borderline of obligations and best practices but sometimes we use a stronger language'. Cited in Le Moli, 'The Human Rights Committee, Environmental Protection and the Right to Life', op. cit., p. 743.

[209] 'Degradation of the environment' replaced the originally chosen term 'pollution of the environment'. In fact, as a result of proposals from Human Rights Watch and other organizations to include 'climate change' in the paragraph, it was agreed that the latter expression was too narrow, as it excluded a number of environmental phenomena such as natural disasters and climate change. See Le Moli, 'The Human Rights Committee, Environmental Protection and the Right to Life', op. cit., pp. 744-745.

[210] *Supra*, Introduction, para 2.1.

[211] Which will be further discussed *infra*, para 5.2.2.

HRC concluded that the '[i]mplementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors'.[212]

Beyond establishing a firm underpinning of the relationship between environmental protection and the right to life, General Comment 36 provides a valuable and authoritative foundation for the recognition of the socio-economic dimension of the right to life, which particularly emerges in relation to environmental conditions. This is done through the inclusion of the right to live with dignity, introduced at paragraph 3: after premising that 'the right to life [...] should not be interpreted narrowly', the HRC makes clear that this right does not only capture the right of individuals 'to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death', but also the entitlement 'to enjoy a life with dignity'.[213] The notion of a dignified life is mentioned again later,[214] where it is linked to the general conditions in society which might impair the enjoyment of the right to life with dignity. After providing an exemplificative list of such general conditions, the HRC also elaborates on the type of measures that states should put in place to address them, which include

> 'measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health-care, electricity and sanitation, and other measures designed to promote and facilitate adequate general conditions such as the bolstering of effective emergency health services, emergency response operations (including fire-fighters, ambulances and police forces) and social housing programs. States parties should also develop strategic plans for advancing the enjoyment of the right to life, which may comprise measures to fight the stigmatization associated with disabilities and diseases, including sexually transmitted diseases, which hamper access to medical care; detailed plans to promote education to non-violence; and campaigns for raising awareness of gender-based violence and harmful practices, and for improving access to medical examinations and treatments designed to reduce maternal and infant mortality. Furthermore, States parties should also develop, when necessary, contingency plans and disaster management plans designed to increase preparedness and address natural and man-made disasters, which may adversely affect enjoyment of the right to life, such as hurricanes, tsunamis, earthquakes, radio-active accidents and massive cyberattacks resulting in disruption of essential services'.[215]

[212] HRC, *General Comment 36*, para 62.
[213] Ivi, para 3.
[214] For the sake of precision, it should be specified that other paragraphs of General Comment 36 (namely paras 9 and 50) contain references to the more general concept of human dignity.
[215] Ivi, para 26.

These suggested means of implementation of Article 6 arguably refer to basic protections that states are required to provide in order to both ensure survival and protect a dignified life. In light of the wide range of areas deemed relevant in this respect, the paragraph creates room for an interpretation of the right to life that incorporates obligations of a socio-economic nature. Although these are normally progressive obligations that depend on states' available resources pursuant to Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[216] the obligations to ensure 'minimum essential levels of each of the rights' protected by the Covenant are of an immediate character.[217] Indeed, the relevance of these obligations also in relation to the protection of the right to life had already been recognized by the IACtHR:

> 'One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating *minimum living conditions* that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority'.[218]

In a similar way, albeit not in relation to the right to life, the Special Rapporteur on Human Rights and Extreme Poverty has also stressed on the need to revitalize socio-economic rights in the context of environmental degradation and disasters by affirming that '[c]limate change should be a catalyst for States to fulfill long ignored and overlooked economic and social rights, including to social security, water and sanitation, education, food, healthcare, housing, and decent work'.[219] While only further practice of the Committee will reveal the precise scope of state obligations in this respect, and particularly the extent to which the right to a life with dignity demands protection of minimum other rights, it is evident that General Comment 36 has embraced a broad interpretation of the right to life, to be understood both in its physical and existential dimensions.[220] This in turn represents a strong endorsement of

[216] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[217] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, UN Doc E/1991/23 (14 December 1990), para 10.

[218] IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, para 162 (emphasis added). The IACtHR's jurisprudence is the most developed in this respect, and has been a pioneer of the right to a 'vida digna' since the seminal case of *Villagrán-Morales et al. v. Guatemala*. For analysis, see T.M. Antkowiak, 'A "Dignified Life" and the Resurgence of Social Rights', in *Northwestern Journal of Human Rights*, 18(1), 2020, p. 16 ff.

[219] HR Council, 'Climate Change and Poverty', cit., para 55.

[220] Another indication of the HRC's broad approach to the interpretation of the right to life can be inferred from the rejection of earlier language of General Comment 36 draft paragraph 15, which stated that: 'Article 6

the interdependence between civil and (certain) socio-economic rights, and is in line with analogous findings by regional courts.[221] Arguably, such a development has also been instrumental to the inclusion of environmental issues into General Comment 36, which frames the relationship between environmental degradation and the right to life in a concrete and defined way.

So far, the HRC has had the occasion to apply the views expressed in paragraphs 26 and 62 of General Comment 36 in two individual communications. The first one, *Portillo Cáceres v. Paraguay*,[222] concerned environmental pollution produced by large-scale fumigations with toxic agrochemicals, which contaminated water wells, crops and farm animals, and in turn resulted in the authors' poisoning. The Committee, recalling General Comment 36, found a violation of Article 6 as a result of the state's failure to perform its duty to protect in respect of both the deceased Mr. Portillo Cáceres and the other authors, considering that the aerial spraying with toxic substances constituted a reasonably foreseeable threat for the authors' lives.[223] The second communication, *Teitiota v. New Zealand*, regarded the linkages between climate impacts, the right to life, and the principle of *non-refoulement*. In light of its relevance for this work, as the first international ruling regarding international protection obligations arising in the context of climate change and disasters, the case is analyzed further on in Chapter 3.[224] For now, it is sufficient to anticipate that, despite an ultimate unsuccessful outcome, the HRC brought even further the normative intersections between human rights protection and the environment by accepting in principle that climate change impacts themselves may activate states' *non-refoulement* obligations. In addition to these cases, another climate-related petition is pending before the HRC at the moment.[225] The petition was filed by a group of eight Torres Strait Islanders who allege a

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of the Covenant imposes on States parties wide-ranging obligations to respect and to ensure the right to life. Individuals claiming to be victims of a violation of the Covenant [for the purposes of article 1 of Optional Protocols] must show, however, that their rights were directly violated by acts or omissions attributable to the States parties [to the Optional Protocol], or are under a real and personalized risk of being violated'. Indeed, the inclusion of this paragraph would have likely restricted individual applications before the HRC, undermining the justiciability of the right to a life with dignity. See Antkowiak, 'A "Dignified Life"', op. cit., p. 15, footnote 78.

[221] In addition to the IACtHR's 'vida digna' jurisprudence, the ECtHR too has considered the socio-economic dimension of Article 3 ECHR prohibiting inhuman and degrading treatment. This case-law will be discussed in further detail *infra*, Chapter 3, para 3.2. ff.

[222] HRC, *Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2751/2016*, UN Doc CCPR/C/126/D/2751/2016 (20 September 2019).

[223] Ivi, paras 7.2-7.5. The Committee also found a violation of Article 17, as the state's failure to enforce environmental standards to ensure the authors' enjoyment of goods and natural resources constituted an arbitrary interference with their privacy, family and home (paras 7.7-7.8).

[224] See *infra*, Chapter 3 para 3.1.

[225] *Torres Strait Islanders* case, Communication no. 3624/2019.

violation of their rights to life, private and family life, and culture as a result of Australia's insufficient mitigation and adaptation measures to tackle climate change, which in turn has resulted in the islanders' vulnerability to sea level rise and related negative effects.[226] The Torres Strait Islanders' petition, as well as the *Teitiota v. New Zealand* case, need to be contextualized within the so-called strand of 'climate litigation', that is, the use of strategic lawsuits, often based on human rights arguments, in order to hold governments accountable for climate change. As will be seen, climate litigation presents a further opportunity to delineate the dynamics occurring at the relationship between human rights and climate change in international law.

3.3. The *Sacchi v. Argentina* case and the rise of human rights in climate litigation: implications for cross-fertilization

Climate litigation is on the rise: as of May 2021, there are 1.841 ongoing or concluded climate-related claims around the world.[227] Amongst these cases, the use of human rights arguments has increased particularly since the inclusion of human rights language in the Paris Agreement in 2015, leading scholars to speak of a 'rights turn' in climate litigation.[228] This trend, on the one hand, suggests that climate litigation has become an established strategic legal tool to address the challenges related to climate change through a human rights lens, while on the other hand, more generally, raises interesting questions about the role of national and international courts and tribunals in respect to global crises and related issues of law and governance.[229] International and regional judicial bodies have so far had only a marginal role compared to the bulk of climate lawsuits at the domestic level;[230] however, there is scope to argue that their engagement with the issue, given its cross-border nature and some key developments in recent years, will likely become increasingly prominent.

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[226] See M. Cullen, *Climate Change and Human Rights: The Torres Strait Islanders' Claim to the UN Human Rights Committee*, in *GroJIL-blog*, 2019, available at https://grojil.org/2019/06/27/climate-change-and-human-rights-the-torres-strait-islanders-claim-to-the-un-human-rights-committee/.

[227] J. Setzer, C. Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot*, London, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2021, p. 5.

[228] J. Peel, H.M. Osofsky, 'A Rights Turn in Climate Change Litigation?', in *Transnational Environmental Law*, 7(1), 2018, pp. 37-67.

[229] See discussion in A. Bufalini, M. Buscemi, L. Marotti, 'Litigating Global Crises: What Role for International Courts and Tribunals in the Management of Climate Change, Mass Migration and Pandemics?', in *Questions of International Law*, 85, 2021, pp. 1-4 and related contributions.

[230] Of the 1.841 identified climate change cases, only 13 have been filed before international or regional courts and tribunals.

The previous paragraphs have already set some premises on the interpretative work employed in environmental and climate-related cases in respect to both substantive and procedural human rights. As climate change is considered a global threat to human rights, human rights norms have to be interpreted and applied in order to accommodate this reality. To some extents, this has taken place, confirming that the climate crisis is already pushing the boundaries of the law, and that a 'transformative change' in the human rights regime, supported in turn by the 'living nature' of international human rights instruments,[231] is occurring. The survey outlined above has shown a development within human rights bodies firstly through the assessment of human rights violations deriving from environmental harm within one country, and subsequently through transboundary environmental damage and consequent extraterritorial human rights obligations. The latter is a clear indication of the ways in which human rights mechanisms can be rendered effective in the context of climate change impacts, and its relevance has started to be accepted also within the UN system: in a 2019 Joint Statement on Human Rights and Climate Change, five UN human rights treaty bodies affirmed that

> 'State parties have obligations, including extra-territorial obligations, to respect, protect and fulfil all human rights of all peoples. Failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations'.[232]

Far from constituting a rhetorical exercise, this approach has been embraced by the Committee on the Rights of the Child (CRC) in *Sacchi et al v. Argentina, Brazil, France, Germany and Turkey* ('*Sacchi v. Argentina*').[233] The petition was filed by 16 children under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure[234] and argued that the respondent states' failure to address climate change had resulted in a violation of their rights to life, health and culture under the Convention on the

[231] The 'living instrument' doctrine was coined in ECtHR, *Tyrer v. United Kingdom*, Application no. 5856/72, 25 April 1978, and subsequently endorsed in the jurisprudence of other human rights treaty bodies.

[232] Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities, 'Joint Statement on "Human Rights and Climate Change"', 16 September 2019, para 1 (States' Human Rights Obligations).

[233] CRC, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure in Respect of Communication No. 104/2019*, UN Doc CRC/C/88/D/104/2019 (8 October 2021). The CRC issued five almost identical decisions for each respondent state; we will refer here to the Argentina decision.

[234] UNGA, Optional Protocol to the Convention on the Rights of the Child on a Complaints Procedure, UN Doc A/RES/66/138 (19 December 2011).

Rights of the Child,[235] including also Article 3 protecting 'the best interest of the child'. Although the CRC declared the communication inadmissible because of the non-exhaustion of domestic remedies, it nonetheless made some significant remarks on matters of law that will likely constitute a basis for future and ongoing litigation – not only in the context of children's rights and in terms of intergenerational justice, but also more broadly in other cases involving the human rights implications of climate change.

After having acknowledged the jurisprudence of the ECtHR and the HRC in respect to extraterritorial jurisdiction, the Committee held that, due to the 'novel jurisdictional issues of transboundary harm related to climate change' raised by the petition,[236] the correct approach to be adopted in the case was that developed by the IACtHR in Advisory Opinion 23, which, in the context of the Convention on the Rights of the Child, implies that

> 'when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question'.[237]

In this respect, the Committee accepted, in principle, the existence of state parties' effective control on the activities producing GHG emissions in light of their capacity to impose regulations upon such activities and to enforce them.[238] In addition to the 'effective control' requirement, the Committee clarified that 'the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions'.[239] Interestingly, in this regard, the CRC has adopted a rather relaxed threshold: firstly, it mentioned the generally accepted scientific evidence over the harmful effects of cumulative emissions, including for human rights enjoyment within and beyond the territories of state parties; secondly, it anchored the foreseeability of harm to the fact that states had long known the negative consequences of their contributions to climate change, as their commitment to the UNFCCC and the Paris Agreement suggests.[240] In this connection, the Committee elaborated upon the principle of common but differentiated responsibilities by further clarifying that 'the collective nature of the causation of climate change does not absolve the

[235] UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[236] CRC, *Sacchi v. Argentina*, para 10.4.
[237] Ivi, para 10.7.
[238] Ivi, para 10.9.
[239] Ibid.
[240] Ivi, paras 10.9,10.11.

State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location'.[241] In doing so, the Committee dismisses restrictive approaches to issues of causality and instead reinforces states' mitigation duties under the UNFCCC framework through an 'environmental'-oriented reading of human rights obligations.

The CRC's decision on *Sacchi v. Argentina*, especially if considered within the wider jurisprudential strand of climate-related instances before human rights bodies, raise a number of reflections on the limits and potential of human rights-based climate litigation. Indeed, the reactions to the CRC's decision plastically illustrate the challenges associated with the transposition of climate change claims into human rights claims. The Committee's ruling has been welcomed with mixed comments by different actors – from the enthusiasm related to the 'historic' character of the decision, particularly in terms of its relevance as a jurisprudential basis for future claims,[242] to the disappointment towards the Committee's formalism and the resulting 'indifference' for youth's predicament in the face of the climate crisis.[243] In the open letter providing a simplified explanation of the case to the authors of the communication, the members of the Committee acknowledged that, after lengthy discussion of the case, 'we struggled with the fact that although we entirely understood the significance and urgency of your complaint, we had to work within the limits of the legal powers given to us'.[244] This statement gets to the core of the difficulties involved in the already mentioned process of 'transformative change' that the international human rights regime and related mechanisms appear to be going through when addressing environmental issues. Such difficulties have indeed already been noted by a number of scholars, who have pointed out that, while there is a tendency to consider climate litigation as an exemplification

[241] Ivi, para 10.10.

[242] OHCHR, 'UN Child Rights Committee Rules that Countries Bear Cross-Border Responsibility for Harmful Impact of Climate Change', 11 October 2021, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27644&LangID=E; A. Nolan, 'Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in Sacchi v Argentina', in *EJIL: Talk!*, 2021, available at https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/.

[243] Earthjustice, 'UN Committee on the Rights of the Child Turns Its Back on Climate Change Petition from Greta Thunberg and Children from Around the World', 11 October 2021, available at https://earthjustice.org/news/press/2021/un-committee-on-the-rights-of-the-child-turns-its-back-on-climate-change-petition-from-greta-thunberg-and; B. Çali, 'A Handy Illusion? Interpretation of the "Unlikely to Bring Effective Relief" Limb of Article 7(e) OPIC by the CRC in Saachi et. al.', in *EJIL: Talk!*, 2021, available at https://www.ejiltalk.org/a-handy-illusion-interpretation-of-the-unlikely-to-bring-effective-relief-limb-of-article-7e-opic-by-the-crc-in-saachi-et-al/.

[244] OHCHR, 'Open Letter to the Authors', available at https://www.ohchr.org/Documents/HRBodies/CRC/Open_letter_on_climate_change.pdf.

of 'judicial activism' and progress, courts and tribunals operate within legal boundaries, which in turn impose caution in seeing the judiciary as an actor of change. It follows that:

> '[t]he degree to which we can perceive climate litigation as progress depends on whether or not we are satisfied with perceiving it as such. To put it differently, when we as legal experts consider these decisions as progress, we are not just articulating a scientific finding, we are also intervening in a highly politicized space in which our determination of progress, or of judicial law-making, might inadvertently make these decisions more susceptible to attempts at delegitimization'.[245]

It is with this caveat in mind that strategic climate litigation, and the role of courts as vehicles of transformative legal outcomes, can be better approached. While unfavorable to the petitioners, the CRC's decision is yet another confirmation of the mutually reinforcing relationship between environmental and human rights law. The underlying basis of this relationship is increasingly construed in terms of recognizing the instrumental nature of environmental protection to a better and more contextualized application of human rights norms.[246] These emerging approaches to climate issues of judicial and quasi-judicial bodies, as innovative or creative might be, are not so much the exercise of an alleged 'activism' on their part, but rather the result of principled legal interpretations that, consistently with the rules of treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT),[247] require systemic integration between the two regimes.[248] This process of systemic integration is likely to be progressively reinforced by judicial 'cross-referencing', as has already happened with regards to the CRC's endorsement of the IACtHR's reasoning in respect to extraterritorial jurisdiction. In this perspective, the CRC's findings may indeed represent a milestone for future rights-based climate litigation: at the moment of writing, a very similar case is pending before the ECtHR, which for the first time ever has been called to address the impacts of climate change on the rights protected by the European Convention

[245] L. Kulamadayil, 'Between Activism and Complacency: International Law Perspectives on European Climate Litigation', in *ESIL Reflections*, 10(5), 2021, p. 3.

[246] See M. La Manna, 'Cambiamento climatico e diritti umani delle generazioni presenti e future: Greta Thunberg (e altri) dinanzi al Comitato sui diritti del fanciullo', in *Diritti Umani e Diritto Internazionale*, 14(1), 2020, p. 224.

[247] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Articles 31-33.

[248] For analysis, see M. La Banda, 'Regime Congruence', op. cit., pp. 1942-1947; O. Quirico, 'Systemic Integration Between Climate Change and Human Rights in International Law?', in *Netherlands Quarterly of Human Rights*, 35(1), 2017, pp. 31-50; A. Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay, and Institutional Linkages', in S. Duyck, S. Jodoin, A. Johl (eds), *Routledge Handbook of Human Rights and Climate Governance*, London, Routledge, 2018, pp. 31-43; M. Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law*, Oxford, Hart Publishing, 2018, pp. 60-69.

on Human Rights (ECHR).[249] Specifically, the application, dubbed *Duarte Agostinho and Others v. Portugal and Others*,[250] was filed by six Portuguese children against 33 states and alleges a violation of the applicants' rights to life, private and family life, and non-discrimination deriving from each state's contribution to climate change. Most likely, the ECtHR will have to address key issues regarding extraterritoriality and intergenerational equity, as well as the peculiar situation of the applicants as young adults in the face of the climate crisis. Indeed, in this respect, the CRC has clearly recognized the particular vulnerability of children to climate impacts, stating that

> 'as children, the authors are particularly impacted by the effects of climate change, both in terms of the manner in which they experience such effects as well as the potential of climate change to affect them throughout their lifetime, in particular if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection states have heightened obligations to protect children from foreseeable harm'.[251]

Beyond these aspects, in respect to which only time will tell how the Court will behave, the ECtHR has already given further room for reflection on the interaction between human rights enjoyment and climate impacts by invoking *motu proprio* Article 3 when it communicated the case. This is interesting, as the prohibition of torture and inhuman or degrading treatment or punishment does not usually feature in climate litigation cases, nor has been discussed in the broader debate about the impact of climate change on specific human rights. The prohibition of torture and other ill-treatment under Article 3 is a non-derogable provision which the Court has interpreted flexibly in order to guarantee its effectiveness and adaptability on a case-to-case basis. An Article 3 issue in relation to the adverse effects of climate change arguably raises considerations about physical and mental integrity, vulnerability, and human dignity.[252] As will be seen later on, the prohibition of ill-treatment comes into particular relevance in the context of the principle of *non-refoulement*, in respect to which the ECtHR has an extensive jurisprudence.[253] This case law has significantly expanded the scope of states' protection obligations towards individuals at risk

[249] European Convention of Human Rights (adopted 4 November 1950, entered into force 3 September 1953).

[250] *Duarte Agostinho and Others v. Portugal and 32 Other States*, 39371/20, Communication 13/11/2010 (IV Section).

[251] CRC, *Sacchi v. Argentina*, para 10.13.

[252] See considerations made in C. Heri, 'The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?', in *EJIL: Talk!*, 2020, available at https://www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/.

[253] See *infra*, Chapter 3, para 3.2. ff.

of being subjected to torture or other ill-treatment upon removal; however, the ECtHR has not yet had the occasion to deal with a protection claim based on the adverse effects of climate change and disasters. While the ECtHR has not delivered yet its ruling on *Duarte Agostinho and Others v. Portugal and Others*, the very fact that it deemed Article 3 relevant to the facts of the case is a remarkable and unexpected development, not only because it further adds to the debate on the relationship between human rights and climate change, but also, more specifically, because of its relevance in respect to possible future claims to international protection before the ECtHR.

These latest developments bring us to the end of our general overview about the legal dimensions of climate change. It has been overall demonstrated that while the climate change regime under the UNFCCC vaguely imposes to do something about global warming, state obligations pertaining to the protection of the environment and relatedly to the fight against climate change are being increasingly construed as human rights obligations. This has occurred on the basis of the generally accepted understanding that a safe environment is a *sine qua non* factor for the enjoyment of human rights, and thus that the adverse effects of climate change, such as the destruction of crops and property, the inability to obtain fresh water, and the increase of waterborne diseases, can negatively affect the enjoyment of fundamental rights. On these general grounds, it is now possible to turn our attention to the second Part of this Chapter, which takes a closer look at the environment-migration nexus as one of the many issues arising in the context of worsening environmental conditions, increased incidents of disasters and related detriment of human rights. Indeed, while Part I already makes it implicitly clear that climate-related human rights risks may compel people to migrate, the question relevant to the present work relates to the circumstances upon which such risks give rise to international protection needs. As such, a first preliminary paragraph illustrates the emergence of the topic in the international arena by focusing in particular on the way in which climate and disaster impacts have been framed within the recently adopted Global Compacts on Refugees and on Safe, Orderly and Regular Migration. After having outlined how the environment-migration nexus is increasingly approached in terms of human rights protection, the analysis moves to unpack a concept that represents the premise of a protection-oriented investigation about the environment-migration nexus, that is, the concept of ‘disaster’.

Part II: Zooming in

4. The recognition of the environment-migration nexus in international law practice

The first-ever recognition of displacement in the context of climate change and disasters in an international agreement has occurred within the UNFCCC process: paragraph 14(f) of the 2010 Cancun Adaptation Framework (CAF) invited state parties to undertake 'measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels'.[254] Paragraph 14(f) of the CAF has functioned as a catalyst for subsequent engagement with the issue by a number of different actors, including the UN High Commissioner for Refugees (UNHCR).[255] While the UNHCR ultimately failed to secure the agreement of states on the development of a 'global guiding framework or instrument to apply to situations of external displacement other than those covered by the 1951 Convention, especially displacement resulting from sudden-onset disasters',[256] the UNHCR's effort paved the way for the launch of the Nansen Initiative in 2012. This was a state-led, bottom-up consultative process aimed at building consensus on key principles and elements to address the protection and assistance needs of persons displaced across borders in the context of disasters and climate change. Beyond having significantly contributed to provide guidance on effective measures and good practices regarding the issue,[257] the Nansen Initiative – and its successor Platform on Disaster Displacement – was successful in securing the inclusion of language on human mobility in the context of climate change and disasters in a number of international instruments.[258]

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[254] UNFCCC, Decision 1/CP.16 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', UN Doc. FCCC/CP/2010/7/Add.1 (15 March 2011), para II (14)(f).

[255] See J. McAdam, 'Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010-2013', in *Refuge*, 29(2), 2014, pp. 11-26.

[256] UNHCR, Summary of Deliberations on Climate Change and Displacement, 22-25 February 2011, available at https://www.unhcr.org/4da2b5e19.pdf.

[257] The Nansen Initiative concluded with the adoption of the *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* (Nansen Protection Agenda). This is a non-binding document containing a compilation of states' practice in relation to forms of ad hoc and temporary protection measures granted to persons displaced in the event of natural disasters, as well as of legal principles and human rights obligations relevant in such situations. The Nansen Protection Agenda also outlines measures to manage disaster displacement risk in the countries of origin, which include practices on reducing vulnerability and building resilience, as well as practices involving planned relocation with respect for people's rights.

[258] See the instruments cited *supra*, Introduction, para 3.3. For discussion about the Nansen Initiative and Platform on Disaster Displacement's activities, see J. McAdam, 'From the Nansen Initiative to the Platform

Amongst such instruments, a particular mention should be given to the NY Declaration and the resulting two (non-binding) Global Compacts.[259] The NY Declaration was the outcome of a high-level summit hosted by the UN General Assembly with the aim to address the issue of large-scale migration of persons: in an acknowledgement of the multicausal nature of human mobility, the NY Declaration states that

> '[s]ome people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors. Many move, indeed, for a combination of these reasons'.[260]

The NY Declaration set to develop two distinct Global Compacts for refugees and migrants respectively on the basis that they 'are distinct groups governed by separate legal frameworks'.[261] Indeed, while no comprehensive legal instrument exists in respect to the general category of migrants, refugees are disciplined by the 1951 UN Convention on the Status of Refugees, which provides for a number of rights and entitlements including, most importantly, protection from *refoulement*.[262] This does not however mean that the distinction between the two categories is always clear-cut, nor that refugees exhaust the much broader category of forced migrants. In fact, while the notion of international protection is primarily anchored to the refugee regime, states' protection obligations extend beyond such regime, encompassing all those persons who might be at risk of serious or irreparable harm if removed.[263]

The complexity inherent in the nature of migratory flows, including in respect to the problematic character of the migrant/refugee dichotomy, is embraced by the Global Compacts, which reaffirm that both groups are entitled to fundamental rights and freedoms, and recognize as well that refugees and migrants 'face many common challenges and similar

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on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement', in *University of New South Wales Journal*, 39(4), 2016, pp. 1518-1546.

[259] Although lacking binding force, the two Compacts are rooted on international refugee, human rights and humanitarian law obligations. For further discussion see E. Guild,T. Basaran, K. Allinson, 'From Zero to Hero? An Analysis of the Human Rights Protections Within the Global Compact for Safe, Orderly and Regular Migration (GCM)', in *International Migration*, 57(6), 2019, pp. 43-59; G. Gilbert, 'Not Bound but Committed: Operationalizing the Global Compact on Refugees', in *International Migration*, 57(6), 2019, pp. 27-42.

[260] NY Declaration, para 1.

[261] Global Compact for Safe, Orderly and Regular Migration, para 4.

[262] Refugee Convention, Article 33.

[263] See *infra*, Chapter 3, para 1. For further analysis on how the concept of international protection is embedded in the Global Compacts, see J. McAdam, T. Wood, 'The Concept of "International Protection" in the Global Compacts on Refugees and Migration', in *Interventions*, 23(2), 2021, pp. 191-206.

vulnerabilities'.[264] This comprehensive approach is also reflected by the way in which the environment-migration nexus has been addressed in the two instruments. The Global Compact on Refugees affirms that '[w]hile not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements'.[265] This may appear as a weak stance for those who had hoped to see the category of 'environmental refugees' recognized in this specific Compact;[266] however, the fact that environmental factors are understood as elements interacting with the classical drivers of refugee movement, possibly compounding preexisting risks, is consistent with empirically-grounded notions of climate change impacts' 'threat multiplier' effect.[267] The Global Compact on Migrants, on its turn, identifies natural disasters, the adverse effects of climate change and environmental degradation as structural factors that compel people to leave their country of origin, and calls on a series of actions aimed at eliminating these drivers.[268] Further on, the Compact recalls states' protection obligations by referring to

> 'the prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law'.[269]

Such obligations arise not only *vis-à-vis* refugees, but more broadly in respect to all forced migrants with international protection needs. It follows that risks giving rise to an international protection need are not limited to persecution or threats to life and physical integrity, but may also stem from other situations such as famine and natural or man-made disasters.[270]

It is in this connection that the comprehensive approach adopted by the two Global Compacts can be appreciated. Read together, the two instruments put forward a nuanced understanding of contemporary migration realities, which rarely reflect a neat distinction between forced and voluntary migrants. Indeed, for instance, the Global Compact on

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[264] Global Compact on Safe, Orderly and Regular Migration, para 3.

[265] Global Compact on Refugees, para 8.

[266] See for instance T.A. Aleinikoff, 'The Unfinished Work of the Global Compact on Refugees', in *International Journal of Refugee Law*, 30(4), 2019, pp. 611-617.

[267] For more on the Global Compact on Refugees' approach to disaster and climate-related displacement, see V. Türk, M. Garlick, 'Addressing Displacement in the Context of Disasters and the Adverse Effects of Climate Change: Elements and Opportunities in the Global Compact on Refugees', in *International Journal of Refugee Law*, 31(2/3), 2019, pp. 389-399.

[268] Global Compact on Safe, Orderly and Regular Migration, para 18(h-l).

[269] Ivi, para 37.

[270] UNHCR, *Persons in Need of International Protection*, 2017, available at https://www.refworld.org/docid/596787734.html.

Refugees calls on states to 'duly determine the status of those on their territory in accordance with their applicable international and regional obligations […], in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it'.[271] In a specular way, the Global Compact on Migrants contains several provisions that are relevant to both refugees and other migrants with an international protection need. As such, the two Compacts make clear that, on the one hand, refugees as defined in the Refugee Convention are only a part of a broader class of people in refugee-like situations and that, on the other hand, those labelled as 'migrants' are not automatically excluded from the benefit of international protection. In this context, the inclusion of climate change and disasters in both instruments paves the way for a critical appraisal of the circumstances upon which a need of international protection may arise.

Some insights in this respect have to some extent been given by a number of actors within the human rights system. As part of its activities on climate change issues, the OHCHR soon started to address the topic of human mobility in light of its linkages with the human rights implications of climate impacts. Accordingly, in a 2018 Report, the OHCHR affirmed that 'climate change substantially contributes to human rights harms and related human movement'.[272] In highlighting human rights risks in this specific context, the OHCHR referred to the concept of vulnerability, the origins of which often stem from 'multiple and intersecting forms of discrimination, inequality and structural and societal dynamics that lead to diminished and unequal levels of power and enjoyment of rights'.[273] Those in situations of vulnerability may see a reduction of their capacity to adapt and in turn of their migratory options, leading to increased vulnerability before, during and after migration. Similarly, the Committee for the Elimination of Discrimination Against Women (CEDAW) has shed light on the mechanisms underpinning the disproportionate impact of climate change upon already under-privileged groups by addressing the gender dimension of disaster-risk reduction in the context of climate change. In signaling a 'feminization' of migration in the context of climate change and disasters, the Committee noted that women migrants face a heightened risk of gender-based violence, discrimination, and other human

[271] Global Compact on Refugees, para 61.

[272] OHCHR, 'Addressing Human Rights Protection Gaps in the Context of Migration and Displacement of Persons Across International Borders Resulting from the Adverse Effects of Climate Change and Supporting the Adaptation and Mitigation Plans of Developing Countries to Bridge the Protection Gap', UN Doc A/HRC/38/21 (23 April 2018), para 10.

[273] Ivi, para 14.

rights abuses during migration and at their destination.[274] Climate impacts, human rights detriment, and human mobility are thus often linked and shaped by situational or personal vulnerabilities. As well-illustrated by the OHCHR in a study on the slow-onset effects of climate change and human rights protection for cross-border migrants,

> '[c]ontextual factors make some people more vulnerable to the […] effects of climate change than others. The degree of voluntariness in the decision to migrate or not is affected by the effective enjoyment of human rights. Differential levels of compulsion and free choice are influenced by the ability to enjoy human rights, including through access to basic necessities'.[275]

What has been outlined so far suggests that the environment-migration is clearly a matter of human rights, and that it is through such lens that the issue is increasingly framed within international law practice. This is actually not surprising: on the one hand, as Part I of this Chapter has demonstrated, climate change and its impacts are also conceived of as a human rights issue, while on the other hand, forced migration has always been a classic topic within the human rights realm. That being said, it is now necessary to engage more closely with the dynamics arising at the intersection of human rights detriment, environmental degradation, and mobility. In other words, in order to examine the implications of the environment-migration nexus from an international protection perspective, it is necessary to provide a conceptual framework that helps to shed light on the circumstances upon which an international protection need might arise. With this purpose, the following paragraphs are dedicated to the conceptualization of the notion of 'disaster'.

5. Premise on the concept of 'disaster' as a legally coherent theoretical framework for the environment-migration nexus

The Introduction to the present work has already mentioned that a common starting point for the legal conceptualization of the environment-migration nexus is represented by working definitions of the concerned individuals – i.e. 'climate migrants', or any other alternative denomination. However, it has also been highlighted that this has led to a proliferation of labels with little utility in terms of clarifying the problem under scrutiny.[276] The analysis made so far should have already made clear that the relevant question concerns

[274] CEDAW, 'General Recommendation no. 37 on Gender-Related Dimensions of Disaster-Risk Reduction in the Context of Climate Change', UN Doc CEDAW/C/GC/37 (7 February 2018), paras 74-75.

[275] OHCHR, 'The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants', UN Doc A/HRC/37/CRP.4 (22 March 2018), para 21.

[276] See *supra*, Introduction, para 3.3.

not so much the identification and definition of individuals displaced in the context of climate change and disasters, but rather the unveiling of realities characterized by increasing environmental pressures and related detriment of human rights enjoyment. The 'definitional debate' on climate migrants has indeed overshadowed this critical question. Besides recognizing that displacement in the context of climate change and disasters is multicausal, and that the former has a threat multiplier effect on preexisting vulnerabilities, little attention has been paid to the conditions that generate and preserve them and to 'the larger framework within which those conditions are systematically reproduced'.[277] Conceptualizations of the issue through the vehicle of definitions tend to 'suggest that nature is at fault, when in fact humans are deeply implicated in the environmental changes that make life impossible in certain circumstances'.[278] An excessive focus on nature, and particularly on the role of climate change in influencing migration and displacement, runs the risk of eclipsing a more nuanced understanding of the wider social context in which natural hazards strike – in other words, it overshadows crucial considerations about what a disaster is, and why it unfolds. This 'distracting' aspect of climate change has been evidenced by former director of the UN Office for Disaster Risk Reduction Sálvano Briceño:

> 'The confused use of the phrase 'natural disaster' is still common. This misperception, currently encouraged by the climate change spotlight, has led to an excessive focus on understanding the hazards themselves from a physical and natural science point of view, and does not facilitate the much-needed attention to understanding and reducing human and social vulnerability'.[279]

Although the concept of disaster is just as controversial as that of 'climate migration', particularly from a definitional point of view, it is a well-established and authoritative field of research.[280] In particular, disaster scholars have long known that 'there is no such thing as a natural disaster',[281] highlighting its fundamentally social dimension. This has significant legal implications, for instance, in terms of disaster risk reduction: as has been observed, '[t]hrough the optics of modern disaster research, the individuals affected are no longer

[277] S. Marks, 'Human Rights and Root Causes', in *The Modern Law Review*, 74(1), 2011, p. 71.

[278] A. Oliver-Smith, cited in F. Thornton, 'Climate Change, Displacement and International Law: Between Crisis and Ambiguity', in *Australian Yearbook of International Law*, 30, 2012, p. 156.

[279] S. Briceño, 'Forward', in B. Wisner, J.C. Gaillard, I. Kelman (eds), *Handbook of Hazards and Disaster Risk Reduction*, New York, Routledge, 2011, p. xxx.

[280] For analysis, see E. Quarantelli, 'The Earliest Interest in Disasters and Crises, and the Early Social Science Studies of Disasters, as Seen in a Sociology of Knowledge Perspective', Working Paper no. 91, Disaster Research Center, 2009, pp. 1-44.

[281] G. Squires, C. Hartman (eds), *There is No Such Thing as a Natural Disaster: Race, Class, and Hurricane Katrina*, New York, Routledge, 2006.

victimized by the forces of nature, but by governments'.[282] By using the notion of disaster as a theoretical framework to approach the environment-migration nexus, the relevant question is situated a step backwards, as it does not focus on whether displacement is caused by disasters, but rather on what are the causes and the consequences of a disaster, including from a human rights perspective.

While the natural starting point for understanding disasters is research conducted within the so called 'disaster studies' area – mainly represented by geographers, sociologists and anthropologists –, international law has also become progressively interested in disasters' legal implications. Therefore, before examining the way in which disasters are conceptualized by modern disaster research, the following paragraph provides a succinct overview of disasters' legal contours according to international law practice.

5.1. Disasters in international law: a brief genealogy of definitions

'Disaster' is hardly a term of art in international law, as '[t]here is no generally accepted legal definition of the term' within the international legal system.[283] Not surprisingly, as of today there is no comprehensive international convention on disasters, and what is commonly referred to as 'international disaster law' is a vast array of instruments of both binding and non-binding character.[284] This proliferation of legal documents in the field has often brought with it a parallel over-production of definitions. One of the earliest can be traced back to the adoption of the Convention Establishing the International Relief Union (IRU Convention) in 1927, the objects of which were delineated as follows: 'in the event of any disaster due to *force majeure*, the exceptional gravity of which exceeds the limits of the power and resources of the stricken people, [the object of the IRU is] to furnish to the suffering population first aid and to assemble for this purpose funds, resources and assistance of all kinds'.[285] This framing encapsulates a number of assumptions on the basis of which international disaster law started to develop, which in turn are predicated upon an essentially humanitarian approach to disaster relief and management. The association between

[282] K. Cedervall Lauta, 'Human Rights and *Natural* Disasters', in S.C. Breau, K.L.H. Samuel (eds), *Research Handbook on Disasters and International Law*, Cheltenham (UK), Edward Elgar Publishing, 2016, p. 94.

[283] ILC, Preliminary Report on the Protection of Persons in the Event of Disasters by Mr. Eduardo Valencia-Ospina, Special Rapporteur, UN Doc A/CN.4/598 (5 May 2008), para 46.

[284] For a detailed overview of such instruments, see K. Cedervall Lauta, *Disaster Law*, New York, Routledge, 2015, p. 93 ff.

[285] Convention Establishing an International Relief Union (adopted 12 July 1927, entered into force 27 December 1932) 135 LNTS 247, Article 2(I).

humanitarianism and 'natural' disasters in international law long predates the adoption of the IRU Convention. Eighteenth century international law scholar Emer de Vattel had already recognized an international duty, grounded on natural law, to provide humanitarian aid in cases of calamities and other events triggering an extreme necessity of assistance.[286] Therefore, the instruments in the field have been primarily focused on facilitating cooperation between states in the provision of assistance during times of disasters. Within such a framework, as is evident from the definition provided in the IRU Convention, disasters were conceived of as short-lived events of exceptional and unpredictable nature.

As a result of the increase in the occurrence of natural hazards, the idea of disasters as exceptional or episodic events started progressively to lose ground. The need to enhance disaster preparedness and relief in light of the growing 'magnitude, complexity, frequency and impact of disasters' was recognized, for instance, in the Preamble of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere Convention),[287] representing the second – and last – multilateral treaty on disaster relief adopted seventy years after the IRU Convention. The greater awareness on disaster implications, signaling a shift from emergency accommodation to disaster management,[288] is apparent from the provisions defining key terms, amongst which disasters have been qualified as 'a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes'.[289] From this definition two aspects, indeed recurring in international law practice, can be identified as disaster-qualifying features: the origin and the effects of disasters.[290] With regards to the former, consistently with mainstream approaches within disaster studies, categorizations of disasters on the basis of their cause or duration is increasingly dismissed in light of the fact that '[i]t is not always possible to maintain a clear delineation between causes', as '[a]n apparent natural disaster can be caused or aggravated by human activity, for example, desertification caused by

[286] D.P. Fidler, 'Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law?', in *Melbourne Journal of International Law*, 6(2), 2005, p. 461.

[287] Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted 18 June 1998, entered into force 8 January 2005) 2296 UNTS 5.

[288] For further analysis on this shift, see generally Cedervall Lauta, *Disaster Law*, op. cit.

[289] Tampere Convention, Article 1(6).

[290] G. Bartolini, 'A Taxonomy of Disasters in International Law', in Zorzi Giustiniani et al. (eds) *Routledge Handbook of Human Rights and Disasters*, op. cit., p. 15.

excessive land use and deforestation'.[291] As for disasters' effects, these are usually measured in respect to the impacts on property, people and the environment, with the requirement that they be particularly severe so as to overwhelm the coping capacity of the affected community or society. Beyond these essential characters, another more general trend started to emerge within legal practice, which progressively began to converge around the idea of disaster risk reduction and related implications in terms of the law's role in mitigating such risk. This shift towards a more comprehensive approach to disaster response is reflected in the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters[292] and in its successor Sendai Framework.

In 2016, as a result of the inclusion of the topic in its programme of work in 2007, the International Law Commission (ILC) adopted the final version of the Draft Articles on the Protection of Persons in the Event of Disasters.[293] The work of the ILC represents a significant development in the area in that it has attempted to systematize the notoriously disorganized legal framework on disaster management and provide a legal foundation for a series of duties arising during the various phases of the disaster cycle – namely prevention, response, and recovery.[294] In this connection, the Draft Articles emphasize the importance of international solidarity and cooperation in order to achieve the goal of facilitating 'the adequate and effective response to disasters, and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights'.[295] In line with this purpose, as emerges from the Draft Articles' commentary, a central concern to be taken into account is the special attention towards vulnerable groups. This is remarked in Draft Article 6, according to which '[r]esponse to disasters shall take place in accordance

[291] ILC, Preliminary Report, op. cit., para 49. It should however be clarified that armed conflict and other events, such as political and financial crises, with analogous characteristics in terms of societal effects are usually outside the scope of disasters' legal boundaries.

[292] UN, Report of the World Conference on Disaster Reduction, UN Doc A/CONF.206/6 (16 March 2005), Resolution 2.

[293] ILC, Report of the International Law Commission, Sixty-eight session (2 May-10 June and 4 July-12 August 2016), UN Doc A/71/10, p. 12 ff.

[294] See D.A. Farber, 'International Law and the Disaster Cycle', in D.D. Caron, M.J. Kelly, A. Telesetsky (eds), *The International Law of Disaster Relief*, New York, Cambridge University Press, 2014, pp. 7-20. For discussion on the status of the Draft Articles, see A.N. Pronto, 'Codification and Progressive Development in Contemporary International Law-Making: Locating the Draft Articles on the Protection of Persons in the Event of Disasters', in *Yearbook of International Disaster Law*, 1, 2020, pp. 148-178; D. Tladi, 'The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?', in *Chinese Journal of International Law*, 16(3), 2017, pp. 425-451.

[295] Draft Article 2.

with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable'.[296]

As will be seen further on,[297] vulnerability, which has been already introduced in respect to climate change's humanitarian dimension,[298] is also a key concept in disaster studies, as it is considered a principal determinant of disaster risk and outcomes. The importance of vulnerability has been recognized, to some extent, in international law practice. For instance, in 2015 the General Assembly established an open-ended intergovernmental expert working group to measure global progress in the implementation of the Sendai Framework,[299] which in 2016 elaborated a Report on indicators and terminology related to the field. The Report defines vulnerability as '[t]he conditions determined by physical, social, economic and environmental factors or processes which increase the susceptibility of an individual, a community, assets or systems to the impacts of hazards',[300] and incorporates this notion into the definition of disaster, understood as '[a] serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts'.[301] In 2017, on input of the Report, the UN Office for Disaster Risk Reduction updated its definition of disaster, which previously did not contain references to the concept of vulnerability. It was thus only logical that the ILC would draw on such developments in order to elaborate a Draft Articles the focus of which was the protection of persons in the event of disasters.

In one respect, the ILC has seized the opportunity offered by increasingly more nuanced understandings of disasters as socially-related phenomena within international law practice by embracing a rights-based approach that would be particularly attentive to the most vulnerable. However, on closer analysis, the extent to which such approach has been accompanied by a meaningful engagement with the structural and deep-rooted dynamics underpinning vulnerability to disasters appears questionable. It has been observed that this has ultimately resulted in a 'conservative' attitude on the part of the ILC, manifesting primarily in the failure to recognize the existence of a duty to provide assistance on the part of external states coupled with the restriction of the right to refuse aid for disaster-affected

[296] Draft Article 6.
[297] *Infra*, para 5.2.1.
[298] *Supra*, Introduction, para 2.1.
[299] UNGA, UN Doc. A/RES/69/284 (25 June 2015).
[300] UNGA, Report of the Open-Ended Intergovernmental Expert Working Group on Indicators and Terminology Relating to Disaster Risk Reduction, UN Doc A/71/644 (1 December 2016), p. 24.
[301] Ivi, p. 13.

states.[302] Arguably, this can be viewed as a contradiction with the ILC's declared central concern with people's protection and the principle of solidarity in general.[303] However, in particular respect to the concept of vulnerability, a more evident indication of the ILC's narrow approach had already emerged in 2009, when the Special Rapporteur classed any inquiry about root causes as 'immaterial'.[304] This dismissal of an appreciation of vulnerability's – and in turn, disasters' – root causes has made its way towards Draft Article 3, which defines disasters as 'a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society'.[305]

The definition ultimately adopted in the Draft Articles was met with criticism by a number of states. They in fact pointed out that Draft Article 3(a) fails to embrace a process and social-oriented understanding of disasters, as would be required by adherence with modern disaster research.[306] As such, despite initial ambitions and expectations, the work of the ILC falls short of putting forward a deeper legal engagement with vulnerability, and ultimately ends up in confining its focus on 'what a disaster causes rather than what causes a disaster'.[307]

In conclusion, despite significant progress and ongoing refinement, international instruments pertaining to disaster relief only begin to scratch the surface of the complex dynamics and mechanisms by which disasters unfold. The limited reach of such instruments has been voiced by a number of scholars whose criticism suggest that, at the institutional level, disasters continue to be understood primarily as geophysical events.[308] For the purposes of this work, a nuanced understanding of the social dimensions of disasters, and a

[302] See T. O'Donnell, 'Vulnerability and the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters', in *International & Comparative Law Quarterly*, 68, 2019, pp. 573-610.

[303] Furthermore, '[t]his dual but contradictory approach seems to highlight the stereotyping of disaster-prone populations as problems to be managed, yet it countenances absolutely no responsibility on the part of external actors for historically and continually creating the political, economic and social conditions which have produced that vulnerability'. Ivi, p. 607.

[304] ILC, Second Report on the Protection of Persons in the Event of Disasters by Eduardo Valencia-Ospina, Special Rapporteur, UN Doc A/CN.4/615 (7 May 2009), para 49.

[305] Draft Article 3(a).

[306] See ILC, Protection of Persons in the Event of Disasters: Comments and Observations Received from Governments and International Organizations, UN Doc A/CN.4/696 (14 March 2016); ILC, Protection of Persons in the Event of Disasters: Additional Comments and Observations Received from Governments, UN Doc A/CN.4/696/Add.1 (28 April 2016).

[307] O'Donnell, 'Vulnerability', op. cit., p. 595.

[308] Ivi, p. 599; M.D. Cooper, 'Seven Dimensions of Disaster: The Sendai Framework and the Social Construction of Catastrophe', in K.L.H. Samuel, M. Aronsson-Storrier, K. Nakjavani Bookmiller (eds), *The Cambridge Handbook of Disaster Risk Reduction and International Law*, Cambridge, Cambridge University Press, 2019, pp. 17-51.

deeper-rooted perspective on the diverse vulnerabilities that arise and are exacerbated in disaster contexts, is essential. As such, the following paragraphs turn to the way in which disaster conceptualizations have evolved in social scientific analysis.

5.2. Insights from disaster studies: from God's wrath to social phenomenon

Enrico Quarantelli, a pioneer in disaster studies and co-founder of the Disaster Research Center,[309] identified three different chronological phases in the way in which societies have approached and perceived disasters: firstly as 'Acts of God', secondly as 'Acts of Nature', and ultimately as 'Acts of Men and Women'.[310] This classification is particularly insightful in representing the evolution of prevalent understandings of what a disaster is. While traditionally viewed as supernatural events through which divine forces manifested their role of architects of the world,[311] the rise of the Enlightenment in the eighteenth century shifted the perception of disasters towards a secular perspective, according to which the disaster is an unpredictable contingency of nature.[312] Yet, already during this second phase, some seeds on the possibility to understand the physical basis of natural hazards in order to mitigate their destructive effects were planted. It was thus only logical that, as the study of the natural sciences started to take hold and evolve, 'our ability precisely to foresee the workings of [natural] hazards reache[d] a level from where the disaster change[d] character and [became] socially tangible'.[313]

As a consequence of the 'social turn' in the understanding of disasters, corresponding to the third and last phase identified by Quarantelli, the disaster is no longer conceived of as an external force of God(s) or Nature, but rather as something that is shaped and created within societies.[314] Recalling an old adage, it is not earthquakes that kill people – buildings do. Better said, 'it is not buildings so much as where they are situated, what they are made

[309] Established in 1963 at Ohio State University, it was the first social science research center in the world devoted to the study of disasters.

[310] E. Quarantelli, 'Disaster Planning, Emergency Management and Civil Protection: the Historical Development of Organized Efforts to Plan for and to Respond to Disasters', Preliminary Paper no. 301, Disaster Research Center, 2000, p. 3 ff.

[311] The etymology of the word ('bad star' in ancient Greek) is indicative of its earliest conception.

[312] This shift is symbolically represented by the 1755 Lisbon earthquake, which prompted profound discussions over divine justice and punishment and had a remarkable echo on Europe's intellectual culture. See R.R. Dynes, 'The Dialogue Between Voltaire and Rousseau on the Lisbon Earthquake: The Emergence of a Social Science View', Preliminary Paper no. 293, Disaster Research Center, 1999, pp. 1-19; S.E. Larsen, 'The Lisbon Earthquake and the Scientific Turn in Kant's Philosophy', in *European Review*, 14(3), 2006, pp. 359-367.

[313] Cedervall Lauta, *Disaster Law*, op. cit., p. 20.

[314] Ibid. See also K. Westgate, B. Wisner, P. O'Keefe, 'Taking the Naturalness Out of Natural Disasters', in *Nature*, 260(5552), 1976, pp. 566-567.

from, how they are built and why people use them that way that proves so fatal'.[315] In other words, a natural hazard translates into a disaster when certain circumstances tied to human agency interact with the physical manifestation of the hazard itself. Under this social paradigm, thus, a disaster is composed of two interacting features: external variability, that is the natural hazard and its physical impacts, and internal complexity, referring to a wide set of socially constructed realities.[316]

With respect to the former, as a result of the re-conceptualization of the disaster as a social phenomenon, the need to categorize natural hazards looses its relevance: the variety of phenomena potentially capable of generating a disaster should be appreciated holistically, and therefore, the (oft-heard) distinction between sudden and slow onset hazards is not tenable under this framework.[317] This is because, as disasters are social processes rather than events, to understand what a disaster is the primary concern is not the type and nature of natural hazards, but rather their effects – i.e. the specific impacts on the social context in which they strike.

The effects of hazards are linked to the second element identified as a component of disasters, namely their internal complexity. Because the disaster, according to the social paradigm, is located in society rather than in the environment, then it becomes crucial to tease out 'the dynamic relationships between a human population, its socially generated and politically enforced productive and allocative patterns, and its physical environment, all in the formation of patterns of vulnerability and response to disasters'.[318] The concept of vulnerability, key in disaster research, can thus be viewed as a bridge between the scientific and the social dimensions of disasters, and can be identified as a reliable analytical tool to examine the outcomes of natural hazards. Having outlined the main features of disasters as currently conceptualized under the social paradigm, the following paragraph focuses on the underlying dynamics that underpin the formation and evolution of vulnerability to disasters.

5.2.1. Root causes of disaster vulnerability

[315] G. Bankoff, 'Historical Concepts of Disaster and Risk', in Wisner et al. (eds), *Handbook of Hazards and Disaster Risk Reduction*, op. cit., p. 37.

[316] A. Oliver-Smith, '"What is a Disaster?" Anthropological Perspectives on a Persistent Question', in A. Oliver-Smith, S.M. Hoffman (eds), *The Angry Earth: Disaster in Anthropological Perspective* (2nd edition), New York, Routledge, 2020, pp. 30-31.

[317] Equally irrelevant are distinctions between man-made (such as toxic exposures, nuclear accidents, fires and the like) and natural hazards.

[318] Oliver-Smith, 'What is a Disaster?', op. cit., p. 38.

As anticipated earlier,[319] vulnerability refers to the propensity to be adversely affected by a natural hazard and constitutes a determinant of climate-related risk, together with the notion of exposure (i.e., the physical proximity to the hazard). In disaster studies, these and other concepts have been further elaborated in order to more accurately determine disaster risk, understood as 'a function of the magnitude, potential occurrence, frequency, speed of onset and spatial extent of a potentially harmful natural event or process', as well as of 'people's susceptibility to loss, injury or death'.[320] The interactions inherent in the determination of disaster risk are often represented through the following equation:

$$DR = H [(V/C) - M],$$

where 'DR' stands for disaster risk, 'H' for hazard, 'V' for vulnerability, 'C' for coping capacity and 'M' for mitigating, preventive and protective measures.[321] Amongst such elements, vulnerability remains the most relevant and multifaceted, and has been described as 'susceptibility to harm *and the process that creates and maintains* that susceptibility'.[322] Evident in this framing is a concern with root causes, often embedded in historical and structural factors,[323] as well as with underlying conditions and other risk drivers that amplify vulnerability for individuals and across social groups.[324] A crucial observation emerging from the appreciation of root causes is that they create differential exposure and vulnerability to hazards. As has been explained:

> '[p]eople's coping capacities are in turn shaped by multiscale historical, cultural, geographic, and political economic factors that conspire to produce unequal hazard exposure in a given population and that constrain some people's ability to withstand with the effects of a hazard event […]. In particular, processes of marginalization and the social inequalities they produce differentially increase hazard exposure and increase people's susceptibility to harm […]. Conversely, those who are advantaged by a given set of political, economic, geographic, and social factors can either avoid

[319] *Supra*, Introduction, para 2.1.

[320] B. Wisner, J.C. Gaillard, I. Kelman, 'Framing Disaster: Theories and Stories Seeking to Understand Hazards, Vulnerability and Risk', in Wisner et al. (eds), *Handbook of Hazards and Disaster Risk Reduction*, op. cit., p. 24.

[321] Ibid.

[322] Ibid (emphasis added).

[323] See for instance A. Oliver-Smith, 'Peru's Five-Hundred-Years Earthquake: Vulnerability in Historical Context', in Oliver-Smith, Hoffman (eds), *The Angry Earth*, op. cit., pp. 83-98.

[324] S.L. Cutter, 'Are We Asking the Right Question?', in R.W. Perry, E. Quarantelli (eds), *What is a Disaster? New Answers to Old Questions*, Philadelphia, Xlibris Corporation, 2005, p. 44. Disaster research has developed the so-called 'Pressure and Release' model of disaster causality in order to understand the 'progression of vulnerability', which results in the cumulation of root causes, dynamic pressures, and unsafe conditions. See B. Wisner, P.M. Blaikie, T. Cannon, I. Davis, *At Risk: Natural Hazards, People's Vulnerability and Disasters* (2nd edition), London, Routledge, 2004, pp. 49-87.

> the hazards altogether or externalize the costs of hazard exposure while benefiting from the environmental amenities […] that are coupled with that exposure'.[325]

These considerations shed light not only on the complicity of human agency in transforming a natural hazard into a disaster, but also on the role that social processes play in the creation and evolution of vulnerability to disaster risk. This approach disproves mainstream assumptions on the indiscriminate nature of disaster – and in turn, climate – impacts, and at the same time evidences that '[p]eople do not simply end up living in places that are exposed to natural and other hazards, and they do not simply happen to lack the resilience to protect themselves from such hazards and recover in the aftermath. There is a story to be uncovered'.[326]

5.2.2. Root causes of disaster vulnerability and human rights: the examples of Haiti and New Orleans

The fact that disaster risk is engendered and exacerbated for individuals that are economically, socially, culturally, institutionally, politically and otherwise marginalized[327] raises a number of issues for law in general and for human rights law in particular. It has been already outlined that international disaster law has evolved, at least partially, to reflect contemporary understandings of disaster within disaster studies: consistently with this evolution, international instruments have increasingly recognized that disaster management has important human rights implications. However, it has been shown also that the integration of a human rights paradigm has generally not been accompanied by an appreciation of vulnerability's root causes.[328] As a way of exemplification, let us consider, for instance, the earthquake that on 12 January 2010 struck Haiti, and in particular the international human rights movement's reaction to what became one of the worst disasters of the last decades. With a magnitude of 7.0 and an epicenter located near the capital city of Port-au-Prince, the earthquake claimed roughly 250,000 lives, it injured 300,000 people, it left another 1,3 million homeless, and it caused severe infrastructural damage in the metropolitan Port-au-Prince area as well as in other cities in the region.[329] In the days

[325] L. Stanford, R. Bolin, 'Examining Vulnerability to Natural Disasters: A Comparative Analysis of Four Southern California Communities after the Northridge Earthquake', in Oliver-Smith, Hoffman (eds), *The Angry Earth*, op. cit., p. 116.

[326] M. Scott, *Climate Change, Disasters, and the Refugee Convention*, Cambridge, Cambridge University Press, 2020, p. 19.

[327] See IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability*, op. cit., p. 6.

[328] See *supra*, para 5.1.

[329] See R. DesRoches, M. Comerio, M. Eberhard, W. Mooney, G.J. Rix, 'Overview of the 2010 Haiti Earthquake', in *Earthquake Spectra*, 27(1), 2011, pp. 1-21.

following the event, governments, civil society, as well as the HR Council all highlighted the importance of a human rights approach in the recovery process, and recognized as well that the catastrophic outcomes of the natural hazard were deeply rooted in preexisting conditions of poverty, instability and fragile institutions. Yet, the root causes of such conditions were not fully acknowledged within the UN human rights system: as has been observed, 'the Human Rights Council signalled that the Haitian earthquake was not simply a natural disaster, but it left us to imagine that the vulnerability of those affected was'.[330]

Although such criticism was directed, in particular, at the HR Council's failure to take into account the country's colonial history – particularly in respect to the reparations owed to France after Haitian independence –, the waves of US military interventions, and the US relations with Duvalier's dictatorship, the Haiti case is nonetheless instructive in connecting the dots between given socio-economic contexts, structural and systemic human rights deprivation, and vulnerability to disasters. The political, economic and environmental instability of Haiti were well-known prior to the 2010 earthquake. Besides being marked by several natural hazards throughout its history, Haiti was and still is the poorest country in America, with more than half of its population leaving below the poverty line and lacking access to basic health care and other critical resources.[331] In the capital Port-au-Prince, 86% of the residents were living in slum conditions – mostly densely packed and poorly-constructed.[332] This was coupled with high levels of social and political corruption and a general lack of rule of law.[333] When the earthquake struck, the already fragile state infrastructure was further aggravated, resulting in disorder and unpunished crime and violence. Amongst the most harshly affected were children, people with disabilities, and women.[334] Taking the latter into consideration, if already before the disaster the country's protracted political instability had favored a general culture of tolerating, rather than punishing, gender-based violence, the earthquake did nothing but exacerbate this problem.[335]

[330] Marks, 'Human Rights and Root Causes', op. cit., p. 67.

[331] R. Green, S. Miles, 'Social Impacts of the 12 January 2010 Haiti Earthquake', in *Earthquake Spectra*, 27(1), 2011, pp. 448-449.

[332] '2010 Haiti Earthquake Facts and Figures', available at https://www.dec.org.uk/article/2010-haiti-earthquake-facts-and-figures.

[333] J.D. Wilets, C. Espinosa, 'Rule of Law in Haiti before and after the 2010 Earthquake', in *Intercultural Human Rights Law Review*, 6, 2011, pp. 181-208.

[334] See UNGA, 'Report of the Independent Expert on the situation of human rights in Haiti, Michel Forst', UN Doc A/HRC/17/42 (4 April 2011).

[335] United Nations Development Programme (UNDP), 'Disaster-Conflict Interface: Comparative Experiences', 2011, available at https://www.undp.org/sites/g/files/zskgke326/files/publications/DisasterConflict72p.pdf, p. 17. As also recognized by the CEDAW, '[s]ituations of crisis exacerbate pre-existing gender inequalities and also compound intersecting forms of discrimination against, inter alia, women living in poverty, indigenous women,

A quite straightforward pattern is evident in that the 'exceptional situation' stemming from the disaster exacerbated the plight of individuals and groups that were already marginalized in 'normal' circumstances.

The general context characterizing Haiti before the earthquake displaces the idea that human rights abuses are random misfortunes and unveils the limitations of disaster responses that are solely focussed on humanitarianism and relief to disaster victims,[336] without proper consideration to 'the local context of history, culture and economy that often is unjust, and has produced vulnerability'.[337] A nuanced discourse on root causes of vulnerability becomes thus preoccupied with links between socio-economic inequalities on the one hand, and state and non-state violence, discrimination, and deprivation of rights on the other. Through this perspective, it becomes apparent that denials of and failures to protect human rights also contribute to generate and sustain vulnerability to disaster outcomes. Although '[u]nderstanding the *root causes* of vulnerability can entail the exploration of centuries of social history',[338] as the Haiti example illustrates, a human rights approach to root causes helps to focus on the role of rights deprivation in engendering and exacerbating disaster vulnerability.

Another instructive example in this respect might be the case of 2005 Hurricane Katrina. Formed as a tropical depression in Caribbean waters on August 23, it hit land over southeast Louisiana and Mississippi in the early hours of August 29 as a Category 4 storm under the Saffir-Simpson scale. While the storm itself caused significant damage, it was its aftermath that left the most destructive effects, causing widespread harm, loss of life and important economic damage.[339] The impact of Katrina on the city of New Orleans plastically exemplifies how preexisting conditions have determined the evolution of the hurricane into

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women belonging to ethnic, racial, religious and sexual minorities, women with disabilities, women refugees and asylum seekers, internally displaced, stateless and migrant women, rural women, single women, adolescents and older women, who are often affected disproportionately compared to men or other women'. CEDAW, General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, cit., para 2.

[336] In warning against the effects that a superficial discourse on root causes and human rights may have, Marks notes that: '[i]f the root causes' discourse that has emerged within human rights circles reveals some aspects of the explanation for human rights abuse, […] it can also conceal other aspects. In particular […] flaws have been illuminated at the level of law, procedure and policy. Yet these flaws have been made to seem like simple misunderstandings or oversights, deficiencies of leadership or accountability, or quirks of local history or culture. The idea that they may themselves be explicable with reference to some wider systemic context has been mostly removed from view'. Marks, 'Human Rights and Root Causes', op. cit., p. 78.

[337] H. ten Have, 'Disasters, Vulnerability and Human Rights', in D.P. O'Mathúna, V. Dranseika, B. Gordijn (eds), *Disasters: Core Concepts and Ethical Theories*, Cham, Springer, 2018, p. 159.

[338] Scott, *Climate Change, Disasters, and the Refugee Convention*, op. cit., p. 19.

[339] See R.D. Knabb, J.R. Rhome, D.P. Brown, 'Tropical Cyclone Report: Hurricane Katrina, August 23-30, 2005', in *Fire Engineering*, 159(5), 2006, pp. 32-37.

one of the deadliest disasters in U.S. history. In terms of physical exposure, New Orleans was already vulnerable to hurricanes before Katrina, as it is partly below sea level rise and completely surrounded by water. Furthermore, the city had one of the highest poverty rate in the U.S., with 28% of its population leaving below the poverty line, often corresponding to African American communities.[340] The divide between the city's black and white population was particularly evident in the geographical segregation that since the 1980s started to increase and was accompanied by the isolation of poor and often black households into high-poverty areas.[341] These racially segregated neighborhoods did not appear in a vacuum, nor reflect solely individuals' choices about where to live, but have emerged partly as a result of 'decades of policies that confined poor households, especially poor black ones, to these economically isolated areas'.[342]

When the levees that protected New Orleans from Lake Ponchatrain and the Mississippi River started to breach at multiple locations, causing a massive flooding that ultimately resulted in the inundation of 80% of the city, the poorest or most segregated parts of New Orleans were disproportionally affected and presented the highest death rates, which also signaled an overrepresentation of African Americans.[343] The geographic vulnerability of these neighborhoods was not tied solely to their physical proximity to the levee breaches – it also resulted from a number of other social risks, such as lack of technology, transportation and communication, as well as lack of financial means to cope with such obstacles.[344] In spite of an evacuation order issued a day before Katrina reached New Orleans, many residents had no other choice but to stay as they had no means to leave.[345] In the immediate

[340] See T.D. Allen, 'Katrina: Race, Class, and Poverty: Reflections and Analysis', in *Journal of Black Studies*, 37(4), 2007, p. 466; A. Berube, B. Katz, 'Katrina's Window: Confronting Concentrated Poverty Across America', The Brookings Institution Metropolitan Policy Program, 2005, available at https://www.brookings.edu/research/katrinas-window-confronting-concentrated-poverty-across-america/.

[341] Berube, Katz, 'Katrina's Window', op. cit., p. 3.

[342] Ivi, p. 1; R.D. Bullard, B. Wright, 'Race, Place, and the Environment in Post-Katrina New Orleans', in R.D. Bullard, B. Wright (eds), *Race, Place, and Environmental Justice after Hurricane Katrina: Struggles to Reclaim, Rebuild, and Revitalize New Orleans and the Gulf Coast*, Boulder (CO), Westview Press, 2009, p. 20 ff.

[343] See P. Sharkey, 'Survival and Death in New Orleans: An Empirical Look at the Human Impact of Katrina', in *Journal of Black Studies*, 37(4), 2007, pp. 482-501.

[344] D.L. Bassett, 'The Overlooked Significance of Place in Law and Policy', in Bullard, Wright (eds), *Race, Place, and Environmental Justice after Hurricane Katrina*, op. cit., p. 51.

[345] Lawyer and activist Ann Fagan Ginger observed that '[m]any orders by FEMA [i.e. the Federal Emergency Management Agency] were not racially discriminatory on their face, but everyone familiar with the facts knew they would have a disparate impact on people of color because the poverty rate in Black communities is much higher than in White communities. E.g., FEMA early ordered citizens to evacuate by car when thousands of African Americans had no cars. Then, when empty federally-ordered buses were driven in, they passed by Black citizens, including the elderly and disabled, walking by the side of the road, rather than picking them up and taking them to a safe, dry place'. Cited in G.E. Edwards, 'International Human Rights Law Violations before, during, and after Hurricane Katrina: An International Law Framework for Analysis', in *Thurgood Marshall Law Review*, 31(2), 2006, p. 373.

aftermath of the storm, the thousands of people that had either gathered at the city's Superdome, the convention center, or were stranded on rooftops were left for days with no or limited access to food, water, medical assistance and other basic needs. It soon became clear that, despite the expected risk and preparedness measures,[346] there was no evident plan in place to assist those who were unable to leave New Orleans.[347]

This brief survey suggests that, while Katrina *per se* brought with it the destructive effects of a force of nature, the inundation that resulted from the flood protection system's failure and the related consequences in terms of human loss and suffering were more closely related to a combination of other social factors. On one hand, these factors were lying in poor levee construction and maintenance, centuries of neglectful city planning, and outdated emergency schemes at municipal and state level.[348] On the other hand, in light of the hurricane's disproportional impact on the poor, the elderly, the black communities and other minorities, the higher disaster risk experienced by some groups of people was grounded in structural and institutional corruption, racism, neglect and injustices that long predated Katrina.[349]

Haiti and New Orleans belong to two very different geographical, political, and economic contexts; however, the way in which the natural hazards that struck them have evolved into disasters reflect similar dynamics in terms of disaster vulnerability. In both cases, those that were already marginalized, discriminated and routinely deprived of their rights before the disaster were the ones who struggled the most during and after the disaster. In this perspective, 'the level of human rights attainment prior to an extreme event significantly determines the outcome of the disaster for these groups'.[350]

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[346] For instance, just less than a year before Katrina, FEMA enacted a simulated hurricane – the 'Pam' exercise –, which predicted even greater devastation than that occurred with Katrina.

[347] See F.J. Jackson, 'A Streetcar Named Negligence in a City Called New Orleans – A Duty Owned, A Duty Breached, A Sovereign Shield', in *Thurgood Marshall Law Review*, 31(2), 2006, p. 562 ff. The poor management of Katrina's aftermath generated more than one million legal claims.

[348] Cedervall Lauta, *Disaster Law*, op. cit., p. 30.

[349] ten Have, 'Disasters, Vulnerability and Human Rights', op. cit., p. 163; L Voigt, W.E. Thornton, 'Disaster-Related Human Rights Violations and Corruption: A 10-Year Review of Post–Hurricane Katrina New Orleans', in *American Behavioral Scientist*, 59(10), 2015, pp. 1292-1313. The systemic disadvantage of marginalized groups was acknowledge also by the HRC, which expressed concern that 'the poor, and in particular African-Americans, were disadvantaged by the rescue and evacuation plans implemented when Hurricane Katrina hit […] and continue to be disadvantaged under the reconstruction plans', and invited the US to 'review its practices and policies to ensure the full implementation of its obligation to protect life and of the prohibition of discrimination, whether direct or indirect'. HRC, Concluding Observations on the second and third periodic reports of the United States of America, CCPR/C/USA/CO/3/Rev.1 (18 December 2006), para 26.

[350] J.C. Mutter, K.M. Barnard, 'Climate change, Evolution of Disasters and Inequality', in Humphreys (ed.), *Human Rights and Climate Change*, op. cit., p. 291.

6. Concluding remarks

This Chapter has sought to provide an overarching legal and theoretical framework that helps to conceptualize the environment-migration nexus within an international protection perspective. Part I has outlined the transformative capacity of the law in addressing a number of key issues regarding environmental protection through the avenue of human rights mechanisms. It has been demonstrated that, in the context of increased recognition of the connection between climate impacts and human rights enjoyment, human rights have a fundamental environmental dimension, and that judicial and quasi-judicial bodies have been capable of integrating such dimension within their reasonings in an ongoing process of cross-fertilization and systemic interpretation of the environmental and human rights regimes. Taken together, the developments occurred within the practice of human rights bodies in respect to environmental matters pave the way for a more specific argument about the relevance of international protection towards persons displaced in the context of climate change and disasters. Indeed, there is scope to argue that the impossibility to exercise basic human rights in the country of origin, and the consequent harm that this would pose upon individuals, may give rise to a concrete claim to protection in a third state. The logical soundness of this argument seems indeed to be supported by the way in which the environment-migration has been framed within the Global Compacts on Refugees and Migrants, where environmental pressures are understood both in their interaction with classical drivers of refugee movements, and as structural factors of other forced migrations.

On these grounds, Part II has sought to provide a more nuanced representation of the mechanisms upon which international protection needs might arise through the analysis of the notion of disaster. By appreciating root causes of disaster vulnerability and systemic human rights deprivation, it has become more readily apparent that

> '[t]he threat posed by a natural disaster is far more than the threat of the moment, the terror experienced when the Earth moves underfoot or when people face the hurricane's gale and advancing storm surge. It is incubated through a history of discrimination that may involve either active denial or inability to ensure fundamental rights'.[351]

The nuances that modern disaster research have highlighted provide relevant insights for the analysis of disaster-related cross-border displacement from an international protection perspective. The fact that disaster vulnerability entails differential risk to disaster

[351] Ivi, p. 295.

impacts calls into question the oft-heard argument that existing international protection instruments are not applicable to people displaced in the context of disasters and climate change because of their 'indiscriminate' or 'natural' character. Conversely, the appreciation of the social context in which a disaster strikes presents a useful entry point to an international protection analysis. In fact, by interacting with other displacement drivers and providing an overarching context for displacement, the impacts of disasters may create circumstances that reinforce or give rise to an international protection need.[352]

On these grounds, it is now possible to start our analysis of the international protection regime by considering, first, the refugee protection regime.

[352] McAdam, 'Displacement in the Context of Climate Change and Disasters', op. cit., pp. 835-836. This has been recently acknowledged by the UNHCR, which emphasize that a narrow focus on the disaster as a natural event fails to 'recognize the social and political characteristics of the effects of climate change or the impacts of disasters or their interaction with other drivers of displacement. More broadly, climate change and disasters may have significant adverse effects on State and societal structures and individual well-being and the enjoyment of human rights'. UNHCR, *Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters*, 1 October 2020, para 5, available at https://www.refworld.org/docid/5f75f2734.html.

Chapter 2

The environment-migration nexus and the refugee protection regime

1. International refugee law and the principle of *non-refoulement*: preliminary considerations

The protection of refugees in contemporary international law draws its origin in a number of arrangements concluded under the auspices of the League of Nations in the aftermath of the First World War,[353] which saw refugee flows of unprecedented dimensions.[354] The development of ad hoc instruments to protect refugees coincided with – and was the product of – the strengthening of the nation-state and the introduction of migration restrictions, which signaled a paradigmatic shift in the reception and perception of immigrants.[355] While, at the time, the international community adopted a 'group-based' or 'category' approach,[356] which often allowed political considerations in determining whom to protect,[357] the existing refugee regime is premised upon an individual-based system, capable of treating the issue of refugees on a universal basis through a legal definition.[358] The 1951 UN Convention Relating to the Status of Refugees is the product of a specific historical time-period: the normative framework that it puts forward stands as one of the many achievements of the early years of the United Nations, characterized by a general

[353] This is acknowledged in the Preamble of the Refugee Convention, which states that '...it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement'.

[354] See G. Loescher, *Beyond Charity: International Co-operation and the Global Refugee Crisis*, New York, Oxford University Press, 1993, pp. 32-55.

[355] Before and until 1920, there was little concern over migrants, who were generally seen as assets rather than burdens. See Loescher, *Beyond Charity*, op. cit. p. 33 ff.; J. Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950', in *The International and Comparative Law Quarterly*, 33(2), 1984, pp. 348-380; G.S. Goodwin-Gill, 'Refugees: The Functions and Limits of the Existing Protection System', in A.E. Nash (ed.), *Human Rights and the Protection of Refugees Under International Law*, South Halifax, Institute for Research on Public Policy, 1988, pp. 149-183.

[356] The refugee definitions were often based on nationality or ethnic origin. The first accords addressed the influx of Russian (Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees, July 5, 1922) and Armenian Refugees (Arrangement Relating to the Issue of Certificates of Identity to Russian and Armenian Refugees, May 12, 1926). These arrangements were subsequently extended to other refugee groups (Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees, June 30, 1928). Similar accords were stipulated in the wake of National Socialism, with the Provisional Arrangement Concerning the Status of Refugees Coming from Germany of July 4, 1936, and the consequent Convention Concerning the Status of Refugees Coming from Germany of February 10, 1938.

[357] See G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edition), Oxford, Oxford University Press, 2007, pp. 15-20.

[358] The universal applicability of the Refugee Convention flows from the 1967 Protocol Relating to the Status of Refugees, which removed the temporal and geographical limitations.

commitment towards the protection of human rights.[359] The 1948 Universal Declaration of Human Rights (UDHR) had already proclaimed the 'right to seek and to enjoy in other countries asylum from persecution'.[360] The Refugee Convention was the first international instrument which translated the ambitions enshrined in the UDHR into legally binding norms. The rationale behind it, as a fundamentally human rights treaty,[361] lies in the idea that the international community will act as a 'surrogate' in granting protection to persons fleeing serious violations of fundamental human rights, when the state of origin of these persons is failing to accord that protection.

Anyone fulfilling the criteria of the refugee definition[362] is entitled to a series of civil, political and social rights,[363] as well as to the fundamental protection from *refoulement*, namely the right of not being returned 'to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[364] Such protection, as introduced into international treaty law through the Refugee Convention, stands as an 'exceptional limitation of the sovereign right of States to turn back aliens to the frontiers of their country of origin'.[365] As the cornerstone of refugee protection, the principle of *non-refoulement* acts as a safeguard against any material act, such as expulsion, return, deportation, rejection or non-admittance at the frontier, resulting in the individual's exposure to a persecutory risk. The principle's territorial application extends to 'the conduct of State officials or those acting on behalf of the State wherever this occurs, whether beyond the national territory of the State in question,

[359] Preamble to the UN Charter: 'We the peoples of the United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'.

[360] UNGA Res. 217 A(III), Universal Declaration of Human Rights (10 December 1948), Article 14.

[361] J. McAdam, *Complementary Protection in International Refugee Law*, Oxford, Oxford University Press, 2007, p. 29 ff.

[362] Fulfilling the refugee definition is a sufficient condition to be a Convention refugee: formal recognition of refugee status by the competent authorities has thus a declarative, rather than constitutive, character.

[363] Enumerated at Articles 3-32.

[364] Refugee Convention, Article 33. It should be clarified that, importantly, the principle of *non-refoulement* applies from the moment at which an asylum seeker enters the territory of a State: as such, 'Art. 33 amounts to a de facto duty to admit the refugee', at least on a temporary basis and for the time necessary to determine an individual's status. J. Hathaway, *The Rights of Refugees Under International Law*, Cambridge, Cambridge University Press, 2005, p. 301.

[365] UN Ad Hoc Committee on Refugees and Stateless Persons, *First Session: Summary Record of the Twentieth Meeting*, New York, 1 February 1950, E/AC.32/SR.20, para 49.

at border posts or other points of entry, in international zones, at transit points, etc',[366] and it encompasses the prohibition of both direct and indirect *refoulement*.[367]

Although the principle of *non-refoulement* finds its most important expression at Article 33 of the Refugee Convention, it has been enshrined in a number of other refugee instruments, of both binding and non-binding character, which have regularly recalled its central role in the refugee protection regime.[368] Furthermore, since its recognition within the Refugee Convention, the principle has considerably transcended the realm of refugee law and is today well-established also in human rights law. This has occurred as a result of both the inclusion of the principle in a number of international and regional human rights instruments, and of the interpretative practice of human rights monitoring bodies. The interaction of refugee and human rights law on such a central issue of refugee protection has led to two key developments. On the one hand, the integration of *non-refoulement* within human rights law has contributed to reshape the content of the principle, the scope of application of which has extended to encompass any individual at risk of being subjected to torture, inhuman or degrading treatment or other fundamental human rights violation upon removal.[369] On the other hand, in light of states' consistent practice and acceptance of the principle, it can be reasonably affirmed that the prohibition of *non-refoulement*, at least in respect to its essential core prohibiting the expulsion, removal or any other act of 'returning' an individual towards territories where he would be subject to threats to life, personal integrity or torture and other ill-treatment, has attained the status of customary international law.[370]

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[366] E. Lauterpacht, D. Benthlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion', in E. Feller, V. Türk, F. Nicholson (eds), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2003, p. 111. See also UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 2007.

[367] The prohibition of indirect *refoulement* comes into particular relevance with regards to 'safe third country' practice. For a recent panoramic on the issue, see J. Lewis, 'Buying Your Way out of the Convention: Examining Three Decades of Safe Third Country Agreements in Practice', in *Georgetown Immigration Law Journal*, 35(3), 2021, pp. 881-904.

[368] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Article 22(8): '[i]n no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions'. The principle has been reaffirmed by the 1984 Cartagena Declaration at Conclusion n. 5. In the African context, the prohibition of *refoulement* is recognized at Article 2(3) of the 1969 OAU Convention. Other examples include Article 3 of the 1966 Bangkok Principles on the Status and Treatment of Refugees adopted by the Asian-African Legal Consultative Organization (AALCO) and Article 3 of the UNGA Declaration on Territorial Asylum, UN Doc A/RES/1212 (XXII) (14 December 1967).

[369] The evolution of the principle of *non-refoulement* and the role of international human rights law in this process is analyzed in further details *infra*, Chapter 3, para 1.

[370] The majority of scholars and the UNHCR agree on the customary status of the principle of *non-refoulement*. See, *ex multis*, E. Lauterpacht, D. Benthlehem, 'The Scope and Content of the Principle of *Non-*

The fact that the principle of *non-refoulement* has developed beyond the refugee regime does not however determine an analogous extended applicability of the Refugee Convention. As a 'treaty regime' specifically dedicated to refugees, the rights and entitlements flowing from the status it confers – which still is the strongest amongst other protected status – are applicable only to those who qualify accordingly with the refugee definition provided by the Convention.[371] Given its obvious importance as the entry point to the protection regime set forth by the Refugee Convention, the following paragraphs turn to analyze the refugee definition as provided by Article 1A(2).

2. The elements of the international refugee definition

Pursuant to Article 1A(2) of the Refugee Convention, the term 'refugee' applies to any person who:

> 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.[372]

The definition clearly sets out at least four essential requirements to be fulfilled: i) that the applicant is outside his or her country of origin; ii) that he or she is unable or unwilling to seek or take advantage of the protection of that country; iii) that such inability or unwillingness is attributable to a well-founded fear of being persecuted; iv) that there is a

Refoulement', op. cit., pp. 87-177; F. Messineo, '*Non-Refoulement* Obligations in Public International Law: Towards a New Protection Status?', in S.S. Juss (ed.), *The Ashgate Research Companion to Migration Law, Theory and Policy*, London, Routledge, 2013, pp. 129-157; Goodwin-Gill, Mcadam, *The Refugee in International Law*, op. cit., p. 345 ff.; UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994. A part of scholarship even considers the principle as *jus cogens*: see J. Allain, 'The Jus Cogens Nature of Non-Refoulement', in *International Journal of Refugee Law*, 13, 2001, pp. 533-558; A. Stuart, 'The Inter-American System of Human Rights and Refugee protection: Post 11 September 2001', in *Refugee Survey Quarterly*, 24(2), 2005, pp. 67-82; A. Duffy, 'Expulsion to Face Torture? *Non-refoulement* in International Law', in *International Journal of Refugee Law*, 20(3), 2008, pp. 373-390. For a skeptical viewpoint on the customary nature of *non-refoulement*, see in particular J.C. Hathaway, 'Leveraging Asylum', in *Texas International Law Journal*, 45(3), 2010, pp. 503-536.

[371] The legal justification for the difference in status and treatment between categories of persons with similar protection needs has been questioned. See, *inter alia*, McAdam, *Complementary Protection*, op. cit., p. 197 ff; J. Pobjoy, 'Treating Like Alike: The Principle of Non-Discrimination as Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection', in *Melbourne University Law Review*, 34(1), 2010, pp. 181-229.

[372] Refugee Convention, Article 1A(2).

causal link between the fear and one of the Convention grounds, namely race, religion, nationality, membership of a particular social group or political opinion.

Over the years, the refugee definition has raised significant problems of interpretation. Even though it clearly narrows the 'sociological' understanding of the notion of refugee, it does not expand on its components: the concept of 'being persecuted', 'well-founded fear', 'for reasons of' and others do not find exemplification throughout the Convention, nor is the meaning of these concepts self-evident. Furthermore, there is no international body in place to settle interpretative issues over the Convention's key features.[373] Thus, it is primarily domestic decision-makers, with the aid of authoritative legal doctrine, that have shaped the contents of the refugee definition through interpretation of its core elements.

It should be stressed that, in spite of a tendency to consider the single terms separately, the refugee definition has to be appreciated in its whole in order to guarantee the effective application of the Refugee Convention, as well as respect of the rules of treaty interpretation codified by the VCLT.[374] Accordingly, the Refugee Convention is to be regarded as a living instrument, 'in the sense that while its meaning does not change over time, its application will'.[375] The capacity of the Refugee Convention to adapt and remain relevant over time has coupled with common practice, amongst decision-makers, to adopt a human rights approach in the interpretation of the refugee definition, an approach that today is considered to be the 'dominant view'.[376] Indeed, the relevance of human rights standards can be inferred from the reference to the UDHR[377] and the recalling of UN's 'profound concern' for refugees[378] in the Preamble, which, according to the UNHCR, 'indicate the aim of the drafters to

[373] Article 38 provides that the International Court of Justice (ICJ) can be asked to settle any dispute relating to its application and interpretation; so far, however, the ICJ has never been called upon. Even though the UNHCR has a supervisory role in ascertaining the implementation of the Refugee Convention, it does not have the authority to impose a given interpretation of the treaty's terms. See J. McAdam, 'Interpretation of the 1951 Convention', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford, Oxford University Press, 2011, pp. 75-115.

[374] VCLT, Articles 31-33. Although the Refugee Convention pre-dates the adoption of the VCLT, the latter reflects principles of customary international law and is thus applicable.

[375] *Sepet v. Secretary of State for the Home Department*, [2003] UKHL, para 6. The 'living' nature of the Refugee Convention as a human rights treaty is widely recognized by jurisprudence and scholars. See McAdam, 'Interpretation of the 1951 Convention', op. cit., p. 103.

[376] M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge, Cambridge University Press, 2007, p. 31. More specifically, the development of a human rights-based approach occurred within the interpretation of a keystone concept in refugee law, namely persecution, which works as a parameter in the determination of refugee status. A more detailed discussion on the human rights approach to the notion of 'being persecuted' is discussed *infra*, para 2.1.

[377] 'Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'.

[378] 'Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms'.

incorporate human rights values in the identification and treatment of refugees, thereby providing helpful guidance for the interpretation, in harmony with the Vienna Treaty Convention, of the provisions of the 1951 Convention'.[379] The interaction between refugee law and human rights law is at the root of the evolutions that have progressively widen the category of persons eligible for refugee status. In other words, the scope of protection under the Refugee Convention has progressively evolved as a result of developments within human rights law.[380] In light of that, the Refugee Convention should be seen as a dynamic instrument, potentially capable to include in its scope of application categories of persons that were not originally intended to receive refugee status.[381]

Notwithstanding this, it should always be borne in mind that the Refugee Convention was conceived of as a means to protect a selected class of forced migrants from the gravest human rights violations: it is thus primarily designed to address acute rather than ongoing crises.[382] In terms of governance, as famously argued, international refugee law might be thought of as a tool 'to govern disruptions of regulated international migration in accordance with the interests of states'.[383] The history of contemporary international refugee law is indicative of the Refugee Convention's pitfalls and gaps, as it testifies a persistent tension between the need to uphold the Refugee Convention's humanitarian purpose and the restrictive legal and political interpretation of its norms aimed at restricting access to asylum.[384] The narrow scope of the Refugee Convention, in spite of progressive

[379] UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para 4.

[380] For analysis, see V. Chetail, 'Moving Towards an Integrated Approach of Refugee Law and Human Rights Law', in Costello, Foster, McAdam (eds), *The Oxford Handbook of International Refugee Law*, op. cit., pp. 202-221. For a critical appraisal of the relationship between refugee and human rights law, see generally R. Bhandari, *Human Rights and the Revision of Refugee Law*, London, Routledge, 2021.

[381] One example is the recognition of refugee status on the basis of gender-related persecution, occurred within creative interpretation of one of the Convention grounds, namely membership of a particular social group.

[382] See N. Canefe, 'The Fragmented Nature of the International Refugee Regime and its Consequences: A Comparative Analysis of the Applications of the 1951 Convention', in J.C. Simeon (ed.), *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony*, Cambridge, Cambridge University Press, 2010, p. 175.

[383] J. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', in *Harvard International Law Journal*, 31(1), 1990, p. 133.

[384] Such tension is plastically exemplified, *inter alia*, by the emergence of the 'internal flight alternative' (IFA) doctrine, according to which a refugee-receiving state is entitled to deny refugee status on the basis that the applicant would obtain adequate protection from persecution in another part of his or her country of origin. The IFA inquiry has progressively become part of refugee status determination processes from the late 1980s, with the increasing arrival of refugees from countries that were culturally, racially and politically different from Western countries. Notwithstanding its influence, reflected for instance by its codification at article 8 of the EU Qualification Directive, the IFA doctrine has been often criticized for its lack of foundation within the Refugee Convention. Indeed, the Recast Qualification Directive, with the aim of achieving compatibility with and greater adherence to international refugee and human rights law, has revised Article 8 by requiring that the applicant 'can safely and legally travel to and gain admittance to that part of the country and can reasonably be

interpretations in some contexts, has been reminded by the jurisprudence on various occasions:

> 'By including in its operative provisions the requirement that a refugee fear persecution, the Convention limits its humanitarian scope and does not afford universal protection to asylum seekers. No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention. And by incorporating the five Convention reasons the Convention plainly contemplates that there will even be persons fearing persecution who will not be able to gain asylum as refugees'.[385]

As this passage makes clear, the restrictive scope of the refugee definition provides room for resistances towards non-traditional refugee claimants: amongst these claimants, persons displaced in the context of disasters are often mentioned as an example of individuals to whom the Refugee Convention does not apply. This assumption is however questionable. In order to test it, the following paragraphs are dedicated to an assessment of the ways in which the key terms and principles of the refugee definition are commonly interpreted by national jurisprudence. Then, the analysis will carry on to consider how these terms and principles are applied in claims to refugee status grounded on climate change and disasters.

2.1. The concept of 'being persecuted'

Doctrinal analyses and judicial interpretations of the notion of persecution seem to reflect a persistent tension between the safeguard of the concept's flexibility and the quest for uniformity and consistency.[386] Indeed, while the former serves the purpose of conserving

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expected to settle there'. Furthermore, the availability of internal protection must be assessed with regards to 'the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant', which have to be inferred from up-to-date information obtained from relevant sources. See C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford, Oxford University Press, 2015, p. 227. For further analysis on the emergence of the internal protection notion, see J. Hathaway, M. Foster, 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination', in E. Feller (ed.), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2003, pp. 357-417. See also J. Eaton, 'The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive', in *International Journal of Refugee Law*, 24(4), 2012, pp. 765-792.

[385] *A and Another v Minister for Immigration and Ethnic Affairs and Another*, [1997], Australia: High Court, 24 February 1997 (Dawson J).

[386] Scholars, in particular, stress the fact that the Refugee Convention's drafters chose not to define the term in order to avoid rigidity in relation to a concept characterized by its changeability. In fact, '[p]ersecution is a concept only too readily filled by the latest examples of one person's inhumanity to another, and little purpose is served by attempting to list all its known measures. Assessments must be made from case to case, taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured'. Goodwill-Gill, McAdam, *The Refugee in International Law*, op. cit., pp. 93-94. At the same time, especially practitioners have pointed out that 'refugee decision makers, including judges, have to be practical people. We have to apply and interpret the legal

the ‘adaptability’ of the refugee definition, the latter responds to the need to operate within established standards, so as to avoid legal uncertainty. A minimum core on the meaning of persecution is inferred from the wording of Article 33 of the Refugee Convention, which mentions threats to life or freedom on account of the Convention grounds – namely race, religion, nationality, political opinion or membership of a particular social group. Other than that, the scope of the concept has been contested for a long time – and remains so today in some aspects –, creating on the one hand, the possibility for expansive interpretations and, on the other, the perils of disharmonious application of the Refugee Convention across jurisdictions.

As a result of the efforts to find a ‘common concept’ of persecution capable of smoothing the above-mentioned tension between flexibility and uniformity, the seminal work by Hathaway in *The Law of Refugee Status* theorized that persecution should be understood as ‘a sustained or systemic violation of basic human rights demonstrative of a failure of state protection’,[387] with reference, specifically, to widely ratified international human rights instruments.[388] Hathaway’s definition, broadly adhered to by the jurisprudence, has paved the way for judicial interpretations of the concept based on a human rights approach,[389] by which the interaction between human rights and refugee law manifests

instruments before us as best we can in order to decide who is a refugee’. Storey, ‘What Constitutes Persecution?’, op. cit., p. 274.

[387] J. Hathaway, *The Law of Refugee Status* (1st edition), Toronto, Butterworths, 1991, p. 101. See also J. Hathaway, M. Foster, *The Law of Refugee Status* (2nd edition), Cambridge, Cambridge University Press, 2014, p. 185, which substitutes the word ‘violation’ with ‘denial’. It has been suggested that the change of language serves the purpose of putting emphasis on the individual’s predicament, rather than on the breach of a human rights obligation by the State. See M. Scott, *Climate Change, Disasters, and the Refugee Convention*, Cambridge, Cambridge University Press, 2020, p. 92.

[388] As such, relevant instruments include not only those composing the International Bill of Rights – namely, the ICCPR, the ICESCR and the UDHR –, but also other treaties that address the rights of specific groups such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of Persons with Disabilities. While recognizing that international refugee law has to take into account the developments occurring within international human rights law, Hathaway warned against excessive expansion on the human rights instruments legally relevant in the refugee context: ‘[i]f we believe that the standards relied on should really be agreed by states to be authoritative, if we believe in the importance of genuine accountability through a dialogue of justification with governments, in short, if we want refugee status determination to be taken seriously as law-based rather than as an exercise in humanitarian “do-goodism”, then we have to exercise some responsible constraint on the impulse to embrace every new human rights idea that comes along’. J. Hathaway, ‘The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute’ in International Association of Refugee Law Judges (IARLJ), *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary*, 1999, cited in *Refugee Appeal No. 74665*, No. 74665, New Zealand: Refugee Status Appeals Authority, 7 July 2004, para 67.

[389] Earlier approaches were based on dictionary definitions, with the obvious consequence of significant variations across countries depending on the meaning of persecution provided by dictionaries in different languages. Another approach, adopted in particular by US jurisprudence, was based on subjective assessment, according to which persecution is to be understood as ‘punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate’. *Begzatowski v. Immigration and Naturalization Service*, No. 01-2225, United States Court of Appeals for the Seventh Circuit, 11 January 2002,

through the use of the former as a means to assist and inform the interpretation of the 'being persecuted' element.[390] That being said, it is well-established in case law that being persecuted entails something more than a human rights violation: following a famous maxim, 'Persecution = Serious Harm + The Failure of State Protection'.[391] With regards to the first element of the formula, the key issue is to determine the point at which the seriousness of harm amounts to persecution. In that respect, the hierarchy of rights originally elaborated by Hathaway in *The Law of Refugee Status*, premised upon a derogability criterion,[392] has been subsequently abandoned, both because '[d]erogability [...] does not provide a principled basis upon which to exclude a given right from the ambit of standards relevant to refugee law's assessment of serious harm',[393] and also since 'an argument based on normative hierarchy is no longer defensible in light of the widely accepted principle that "[a]ll human rights are universal, indivisible and interdependent and interrelated"'.[394] In other words, while not all forms of harm are sufficiently serious to amount to persecution, potentially the denial of any category of rights might reach the threshold of persecutory harm, since the latter is not measured solely on the nature of the right at risk, but also on the degree to which the right is going to be impaired. As put it by the International Association of Refugee Law Judges:

> '[a] framework which accepts that all widely ratified human rights conventions should be used in assessing the kinds of breaches that might be persecutory […] and then further requires an assessment of the seriousness of the breach in terms of its impact on the dignity of the person, would provide consistency and fairness. The resort to all human rights instruments provides flexibility and sensitivity, while the requirement of

p. 669. Such interpretations have often led to controversial outcomes: the clearest examples pertain to cases involving gender-based persecution, where claims have been dismissed on the basis that discrimination against women is justified by culture or social norms. Other examples include claims by homosexual applicants who were denied refugee status on the basis that they should hide their sexuality or exercise discretion in their country of origin in order to avoid persecution. See Foster, *International Refugee Law and Socio-Economic Rights*, op. cit., p. 36 ff.

[390] Hathaway, Foster, *Refugee Status*, op. cit., p. 200.

[391] Lord Hoffman, *Islam v Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals)*, UKHL 25 March 1999.

[392] In particular, within the International Bill of Rights, the author placed at the top of the hierarchy the non-derogable rights contained in the ICCPR – namely the right to be free from arbitrary deprivation of life, protection from torture or other cruel, inhuman or degrading treatment, freedom from slavery, prohibition from criminal prosecution by retroactively applied law, the right to recognition as a person in law and freedom of thought, conscience and religion; second in the hierarchy are the rights in the ICCPR from which states may derogate in times of public emergencies; third the rights contained in the ICESCR; fourth and last in the hierarchy are other human rights found in the UDHR and not codified in either of the Covenants.

[393] Hathaway, Foster, *Refugee Status*, op. cit., p. 203.

[394] Ibid.

> seriousness in the breach lessens the fear of overly liberalizing the interpretation of the Convention'.[395]

This has led to a progressive acceptance of socio-economic rights violations as relevant breaches for the recognition of refugee status. In fact, persecution is not confined to harms that amount to an infringement of life or freedom, as it has been acknowledged that 'an inability to earn a living or to find anywhere to live can result in destitution and at least potential damage to health and even life. If discrimination against which the state cannot or will not provide protection produces such a result, the Convention can be engaged'.[396] Accordingly, persecution can also be established by

> 'a concatenation of individual denial of rights; for example [of] the right to work, to education, to health or to welfare benefits to such an extent that it erodes the very quality of life in the result that such a combination is an interference with a basic human right to live a decent life'.[397]

The focus on the identification of the meaning of the noun 'persecution' should not divert attention away from the fact that the Refugee Convention uses the corresponding verb in the passive form. Indeed, apart from considerations on the kind of harm that would reach the qualifying threshold – which largely dominate the debate on what 'persecution' means – the language used by the Refugee Convention entails other implications, which go beyond the need to identify persecutory harm. The choice of the passive voice of the verb 'to persecute' suggests that the refugee definition is centered on the individual's predicament, rather than on the conduct of the agent of persecution. The 'predicament approach' is

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[395] International Association of Refugee Law Judges (IARLJ), *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary*, Harleem, the Netherlands, 1999, p. 15, cited in Foster, *International Refugee Law and Socio-Economic Rights*, op. cit., p. 193.

[396] Secretary of State for the Home Department v. Sijakovic (unreported, IAT, appeal no. HX-58113-2000, 1 May 2001), para 16, cited in Foster, *International Refugee Law and Socio-Economic Rights*, op. cit., p. 92.

[397] Gudja (unreported, IAT, CC/59626/97, 5 August 1999), para 2, cited in Foster, *International Refugee Law and Socio-Economic Rights*, op. cit., p. 105. It should however be noted that refugee claims based on deprivations of socio-economic rights are much less developed in the jurisprudence, which generally tends to accept such claims only in very extreme cases. As Foster observes in her analysis, traditionally, civil and political rights have been understood as true liberal rights imposing primarily negative duties to abstain from actions infringing such rights, while socio-economic rights have been characterized as imposing positive duties, consisting in the expenditure of resources in order to fulfil them: this would pose some issues of justiciability. Although this argument has been extensively challenged and undermined in both the literature and in the practice of treaty bodies, the idea that socio-economic rights are in some manner inferior to civil and political rights has persisted. Notwithstanding the acceptance that the violation of the former may form a basis for refugee status, courts tend to apply a considerably higher test to claims involving such 'third level' rights than that applied in relation to 'first level' rights: for instance, the UK Immigration Appeal Tribunal (UKIAT) has held that '[e]conomic hardship must be extreme and the discrimination must effectively destroy a person's economic existence before surrogate protection can be required'. Thus, a violation of a socio-economic right can amount to persecution only when the harm can be considered to be extreme or life-threatening. See Foster, *International Refugee Law and Socio-Economic Rights*, p. 123 ff.

supported by authoritative doctrine and puts at the core of the inquiry the reasons for the applicant's exposure to the risk of being persecuted.[398] A first consequence of such reading is that the applicant is not required to bring evidence of the persecutor's motives in order to have his refugee status recognized. The marginal relevance of the persecutor's intents in refugee status determination (from now on, RSD) has long been recognized by both refugee law doctrine and the UNHCR, according to which:

> '[t]here is no need for the persecutor to have a punitive intent [...]. The focus is on the reasons for the applicant's feared predicament within the overall context of the case, and how he or she would experience the harm rather than on the mind-set of the perpetrator'.[399]

Judicial authorities have as well progressively abandoned the 'intent-based approach', observing that 'some persecution is performed by people who think that they are doing their victims a favour'.[400] It has also been pointed out that the view that considers motivation critical to establish refugee status misinterprets the object and purpose of the Refugee Convention, which aims at providing protection rather than punishing the persecutor.[401] The evidence of an intent to persecute might certainly substantiate the applicant's claim and be sufficient to establish refugee status; however, it is not a mandated requirement.[402]

Beyond the issue of intentional infliction of harm as a sufficient but not necessary condition, the 'predicament approach' reflected by the refugee definition's wording provides other relevant insights with regards to the temporal dimension of being persecuted. This is indeed well captured by Hathaway's definition through the framing of being persecuted as a *sustained* or *systemic* denial of human rights. A first clarification in this respect pertains to the issue of persistence as a necessary feature in assessing the existence of a risk of persecution. Although some courts have at times understood the 'sustained or systemic' element of Hathaway's definition as implying that the harm must occur repetitively, it is now widely recognized that such interpretation is incorrect, since a single act might be

[398] Hathaway, Foster, *Refugee Status*, op. cit., pp. 376-382.

[399] UNHCR, *Guidelines on International Protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/09, para 39.

[400] Kirby J, *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14, Australia: High Court, 11 April 2002, para 108.

[401] Foster, *International Refugee Law and Socio-Economic Rights*, op. cit., p. 274.

[402] See Goodwin-Gil, McAdam, *The Refugee in International Law*, op. cit., pp. 100-102. The authors also note that there is no indication in the Convention's drafting history that 'the motive or intent of the persecutor was ever to be considered as a *controlling* factor in either the definition or the determination of refugee status'.

sufficiently severe to substantiate persecutory harm.[403] This has been made explicitly clear, for instance, by the European Union Qualification Directive (EU QD),[404] according to which an 'act of persecution' must be 'sufficiently serious *by its nature or repetition* as to constitute a severe violation of basic human rights'[405] or 'an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a)'.[406]

In rejecting the view that harm must be repetitive or persistent, the sustained or systemic character of Hathaway's formulation needs then to be referred to the enduring nature of the 'being persecuted' element. Put it differently, the focus of the 'sustained or systemic requirement' is not on the nature of the harm, but on the *risk* faced by the individual to being subjected to such harm. The notion of 'risk' is nowhere present in the Refugee Convention; however, it is constantly employed by decision-makers and scholars, to the point that it might be regarded as a fundamental feature in RSD. As a matter of treaty interpretation, the notion of risk appears appropriate to emphasize the ordinary meaning of the term 'being persecuted' in its context, as well as in light of the object and purpose of the Refugee Convention.[407] That risk is an implicit feature of the human rights approach to the interpretation of persecution is confirmed by the authoritative refugee law scholars, who have clarified that:

> '[s]o long as the risk of denial of a broadly accepted international human right is sustained – in the sense that, as a practical matter, it is ongoing; or systemic – in the sense that the risk is endemic to the political or social system – it can reasonably be

[403] Courts have sometimes required that the ill-treatment feared by the claimant had to be 'systematic', a term employed to signify persistency; however, it has been recognized that 'the notion of "systematic" conduct is a possible, but not a necessary, element in the idea of "persecution"'. Kirby J, Minister for Immigration and Multicultural Affairs v. Haji Ibrahim, [2000] HCA 55, Australia: High Court, 26 October 2000, para 193.

[404] Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, OJ 2004 L 304/12.

[405] EU QD, Article 9 (emphasis added).

[406] Ivi, Article 9(1)(b). Article 9(2) of the EU QD also provides a non-exhaustive list of acts of persecution, which can take the form of: '(a) acts of physical or mental violence, including acts of sexual violence'; '(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner'; '(c) prosecution or punishment which is disproportionate or discriminatory'; '(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment'; '(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2)'; '(f) acts of a gender-specific or child-specific nature'. For further analysis of the European protection system, including in respect to its relationship with the Refugee Convention, see E. Tsourdi, 'Regional Refugee Regimes: Europe', in Costello, Foster, McAdam, *The Oxford Handbook of International Refugee Law*, op. cit., pp. 352-370.

[407] Specifically, Article 31(1) of the VCLT provides that: '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

> said that there is a risk of "being persecuted" of the kind that may engage Convention obligations'.[408]

This perspective reflects a wider temporal scope of the refugee definition: by focusing on the risk of being persecuted, rather than on the risk of persecution understood as the moment at which harm is experienced, the refugee definition is arguably sufficiently inclusive to embrace considerations about the wider social context in which the risk of being persecuted might materialize.[409] Yet, the insights inherent to the 'predicament approach', which in turn flow from the almost intangible difference between a focus on persecution as a noun rather than on the passive voice of the verb, have only been partially addressed by the jurisprudence. For instance, the New Zealand Refugee Status Appeals Authority has observed that:

> '[w]hile it is common in refugee discourse to refer to "the persecution element" of the refugee definition, the Authority prefers to use the language of the Convention itself, namely "being persecuted". Not only is this mandated by principles of treaty interpretation, it also serves to emphasise the employment of the passive voice. The inclusion clause has as its focus the predicament of the refugee claimant. The language draws attention to the fact of *exposure to harm* rather than to the act of inflicting harm.'[410]

Similarly, the New Zealand Immigration and Protection Tribunal has recognized that:

> '"[s]ystemic" (not, as sometimes stated, systematic) identifies that "being persecuted" arises because of an anticipated failure of the legal and other protection-relevant systems in the claimant's country of origin. Finally, "sustained" can be seen to serve two functions. It references the enduring nature of the claimant's predicament arising from the failure of state protection in the country of origin. It also reminds decision-makers that persecutory harm can, but not must, encompass multiple and ongoing violations of rights'.[411]

As the abovementioned statements seem to imply, the risk feature, in turn enshrined in the sustained and systemic element, is an essential component of the concept of persecution when it is interpreted in accordance with the predicament approach. However, the jurisprudence, as well as refugee doctrine, anchors this component to the 'well-founded fear' criterion of the refugee definition.[412] This leads to a diminished application of the

[408] Hathaway, Foster, *Refugee Status*, op. cit., p. 195.

[409] See Scott, *Climate Change, Disasters, and the Refugee Convention*, op. cit., p. 96 ff.

[410] *Refugee Appeal No. 74665*, New Zealand: Refugee Status Appeals Authority, 7 July 2004, para 36 (emphasis added).

[411] DS (Iran) [2016] NZIPT 800788, [126], cited in Scott, *Climate Change, Disasters, and the Refugee Convention*, op. cit., p. 100.

[412] Scott, *Climate Change, Disasters, and the Refugee Convention*, op. cit., p. 99. Scott argues that this is due to a dominant interpretation according to which the experience of being persecuted is equated with acts of

'predicament approach', as 'being persecuted' is predominantly conceptualized in its material dimension, that is, with reference to the nature of harm and the acts that would qualify as persecutory. The removal of the risk component from the 'being persecuted' element to the 'well-founded fear' notion has two main consequences: first, it shifts the focus of RSD on whether, in case of return to the country of origin or nationality, the applicant would risk persecutory harm. Secondly, as a result, it imports into RSD questions revolving around the chance of a certain event happening, which consequently turn to issues of timing.[413] The likelihood of being subjected to persecutory harm is certainly a relevant factor in determining that a person is in need of international protection. As a matter of treaty interpretation however, the scope of the refugee definition is broader than that, as it confers relevance to situations characterized by a persistent risk of being subjected to such harm – that is, the enduring nature of the claimant's predicament.

2.2. Failure of state protection

As already mentioned, a second fundamental component of 'being persecuted', along with serious harm, is the absence of state protection. Indeed, the importance of lack of protection from the state flows from the human rights-based interpretation of the concept of persecution outlined above: it is not sufficient to demonstrate that there is a risk of serious harm, as that risk needs to be connected to the inability or unwillingness of the state to protect from that harm.[414] The protection accorded by the Refugee Convention stems precisely from the fact that refugees are *de facto* deprived of minimum guarantees flowing from possession

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persecution. The author cites a number of commentators who have celebrated the EU QD as the first instrument providing a definition of 'being persecuted',[412] and observes that '[t]he element of risk that exists within Hathaway and Foster's explanation of the "sustained and systemic" formulation is lost *with the elision of being persecuted with "acts of persecution"* under Article 9(1)'. For instance, Storey has argued that 'the Qualification Directive's Article 9(1) short definition marks one very significant improvement on the Hathaway formulation'. The reason why, according to the author, the QD has improved Hathaway's definition lies in that the former excludes the 'sustained or systemic' requirement *with regards to the act of persecution*, which, as already mentioned, can be sufficiently serious by its nature or repetition. This line of reasoning point towards two points: firstly, the exemplification made by the EU QD of 'acts of persecution' is regarded as a definition of 'being persecuted'; secondly, the 'sustained or systemic' element is understood with reference to the harm, rather than to the risk of harm. Of course, the author is not unaware of the fact that the refugee definition employs the verb in the passive form, and affirms that 'it is always important to recall that the Article 1A(2) focus is on "being persecuted", not on persecution'.[412] However, he goes on to argue that: '[i]t would be idle to ignore that at root we are concerned with attempting a definition of the abstract noun, not just of its passive voice expression/gerund. And as a matter of plain grammar, one cannot easily describe all the modalities in the passive voice: do we really want to have to start referring, for instance, to a persecutor as an actor of "[the condition of] being persecuted" [...]?'. Storey, 'Persecution: towards a working definition', op. cit., pp. 479-480.

[413] See *infra*, para 2.3.

[414] See Hathway, Foster, *Refugee Status*, op. cit., p. 292 ff.

of a nationality: thus, '[t]he general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community'.[415]

The inclusion of failure of state protection as a component of being persecuted has been crucial to the recognition that actors of persecution can be both state and non-state actors. Although persecution, in light of the historical context in which the Refugee Convention was drafted and applied in early years, has been traditionally conceived of as an act of the state, it has been increasingly acknowledged that the role of non-state agents cannot be underestimated. By the 2000s it was in fact observed that 'it is highly likely that the majority of today's refugees are fleeing dangers emanating from non-state agents',[416] such as local militias, clans, insurgent groups, and even family members. This view has been notably embraced by the EU QD, according to which actors of persecution include 'non-State actors'.[417] Thus, consistently with the Refugee Convention's object and purpose, refugee law accommodates both individuals who are at risk of being persecuted by their own state and those who do not benefit from the protection of the state against threats posed by private actors. However, while persecution by the state is less problematic in terms of establishing that a lack of state protection exists, persecutory harm inflicted by non-state actors raises more challenges in relation to the meaning and scope of the notion of failure of state protection. The main issue in that respect has revolved around the *inability* – as opposed to the *unwillingness* – of the state to provide protection. Such issue intersects with the way in which the so-called 'principle of surrogacy' has been conceptualized, which, in turn, raises issues concerning sufficiency of protection. In earlier case-law, surrogacy has played a crucial role in determining whether state protection was available in the applicant's country of origin:

> '[t]he claimant must provide clear and convincing confirmation of a state's inability to protect absent an admission by the national's state of its inability to protect that

[415] Lord Hope, Horvath v. Secretary of State for the Home Department [2001] 1 AC 489, [2000] UKHL 37.

[416] W. Kalin, 'Non-State Agents of Persecution and the Inability of the State to Protect', in *Georgetown Immigration Law Journal*, 15(3), 2000, p. 415.

[417] EU QD, Article 6(c). The inclusion of non-state agents of persecution is one of the most significant provisions of the Directive, as it contributed to the abandonment of the so-called 'accountability theory' so far adopted by some Member States. According to this theory – which stands in opposition to the so-called 'protection theory' adopted in most common law jurisdictions – the source of persecution was of fundamental importance, as refugee protection could be granted only where it was found that the state was accountable for the harm under international law. The accountability approach – held particularly in Germany and France – was strongly criticized as it 'unnecessarily imports principles governing state responsibility into a regime which is solely concerned with ensuring protection, not with the question whether a state is accountable or responsible at international law for a human rights violation'. Hathaway, Foster, *Refugee Status*, op. cit., p. 305.

> national. Except in situations of complete breakdown of the state apparatus, it should be assumed that the state is capable of protecting a claimant. This presumption, while it increases the burden on the claimant [...] reinforces the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant'.[418]

Clearly, in this case, surrogacy is seen as a fundamental and integral aspect of RSD, rather than as a general principle at the root of the refugee regime. The centrality attributed to the principle of surrogacy, so as to reveal a state-centered approach in RSD, is also reflected in the notorious *Horvath* decision by the UK House of Lords:

> 'I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consist of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well-founded, do not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy'.[419]

This line of argument is premised upon an implicit 'due diligence' standard. According to this test, the protection afforded by the state is considered to be sufficient when there is in place 'a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected', connected with 'an ability and a readiness to operate that machinery'.[420] As has been explained, such standard is of a formalist nature, in the sense that '[t]he sufficiency of state protection is not measured by the existence of a real risk of an abuse of rights but by the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate it'.[421] Thus, fundamentally, the idea behind the 'due diligence' approach is that, as long as the state has taken its 'best efforts' to avoid persecution, a refugee claim is not going to succeed, even in presence of evidence of a well-founded fear of persecution.

[418] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (emphasis added).
[419] *Horvath v. Secretary of State for the Home Department [2001] 1 AC 489*, [2000] UKHL 37 (Lord Hope).
[420] *Horvath* (Lord Clyde).
[421] Ibid.

This understanding of failure of state protection has been extensively criticized both by academic writing and jurisprudence.[422] The principle of surrogacy cannot in fact be interpreted in a way that undermines the purpose and object of the Refugee Convention, which is concerned with whether an individual is in need of protection rather than with states' duties and obligations towards its citizens. As a result, failure of state protection in the context of refugee analysis must be understood in substantive – as opposed to formalist – terms: regardless of whether the state is 'doing its best' to avoid harms against its citizens, what matters is the availability of an effective system of protection.[423] This brings the inquiry concerning state protection on an individual, context-specific dimension, consistently with the aim of the refugee protection system. As a result, 'the only possible standard for "protection" is that it reduces the risk below the level of well-founded fear or real risk – either protection is available, or it is not'.[424]

2.3. 'Well-founded fear'

As explained earlier,[425] according to the dominant paradigm, 'being persecuted' is conceived of as harm that might occur: it is thus only logical that the well-founded fear notion developed as a risk assessment test. This means that the well-foundedness of the fear of the applicant is measured with regards to the likelihood of harm materializing.[426] The necessary degree of likelihood to determine that a fear of being persecuted is well founded has been one of the most debated and analyzed issues on the notion. Rejecting the balance of probabilities standard, courts have progressively accepted that a well-founded fear can be established when there is a small chance of an event occurring. This is significant, as a low-standard probability test certainly broadens the protective scope of the refugee definition. In

[422] See Goodwin-Gill, McAdam, *The Refugee in International Law*, op. cit., p. 9 ff.; Hathaway, Foster, *Refugee Status*, op. cit., p. 309 ff.; H. Lambert, 'The Conceptualisation of "Persecution" by the House of Lords: *Horvath v. Secretary of State for the Home Department*', in *International Journal of Refugee Law*, 13, 2001, pp. 16-31.

[423] That the relevant protection provided by the state needs to be available and effective has been confirmed by the EU QD at Article 7(2), according to which '[p]rotection against persecution or serious harm must be *effective* and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an *effective* legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and *when the applicant has access* to such protection' (emphasis added).

[424] H. Battjes, *European Asylum Law and International Law*, Leiden, Martinus Nijhoff Publishers, 2006, p. 247.

[425] See *supra*, para 2.1.

[426] See Goodwin-Gill, McAdam, *The Refugee in International Law*, op. cit., p. 64: '[a]ll the circumstances of the case have to be considered, including the relation between the nature of the persecution feared and the degree of likelihood of its happening'.

rejecting the then dominant 'more likely than not' approach, the US Supreme Court has famously argued that:

> '[t]here is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening [...] a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."'.[427]

The standard set forth by this decision has been elaborated by subsequent case-law, which has interchangeably employed terms such as 'real chance', 'reasonable possibility', 'real and substantial danger' and the like. Even though these expressions have all been circumscribed in the sense that a well-founded fear cannot substantiate in cases of a speculative possibility of persecution, they allow for a discreetly wide margin in determining the existence of such fear. Indeed, the risk assessment test 'is essentially an essay in hypothesis'[428]: thus, while 'a real chance […] as distinct from a remote chance, of persecution occurring'[429] must be established, it has also been recognized that 'a fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur'.[430]

Besides issues of likelihood of persecution materializing – which reflect judicial and doctrinal consensus over the identification of the 'well-founded fear' element with a risk assessment test –, interpretative challenges arise with reference to the interrelation of the term's two components, namely 'well-founded' and 'fear'. In that respect, it has been common to refer to an objective and subjective element of the notion, in accordance with the position expressed by the UNHCR:

> '[t]o the element of fear – a state of mind and a subjective condition – is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration'.[431]

[427] USSC, *Cardoza-Fonseca*, 1987, p. 440.
[428] Goodwin-Gill, McAdam, *The Refugee in International Law*, op. cit., p. 54.
[429] *Chan Yee Kin v Minister for Immigration & Ethnic Affairs*, HCA 62, 169 CLR 379, 1989, para 12.
[430] Ivi, para 35.
[431] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, HCR/1P/4/ENG/REV. 4, 2019, para 38.

Thus, applying a 'dictionary' perspective, well-founded fear is composed of a subjective feature, understood as something 'characteristic of or belonging to reality as perceived rather than as independent of mind',[432] and an objective aspect, relating to 'facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations'.[433] In practice and generally speaking, the objective element of the notion will entail consideration of the general information about the applicant's country of origin. Within the European Union, the EU QD has provided relevant guidance in this respect: Article 4 sets forth an articulated list of the facts and circumstances to be taken into account in assessing applications for international protection. These include, for instance, country of origin data,[434] statements and documentation presented by the applicant,[435] personal circumstances,[436] as well as information on past episodes of persecution.[437] The 'bipartite' nature of the test, giving equal and essential value to both the objective and the subjective element of the notion, has been extensively adopted in common law jurisprudence,[438] while in civil law countries the subjective fear appears to be treated as a feature that 'shapes and contextualizes that objective inquiry'.[439]

Refugee law doctrine appears much more divided on the role to be given to the meaning of 'fear' as a substantive component of the notion, at times denying all together the sustainability of such an inquiry. Some scholars reject the view that the term 'fear' implies a subjective examination of the claimant's trepidation, and argue that the bipartite approach to the notion of well-founded fear

> 'is neither desirable as a matter of principle, nor defensible as a matter of international law. The concept of well-founded fear is rather inherently objective. It denies protection to persons unable to demonstrate a real chance of present or prospective persecution, but does not in any sense condition refugee status on the ability to show subjective fear'.[440]

In fact, the term 'fear' is to be understood as an individual, forward-looking expectation of risk, rather than as a manifestation of terror or of other emotional reactions on the part of

[432] Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/.
[433] Ibid.
[434] EU QD, Article 4(3)(a).
[435] Ivi, Article 4(3)(b).
[436] Ivi, Article 4(3)(c). In particular, individual circumstances include background, gender, and age.
[437] Ivi, Article 4(3)(a), 4(4).
[438] See Hathway, Foster, *Refugee Status*, op. cit., p. 91 ff., and the case-law cited therein. The authors note that this bipartite understanding of well-founded fear might lead to the paradoxical result that even when there is sufficient evidence of a real chance of persecution, refugee status would be denied if the applicant is not found fearful from the subjective point of view.
[439] Hathaway, Foster, *Refugee Status*, op. cit., p. 106.
[440] Ivi, p. 92.

the applicant.[441] In this perspective, the very fact of seeking international protection is indicative of the existence of fear – it is the role of the authorities assessing refugee status to determine whether such fear is substantiated by the circumstances of the case, and is thus well-founded.[442] Other commentators have taken a more moderate approach by pointing out that what matters in respect to the subjective element is not so much the state of mind of the claimant, but rather those personal aspects of his or her life that are relevant to contextualize him or her within a given social and political environment.[443] The UNHCR has characterized the subjective element in a similar manner, by also referring to the concept of credibility:

> '[d]ue to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences – in other words, everything that may serve to indicate that the predominant motive for his application is fear'.[444]

Beyond these different perspectives, it should be borne in mind that the Refugee Convention says nothing about either the necessity of a subjective or an objective requirement with regards to 'well-founded fear'. Assessing the existence of a well-founded fear through the lens of the subjective-objective dichotomy splits the notion into two parts, and has the potential to add uncertainty rather than precision to the test.[445] As mentioned earlier, each notion contained in the refugee definition should be interpreted and contextualized in light of the overall text of Article 1A(2) in order to preserve the definition's uniformity. Furthermore, Article 1A(2) of the Refugee Convention should be read in conjunction with other relevant norms of the treaty. In that respect, one might look at Article

[441] See J.C. Hathaway, W.S. Hicks, 'Is there a Subjective Element in the Refugee Convention's Requirement of "Well-Founded Fear"?', in *Michigan Journal of International Law*, 26(2), 2005, p. 507. See also Hathaway, Foster, *Refugee Status*, op. cit., p. 110: 'the risk-oriented understanding of "fear" as forward-looking apprehension, and as mandating only a prospective appraisal of an applicant's actual risk, is very much in accord with the underlying goals of the treaty'; A. Zimmermann, C. Mahler, 'Article 1 A, Para 2 1951 Convention' in Zimmermann, *A Commentary*, op. cit., p. 338: 'The object and purpose of the 1951 Convention thus supports an interpretation of the notion of "well-founded fear" as forward-looking expectation of risk'.

[442] See A. Grahl-Madsen, *The Status of Refugees in International Law*, Leyden, A. W. Sijthoff, 1966, p. 174: '[e]very person claiming [...] to be a refugee has "fear" ("well-founded" or otherwise) of being persecuted [...] irrespective of whether he jitters at the very thought of his return to his home country, is prepared to brave all hazards, or is simply apathetic or even unconscious of the possible dangers'.

[443] Goodwin-Gill, McAdam, *The Refugee in International Law*, op. cit., p. 64.

[444] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 4, 2019, para 41.

[445] See G. Noll, 'Evidentiary Assessment Under the Refugee Convention; Risk, Pain and the Intersubjectivity of Fear', in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Leiden, Martinus Nijhoff, 2005, p. 144 ff.

33 on the prohibition of *refoulement* incumbent upon states *vis-à-vis* refugees. While Article 1A(2) speaks of a 'well-founded fear of being persecuted for reasons of' the Convention grounds, Article 33 refers to a 'threat' to the refugee's life or freedom 'on account of' the same grounds. This difference of language might be indicative of the fact that 'the Convention accords the refugee a greater role in contributing to the assessment of a *general* risk of persecution by stating her fear, while any consecutive assessment of *specific* threats to her "life or freedom" under Article 33(1) CSR is put into the hands of the determining state'.[446] This suggests that 'well-founded fear', rather than requiring an objective-subjective inquiry, should be viewed in its unitary character as a 'procedural standard', mandating assessment of the applicant's perspective of risk in case of return.[447]

This understanding of well-founded fear clearly adheres to the 'predicament approach' outlined earlier, according to which the focus of the refugee definition is on the reasons for the applicant's exposure to the risk of being persecuted. The primary source of information on such an inquiry is thus the applicant, whose interpretations and perception of risk in his or her country of origin are of fundamental importance in determining whether the fear is well-founded. That being said, it should be borne in mind that, as already outlined, the threshold to be met to establish well-foundedness is anchored to the likelihood of persecution happening – not to, for instance, 'reasonable grounds' of persecution.[448] That the well-founded fear test focuses on a real chance of a certain event occurring, rather than on a plausible account on why the applicant fears persecution, has contributed to import issues of

[446] Ivi, pp. 143-144. It seems appropriate to clarify that the difference of language between the two provisions does not entail a different threshold of applicability, as the textual difference is immaterial for the purposes of refugee protection. In other words, 'all persons who are refugees are protected from return to the risks which gave rise to that status: no more, and no less'. J. Hathaway, *The Rights of Refugees*, op. cit., p. 307. See also C.W. Wouters, *International Legal Standards for the Protection from Refoulement*, Antwerp, Intersentia, 2009, p. 57.

[447] Wouters, *International Legal Standards*, op. cit., p. 57. As the author puts it: 'To our understanding, the occurrences of the term fear, as well as the explicit linkage between fear and unwillingness, suggest that refugee status determination under Article 1A(2) CSR involves the applicant's own assessment of her situation upon return to a higher degree'.

[448] See Scott, *Climate Change, Disasters, and the Refugee Convention*, op. cit., p. 100 ff. The author persuasively argues that the 'well-founded fear' element of the refugee definition is a standard of proof, rather than a risk assessment. He first outlines how the drafters referred to 'good reasons' and 'plausible account' of why the applicant fears persecution, terms that reflect an understanding of the notion as a standard of proof. He then goes on to delineate the controversial implications that follow from a focus on an event occurring (which is the current test inherent in the risk assessment) by making reference to Anne Frank's predicament: through hiding, '[s]he might avoid being subjected to a specific act of persecution, but the discriminatory social context that forces her to hide gives rise to the experience of being persecuted and thus having to hide in order to avoid exposure to feared acts of persecution'. Thus, being persecuted is better understood as a 'condition of existence, permeated by risk and potentially punctuated by acts of persecution or other serious denials of human rights that reflect and reinforce that predicament' (p. 107).

timing into RSD. Indeed, 'time has a complex, hidden but central role in RSD'[449] – a role that emerges particularly in the context of the well-founded fear test. Yet, the importance attributed to time in relation to the assessment of risk puts the inquiry on a slippery slope. While anticipatory flight does not preclude the achievement of refugee status, the issue is to understand how pre-emptive flight can be – in a specular way, to determine how far in the future the assessment of risk can extend. Indeed, there seems to be no principled way on the basis of which the relevant point in future time is to be identified, as this will strongly depend on the nature of the claim. In spite of its influence in the assessment of risk test, the role of time in RSD – as well as in other international protection claims – has so far received little attention by both jurisprudence and scholarship. This has led to the use of misplaced concepts into the reasonings of decision-makers, such as that of imminence of risk.[450] The logical consequence of this approach is that the sooner the harm is likely to occur, the easier it is for the applicant to establish that a real chance of persecution exists, while the further in time the threat is likely to materialize, the less possibility a claim has to succeed. This is troubling, as the well-founded fear test – even when understood as a risk assessment – simply requires to establish the existence of a real chance of persecution, regardless of *when* this might occur. As will be seen further in the analysis, the role of timing in international protection claims has profound implications in cases of generalized threats, such as those arising from climate change impacts.

2.4. 'For reasons of': the nexus clause to the Refugee Convention's grounds

The provision of Convention grounds is probably the clearest indication of the fact that states, though inspired by a humanitarian commitment towards refugees, intended to limit the scope of international protection obligations owed to forced migrants. In fact, the last and necessary criteria to be fulfilled in order to be recognized as a refugee is the causal link between the well-founded fear of being persecuted and one or more of the five Convention grounds: race, religion, nationality, membership of a particular social group and political opinion. The nature of the causal link between the fear and the grounds has probably been

[449] B. Burson, 'The Concept of Time and the Assessment of Risk in Refugee Status Determination', Presentation to Kaldor Centre Annual Conference, 18th November 2016, p. 10, available at https://www.kaldorcentre.unsw.edu.au/sites/default/files/B_Burson_2016_Kaldor_Centre_Annual_Conference.pdf.

[450] See A. Anderson, M. Foster, H. Lambert, J. McAdam, 'Imminence in Refugee and Human Rights Law: a Misplaced Notion for International Protection', in *International Comparative Law Quarterly*, 68, 2019, pp. 111-140.

one of the most complex interpretative challenges of the refugee definition.[451] Earlier jurisprudence understood the 'for reasons of' element of the refugee definition as implying that intention to persecute was a necessary requirement in order to establish nexus – a view that today has been widely abandoned.[452] The EU QD has indeed adhered to a more consistent approach, according to which the reasons of persecution have to be connected either with the acts of persecution *or* the absence of state protection.[453] This reflects a 'bifurcated' understanding of the nexus.[454] This principled 'bifurcated' approach has given room to analysis of the causal nexus on the basis of the already mentioned 'predicament approach', which focuses on 'why the person is in the predicament of fearing persecution'.[455] Elaborating on this perspective, it has been argued that:

> '[a] predicament approach […] allows for a more realistic assessment of the wider context of a person's fear of being persecuted, admitting of the possibility that, where the predicament is the result of widespread discrimination against a group on a ground protected by the Convention, refugee status will be established'.[456]

This approach is consistent with the refugee definition's wording, as explained by the Refugee Status Appeals Authority of New Zealand:

> '[l]ooking first at the language of the Refugee Convention, the "for reasons of" clause relates not to the word "persecuted" but to the phrase "being persecuted". The employment of the passive voice ("being persecuted") establishes that the causal

[451] See, for instance, *Montoya v. Secretary of State for the Home Department*, [2002] EWCA Civ 620, United Kingdom: Court of Appeal (England and Wales), para 28: 'We are thus brought to the potentially difficult issue of causation. Lords Steyn, Hope and Hutton in *Shah* and *Islam* did not find it necessary to add to the vast amount of doctrine on causation. Lord Hoffmann [...] points out that answers to questions about causation will often differ according to the context in which they are asked [...] he indicates that in the present context such cases have to be considered by the factfinders on a case by case basis as they arise. We agree'.

[452] See *supra*, para 2.1. For a detailed analysis of the jurisprudence on the matter, see Hathaway, Foster, *Refugee Status*, op. cit., pp. 368-373.

[453] EU QD, Article 9(3): 'there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts'.

[454] Such understanding has been delineated in the following terms: 'suppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question "Why was he attacked?" would be "because a competitor wanted to drive him out of business." But another answer, and in my view the right answer in the context of the Convention, would be "he was attacked by a competitor who knew that he would receive no protection because he was a Jew"'. *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999 (Lord Hoffman).

[455] Foster, *International Refugee Law and Socio-Economic Rights*, op. cit., p. 271.

[456] Ivi, p. 283.

> connection required is between a Convention ground and the predicament of the refugee claimant'.[457]

The focus on the applicant's predicament attracts into the scope of the Refugee Convention cases characterized by indirect forms of discrimination by shedding light on the disproportionate impacts that laws and measures of general application may have on specific groups. The mechanism has been explained by the Federal Court of Australia:

> 'the equal application of the law to all persons may impact differently on some of those persons. The result of the different impact might be such as to amount to persecution for a Convention reason. […] Simply to regard the case as closed because there is in place a law of general application is to misapply the Convention'.[458]

It is in this connection that the interaction between international refugee and human rights law becomes more clearly visible. What matters in terms of establishing whether there is a causal link to a Convention ground is not so much a persecutory intent, but rather a persecutory effect. Through this lens, thus, the causal link may be fulfilled 'where the Convention ground explains why the applicant is at risk of being persecuted'.[459]

Besides issues regarding the scope of the causal link, another aspect to clarify pertains to the standard at which causation is established. In other words, courts and academics have asked themselves what weight should be attributed to the Convention ground in order to satisfy the causal requirement. The question is of significant practical relevance, as it closely relates to issues regarding mixed motivations to migrate (which recall the *multicausality* inherent in every migratory movement, including refugee flows). Given that an individual might be at risk of being persecuted both for Convention and non-Convention reasons, to what extent should the former prevail, and what role, if any, do the latter play in establishing the causal link?

While some jurisdictions have adopted a restrictive approach, based on the centrality of the Convention ground in establishing the risk of being persecuted,[460] most refugee law scholars support the idea that:

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[457] *Refugee Appeal No. 72635/01*, New Zealand: Refugee Status Appeals Authority, 6 September 2002, para 168.

[458] *Applicant VEAZ of 2002 v. Minister for Immigration & Multicultural & Indigenous Affairs*, [2003] FCA 1033, Australia: Federal Court, 2 October 2003, para 26.

[459] Hathaway, Foster, *Refugee Status*, op. cit., p. 382.

[460] For instance, section 5J(4) of the 1958 Australian Migration Act provides that: 'If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a): (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution'. Similarly, US legislation adopts a 'central' or 'predominant' test, while other jurisdictions have applied the so-called 'but for' test, according to which the applicant would have to demonstrate that the risk of being

> '[i]n view of the unique objects and purposes of refugee status determination […] the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a *contributing factor* to the risk of being persecuted. If, however, the Convention ground is remote to the point of irrelevance, refugee status need not be recognized'.[461]

This 'contributing cause' approach has been endorsed by the UNHCR[462] as well as by the jurisprudence. In particular, it has been noted that, given the difficulties in the determination of causation in the refugee law context, 'causation standards [...] must operate clearly and consistently to accommodate both multiple causes and evidentiary insufficiency, if not ambiguity'.[463]

This paragraph closes the overview of the most crucial aspects regarding the elements of the refugee definition provided in the Refugee Convention. On these grounds, it is now possible to turn to the specific case of refugee protection claims arising in the context of climate change and disasters.

3. Climate change, disasters, and refugee status. Case overview

So far, claims for refugee status based on the impacts of climate change and disasters have not been successful. The most comprehensive analysis on such claims to date is represented by New Zealand and Australia's jurisprudence, which has dealt with climate change-related cases since 1995.[464] Given that New Zealanders and Australian decision-makers have addressed claims directly based on fear of return because of adverse environmental conditions – as opposed to other jurisdictions which have touched upon environmental issues primarily in a marginal way[465] – it is to these two countries' jurisprudence that the following analysis looks at.

Earlier case-law in both countries seem to reflect the already mentioned[466] traditional 'refractoriness' of refugee law judges as to the applicability of the Refugee Convention to

persecuted would not exist 'but for' a Convention ground. See Zimmermann, Mahler, 'Article 1, para. 2', op. cit., p. 373.

[461] Michigan Guidelines on Nexus to a Convention Ground, *in Michigan Journal of International Law*, 23, 2001, p. 217.

[462] See the Guidelines on International Protection listed in Hathaway, Foster, *Refugee Status*, op. cit., p. 389 note 160.

[463] *Refugee Appeal No. 72635/01*, New Zealand: Refugee Status Appeals Authority, 6 September 2002, para 172.

[464] See McAdam, 'The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement', op. cit., pp. 131-142.

[465] For a detailed discussion of this case-law, see Scott, *Climate Change, Disasters, and the Refugee Convention*, op. cit., p. 45 ff.

[466] See *supra*, para 2.

individuals displaced in the context of disasters and climate change. In examining claimants' grievances about the harsh living conditions characterizing their countries of origin, exacerbated by the increasingly severe impacts of climate change, decision-makers have highlighted the 'non-discriminatory nature of the risk'[467] faced by these individuals, and have generally concluded that, while certainly serious, disaster-related harms do not raise a well-founded fear of persecution for a Convention reason.[468] More recently however, and especially in New Zealand, the assumptions linked to the non-applicability of the Refugee Convention in disaster-related situations have been put into question by decision-makers, who have started to engage more closely with the nuances implied in human mobility, disasters and refugee protection. This has occurred in particular on occasion of the well-known *Teitiota* case which, for the first time, brought to the attention of the HRC the issue of human mobility in the context of (gradual) environmental deterioration. Although, as previous rulings, the claim has failed, the New Zealand Immigration and Protection Tribunal (IPT), the High Court, the Court of Appeal and the Supreme Court all emphasized that their decisions did 'not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction', and that '[o]ur decision in this case should not be taken as ruling out that possibility in an appropriate case'.[469] The following paragraphs examine the main issues raised by the case and the way in which they have been addressed by the competent authorities.

3.1. Flee from generalized climate change threats: the *Teitiota* case

As already mentioned, the decisions provided in the *Teitiota* case represent the most comprehensive analyses of a climate change-related claim to refugee status to date.[470] The judgment delivered by the IPT is particularly valuable for the nuanced and refined approach that the decision-makers demonstrate in analyzing the issues that the environment-migration nexus encompasses, both in general terms and in specific reference to the refugee law

[467] *N96/10806*, RRTA 3195, 7 November 1996.

[468] *1004726*, RRTA 845, 30 September 2010. For a recollection of other case-law, see K. Buchanan, 'New Zealand: "Climate Change Refugee" Case Overview', The Law Library of Congress, 2015, available at https://tile.loc.gov/storage-services/service/ll/llglrd/2016295703/2016295703.pdf; McAdam, 'The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement', op. cit., p. 139 footnote 2.

[469] *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, NZSC 107, 20 July 2015, para 13.

[470] It has to be noted that the applicant also claimed for protected person status: this pertains to the field of so-called 'complementary protection', which is analyzed *infra*, Chapter 3, para 3 ff.

context. The case concerned Mr. Ioane Teitiota, a Kiribati citizen, who had moved to New Zealand and overstayed his work visa. When his application for refugee status was rejected, he challenged the decision before the IPT, claiming recognition of refugee status on the basis of the adverse effects of environmental changes that were taking place in his country of origin. In particular, the applicant submitted that life had become progressively unsustainable in Kiribati: in fact, he and his family were largely dependent on fishing and agriculture, both adversely affected by climate change impacts, and on governmental water supply, which was becoming increasingly scarce due to overpopulation and difficulties to obtain fresh water.[471] The Tribunal considered extensive evidence on the situation in Kiribati, which indicated that the country is particularly affected by sea-level rise and its consequences, such as coastal erosion, floodings, lack of ability to grow crops, and so forth. Evidence of a country expert was also submitted, according to which Kiribati is 'a society "in crisis" as the result of population pressure and climate change'. In fact, in addition to and as a result of a series of environmentally-related phenomena, exacerbated by climate change, Kiribati's capital Tarawa had become overcrowded. Overcrowding and resource scarcity led to social tension and increasing insecurity, with violent fights frequently occurring.[472]

Although the Tribunal found the applicant to be credible and accepted the evidence brought in its entirety, it nonetheless went on to reject the claim. One of the first legal issues addressed by the decision-makers regarded the scope of being persecuted as a legal concept, with specific reference to the identification of actors of persecution. The applicant had submitted that the notion of 'being persecuted', given its latin etymology, encompasses both a 'passive voice of fleeing from something' and 'an active quality of following somebody'. Passive persecution, thus, does not require an actor, and in climate change-related claims can be understood as the 'act of fleeing climate change because of the serious harm it will do him and his family'.[473] The Tribunal, in rejecting this argument on the basis that it reflected a sociological conception of refugee-hood, stated that although refugee law has been developed to the point that persecution is attributable to both state and non-state actors that the government is unwilling or unable to control, those actors need to be identifiable as humans since '[t]he legal concept of "being persecuted" rests on human agency'.[474] Later on before the High Court, the applicant sought to implicitly argue that GHG emitters could

[471] *AF (Kiribati) NZIPT 800413*, New Zealand: Immigration and Protection Tribunal, 25 June 2013, para 23-28.
[472] Ivi, paras 5-21.
[473] Ivi, para 51.
[474] Ivi, para 54.

account as actors of persecution, as their failure to reduce GHG emissions has resulted in major climate change impacts upon particularly exposed and vulnerable populations, such as those living in low-lying coastal areas.[475] In its reply, the High Court referred to the case law of the Australia Refugee Review Tribunal, stating that:

> '[i]n this case the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required […]. There is simply no basis for concluding that countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases, have any element of motivation to have any impact on residents of low lying countries such as Kiribati, either for their race, religion, nationality, membership of a particular social group or political opinion'.[476]

This statement recalls an 'intent-based' approach to the refugee definition, which, as shown previously, has been largely abandoned by the jurisprudence.[477] The reason why the argument advanced by the applicant is problematic needs rather to be identified in two main points. The first relates to issues of causation, as for such an argument to succeed it would needed to be demonstrated that the GHGs emitted by industrialized states have directly caused a given climatic impact or event, something that current scientific knowledge cannot yet establish.[478] Secondly, as recognized by the High Court, the argument reverses the refugee paradigm, as

> '[t]raditionally a refugee is fleeing his own government or a non-state actor from whom the government is unwilling or unable to protect him. Thus the claimant is seeking refuge within the very countries that are allegedly "persecuting" him'.[479]

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[475] *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 (26 November 2013), para 40(c). For the sake of precision, it should be noted that the argument advanced by Teitiota's attorney held that GHGs constituted an indirect human agency, as they are responsible for climate change impacts such as rising sea levels. This argument recalls claims made by some scholars according to which 'the governments of the developed world persecute millions of people by refusing to commit their collective resources to fight global warming. Effectively, the individuals who are at greatest risk of ultimate inundation from sea level rise are not receiving the assistance they need to protect their homes and homelands. As the governments of developed countries knowingly continue to cause global warming and expose individuals to the harm of sea level rise, government persecution occurs'. J.B. Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition', in *New York University Environmental Law Journal*, 6(2), 1998, p. 520. See also C. M. Kozoll, 'Poisoning the Well: Persecution, the Environment, and Refugee Status', in *Colorado Journal of International Environmental Law and Policy*, 15(2), 2004, pp. 271-308.

[476] *Teitiota v Chief Executive* (NZHC), para 55.

[477] See *supra*, para 2.1.

[478] See discussion in W. Kalin, N. Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, UNHCR Legal and Protection Policy Research Series, 2012, pp. 7-10

[479] *Teitiota v Chief Executive* (NZHC), para 55. The Court tacitly drew on McAdam's analysis, according to which 'this delinking of the actor of persecution from the territory from which flight occurs is a complete reversal of the traditional refugee paradigm'. J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford, Oxford University Press, 2012, p. 45.

As for the applicant's fear of being persecuted, the decision-makers found that it had not reached the threshold required by the Refugee Convention. The IPT premised that:

> '[i]t is indubitably correct that natural disasters and environmental degradation can involve significant human rights issues. Nevertheless, like any other case, in cases where such issues form the backdrop to the claim, the claimant must still establish that they meet the legal criteria set out in Article 1A(2) of the Refugee Convention (or, for that matter, the relevant legal standards in the protected person jurisdiction). This involves an assessment not simply of whether there has been breach of a human right in the past, but the assessment of a future risk of being persecuted. In the New Zealand context, the claimant's predicament must establish a real chance of a sustained or systemic violation of a core human right demonstrative of a failure of state protection which has sufficient nexus to a Convention ground'.[480]

Applying the principles outlined in this statement, the Tribunal found that the applicant had failed to demonstrate that there would be a real chance for him to suffer physical harm resulting from social tension in Kiribati, or that he would be unable to provide his family with food or water. Generally, there was no evidence suggesting that 'the environmental conditions that he faced or is likely to face on return are so parlous that his life will be placed in jeopardy, or that he and his family will not be able to resume their prior subsistence life with dignity'.[481] Lastly, the Tribunal emphasized that, in any case, the applicant failed to demonstrate any discriminatory character capable of substantiating the nexus clause. On the very contrary, the judges noted that, by the applicant's own admission, 'the environmental degradation caused by both slow and sudden onset natural disasters is one which is faced by the Kiribati population generally', and that there had been no suggestion whatsoever that 'the Government of Kiribati has in some way failed to take adequate steps to protect him from such harm as it is able to for any applicable Convention ground'.[482] Both the High Court and the Court of Appeal adhered to the IPT findings and upheld the decision, which was eventually confirmed by the Supreme Court.

3.2. 'Being persecuted' in the context of gradual environmental degradation and associated climate impacts

[480] *AF (Kiribati)*, para 65.

[481] Ivi, para 74. Similarly, the High Court stated that '[b]y returning to Kiribati, he would not suffer a sustained and systemic violation of his basic human rights such as the right to life under Article 6 of the ICCPR or the right to adequate food, clothing and housing under Article 11 of ICESCR'. *Teitiota v Chief Executive* (NZHC), para 54.

[482] *AF (Kiribati)*, para 75.

The IPT reached its conclusion on whether the applicant would face serious harm by thoroughly outlining the way in which the human rights-based approach to the notion of 'being persecuted' would operate in the context of climate change-related claims to refugee status.[483] In that respect, it explored the relationship between environmental deterioration and international human rights law, stating that 'there is now a growing recognition that states can have responsibilities in respect of environmental matters under existing human rights treaties in both the civil/political and socio-economic spheres'.[484] Protection needs might arise, for instance, if a government fails to undertake adequate measures to protect its citizens against known and imminent risks stemming from environmental hazards.[485]

As for the ICESCR, relevant norms include Article 11 on the right to an adequate standard of living and Article 12 on the right to the highest attainable standard of physical and mental health, the enjoyment of which might be affected by frequent and intense natural disasters and environmental degradation.[486] The Tribunal referred to its previous jurisprudence, particularly with regards to the findings reached in *BG (Fiji)*. In that occasion, the judges articulated in detail the legal concept of being persecuted in relation to breaches of economic and social rights, clarifying both the point at which harm reaches the qualifying threshold and the failure of state protection in that context. The judgment is of particular interest as it is within the socio-economic sphere that climate-related claims to refugee status seem to be more appropriately situated. Indeed, the country of origin information considered in *AF (Kiribati)*, by referring to overcrowding, high levels of unemployment, diminished agricultural capacity and worsening health conditions, suggest that 'the impacts of climate change are felt predominantly in the enjoyment of socioeconomic rights'.[487]

In *BG (Fiji)*, the Tribunal affirmed that 'breaches of rights under the ICESCR may, in principle, be relied on to [find] a refugee claim as rights *in themselves*'.[488] Interestingly, this statement reflects both a conservative and a progressive attitude on the part of the judges. On the one hand, the language used – 'may, in principle' – reflects the general cautious

[483] Ivi, para 60 ff.

[484] Ivi, para 60.

[485] Ivi, para 62. The Tribunal took into account the case law of the ECtHR on the protection of the right to life in the context of natural disasters, such as *Budayeva & Ors v Russia* and *Oneryaldiz v Turkey*. In the first case, the ECtHR found a violation of the right to life of the victims of a mudslide deriving from the government's failure to 'implement land-planning and emergency relief policies', as well as a failure in its 'duty to establish a legislative and administrative framework with which to provide effective deterrence against a threat to the right to life'.

[486] Ivi, para 63.

[487] J. McAdam, 'From Economic Refugees to Climate Refugees?', in *Melbourne Journal of International Law*, 10(2), 2009, p. 588.

[488] *BG (Fiji)*, NZIPT 800091, New Zealand: Immigration and Protection Tribunal, 20 January 2012, para 90.

approach employed by the jurisprudence when considering refugee status in relation to socio-economic rights.[489] In fact, as mentioned earlier,[490] decision-makers apply a considerably higher threshold in such cases, and generally 'the extent to which the ICESCR is engaged with is highly variable'.[491] On the other hand, the Tribunal also accepted that ICESCR rights are relevant to RSD *in themselves*: this is a significant endorsement of the indivisibility of rights doctrine, which recognizes that the obligations of states to respect, protect and fulfill apply equally to all human rights.[492] That being said, the Tribunal acknowledged that 'determining whether any particular non-enjoyment [of socio-economic rights] constitutes "being persecuted" can be a complex task'.[493] With the aim of delineating a principled methodology to address the issue, the Tribunal made reference to some of the General Comments elaborated by the UN Committee on Economic Social and Cultural Rights (CESCR),[494] and affirmed the relevance of the notion of the 'minimum core' of rights to the refugee inquiry.[495] To explain the notion, the Tribunal cited a passage of the CESCR General Comment 3, according to which

> '[o]n the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the

[489] As noted by Foster, 'although decision-makers have embraced the idea that economic and social rights in international law are potentially relevant to refugee claims, they have had greater difficulty in translating this recognition of principle into positive outcomes for refugee applicants'. Foster, *International Refugee Law and Socio-Economic Rights*, op. cit., p. 154.

[490] *Supra*, para 2.1.

[491] *BG (Fiji)*, para 91.

[492] See M. Nowak, 'Social Rights in International Law: Categorization Versus Indivisibility', in C. Binder, J.A. Hofbauer, F. Piovesan, A. Úbeda de Torres (eds), *Research Handbook on International Law and Social Rights*, Cheltenham (UK), Edward Elgar, 2020, pp. 2-18. Consistently, the Tribunal rejected the idea according to which 'international human rights law is to be approached from a hierarchical perspective in which civil and political rights take precedence over, or are a superior form of rights, to their economic, social and cultural counterparts'. *BG (Fiji)*, para 90.

[493] *BG (Fiji)*, para 93.

[494] Such as CESCR, *General Comment No. 4: The Right to Adequate Housing* (Art. 11 (1)), UN Doc E/1992/33 (13 December 1991); CESCR, *General Comment No. 12: The Right to Adequate Food* (Art. 11), UN Doc E/C.12/1999/5 (12 May 1999); CESCR, *General Comment No 15: The Right to Water* (Arts 11 and 12), UN Doc E/C.12/2002/11 (20 January 2003); CESCR, *General Comment No 18: The Right to Work* (Art 6), UN Doc E/C.12/GC/18 (6 February 2006).

[495] The relevance of the notion is also endorsed by Foster, *International Refugee Law and Socio-Economic Rights*, op. cit., p. 198 ff.

> Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être'.[496]

Building on this understanding of the notion, the Tribunal stated that the denial of such 'minimum core' relating to socio-economic rights, besides reaching the required threshold of persecutory harm, might also be indicative of a failure of state protection.[497] Most importantly, the judges recognized that such a failure might exist regardless of the state's 'best efforts' in harsh situations:

> '[r]efugee status determination is concerned with [...] whether the appellants' predicament constitutes the international law status of 'being persecuted', thereby requiring surrogate international protection. Where this status arises because serious harm is anticipated to arise due to a failure of state protection, the fact that the state has done what it reasonably could to avoid that situation provides no answer to the claimant's predicament. It is precisely because either agents of the state are the cause of the anticipated serious harm, or are simply unable despite the good faith discharge of their obligations to provide effective protection from serious harm inflicted by non-state agents, that international protection may be required'.[498]

The approach adopted by the Tribunal in *BG (Fiji)* adheres with the most evolved interpretations on the notion of failure of state protection, which, as already explained,[499] has regard to the effectiveness of the protection system, rather than to its formal presence. Applying this principle to the context of climate change and natural disasters, the fact that the state is unable to deliver effective protection would thus not exclude recognition of refugee status. However, in such a context, another layer of complexity is added, as the steps that a state may take in protecting its population from future climate impacts have also to be considered. This issue has been illustrated by the IPT in *AC (Tuvalu)*:

> 'The disasters that occur in Tuvalu derive from vulnerability to natural hazards such as droughts and hurricanes, and inundation due to sea-level rise and storm surges. The content of Tuvalu's positive obligations to take steps to protect the life of persons within its jurisdiction from such hazards must necessarily be shaped by this reality. While the Government of Tuvalu certainly has both obligations and capacity to take steps to reduce the risks from known environmental hazards, for example by undertaking ex-ante disaster risk reduction measures or though ex-post operational responses, it is simply not within the power of the Government of Tuvalu to mitigate

[496] CESCR, *General Comment 3*, cit. para 10.
[497] *BG (Fiji)*, para 105.
[498] Ivi, para 117.
[499] *Supra*, para 2.2.

> the underlying environmental drivers of these hazards. To equate such inability with a failure of state protection goes too far. It places an impossible burden on a state'.[500]

Although the case concerned the applicant's eligibility for protected person status rather than refugee status,[501] this observation is relevant for RSD as well. All the circumstances of the case, including those regarding the state's conduct in reducing the risk of disaster-related harm, the possible developments on the part of state's assistance against foreseeable climatic impacts, and the specific position of the individual with regards to access to such assistance, play a role in determining whether a failure of state protection is established. This is confirmed by the observations made in *AF(Kiribati)* by the Tribunal, which on the one hand noted that the situation faced by Mr. Tetiota, however harsh, does not differ from that experienced by other inhabitants of Kiribati, and on the other hand emphasized the state's conduct in taking the appropriate measures to protect its citizens from climate-related harms. Furthermore, the question whether the state is capable of protecting from worsening environmental conditions intertwines in part with the assessment of risk, as well as with issues of timing. As already explained,[502] the risk assessment test enshrined in the well-founded fear notion entails evaluation on the likelihood of persecutory harm occurring. Even though the relevant question in this respect is whether there is a real chance of being subjected to such harm, regardless of when this might happen, time will play a major role in cases grounded in generalized threats posed by climate change, primarily because of the uncertainties regarding both the severity of its impacts and the state's capacity to address them. This in turn means that 'the impacts of slow-onset climate change processes may take some time before they amount to sufficiently serious harm'.[503]

Having said that, a most remarkable aspect of the reasoning developed in *AF (Kiribati)* lies in that the judges, far from adhering to the dominant view that people facing climate-related adversity are unfortunate victims of the forces of nature, seem to have adopted a more nuanced understanding of the dynamics at play in relation to human mobility in the context of climate change and disasters. The way in which the Tribunal has opened the discussion about the relationship between environmental degradation, natural disasters, and international protection warrants quoting at length:

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[500] *AC (Tuvalu)*, [2014] NZIPT 800517-520, New Zealand: Immigration and Protection Tribunal, 4 June 2014, para 75.

[501] Ivi, para 45: the claimants in fact were discouraged to rely on the Refugee Convention in light of the outcome of *AF (Kiribati)*.

[502] See *supra*, para 2.3.

[503] McAdam, *Climate Change, Forced Migration, and International Law,* op. cit., p. 84.

> 'Courts of high judicial authority have made general statements that "persons fleeing natural disaster" cannot obtain Convention-based protection […]. Insofar as these statements point out that the effects of natural disasters are often felt indiscriminately and do not distinguish on grounds of race, religion, nationality, membership of a particular social group or political opinion they are uncontroversial. This statement of principle will hold true in many cases, if not most cases, involving natural disasters [...].
>
> However, it is also recognised that broad generalisations about natural disasters and protection regimes mask a more complex reality. The relationship between natural disasters, environmental degradation, and human vulnerability to those disasters and degradation is complex. It is within this complexity that pathways can, in some circumstances, be created into international protection regimes, including Convention-based recognition'.[504]

Building on this premise, the IPT noted that some of the states most affected by natural disasters do not always respect the human rights of their citizens, and that humanitarian relief could become politicized when the recovery needs of marginalized groups are not met.[505] The Tribunal also mentioned the increasing attention given to the nexus between environmental pressures and armed conflicts: citing the works of some scholars on this field, and in spite of the uncertainties on the topic, it accepted that 'where environmental degradation is used as a direct weapon of oppression against an entire section of the population', the requirements of the Refugee Convention can be met.[506] Beyond these cases, which represent situations where the involvement of state and non-state actors in the infliction of harm is more evident, the Tribunal's recognition of the complex relationship between environmental degradation, disasters and vulnerability is significant in that it touches upon the nuances evidenced earlier in this work about the social dimension of disasters.[507] The Tribunal seems to accept, in principle, that a disaster-grounded protection claim could be successful in cases where the applicant could demonstrate the differential impact of disaster-related threats so as to cause his or her exposure to a sustained or systemic denial of human rights. Recalling what has been said earlier on the predicament approach to the refugee definition, capable of embracing considerations on the wider social context in which the individual is situated, a failure of state protection could result from the state's

[504] Ivi, paras 56-57.
[505] Ivi, para 58.
[506] Ivi, para 59. The Tribunal cited the repression of the Marsh Arabs by the Iraqi government following the First Gulf War: the massive drainage works undertaken by the Iraqi authorities resulted in the collapse of the marshland region, which was qualified by the UNEP as 'one of the world's greatest environmental disasters'. See Human Rights Watch, *The Iraqi Government Assault on the Marsh Arabs*, Briefing Paper, January 2003, p. 4.
[507] See *supra*, Chapter 1, para 5.2. ff.

inability to protect individuals that, in light of preexisting vulnerabilities and systemic patterns of discrimination, find themselves at greater risk of being subjected to serious harm.[508]

Clearly, this has to do with the nexus requirement to one of the five Convention grounds. In *AF (Kiribati)* nothing was claimed in this respect, nor did the evidence suggest a particular civil or political status held by Mr. Teitiota which would explain his predicament. In past climate-related claims, the New Zealand Refugee Status Appeals Authority (RSAA – the IPT's predecessor) has dealt with arguments that the applicants faced a risk of being persecuted because of their membership of a particular social group.[509] For instance, in a claim from a family of seven Tuvaluan citizens, the appellants held that they faced persecution because of their belonging to the lower socio-economic group in Tuvalu. They argued that the government had been negligent in failing to improve their living conditions and that the government's negligence, demonstrative of a failure to protect their social group, amounted to persecution.[510] Their argument was rejected on the basis that there was no evidence of a nexus between the appellants' predicament and their civil or political status, as they were 'unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family property being partially submerged at high tide'.[511] The RSAA thus characterized the appellants' belonging to the lower socio-economic

[508] See discussion in Scott, *Climate Change, Disasters, and the Refugee Convention*, op. cit., p. 133 ff.

[509] The notion of 'membership of a particular social group' is probably the broadest amongst the five Convention grounds and has been often relied on for progressive interpretations of the refugee definition. As noted in *Islam* (Lord Hoffman), '[i]n choosing to use the general term "particular social group" rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention'. The jurisprudence has construed the notion of 'social group' on the basis of three factors: i) the presence of an innate, unchangeable characteristic; ii) the fact that members of the group voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; iii) the existence of groups associated by a former voluntary status, unalterable due to its historical permanence. Importantly, the existence of the group is based on immutable characteristics different from the risk of persecution itself, as explained in *A and Another v Minister for Immigration and Ethnic Affairs and Another*, [1997], Australia: High Court, 24 February 1997 (McHugh J): 'the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group'. As a consequence, characterizing those living in small island states as a 'particular social group' on the basis of a unifying shared risk of climate change impacts does not meet the legal understanding of the notion. See Cooper, *Environmental Refugees*, op. cit., p. 521 ff., for the argument that those fleeing climate change and disasters belong to a particular social group in their quality of 'persons who lack the political power to protect their own environment', as they are usually citizens of developing states with little political power in the global arena. Clearly, this argument stretches the law too far.

[510] *Refugee Appeal Nos. 72189/2000, 72190/2000, 72191/2000, 72192/2000, 72193/2000, 72194/2000 & 72195/2000*, New Zealand: Refugee Status Appeals Authority, 17 August 2000, para 9(c).

[511] Ivi, para 13.

group in Tuvalu as a factual circumstance which simply could not be said to constitute 'a particular *social group* in respect of which its members can be said to be persecuted in terms of the Refugee Convention'.[512] Differently from the IPT's approach in *AF (Kiribati)*, the RSAA did not address thoroughly the socio-economic conditions in Tuvalu, the impacts of climate change and associated hazards on the population, and the state's conduct in relation to disaster risk reduction measures. In other words, the RSAA did not apply a 'predicament approach' in analyzing the situation of the appellants, which arguably would have had greater focus on whether their economic conditions played any role in putting them in a position of greater vulnerability to environmental impacts. A similar logic has been applied in a recent IPT decision which, despite referring to the findings reached in *AF (Kiribati)*, recalls again the narrative that climate change impacts are indiscriminate forces of nature.[513]

The survey above has considered only the potential applicability of the Refugee Convention. While the latter and its 1967 Protocol are the cornerstone of the refugee protection regime, refugee law has considerably developed also at the regional level. It is to the regional context that the following paragraphs turn to.

4. Refugee law developments in regional contexts

The rationale underpinning the development of regional refugee law beyond the 1951 Refugee Convention can be identified in the need of resorting to a normative framework that is more readily responsive of the specific exigencies existing within a given geographical context. Considering the existing refugee regional instruments, such exigencies are overall concerned with two aspects. The first relates to the aim of harmonizing state practice and provide guidance on the scope and application of the international refugee definition. This is the case of the EU QD, which further develops some features of the definition contained in the Refugee Convention without substantially expanding it.[514] The second aspect, much more relevant for our purposes, concerns the need to address the refugee problem in a way that is more anchored to the specific regional realities: this has led to the development of broader refugee definitions, compared to the universal one. The two most remarkable examples in this respect are the definitions contained in the OAU Convention and in the

[512] Ivi, para 14.
[513] *AV (Nepal)* [2017] NZIPT 801125 (22 September 2017), para 38.
[514] As has been mentioned in previous paragraphs, the EU QD provides a non-exhaustive list of acts of persecution and recognizes non-state actors of persecution, besides adding precision to the Convention grounds. For further analysis see Tsourdi, 'Regional Refugee Regimes: Europe', op. cit., pp. 352-370.

Cartagena Declaration on Refugees. The two instruments are particularly interesting from a theoretical point of view and worth to analyze for the remainder of the present Chapter.[515]

4.1. The Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa

While the first part of the refugee definition contained in the OAU Convention substantially replicates the one enshrined in the Refugee Convention, Article 1(2) of the OAU Convention adds that

> '[t]he term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'.[516]

It has been said that such a broadened notion of refugeehood is the product of a communitarian conception of asylum, according to which 'the notion of asylum is built around the quality of the community, instead of around the quality of the individual'.[517] In fact, from the outset, it is evident that the OAU Convention's definition accords marginal weight to the individual characteristics of the refugee, and focuses instead on a series of disruptive events.[518] Furthermore, such events, identified as the reason(s) for which the individual is 'compelled' to move, refer to situations of generalized – as opposed to individualized – threats, thus potentially capable to affect an indeterminate class of people. As such, whereas in the Refugee Convention's definition the core focus is on the individual risk of being persecuted, in the OAU Convention's context the attention is primarily directed at the prevailing circumstances in the country of origin in order to ascertain the existence of

[515] Another instrument worthy of mention is the Arab Convention on Regulating Status of Refugees in the Arab Countries, adopted by the League of Arab States in 1994, the definition of which includes '[a]ny person who unwillingly takes refuge in a country other than his country of origin or his habitual place of residence because of sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof'. The Arab Convention represents a *unicum* in the international and regional panorama for its inclusion of natural disasters into the refugee definition; the instrument's relevance, however, is fundamentally symbolic, as it has never entered into force.

[516] OAU Convention, Article 1(2).

[517] M.B. Rankin, 'Extending the Limits or Narrowing the Scope – Deconstructing the OAU Refugee Definition Thirty Years On', in *South African Journal on Human Rights*, 21(3), 2005, p. 414.

[518] This does not mean, however, that the expanded definition embraces an entirely objective criterium. See M. Sharpe, 'The 1969 OAU Refugee Convention in the Context of Individual Refugee Status Determination', in V. Türk, A. Edwards, C. Wouters (eds), *In Flight from Conflict and Violence. UNHCR's Consultations on Refugee Status and Other Forms of International Protection*, Cambridge, Cambridge University Press, 2017, p. 129 ff.

external aggression, occupation, foreign domination and events seriously disturbing public order.[519]

Before considering in further detail the relevance of the African refugee definition to the environment-migration nexus, a caveat is in order: research on the expanded refugee definition, in contrast to the wide literature on the traditional definition, is still slowly developing, with many commentators attributing the difficulty to determine its scope and meaning to the lack of interpretative guidance, due in particular to the unavailability of reported RSD decisions.[520] This, however, does not mean that recourse to the general rules of treaty interpretation codified by the VCLT, which certainly apply to the OAU Convention, is irrelevant or non-practicable. In fact, while state practice is a useful means of interpretation,[521] the primary interpretative source is the text of the treaty itself, as provided by Article 31(1) of the VCLT according to which '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[522]

Whereas the notions of external aggression, occupation and foreign domination can be grouped into one category and are easily understandable with reference to humanitarian law,[523] the second category, namely 'events seriously disturbing public order', has raised some interpretative uncertainty.[524] Similarly to the notion of 'membership of a particular social group' in the traditional refugee definition, the category of 'events seriously disturbing public order' has been perceived as the broadest, and as such capable of including 'residual' refugee-generating situations. Although the notion cannot be considered as a 'catch-all' clause, it arguably reflects the idea that, in light of the changing dynamics of refugee realities, refugee protection instruments need to be able to encompass circumstances that were not contemplated at the time of their drafting. This, in turn, is strictly connected to the object

[519] In addition to these aspects, the African refugee definition is also praised for providing that the events compelling the individual to leave can occur 'in either part or the whole of his country of origin or nationality', thus excluding the applicability of the 'internal flight alternative' doctrine.

[520] One of the few analyses on the OAU definition notes that 'the precise legal meaning of the OAU refugee definition is non-existent, and […] comparative jurisprudence from other jurisdictions on the continent is not readily available'. T.H. Schreier, 'An Evaluation of South Africa's Application of the OAU Refugee Definition', in *Refuge*, 25(2), 2008, p. 61.

[521] VCLT, Article 31(3)(b).

[522] Ivi, Article 31(1).

[523] This category also manifestly reflects the climate of decolonization forming the backdrop against which the OAU Convention was drafted. The recourse to international humanitarian law should however be understood as an auxiliary for interpretation, bearing in mind that a given term might not have the same meaning in all the contexts in which it is used.

[524] Currently, this category seems also to be the most relied on for determining refugee status. Sharpe, 'The 1969 OAU Refugee Convention', op. cit., p. 133.

and purpose of the treaty. Debates in the existing literature on the object and purpose of the OAU Convention remind of discussions on the same topic occurred in reference to the Refugee Convention. Just as in that context there were views that supported either the humanitarian or the states interest-oriented object and purpose of the Refugee Convention,[525] so too there are disagreements on whether the OAU Convention approaches the refugee problem with a focus on human rights protection on the one hand, or security and state relations concerns on the other.[526] While the exigency to ensure peaceful relations between states transpires in some parts of the OAU Convention,[527] a critical reading of its overall text suggests that the refugee problem has been addressed through an 'essentially humanitarian approach'.[528] Furthermore, the overarching humanitarian purpose of the OAU Convention also flows from the fact that the African refugee system has been designed as a 'regional complement' to the Refugee Convention,[529] the humanitarian character of which is currently nearly undisputed.[530]

As a result of the 'living' nature of the OAU Convention as a human rights instrument, its provisions accommodate liberal interpretations in order to adapt to the realities of forced migrations. This is particularly relevant with regards to the interpretation of 'public order' and 'serious disturbances' which qualify the fourth category of events in the African refugee definition. A South African Refugee Appeal Board decision might be instructive in this respect:

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[525] Supporting the humanitarian nature of the Refugee Convention, see UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, Geneva, April 2001, para 4. See also discussion in T. Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol', in Zimmerman, *A Commentary*, op. cit., p. 66 ff; McAdam, 'Interpretation', op. cit., pp. 91-93; Foster, *International Refugee Law and Socio-Economic Rights*, op. cit., p. 40 ff. *Contra*, see Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', op. cit., pp. 129-147.

[526] See J. Garderen, J. Ebenstein, 'Regional Developments: Africa', in A. Zimmerman (ed), *A Commentary*, op. cit., p. 188, according to whom: '[t]he principle objective of the OAU Refugee Convention is to ensure the security and peaceful relations among OAU member States, particularly in cases where the presence of refugees causes inter-State tension'. See also Rankin, 'Extending the Limits or Narrowing the Scope', op. cit., p. 408.

[527] For instance, Recital 3 of the Preamble notes that 'refugee problems are a source of friction among many Member States', while Recitals 4 and 5 and Article 3 reflect concerns about potential subversive activities on the part of refugees.

[528] Recital 2, Preamble to the OAU Convention. Other references reflect the Convention's protective aim: for instance, recital 1 of the Preamble expresses states' desire to find 'ways and means of alleviating [refugees'] misery and suffering as well as providing them with a better life and future', while recital 6 makes reference to the UN Charter and the UDHR in order to affirm 'the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'. In addition to that, Article 2(2) states that '[t]he grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State'.

[529] OAU Convention, Article 8(2).

[530] See T. Wood, 'Who is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa's Expanded Refugee Definition', in *International Journal of Refugee Law*, 31(2/3), 2019, p. 309.

> 'Where law and order has broken and the government is unwilling or unable to protect its citizens, it can be said that there are events seriously disturbing public order. To determine when a disturbance had taken place involves weighing the degree and intensity of the conduct complained of against the degree and nature of the peace which can be expected to prevail in a given place at a given time. The test should be objective'.[531]

Firstly, this statement reflects the common understanding of public order in international law in the sense of 'law and order'.[532] Secondly, it mentions the role of the government's inability or unwillingness to protect in producing a breakdown of law and order (which is akin to the failure of state protection requirement in international refugee law). Thirdly, it clarifies how the existence of a disturbance to public order must be assessed, that is, by comparing the existing level of law and order to the one that it is expected in a normally functioning state. From these observations however it should not be deduced that a breakdown of law and order is a *sine qua non* element for the existence of events seriously disturbing public order, as this narrows excessively the scope of the notion.[533] According to the UNHCR,

> '[t]he phrase "events seriously disturbing public order" should be construed, in line with the 1969 OAU Convention's humanitarian object and purpose, to include events that impact the maintenance of public order (ordre public) based on respect for the rule of law and human dignity to such an extent that the life, security and freedom of people are put in danger'.[534]

The UNCHR represents some authoritative guidance also in respect to the threshold of 'serious' disturbances, characterized as 'public disorder events likely to disrupt the normal functioning of the institutions of the state and affect internal and external security and stability of the state and society'.[535] This might be the case, for instance, in situations of international and non-international armed conflict within the meaning of international humanitarian law, but also in other cases involving 'violence by or between different groups

[531] Refugee Appeal Board decision number 729/06 (South Africa), cited in Schreier, 'An Evaluation', op. cit. p. 61.

[532] The term, which is often used in conjunction with national security, appears in the Refugee Convention at Articles 2, 28, and 32 as well as in the ICCPR at Articles 12(3), 14(1), 19(3)(b), 21, 22(2), which prescribe restrictions to the exercise of certain rights in the presence of particular circumstances.

[533] See T. Wood, 'Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Context', Nansen Initiative Technical Paper, 2014, p. 27, available at http://www.nanseninitiative.org/wp-content/uploads/2015/03/190215_Technical_Paper_Tamara_Wood.pdf.

[534] UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, para 56.

[535] Ibid.

in society or between the state and non-state actors',[536] as well as generalized violence.[537] Furthermore, the Guidelines add a number of factual indicators of events seriously disturbing public order, including, *inter alia,* 'a declared state of emergency […]; the closure of schools; a lack of food, medical services and supplies, and other vital services such as water, electricity and sanitation'.[538]

The scope of the terms used in the African refugee definition as delineated above suggests that there might be some scope to argue that the notion of 'events seriously disturbing public order' could encompass disaster and climate-related claims to refugee protection under the OAU Convention. Indeed, there is nothing in the text that would prevent such a reading: if the four refugee-generating events listed in the definition are compared, it can be observed that while the first three – namely external aggression, occupation and foreign domination – clearly refer to human activities, the last one does not immediately contain such a connection. This is not to say that natural hazards *per se* would amount to events that seriously disrupt public order, just like climate change alone would not substantiate a protection claim. Thus, what seems to be more relevant is the appreciation of the effect that the hazard has on the affected community, and whether such an effect amounts to a serious disturbance of public order. In other words, as long as serious disturbances of public order are found, the source of the disturbances should be irrelevant.[539] In that connection, the way in which disasters are commonly conceptualized also within international law practice provide some useful insights. As has been outlined,[540] the numerous definitions that have been laid out often have in common the idea that disasters overwhelm affected communities and states by producing widespread economic, human and environmental losses, material and social damage, and the like. The definition adopted in the ILC's Draft Articles on the Protection of Persons in the Event of Disasters refers indeed to events that seriously disrupt the functioning of society,[541] which recalls the language used in the OAU Convention and thus may arguably be considered as an event falling into the category of 'events seriously disturbing public order'.

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[536] Ibid.

[537] Understood as 'violence that is widespread, affecting large groups of persons or entire populations, serious and/or massive human rights violations, or events characterized by the loss of government control and its inability or unwillingness to protect its population - including situations characterized by repressive and coercive social controls by non-state actors, often pursued through intimidation, harassment and violence'. Ivi, para 58.

[538] Ivi, para 59.

[539] See Wood, Protection and Disasters in the Horn of Africa', op. cit., p. 26.

[540] See *supra*, Chapter 1, para 5.1.

[541] Draft Articles on the Protection of Persons in the Event of Disasters, Draft Article 3(a).

Although possible in principle, the applicability of the OAU Convention to the environment-migration nexus has been viewed skeptically by many scholars on a series of grounds, a part of which seems however questionable. In particular, an oft-heard argument against the inclusion of disasters within the OAU Convention's definition rests on a distinction between man-made and natural disasters, of which only the former would eventually be captured by the definition.[542] This is because, according to this perspective, serious disturbances of public order refer typically to social and political upheavals resulting in violence or breakdown of law and order.[543] Thus Rankin, for instance, considers natural disasters as 'external threats' to the community, as *force majeure* understood in its legal sense of an unforeseeable and uncontrollable event.[544] This approach resembles outdated understandings of natural disasters as forces of nature, and thus risks to dismiss to easily the potential applicability of the OAU Convention to persons fleeing from disaster-related forms of harm. Furthermore, it introduces into the definition, and more specifically into the notion under analysis, a distinction between natural and man-made disasters that the terms do not straightforwardly suggest.[545] Overall, what these views seem to reflect is a misplaced focus on the *nature* of the event causing the disturbance, rather than on its *effect*. There is thus a parallelism between the already described common assumptions about the inapplicability of the Refugee Convention to climate-related claims to refugee protection – mainly based on the indiscriminate nature of climate-related threats – and similar assumptions with regards to the OAU Convention, rooted on a distinction between natural – assumed not to give rise to serious disturbances of public order – and human disasters. Such a distinction is not only inaccurate from a conceptual point of view, but is also inconsistent with a principled interpretation of the textual wording of the definition.

The abovementioned natural/man-made disasters dichotomy in many scholarly interpretations of 'events seriously disturbing public order' might have been influenced by what is often advanced as a second argument against the inclusion of disaster-related harm

[542] See Rankin, 'Extending the Limits or Narrowing the Scope', op. cit., pp. 428-429; M.M. Rwelamira, 'Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa', in *International Journal of Refugee Law,* 1(4), 1989, p. 558; J. Hathaway, *The Law of Refugee Status*, Butterworths, 1991, pp. 16-21.

[543] See A. Edwards, 'Refugee Status Determination in Africa', in *African Journal of International and Comparative Law*, 14(2), 2006, pp. 225-227. See also T. Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition', in *International Journal of Refugee Law*, 26(4), 2014, pp. 555-580.

[544] Rankin, 'Extending the Limits or Narrowing the Scope', op. cit., pp. 428-429.

[545] Wood, 'Who is a Refugee in Africa?', op. cit., p. 307.

into the African refugee definition, that is, the lack of state support for such an inclusion.[546] Indeed, it must be recognized that the little available case law has found the existence of events seriously disrupting public order primarily in cases of conflict or generalized violence,[547] and that some states have expressed their reluctance to consider disasters as a ground for refugee protection.[548] What is however to be remarked is that, as anticipated above, evidence of state practice on the application and interpretation of the OAU Convention's definition is very limited. Thus, as has been pointed out by some scholars,[549] while examples of African state practice may represent a useful guidance for ascertaining how refugee protection is approached in the region, they are not sufficient to qualify as relevant interpretative sources in the terms of the VCLT, which clarifies that state practice shall be taken into account when it 'establishes the agreement of the parties regarding [the treaty's] interpretation'.[550] This is not the case of African state practice, which, in addition to its scarce evidence, is also inconsistent on the issue under analysis. In fact, although rarely, the OAU Convention has been applied by some states to persons fleeing from disaster-related threats, most notably to Somalis during the 2011 drought in the Horn of Africa.[551] Relevantly, this has occurred in consideration of the disproportionate impact of the drought in Somalia, where preexisting vulnerabilities – i.e. poverty, economic and political instability, conflicts and generalized violence – have been exacerbated by the occurrence of the natural hazard.[552] In addition to that, the relevance of the OAU Convention was further endorsed during the regional consultations in the context of the Nansen Initiative, where several African states expressed their support for the expanded refugee definition's potential applicability to situations where disasters combine with conflict or violence.[553]

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[546] See Edwards, 'Refugee Status Determination in Africa', op. cit., p. 227; McAdam, *Climate Change, Forced Migration, and International Law*, op. cit., pp. 48-49; Kälin, 'Conceptualising Climate-Induced Displacement', op. cit., p. 88.

[547] For further analysis, see Sharpe, 'The 1969 OAU Refugee Convention', op. cit., p. 133 ff.

[548] For instance, during the drafting of the South African Refugees Act, it was affirmed that '[t]he government […] does not agree that it is appropriate to consider as refugees, persons fleeing their countries of origin solely for reasons of poverty or other social, economic or environmental hardships'. 'Draft Refugee White Paper', Republic of South Africa Government Gazette General Notice 1122 of 1998, cited in Wood, 'Protection and Disasters in the Horn of Africa', op. cit., p. 25.

[549] Ibid.

[550] VCLT, Article 31(3)(b).

[551] See Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* ('Nansen Protection Agenda) (Vol. I), 2015, para 56. Those states included Ethiopia, Kenya, Djibouti, and Uganda.

[552] For further analysis, see V. Kolmannskog, '"We Are in Between": Case Studies on the Protection of Somalis Displaced to Kenya and Egypt during the 2011 and 2012 Drought', in *International Journal of Social Science Studies*, 2(1), 2014, pp. 83-90.

[553] See Nansen Protection Agenda (Vol II), p. 88. At the Global Consultation, Ethiopia's representative stated: '[w]e are of the view that, as outlined in the Agenda for Protection, the broader definition of refugees adopted by the OAU/AU Convention Governing the Specific Aspects of Refugee Problems in Africa to include

4.2. The Cartagena Declaration on Refugees in Latin America

The OAU Convention laid out a starting point for normative developments in other regions, most notably in Latin America with the adoption of the Cartagena Declaration.[554] Although legally non-binding, the Cartagena Declaration's importance for the development of a regional standard of international refugee protection has been voiced by several institutions, including the UN General Assembly,[555] the UNHCR,[556] and the IACtHR.[557] Furthermore, the Declaration's definition of refugee has been incorporated into the legal frameworks of fifteen states in the region of Central and South America,[558] thus showing fair regional implementation.[559]

The definition contained in the Cartagena Declaration mirrors Article 1(A) of the OAU Convention and further expands it by including in the concept of a refugee 'persons who

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persons who are compelled, due to natural disasters, to leave their place of habitual residence in order to seek refuge in another place outside their country of origin or nationality, has enabled African countries, including Ethiopia to open their borders'. The Nansen Initiative Global Consultation, Conference Report, Geneva 12-13 October 2015, p. 107, available at https://www.nanseninitiative.org/global-consultations/.

[554] The 'precedent of the OAU Convention' is recognized in Conclusion III(3) of the Cartagena Declaration.

[555] UNGA Res. A/RES/42/110; A/RES/60/129.

[556] UNHCR Executive Committee Conclusion no. 37 (XXXVI), Central American Refugees and the Cartagena Declaration, 1985.

[557] See in particular IACtHR, Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014, para 79: 'the Court notes that the developments produced in refugee law in recent decades have led to state practices, which have consisted in granting international protection as refugees to persons fleeing their country of origin due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances which have seriously disturbed public order. Bearing in mind the progressive development of international law, the Court considers that the obligations under the right to seek and receive asylum are operative with respect to those persons who meet the components of the expanded definition of the Cartagena Declaration, which responds not only to the dynamics of forced displacement that originated it, but also meets the challenges of protection derived from other displacement patterns that currently take place. This criterion reflects a tendency to strengthen in the region a more inclusive definition that must be taken into account by the States to grant refugee protection to persons whose need for international protection is evident'. The same views have been reaffirmed in Advisory Opinion OC-25/18, *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22.7 and 22.8 in relation to Article 1(1) of the American Convention on Human Rights*, 30 May 2018, para 132.

[558] See D.J. Cantor, *Cross-Border Displacement, Climate Change and Disasters: Latin America and the Carribean. Study Prepared for UNHCR and the PDD at Request of Governments Participating in the 2014 Brazil Declaration and Plan of Action*, 2018, p. 23, available at https://caribbeanmigration.org/sites/default/files/crossborder_displacement_climate_change_and_disasters_lac_david_cantor_2018.pdf.

[559] Some scholars have claimed that there is a regional custom on who is considered a refugee in Latin America, and that the Cartagena Declaration 'does further crystallize customary international law'. W.T. Worster, 'The Evolving Definition of the Refugee in Contemporary International Law', in *Berkeley Journal of International Law*, 30(1), 2012, p. 114. This position is however not entirely convincing: besides having been imported into the legislation of only a fraction of states in the region, there exists significant domestic variation across these states, suggesting a lack of consensus over a regional understanding of refugeehood. See J.H. Fischel de Andrade, 'The 1984 Cartagena Declaration: A Critical Review of Some Aspects of Its Emergence and Relevance', in *Refugee Survey Quarterly*, 38(4), 2019, pp. 359-360.

have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'.[560] The applicability of this definition to disaster-related threats has been the object of debates resembling the ones arisen in reference to its African counterpart, given the similarity of language used in the two instruments. In the first document produced by the International Conference on Central American Refugees (CIREFCA) in order to provide interpretative guidance to the Cartagena Declaration, it was affirmed that the phrase 'other circumstances which have seriously disturbed public order' referred to man-made disasters only, and that victims of natural disasters 'do not qualify as refugees, unless special circumstances arise which are closely linked to the refugee definition'.[561] State practice too appears to approach the regional refugee definition in similar terms, usually requiring some link to governmental or political circumstances as triggers of general situations of instability causing a need of international protection.[562]

In 2014, at the 30th anniversary to commemorate the adoption of the Cartagena Declaration, participating governments approved the Brazil Declaration ('A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean') and Plan of Action.[563] In that occasion, after having highlighted that the majority of Latin American countries had incorporated the Cartagena refugee definition in their internal legislations, state representatives recognized 'the existence of new challenges regarding international protection for some countries of the region that need to continue making progress in the application of the regional extended refugee definition, thus responding to the new international protection needs'.[564] This at once points towards the humanitarian character of the Cartagena Declaration, and the pragmatic and flexible spirit on the basis of which it is

[560] Cartagena Declaration, Conclusion III(3).

[561] CIREFCA, *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America*, 1990, paras 33, 38.

[562] See Cantor, *Cross-Border Displacement, Climate Change and Disasters*, op. cit., p. 24.

[563] The Brazil Declaration builds on the previous 1994 San José Declaration on Refugees and Displaced Persons and on the 2004 Mexico Declaration and Plan of Action, adopted respectively at the 10th and 20th commemoration event. These commemorative processes have 'enabled us to identify new humanitarian challenges and to propose effective solutions to improve the protection of refugees, displaced and stateless persons in the region, in a spirit of flexibility and innovation'. Preamble, recital 1, Brazil Declaration and Plan of Action, 3 December 2014.

[564] Recital 10, Preamble to the Brazil Declaration and Plan of Action.

premised – consistently with its non-binding character.[565] At the same time, the Brazil Declaration acknowledged the 'challenges posed by climate change and natural disasters, as well as by the displacement of persons across borders that these phenomena may cause in the region'.[566] Such 'challenges' were actually not new in the region, where many countries are regularly exposed to natural hazards and mobility induced by environmental factors have occurred both internally and across borders.[567] What indeed was relatively new, or at least not fully tested, was the use of the expanded refugee definition as a tool of protection for individuals in flight from disaster-hit countries.

During the regional consultations occurred in the context of the Nansen Initiative, participants from Central American countries recognized that cross-border displacement in the context of disasters is a very important issue in the region, and recalled in particular the displacements of people in the aftermath of Hurricane Fifi in 1974, Hurricane Mitch in 1998, and the earthquake in Haiti in 2010.[568] Indeed, with reference to the latter, two states (Ecuador and Mexico) recognized refugee status to some Haitians by applying the Cartagena Declaration's definition.[569] This has occurred not in light of the disaster *as such*, but rather because of its *effects*, which intertwined with preexisting conditions of vulnerability and the rise of insecurity in the aftermath of the disaster. Thus, like in the case of Somalis fleeing the 2010 drought, the source of the risks of harm was rather irrelevant in the determination of international protection – more precisely, the occurrence of the disaster was treated like a contributing factor to the accumulation of a series of dangerous conditions triggering the need of protection.[570] This once again confirms that focus on natural hazards as a cause of

[565] See UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, para 61.

[566] Recital 32, Preamble to the Brazil Declaration and Plan of Action.

[567] See generally R. Kaenzig, E. Piguet, 'Migration and Climate Change in Latin America and the Carribean', in E. Piguet, F. Laczko (eds), *People on the Move in a Changing Climate. The Regional Impact of Environmental Change on Migration*, Dordrecht, Springer, 2014, pp. 155-176.

[568] Nansen Initiative, *Nansen Protecion Agenda* (Vol. II), p. 48-49.

[569] In addition, Peru and Panama recognized refugee status by applying the Refugee Convention on the basis of a well-founded fear of persecution from non-state actors and the lack of state protection resulting from the breakdown of governmental authority after the earthquake. See D.J. Cantor, *Law, Policy and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters*, Nansen Initiative Background Paper, 2015, p. 17, available at https://disasterdisplacement.org/wp-content/uploads/2015/07/150715_FINAL_BACKGROUND_PAPER_LATIN_AMERICA_screen.pdf. Further discussion of Latin American state practice is undertaken *infra*, Chapter 3, para 2.2.

[570] The case of Haitians on the move after the 2010 earthquake plastically exemplifies the complex and intertwined relationship between socio-economic, political, and ecological factors, which has in turn defined the 'multidimensional' vulnerability of locals. The multiform dynamics associated with Haitian mobility also considerably blur the distinction between refugees and economic migrants: as noted by a commentator, '[t]here is little point in trying to neatly determine whether post-earthquake Haitian migrations towards South America are refugee flows or if they have an economic nature, given the complexity of the factors at work. The 2010 cataclysm acted as a mirror and an amplifier of the multiple historico-structural reasons why Haitians have

flight *per se* distorts the nature of the inquiry by failing to appreciate the complex interaction between the hazards' effects, violence or insecurity, and preexisting vulnerable conditions. At the same time, this 'hazard-centered' approach risks overlooking the potential applicability of already existing instruments, the relevance of which is increasingly emerging especially at the regional level. That being said, it is clear that state practice implementing the Cartagena Declaration through what seems still to be perceived as an expansive approach remains, at best, at an embryonic phase.[571]

5. Concluding remarks

This Chapter has reflected on the capacity of the refugee regime to encompass in its scope of protection individuals displaced in the context of climate change and disasters. From the above analysis, it is reasonable to conclude that both the international and the regional refugee instruments present a potential transformative capacity in that they can be interpreted in a way that allows integration of disaster-related considerations. Some important signs in this respect have already emerged, such as the IPT's appreciation of the complex relationship between environmental degradation, vulnerability and international protection needs. At the regional level, refugee protection has been in some cases accorded in light of the effects of the disaster, which have been implicitly understood along the lines of their 'threat multiplier' character. These examples, however, represent still an exception to more traditional applications of refugee law, the development of which in this specific field is constrained by a yet prevalent 'natural' – as opposed to social – understanding of disasters.

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been leaving their country for several generations, as evidenced by the interweaving of geopolitical, economic and environmental forces behind the most recent stages of the phenomenon'. C. Audebert, 'The Recent Geodynamics of Haitian Migration in the Americas: Refugees or Economic Migrants?', in *Revista Brasileira de Estudos de População*, 34(1), 2017, p. 62.

[571] In a recent article, Cantor interestingly reports that earlier state approaches in the Americas actually tended more easily to understand the disaster-mobility nexus as a matter of refugee protection: a number of states, in fact, included in their national refugee definitions persons displaced by disasters. This approach started to be abandoned during the 1980s, as more and more states joined the Refugee Convention and Protocol. As the author notes, 'whereas the legal scholarship usually envisages a positive role for international law in extending international protection to persons fleeing disaster contexts, here it appears to have curtailed the protection available to such persons under existing national law and thus helped create a "gap" as a result of promoting the harmonization of national law with U.N. refugee treaty law'. Indeed, the only state in the Americas contemplating environmental factors in its national refugee definition is Cuba, which has not adhered to the universal nor to the regional instruments of refugee protection. See D.J. Cantor, 'Environment, Mobility, and International Law: A New Approach in the Americas', in *Chicago Journal of International Law*, 21(2), 2021, pp. 293-294.

Having said that, as has been already highlighted, the sources of international protection are not exhausted by refugee law. Further avenues of protection, especially for individuals not easily fitting into the international or regional refugee definitions, may derive from protection obligations that over time have developed alongside the refugee regime, as will be shown in the next Chapter.

Chapter 3

The environment-migration nexus and complementary forms of protection

1. Introduction: the expanding scope of international protection in international law

Already in late Eighteenth century, Emer de Vattel had identified a broad right of illegal entry rooted on the principle of necessity:

> 'When a real necessity obliges you to enter into the territory of others, – for instance, if you cannot otherwise escape from imminent danger, or if you have no other passage for procuring the means of subsistence, or those of satisfying some other indispensable obligation, – you may force a passage when it is unjustly refused'.[572]

Although the necessity dimension has almost disappeared from contemporary conceptions of international protection, de Vattel's formulation 'prefigured a postmodern duty of *non-refoulement* where there is a risk of serious violations of human rights (whether civil, political, economic, or social)'.[573] Indeed, retrospectively, de Vattel's representation of the balance between sovereignty and basic principles of humanity invites an interesting reading of the evolution of international protection, and of *non-refoulement* as its cornerstone, in international law.

As has been already mentioned, the principle of *non-refoulement* was integrated into international treaty law by the Refugee Convention, where it established as one of the strongest 'space[s] of exception'[574] to state sovereignty's right of admission and expulsion of aliens. This 'space of exception', corresponding to the scope of international protection obligations owed by states, was circumscribed by the wording of Article 33 of the Refugee Convention, which applied to refugees as defined by the same treaty.[575] Furthermore, in that specific time period, the principle of *non-refoulement* was framed and conceived of as more of a duty upon states rather than a right conferred to the individual. Clearly, at the root of

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[572] E. de Vattel, B., Kapossy, R. Whatmore, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury; Natural Law and Enlightenment Classics*, Indianapolis, Liberty Fund, 2008, p. 322.

[573] V. Chetail, 'The Architecture of International Migration Law: A Deconstructivist Design of Complexity and Contradiction', in *AJIL Unbound*, 111, 2017, p. 20.

[574] K. Long, 'Imagined Threats, Manifactured Crises and "Real" Emergencies: The Politics of Border Closure in the Face of Mass Refugee Influx', in A. Lindley (ed.), *Crisis and Migration: Critical Perspectives*, London, Routledge, 2014, p. 159.

[575] See *supra*, Chapter 2, paras 1, 2.

such a duty were basic considerations of humanity and protection from persecutory risks; however, *non-refoulement* was anchored to the narrow definition of refugee, which identified persecution as the only cause of forced displacements capable of activating states' protection obligations. Broader reasons for migrating, such as famine or extreme poverty – akin to de Vattel's right of necessity to procure one's own 'means of subsistence' – where thus excluded from the purview of refugee protection.[576]

At the same time, however, the limits of the 1951 Refugee Convention as a protection instrument, and the consequent need to ensure alternative mechanisms to address forced migration more comprehensively, had already emerged during the Convention's drafting process. While Article 1A(2) does not make reference to possible substantial expansions of the refugee definition, Recommendation E of the Final Act of the Conference of Plenipotentiaries to the Refugee Convention reflects the aspiration that the instrument

> 'will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides'.[577]

Subsequent state practice has confirmed that international protection might be granted to individuals for whom, while not entitled to refugee status, return to the country of origin would not be possible or advisable.[578] It was however only around the 1990s that the legal basis of non-removal of aliens in such circumstances started to be conceptualized and addressed more systematically, under the umbrella of the newly-coined concept of 'complementary protection'.[579] In that respect, the UNHCR significantly noted that:

> 'The need to provide international protection to persons fleeing armed conflict and civil strife, whether or not they come within the terms of the 1951 Convention definition, is generally accepted in practice by States […]. The protection accorded in these countries to persons who are not deemed to be refugees under the 1951 Convention is normally granted as a sovereign humanitarian act, or as a duty under national law (including constitutional provisions), without reference to international legal obligations. It should be noted however that many of these countries are parties to other international instruments that could be invoked in certain circumstances

[576] On the original design of refugee protection, see Chetail, 'Moving Towards an Integrated Approach of Refugee Law and Human Rights Law', op. cit., p. 204 ff.. For a critical appraisal on the same topic, see J.C. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', op. cit., pp. 129-183.

[577] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, Recommendation E.

[578] See McAdam, *Complementary Protection in International Refugee Law*, op. cit., p. 19 ff.

[579] UNHCR, *Note on International Protection*, 25 August 1992, UN Doc. A/AC.96/799, para 5.

> against the return of some non-Convention refugees to a place where their lives, freedom or other fundamental rights would be in jeopardy.'[580]

The UNHCR's reference to international legal obligations preventing *refoulement* for persons outside of the scope of the 1951 Refugee Convention marked a turning point for the development of complementary protection as a legal concept,[581] and in turn for the extension of international protection. In fact, it was recognized that such extension to 'extra-Convention' refugees derives from obligations under international law, rather than from humanitarian considerations made on a discretionary basis. Apart from the work of the UNHCR, which contributed to delineate the scope of international protection, including towards 'non-statutory' refugees,[582] human rights treaty monitoring bodies have also had a fundamental role in clarifying states' protection obligations through the production of extensive jurisprudence on the matter.[583] As a result of this process, it soon emerged that international protection, of which the principle of *non-refoulement* is the most crucial component, does not pertain exclusively to the field of international refugee law, as it is enshrined in a number of other international instruments and norms. It is precisely in that connection that the term 'complementary protection' becomes clearer from a legal point of view, as it can be regarded as 'a shorthand term for the widened scope of *non-refoulement*

[580] UNHCR, *Note on International Protection*, 7 September 1994, UN Doc. A/AC.96/830, para 40.

[581] Goodwin-Gill, McAdam, *The Refugee in International Law*, op. cit., p. 295.

[582] See for instance UNHCR, *Report of the Working Group on Solutions and Protection to the Forty-second Session of the Executive Committee of the High Commissioner's Programme*, 12 August 1991, EC/SCP/64; UNHCR, *Protection of Persons of Concern to UNHCR Who Fall Outside the 1951 Convention: A Discussion Note*, 2 April 1992, EC/1992/SCP/CRP.5.

[583] The ECtHR was a pioneer in this respect with the landmark decision of *Soering v. United Kingdom*, which established that '[i]t would hardly be compatible with the underlying values of the Convention […] were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 […], would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article'. ECtHR, *Soering v. United Kingdom*, Application no. 14038/88, 07 July 1989, para 88. Later on, the applicability of article 3 was extended to expulsion cases (ECtHR, *Cruz Varas and Others v. Sweden*, Application no. 15576/89, 20 March 1991, para 70; ECtHR, *Chahal v. United Kingdom*, Application no. 22414/93, 15 November 1996, para 74). The approach adopted by the HRC's jurisprudence – which is numerically far less developed in comparison to the ECtHR – mirrors that of the ECtHR: see, for instance, HRC, *Chitat Ng v. Canada*, Communication no. 469/1991, UN Doc. CCPR/C/49/D/469/1991 (1994); HRC, *Cox v. Canada*, Communication no. 539/1993, UN Doc. CCPR/C/52/D/539/1993 (1994); HRC, *G.T. v. Australia*, Communication no. 706/1996, UN Doc. CCPR/C/61/D/706/1996 (1997). Some scholars have however argued that the HRC has on some occasions adopted 'a restrictive application of the principles developed by the Strasbourg organs'. H. Lambert, 'Protection Against Refoulement from Europe: Human Rights Law Comes to the Rescue', in *International & Comparative Law Quarterly*, 48(3), 1999, p. 543. For further comparative analysis on the interpretation of the principle of *non-refoulement*, see B. Çali, C. Costello, S. Cunningham, 'Hard Protection Through Soft Courts? *Non-Refoulement* Before the United Nations Treaty Bodies', in *German Law Journal*, 21, 2020, pp. 355-384.

under international law'.[584] On the one hand, thus, complementary protection differentiates from other forms of protection that states may grant to individuals due to their personal conditions – such as age, health, family reunion – not related to a legal ground.[585] On the other hand, the term 'describes the engagement of States' legal protection obligations that are *complementary* to those assumed under the 1951 Refugee Convention […], whether derived from treaty or customary international law'.[586]

As to treaty law, a crucial role in the expansion of the scope of international protection has been played by international human rights law. The prohibition of *refoulement* has been explicitly recognized in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) under Article 3,[587] in the UN Convention for the Protection of All Persons from Enforced Disappearance at Article 16,[588] and in the Charter of Fundamental Rights of the European Union at Article 19.[589] Furthermore, as already anticipated, the existence of *non-refoulement* obligations in respect to a number of human rights provisions have been construed by way of interpretation by human rights monitoring bodies: as such, the principle of *non-refoulement* finds its most acknowledged sources in Articles 7 of the International Covenant on Civil and Political Rights (ICCPR)[590] and Article 3 ECHR prohibiting cruel, inhuman and degrading treatment or punishment, as well as in Articles 6 ICCPR and 2 ECHR protecting the right to life.[591] Regarding the content of the prohibition of *refoulement*, in the CAT, it is linked to torture as defined by Article 1,[592] while the ICCPR and the ECHR broaden its scope by embracing as well cruel, inhuman and degrading treatment or punishment. Furthermore, under the CAT, the ICCPR and the ECHR,

[584] Goodwin-Gill, McAdam, *The Refugee in International Law*, op. cit., p. 285.

[585] Ivi, p. 286.

[586] McAdam, *Complementary Protection*, op. cit., pp. 2-3.

[587] UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[588] UN Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.

[589] Charter of Fundamental Rights of the European Union (OJ 2000 C 364/1).

[590] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[591] It is nonetheless accepted, although less developed in practice, that *non-refoulement* obligations can attach in principle to any human right, and particularly to those that cannot be derogated from upon situations of emergency. See A.M. Calamia, M. di Filippo, M. Gestri, *Immigrazione, Diritto e Diritti: profili internazionalistici ed europei*, Milano, Cedam, 2012, p. 101; J. McAdam, 'Complementary Protection', in Costello, Foster, McAdam (eds), *The Oxford Handbook of International Refugee Law*, op. cit., p. 663 ff.

[592] According to which 'the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.

the principle of *non-refoulement* allows no exception: while the Refugee Convention contemplates the so-called 'exclusion clauses',[593] the prohibition of torture and other ill-treatment is absolute, and thus its inherent *refoulement* component is also non-derogable.[594] In addition to that, a significant constraint on the protective reach of *non-refoulement* in international refugee law is to be identified in that the principle is tied to the five Convention grounds. By contrast, the main focus in a complementary protection claim is on the nature and severity of the potential harm that the individual would face if returned: the fact that the risk of harm is related (or not) to the individual's civil or political status, as a matter of international human rights law, is immaterial.

It is respect to the principle's 'preventive' function against human rights abuses that the role of international human rights law in shaping and expanding international protection towards forced migrants can be appreciated. By providing a further source of protection from *refoulement* – which thus applies to individuals who do not fit into the refugee definition, as well as to refugees excluded from the Refugee Convention's benefits because of the exceptions to *non-refoulement* under Article 33(2) –, international human rights law has progressively transformed the distinctive tenets of international protection, which can now be understood as a 'normative continuum of protection' within which refugee and human rights law mutually complement and reinforce each other.[595] This 'normative continuum' is in turn inherently dynamic, consistently with the idea of *non-refoulement* as an 'open concept' – i.e. as a concept the content of which is not clearly defined in international law.[596] At the same time, however, this 'open concept' feature does not undermine the

[593] Article 33(2) provides that: '[t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.

[594] This has been recognized by the ECtHR with respect to Article 3 in the removal context since *Chahal v. UK* (cit.), para 80. The Court has subsequently reaffirmed the absolute character of the norm, especially in the light of some states' attempts to restrict its application in cases of terrorist activities on the part of the claimant: see ECtHR (Grand Chamber), *Saadi v. Italy*, Application no. 37201/06, 28 February 2008, paras 137-138. The HRC as well has affirmed the non-derogable nature of the prohibition of *refoulement* on various occasions: see HRC, *Concluding Observations on Canada*, 7 April 1999, UN doc. CCPR/C/79/Add.105, para 13, HRC, *Mansour Ahani v. Canada*, Communication no. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002 (2004), para 10.10; HRC, *C. v. Australia*, Communication no. 900/1999, UN Doc. CCPR/C/76/D/900/1999.

[595] Chetail, 'Moving Towards an Integrated Approach of Refugee Law and Human Rights Law', op. cit., pp. 202-221.

[596] J. Pirjola, 'Shadows in Paradise – Exploring *Non-Refoulement* as an Open Concept', in *International Journal of Refugee Law*, 19(4), 2007, pp. 639-660. The author argues that this constitutes a paradox: '[w]hile states have committed to respecting the principle by joining key human rights conventions, its content is not established in international law. In other words, states have committed to a principle the content of which has not been defined. Since no common definition exists, national and international authorities and courts have, in practice, extensive power of discretion to give content to the terms 'persecution' or 'degrading' or 'cruel' treatment'. (p. 639-640).

fundamentally rights-based nature of *non-refoulement*. In other words, as it currently stands, the principle is firmly anchored to the progressively developing character of international human rights law, which, in turn, paves the way for evolutionary interpretations in light of the changing realities of forced displacement.

It should be recalled that states' international protection obligations also flow from international customary law. As has been anticipated in Chapter 2,[597] over time, the principle of *non-refoulement* has developed into a separate, independent customary norm prohibiting at a minimum the removal of individuals towards threats of arbitrary deprivation of life, personal integrity as well as torture and cruel, inhuman or degrading treatment or punishment. More broadly even, some scholars have discussed other international protection obligations under customary law in relation to the concept of temporary refuge, an emergency measure typically – but not exclusively – operating in cases of *mass influx* of refugees,[598] and consisting in a prohibition upon states from returning individuals fleeing generalized violence and armed conflict.[599] The underlying premise of such discussions, as well as of legal developments in this direction, stems from the observation that since the 1980s, refugee flows have been more likely 'the result of civil wars, ethnic and communal conflicts and generalised violence, or natural disasters or famine – usually in combinations

[597] *Supra*, Chapter 2, para 1.

[598] UNHCR, *Global Consultations on International Protection/Third Track: Complementary Forms of Protection*, UN Doc. EC/GC/01/18, 4 September 2001, para 11(g): '[t]emporary protection, which is a specific provisional protection response to situations of mass influx providing immediate emergency protection from *refoulement*, should be clearly distinguished from forms of complementary protection which are offered after a status determination and which provide a definitive status'. In the EU, temporary protection is provided by 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 (TPD). The TPD was adopted as a result of the Kosovar refugee crisis in the 1990s and its aim is to provide immediate and temporary protection to displaced persons from third countries who are unable to return to their countries of origin in mass influx situations. Although the EU has witnessed several humanitarian crises, with large numbers of asylum seekers entering its borders, the Directive has never been activated. Indeed, for protection to be made available under this instrument, a mass influx situation has to be declared by the Council. For further analysis on the TPD's lack of implementation, see M. Ineli-Ciger, 'Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean', in C. Bauloz, M. Ineli-Ciger, S. Singer, V. Stoyanova (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*, Leiden, Brill Nijhoff, 2015, pp. 225-246. It should be noted that, as part of the new European Pact on Migration and Asylum, the European Commission presented the *Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*, which seeks to repeal the TPD. The Proposal is available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0613&from=EN.

[599] See in particular D. Perluss, J.F. Hartman, 'Temporary Refuge: Emergence of a Customary Norm', in *Virginia Journal of International Law*, 26(3), 1986, pp. 551-626; G.S. Goodwin-Gill, '*Non-Refoulement* and the New Asylum Seekers', in *Virginia Journal of International Law*, 26(4), 1986, pp. 897-920; K. Hailbronner, '*Non-Refoulement* and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?', in *Virginia Journal of International Law*, 26(4), 1986, pp. 857-896.

– than individually targeted persecution by an oppressive regime'.[600] It is to the development of a possible norm of temporary refuge from disasters that the following paragraphs turn to. Subsequently, the remainder of the enquiry goes back to the scope of protection provided under human rights law by analyzing pertinent *non-refoulement* case-law and reflecting on its direct and indirect relevance for the environment-migration nexus.

2. The notion of temporary refuge and its relevance for the environment-migration nexus: elements of state practice

Although the meaning and legal basis of temporary refuge in international law remain ill-defined, the norm's essential character seems to be rooted upon notions of human necessity, solidarity, and the duties owed to the general category of 'people in distress'.[601] In this connection, temporary refuge is understood as independent from, albeit strictly related to, *non-refoulement*: its normative force lies at the intersection between refugee law, humanitarian law and human rights law,[602] and its 'distinctive character is best appreciated by recognizing it as a customary humanitarian norm, rather than as an extension of refugee law'.[603] Other scholars have supported the existence of a broad, customary norm of temporary refuge, and have argued that (temporary) refuge itself may be understood as an overarching principle of protection, 'sufficient to accommodate all those instances where States are obliged to act or refrain from action in order that individuals or groups are not exposed to the risk of certain harms'.[604]

Drawing on such broader conceptions of temporary and humanitarian refuge, notions of 'non-returnability' have started to take hold in discussions regarding possible approaches

[600] A. Millbank, *The Problem with the 1951 Refugee Convention*, Research Paper No. 5 2000–01, 2000, p. 8, available at https://www.aph.gov.au/binaries/library/pubs/rp/2000-01/01rp05.pdf.

[601] See A. Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention', in *Melbourne Journal of International Law*, 13(2), 2012, pp. 1-41; J.F. Durieux, 'The Duty to Rescue Refugees', in *International Journal of Refugee Law*, 28(4), 2016, pp. 637-655; H. Lambert, 'Temporary Refuge from War: Customary International Law and the Syrian Conflict', in *International & Comparative Law Quarterly*, 66, 2017, pp. 723-745.

[602] This intersection comes into play in the context of refugee flows from armed conflicts, regarding which, despite their prominence in current realities of forced displacement, the applicability of international refugee and human rights protection is far from being a settled legal question. For analysis on the interaction and possibly mutually supporting relationship of these regimes, see V. Chetail, 'Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law, And International Human Rights Law', in A. Clapham, P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, Oxford University Press, 2014, pp. 700-737.

[603] Perluss, Hartman, 'Temporary Refuge', op. cit., p. 554.

[604] G.S. Goodwin-Gill, '*Non-refoulement*, Temporary Refuge, and the "New" Asylum Seekers', in D.J. Cantor, J. Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Leiden, Brill-Nijhoff, 2014, p. 458.

to disaster displacement. The key question in this respect would be based on 'whether, in light of the prevailing circumstances and the particular vulnerabilities of those concerned, [disaster-displaced persons] can be required to return to their country of origin'.[605] This test would assess whether there are legal (i.e. based on *non-refoulement*) factual (practical impossibility of return) or moral impediments to removal: if one of this conditions is attained, then the concerned individual should be considered in need of protection and be granted 'at least temporary stay […] until the conditions for [his or her] return in safety and dignity are fulfilled'.[606] The UNHCR also seems to accept that the need for protection may extend beyond refugees and beneficiaries of complementary protection, as it has included amongst 'persons otherwise in need of international protection' those 'who are displaced across an international border in the context of disasters or the adverse effects of climate change'. In those cases, '[s]tates may accordingly offer protection – including leave to remain – on a humanitarian basis to persons whose own country is unable, for some period of time, to protect them against serious harms'. In addition, it was acknowledged that '[t]emporary protection or stay arrangements may be particularly suited to providing flexible and speedy responses to international protection needs arising because of exceptional and temporary conditions in the country of origin, such as in the context of cross-border disaster displacement'.[607]

Temporary protection measures have indeed been used by some states to expand the categories of protected persons, including those fleeing from natural hazards.[608] They represent the most common form of protection provided in this context, even though they do not follow a single, consistent model. The variety of temporary protection mechanisms put in place by states to address disaster-related displacement seem to reflect a common consensus that broader humanitarian grounds can justify the entry and stay of aliens even if they do not qualify for international protection under refugee or human rights law. They are in this sense, as put it by the UNHCR, 'pragmatic "tools" of international protection, reflected in States' commitment and practice of offering sanctuary to those fleeing

[605] W. Kälin, N. Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change. Normative Gaps and Possible Approaches*, UNHCR Legal and Protection Policy Research Series, 2012, p. 65.

[606] Ivi, p. 66.

[607] UNHCR, *Persons in Need of International Protection*, 2017, p. 4.

[608] The Nansen Initiative has identified at least fifty countries that have received or refrained from returning individuals in the aftermath of disasters, mostly through humanitarian protection measures on a temporary basis. See Nansen Protection Agenda, pp. 6-7.

humanitarian crises'.[609] Temporary humanitarian entry and stay can either take the form of specific legislation or ad hoc humanitarian schemes, and be accorded to individuals or on a group-based approach. The following paragraphs review these measures, and eventually discuss whether an international or regional customary norm of temporary refuge from disasters is emerging.

2.1. Temporary protection schemes in regional and domestic law

Starting to consider first measures within Europe, notably, the Temporary Protection Directive (TPD) adopted by the European Union remains, so far, the only legal instrument with regional scope specifically dedicated to temporary protection. In a press conference, former UK Home Office Minister declared that '[t]he Directive that we are implementing will ensure that each European Member State plays its part in providing humanitarian assistance to people forced from their homes by war and natural disasters and will enable a quicker coordinated response to prevent human suffering'.[610] Indeed, the personal scope of the TPD is rather broad, thus potentially representing a tool that could be used to provide protection to a varied class of individuals in cases of massive displacement.[611] However, its applicability to the disaster-displacement nexus remains untested, and will probably remain so.[612] That being said, several EU member states, in light of the gap existing under the EU framework, have extended protection through national protection statuses covering humanitarian grounds or based on exceptional circumstances.[613] More specifically, two

[609] UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, 2014, para 3. The importance of temporary protection practices in relation to disaster displacement is also recalled in the Global Compact on Refugees at para 63.

[610] 'UK Plans in Place To Protect Victims Of Humanitarian Disasters. Press release', UK Home Office 2004, cited in V. Kolmannskog, F. Myrstad, 'Environmental Displacement in European Asylum Law', in *European Journal of Migration and Law*, 11(4), 2009, p. 317.

[611] It should be noted that the inclusion of persons displaced as a result of natural disasters was debated during the *travaux préparatoires*. The final text however does not mention them, and refers instead to 'persons who have fled areas of armed conflict or endemic violence', and 'persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights'. The list is non-exhaustive.

[612] Indeed, the TPD has never been activated even in circumstances more easily fitting into its scope of application. For further analysis see Kolmannskog, Myrstad, 'Environmental Displacement in European Asylum Law', op. cit., pp. 313-326; M. Scott, 'Refuge from Climate Change-Related Harm. Evaluating the Scope of International Protection within the Common European Asylum System', in C. Bauloz et al., *Seeking Asylum in the European Union*, op. cit., pp. 195-222.

[613] See generally the comprehensive study conducted by the European Migration Network (EMN), *Comparative Overview of National Protection Statuses in the European Union (EU) and Norway*, Synthesis Report, May 2020, available at https://emn.ie/wp-content/uploads/2020/05/emn_synthesis_report_nat_prot_statuses_final.pdf.

states (Italy[614] and Finland[615]) have introduced climate change reasons and natural disasters into their temporary protection systems, even though, to date, these provisions have never been applied in respect to individuals fleeing natural disasters.

Moving from Europe to the Americas, other examples of temporary protection mechanisms include the Temporary Protected Status (TPS) in the United States and Temporary Humanitarian Protection (THP) in Panama. The latter bears some resemblance with the EU model of temporary protection, but its *ratione personae* scope is broader, as it is activated upon determination of the executive in cases of 'a mass influx of persons illegally or irregularly entering the country in search of protection'.[616] While so far it has only been applied to Colombians fleeing conflict in the Chocó department, there have been discussions about the need to reform the THP in order to encompass contemporary flows of migration, including those linked to disasters and climate change.[617]

By contrast, the U.S. TPS has found application in respect to disaster situations several times. Differently from the Panamanian THP, it functions as a halt to removals of individuals already in the U.S. for whom return would be potentially dangerous and is activated upon designation of countries of concern by the Secretary of the Department of Homeland Security (DHS). More specifically, designation may occur in cases of an ongoing armed conflict, or when i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected, ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and, iii) the foreign

[614] Legislative Decree no. 286 of 25 July 1998, *Consolidated Act of Provisions Concerning Immigration and the Condition of Third Country Nationals* ('Immigration Act'), Article 20: 'By decree of the President of the Council of Ministers, adopted in agreement with the Ministers for Foreign Affairs, the Interior, Social Solidarity, and any other Ministers concerned, are established […] the measures of temporary protection to be adopted, even in derogation of the provisions of this text, for significant humanitarian needs, during conflicts, natural disasters or other events of particular gravity in countries outside the European Union'. It should also be noted that in 2018, a new resident permit for calamities was introduced at Article 20-*bis* of the Immigration Act to provide a specific form of protection to third-country nationals who cannot return and stay in their country of origin in safe conditions because of an exceptional and contingent situation of calamity. In 2020, the norm was modified by a replacement of the words 'exceptional and contingent' with 'serious', thus broadening its scope of application. The permit has a six-month validity and can be renovated if the serious situation of calamity is enduring.

[615] Finland: Act no. 301/2004 of 2004, Aliens Act, 30 April 2004, Section 109: '[t]emporary protection may be given to aliens who need international protection and who cannot return safely to their home country or country of permanent residence, because there has been a massive displacement of people in the country or its neighbouring areas as a result of an armed conflict, some other violent situation or an environmental disaster. Providing temporary protection requires that the need for protection may be considered to be of short duration. Temporary protection lasts for a maximum of three years in total'.

[616] Decreto Ejecutivo no. 23, 10 February 1998, Title I, Chapter II, Article 80 ('Estatuto Humanitario Provisional de Protección').

[617] For further analysis on Panamanian THP, see D.J. Cantor, *Law, Policy and Practice*, op. cit., pp. 19-21.

state officially has requested designation under this subparagraph.[618] At the moment of writing, twelve countries are designated for TPS,[619] five of which under the environmental disaster limb.[620]

These designations offer some insights on the TPS as a protection tool for persons at risk of removal towards unsafe conditions resulting from disasters and more generally on the appropriateness of temporary protection in such circumstances. In fact, while on the one hand TPS has benefited a discrete number of nationals from disaster-affected countries to stay in the U.S., thus signaling the instrument's effectiveness, the fact that these countries have been repeatedly redesignated for TPS because of enduring unsafe conditions sheds light on the limits and short-sightedness of temporary protection, especially when it turns into a *de facto* permanent residence.[621] Furthermore, the misuse of TPS as a mechanism to fill a protection gap in respect to protracted unstable conditions risks undermining its effectiveness and favour instead arbitrary decisions. This has been observed, for instance, in respect to the 2004 termination of TPS for nationals of Monsterrat, hit by volcanic eruptions since 1995 and designated for TPS in 1997. In that occasion, the DHS, rather than focusing on changes in the country's conditions, emphasized instead the temporary character of TPS and concluded that, because the eruptions would have likely continued for decades, Monsterrat's conditions no longer satisfied the temporary character required in order to be designated under the TPS mechanism.[622] Another example evidencing the discretionary character of TPS relates to the case of the Philippines which, after being hit by Typhoon Haiyan (Yolanda) in 2013 and having experienced its devastating impacts, were not designated for TPS in spite of a formal request in this sense by the Philippine government.[623] This confirms that even when a given disaster meets the required conditions under the TPS

[618] Immigration and Nationality Act (INA), Section 244, 8 U.S.C. 1254a (b).

[619] Burma (Myanmar), El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, Venezuela and Yemen (https://www.uscis.gov/humanitarian/temporary-protected-status).

[620] Specifically Nicaragua and Honduras (1998 Hurricane Mitch), El Salvador (2001 earthquake), Haiti (2010 earthquake), Nepal (2015 earthquake).

[621] TPS cannot be adjusted to lawful permanent resident status, thus relegating long-term beneficiaries in a legal limbo. This precarity has become all the more evident in light of the various attempts during the Trump administration to terminate TPS for a number of long-term TPS designated countries (specifically El Salvador, Haiti, Honduras, Nepal, Nicaragua and Sudan). For further detail, see generally J.H. Wilson, *Temporary Protected Status and Deferred Enforced Departure*, Congressional Research Service Report, 2021, available at https://fas.org/sgp/crs/homesec/RS20844.pdf.

[622] DHS Notice no. 04-15243, 07/06/2004 at https://www.govinfo.gov/content/pkg/FR-2004-07-06/pdf/04-15243.pdf.

[623] L. Seghetti, K. Ester, R.E. Wasem, *Temporary Protected Status: Current Immigration Policy and Issues*, Congressional Research Service Report, 2010, pp. 4-5, available at https://trac.syr.edu/immigration/library/P10206.pdf.

statute, there is no legal expectation that the mechanism will be activated or extended, as this remains within the discretion of U.S. authorities.[624]

2.2. Ah hoc temporary humanitarian responses

The absence of specific legal frameworks of temporary protection has not prevented states from responding to the displacement of individuals from disaster-affected countries by putting in place ad hoc, ex post-disaster mechanisms based on principles of humanity, solidarity and cooperation. While there are examples of such practices within developed countries,[625] it is in developing countries that these protection mechanisms have been most used: this is not surprising, as these areas are amongst the most disproportionally affected by natural disasters, including those linked to climate change, and have experienced the largest number of disaster-related displacements across borders.[626]

According to the UNHCR, 'it has become common practice or custom in some regions to offer temporary protection to persons who cross an international border to escape the effects of natural disasters'.[627] In particular, the UNHCR was referring to the African continent, where several states have an historical tradition of providing temporary refuge to persons fleeing from neighbouring countries in hardship, including in disaster situations. While protection has been sometimes accorded on the basis of the OAU Convention, most notably during the exodus of Somalis in 2011,[628] more often states have received disaster-displaced persons on a temporary, ad hoc humanitarian basis through informal arrangements. This has occurred, for instance, in 2002, when persons displaced after the eruption of Mount Nyiragongo in the Democratic Republic of Congo found refuge in Uganda and Rwanda. Other examples include the practice of Tanzania and Botswana providing temporary refuge to neighbouring citizens fleeing from flooding,[629] as well as Angolans' migration to Namibia during floods.[630] In addition, by virtue of special historical and cultural ties, several African

[624] Cantor, 'Environment, Mobility, and International Law', op. cit., p. 296.

[625] For instance, after the volcanic eruptions in Monsterrat, the UK designed a voluntary evacuation scheme according nationals of Monsterrat a two-years exceptional leave to remain or enter the UK. Similarly, following the 2004 tsunami in Asia, several states suspended the removals of nationals from countries severely hit by the disaster, as was also the case after the 2010 Haiti earthquake. For further analysis, see McAdam, *Climate Change, Forced Migration, and International Law*, op. cit., p. 108 ff.

[626] See Nansen Protection Agenda (Vol. I), cit., p. 6.

[627] UNHCR, *Summary of Deliberations on Climate Change and Displacement*, Expert Roundtable, Bellagio Conference Centre, 22-26 February 2011, para 9.

[628] See *supra*, Chapter 2, para 4.1.

[629] See T. Wood, 'Developing Temporary Protection in Africa', in *Forced Migration Review*, 49, 2015, pp. 23-25.

[630] Nansen Protection Agenda (Vol II.), cit., p. 47.

states have offered special temporary protection to Haitians in the aftermath of the 2010 earthquake.[631]

Beyond Africa, a similar approach can be observed in respect to the practices of Latin American countries. Differently from Africa though, the challenges associated to the displacement-disaster nexus have long been recognized by Latin American states in different forums, which have at occasion discussed the issue with the aim of promoting appropriate responses at the national level. For instance, an Extraordinary Meeting of Central American Presidents convened in the aftermath of Hurricane Mitch in 1998 called upon 'the understanding of the International Community […] in order that a general amnesty be conceded to undocumented Central American immigrants who currently reside in different countries, with the objective of avoiding their deportation and, consequentially, greater aggravation of the current situation of our countries':[632] as a result, a number of Central American countries created special regularization measures for nationals of the states most affected by the disaster.[633] Another illustrative example is, once again, the reaction to the 'Haitian question',[634] in the wake of which states have generally endorsed the need to provide some form of humanitarian response to the individuals displaced by the disaster.[635] Beyond regularization measures adopted by a series of states in respect to Haitian nationals already present in their territories, primary destination states of post-earthquake Haitian migration have provided temporary refuge as affected individuals started to increasingly accumulate on the borders with the aim of seeking assistance. While the Dominican Republic adopted temporary humanitarian measures – such as suspension of removals and provision of humanitarian visas – which were rescinded shortly after,[636] Brazil's response and related

[631] McAdam, *Climate Change, Forced Migration, and International Law*, op. cit., p. 107.

[632] Meeting of Central American Presidents, 'Reunión Extraordinaria de Presidentes Centroamericanos: Declaración Conjunta', Comalapa, El Salvador, 9 November 1998', cited in Cantor, *Law, Policy and Practice*, op. cit., p. 28.

[633] The most far-reaching measures were adopted by Costa Rica, which regularized around 150000 aliens. The program provided beneficiaries with a temporary residence document to be renovated every two years. For further detail, see ivi, pp. 37-40.

[634] C. Moulin, D. Thomaz, 'The Tactical Politics of "Humanitarian" Immigration: Negotiating Stasis, Enacting Mobility', in *Citizenship Studies*, 20(5), 2016, p. 596.

[635] The twelve states that at the time composed the Union of South American Nations (UNASUR) adopted a decision to promote 'joint actions', and invited 'those Member States that still have not applied special processes of migratory regularisation for the benefit of Haitian citizens to do so'. Union of South-American Nations, 'Solidaridad de UNASUR con Haití: Decisión de Quito', February 2010. Similarly, the Bolivarian Alliance for the Peoples of Our America (ALBA), composed of nine member states, called on ALBA members to '[d]ecree a migratory amnesty that regularises the migratory status of Haitian citizens resident in ALBA countries'. Bolivarian Alliance for the Peoples of Our America, 'Plan para la contribución solidaria de los países del ALBA al esfuerzo del reconstrucción de Haití, Reunión de emergencia del Consejo Político del ALBA-TCP, Caracas, Venezuela, 25 January 2010, cited in Cantor, *Law, Policy and Practice*, op. cit., p. 29.

[636] See D.J. Cantor, *Cross-Border Displacement, Climate Change and Disasters*, op. cit., p. 61.

developments have been praised by the UNHCR as a virtuous example of efficient approaches to protection and management of movement stemming from disasters.[637] Initially provided with temporary refuge, the situation of Haitians was not considered by Brazilian authorities to be deserving of international refugee protection,[638] nor, however, was it perceived as a typical flow of economic migration: as a solution, starting from 2011, Haitians were granted a 'permanent residence for humanitarian reasons' with an initial validity of five years. Subsequently, as a response to increasing reliance by migrants of irregular migration channels to reach Brazilian soil, the National Immigration Council approved Normative Resolution 97, which created a legal pathway to the country through the issuance of 1,200 permanent visas on humanitarian grounds per year by the Brazilian embassy in Port-au-Prince. Over the years, the restrictions on the quota originally established and on the authorities competent to release the visas were abolished: as of 2018, approximately 98,000 Haitians were granted humanitarian visas and permanent residence.[639] Besides Brazil, which represented the third most important country of destination for Haitians in the aftermath of the earthquake,[640] Mexico, Ecuador, Venezuela, Chile and Argentina all provided some form of temporary protection either through a halt to removals or the issuance of humanitarian visas.[641]

2.3. Temporary refuge from disasters: possible evolutions and limitations

From the review of state practice outlined above, a number of observations can be made. From the outset, it seems clear that state practice within the European region is extremely

[637] F. Zorzi Giustiniani, 'Temporary Protection After Disasters. International, Regional and National Approaches', in Zorzi Giustiniani et al. (eds), *Routledge Handbook of Human Rights and Disasters*, op. cit., p. 338.

[638] Between 2010 and 2015, no Haitian was recognized as a refugee under the universal or the regional definition – which is (partly) incorporated in Brazilian refugee law –, in spite of roughly 35,000 applications. This has been criticized, particularly because perceptions about Haitian migration's lack of refugee character were based on a misplaced focus on the earthquake as the cause of flight, which in turn overshadowed proper consideration of other underlying conditions in Haiti. For discussion, see S. Weerasinghe, *In Harm's Way. International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change*, UNHCR Legal and Protection Policy Research Series, 2018, p. 64 ff.

[639] S. Wejsa, J. Lesser, *Migration in Brazil: The Making of a Multicultural Society*, Migration Policy Institute, March 2018, available at https://www.migrationpolicy.org/article/migration-brazil-making-multicultural-society.

[640] A.P. Pacifico, E.P. Ramos, C. de Abreu Batista Claro, N.B. Cavalcante de Farias, 'The Migration of Haitians within Latin America: Significance for Brazilian Law and Policy on Asylum and Migration', in D.J. Cantor, L. Feline Freier, J. Gaucip (eds), *A Liberal Tide? Immigration and Asylum Law and Policy in Latin America*, London, Institute of Latin American Studies, 2015, p. 140.

[641] See P.W. Fagen, *Receiving Haitian Migrants in the Context of the 2010 Earthquake*, Nansen Initiative Discussion Paper, 2013, p. 21, available at http://www.nanseninitiative.org/wp-content/uploads/2015/03/DP_Receiving_Haitian_Migrants_in_the_Context_of_the_2010_earthquake.pdf; Weerasinghe, *In Harm's Way*, op. cit., p. 75 ff.

limited, both in respect to national legislation addressing disaster displacement and ad hoc responses.[642] Although, as seen earlier,[643] the EU has developed a specific legislative mechanism to respond to mass influx situations on a temporary basis, which could be potentially applicable and is often cited as a viable protection instrument for individuals fleeing disasters, the EU TPD has so far remained ineffectual, making its hypothetical contribution rather irrealistic. Beyond Europe, although a number of states has proved to be willing to temporarily receive or refrain from returning individuals in the aftermath of disasters, taken together these responses appear overall unpredictable, discretionary and highly varied. In fact, the protection accorded by states to individuals fleeing disasters has differed in terms of application and extent, making it hard to discern clearly whether, and under what circumstances, such protection should be provided. In other words, it seems not yet possible to affirm that a customary norm of temporary refuge from disasters, even in its core contents of admission and non-return, has emerged in international law, given the difficulty to identify a 'general practice accepted as law' in this regard.[644]

That being said, there might yet be some scope to examine whether, amongst particular states, a customary international norm of a regional character can be detected.[645] As has been outlined, in fact, state practice on temporary protection from disasters has mostly developed within those regions that have been most affected by natural disasters, including those related to climate change, and have often experienced cross-border displacements linked to these phenomena.

Regarding Africa, in spite of rather widespread practice providing temporary refuge to disaster-displaced persons, it must be noted that usually African states have explained their behavior in these circumstances as manifestations of principles of African hospitality, solidarity and good neighborliness, rather than of a legal obligation.[646] In addition to that, there is currently increasing evidence pointing towards an erosion of African traditional

[642] For a comprehensive overview, see generally A. Kraler, C. Katsiaficas, M. Wagner, *Climate Change and Migration. Legal and Policy Challenges and Responses to Environmentally Induced Migration*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, 2020, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU(2020)655591_EN.pdf.

[643] *Supra*, para 2.1.

[644] The lack of a legal duty in this respect seems also to be confirmed by the language used in the NY Declaration, which welcomed 'the willingness of some States to provide temporary protection against return to migrants who do not qualify for refugee status and who are unable to return home owing to conditions in their countries'. NY Declaration, para 53.

[645] On 'particular customary international law', see the Report of the International Law Commission, seventieth session, 2018, A/73/10. pp. 154-156.

[646] Wood, 'Developing Temporary Protection in Africa', op. cit., p. 24. See also Edwards, 'Refugee Status Determination in Africa', op. cit., p. 227.

hospitality towards asylum seekers, thus posing a further obstacle to the identification of a regional customary norm of temporary refuge.[647]

Latin America, on the other hand, deserves a separate discussion. The region appears to have one of the world's most developed response practices in respect to disaster displacement.[648] Furthermore, in recent years, there has been growing interest and discussion about the challenges associated with mobility in the context of disasters and climate change in the region. As has been already mentioned, the ad hoc responses put in place by Latin American countries in the wake of particularly devastating disasters have partly resulted from calls made in different regional forums. Since 2010, on the backdrop of the Haiti disaster, which has most probably provided impetus in this respect, the role of these interstate processes has become increasingly prominent in terms of promoting preparedness to cross-border disaster displacement through the development of normative frameworks aimed at harmonizing state practice on the matter. In 2016, the Regional Conference on Migration (RCM) adopted the *Guide to Effective Practices for RCM Member Countries: Protection for Persons Moving across Borders in the Context of Disasters* (RCM Guide).[649] This non-binding document draws together the experiences of RCM member countries with the aim of sharing 'information on the use of humanitarian protection measures that RCM member countries, depending on their domestic laws, may apply on a temporary basis in response to the needs of disaster-affected foreigners'.[650] Similarly, two years after, the South American Conference on Migration approved the *Regional Guidelines on Protection and Assistance to People Displaced across Borders and Migrants in Countries Affected by Disasters of Natural Origins* (SACM Guidelines).[651] Although these regional instruments – the first ones aimed at regulating cross-border mobility in the context of natural disasters – differ from traditional soft law instruments, in that they primarily build on existing state practice instead of advancing new laws or interpreting binding norms of international law, they represent a valuable indication of how states in the region view the disaster-mobility nexus and

[647] See Zorzi Giustiniani, 'Temporary Protection After Disasters' op. cit., p. 332.

[648] Cantor, *Cross-Border Displacement, Climate Change and Disasters*, op. cit, p. 69.

[649] Nansen Initiative, RCM Guide, available at https://disasterdisplacement.org/wp-content/uploads/2016/11/PROTECTION-FOR-PERSONS-MOVING-IN-THE-CONTEXT-OF-DISASTERS.pdf.

[650] RCM Guide, p. 8. For further analysis, see W. Kälin, D.J. Cantor, 'The RCM Guide: A Novel Protection Tool for Cross-Border Disaster-Induced Displacement in the Americas', in *Forced Migration Review*, 56, 2017, pp. 58-61.

[651] 'Lineamientos regionales en materia de protección y asistencia a personas desplazadas a través de fronteras y migrantes en países afectados por desastres de origen natural', available at https://disasterdisplacement.org/wp-content/uploads/2019/06/CSM-Lineamientos-regionales-personas-desplazadas-por-desastres_compressed.pdf.

associated challenges.[652] While both instruments recall states' international obligations and support the applicability of *non-refoulement* in disaster situations,[653] their main focus rests on the provision of humanitarian protection measures, and specifically on avoiding discretionality when applying those measures. Thus, for instance, the RCM Guide encourages to favorably exercise discretion powers to provide temporary protection measures, and notes that many states already do so, in respect to individuals who are 'directly and seriously affected by the disaster', with the aim of strengthening consistency within state responses.[654]

How, and to what extent, such state practice squares or may contribute to the emergence of a regional customary norm of temporary refuge to disaster displacement is hard to define. On the one hand, states in Latin America appear to share consensus on providing disaster-displaced persons with some form of temporary humanitarian protection. On the other hand, as such protection remains within the realm of discretionary powers, it is questionable whether it can be considered to reflect a practice regarded to be required by law. In other words, in spite of its increasing well-established character, this practice does not seem yet to be supported by the *opinio juris* necessary in order to be considered as evidence of a customary norm.[655]

Finally, one last and important observation to be made is that all these reviewed mechanisms activated by states mostly relate to sudden onset disasters – such as earthquakes, floodings, hurricanes –, rather than to gradually occurring environmental degradation. This is coherent with the fact that protection measures in this respect are usually provided temporarily, consistently with the idea that a sudden catastrophe produces non-permanent displacement and thus assistance and protection needs of a temporary character. Still, this may not always be the case, as has been plastically demonstrated by the Haitian situation,

[652] Cantor, 'Environment, Mobility, and International Law', op. cit., pp. 315-319.

[653] For instance, the RCM Guide recognizes that '[t]he occurrence of a disaster […] should not serve as a pretext for withholding recognition of refugee status', and that '[e]ven if a disaster does not in itself constitute a ground for refugee status, its effects may create international protection needs if they generate violence or persecution […], including events seriously disturbing public order as recognized by some countries that have adopted the Cartagena Declaration in their national legislation. Competent authorities should therefore carefully scrutinize cases from an affected country with a view to assessing if refugee status is merited as a result of the negative consequences of the disaster'. RCM Guide, pp. 20-21. Furthermore, the RCM Guide also acknowledges the role of international human rights law in limiting states' discretionary power on immigration issues, despite the absence of specific jurisprudence (pp. 13-14).

[654] RCM Guide, p. 15.

[655] See however Cantor, who argues that 'the codification in national law of a power to favorably resolve these types of cases [i.e. those concerning disaster displacement], and its exercise in practice by the state concerned according to the terms of its law, may suggest that states perceive the creation of such powers as a matter of legal obligation'. Cantor, 'Environment, Mobility, and International Law', op. cit., p. 322 (note 280).

and in turn by the U.S. practice of repeatedly extending TPS towards nationals of certain countries affected by disasters. These cases, of which Haiti is the clearest example, raise reflections on the tenability of the distinction between sudden and slow onset disasters, particularly in terms of their 'treatment' in law, and in turn on the (in)sufficiency of temporary relief. They in fact evidence that, when a natural hazard hits in places already characterized by weak institutions, severe poverty, and other precarious conditions, its effects will often have long lasting impacts. This scenario is likely to become even more evident in light of the increasing impacts of climate change and its 'threat multiplier' effect.

Moreover, and relatedly, Haiti and similar contexts also shed light on the difficulty to discern the clear *nature* of the mobility associated with disasters. As has been seen, there have been slight discrepancies in state practice in this respect, with a small number of states recognizing refugee status to some Haitians either under the universal or regional definition, and other states, such as Brazil, ruling out this possibility. In this connection, it must be remarked that ad hoc humanitarian responses to disaster displacement should not be used by states to circumvent their obligations under international refugee and human rights law. In other words, the characterization of a given migratory flow as 'disaster displacement' does not rule out the applicability of refugee or complementary protection under human rights law in respect to certain individuals. This has been recently remarked by the UNHCR, which recalled that the pragmatic use of temporary protection measures should be carried out '[w]ithout prejudice to the applicability of international and regional refugee and human rights law to claims for international protection made in the context of the adverse effects of climate change and disasters'.[656] It is the purpose of the following paragraphs to analyze the relevance of complementary protection under human rights law as an additional ground of protection for persons displaced in the context of climate change and disasters.

3. The scope of harm in human rights-based protection and its bearing on climate and disaster-related impacts: general considerations

The previous paragraphs have outlined the evolution of the principle of *non-refoulement* with regards to its extended applicability beyond its original context on the one hand, and of its legal nature and content in international law on the other hand.[657] It has been evidenced

[656] UNHCR, *Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters*, 1 October 2020, para 20.

[657] See *supra*, para 1.

that, in light of this evolution, the more overarching concept of international protection continues to being reshaped and enlarged, as evidenced by the evolution of the notion of temporary refuge from conflicts and its relevance for other humanitarian crises, such as disasters and related impacts. These developments reflect the progressive 'globalization' of forced migration, a phenomenon that has considerably transcended the ways in which it was conceived during the 1951 Refugee Convention's drafting process both in terms of the reasons why people move and the geographical contexts in which it most typically occurs. These changing dynamics have inevitably put to test the international protection frameworks, the principles and concepts of which – accordingly with the 'living nature' of the instruments containing them – have proved to be capable of being reshaped on many occasions, also thanks to a mutually constructive and complementing relationship between the refugee and human rights regimes.

In refugee law, as outlined,[658] developments have occurred in particular through expansive interpretations of the concept of persecution. In the human rights context, the prohibition of cruel, inhuman or degrading treatment has been the most relied on to find protection obligations on the part of sending states. In fact, just like persecution, these forms of ill-treatment are not strictly defined in either the ECHR nor the ICCPR and have thus been interpreted on a case-by-case basis, consistently with *non-refoulement*'s nature as an 'open concept'. Important developments have also recently occurred in respect to the protection of the right to life, especially within the HRC's case-law in its *Teitiota v. New Zealand* views. It seems appropriate to reiterate that under human rights law, differently from refugee law, there is no need for an international protection applicant to fulfill a 'nexus' requirement between his or her civil or political status (i.e. the grounds of race, religion, nationality, political opinion or membership of a social group in refugee law) and the risk to life or feared treatment. Furthermore, as already mentioned, the rights-based approach to the protection of individuals at risk of serious or irreparable harm has paved the way for consideration of the relevance of rights other than the fundamental ones traditionally protected by the prohibition of *refoulement*.[659] In fact, treaty bodies have increasingly accepted not only that civil and political rights other than the right to life and the prohibition of ill-treatment might trigger states' protection obligations, but also that a serious impairment of socio-economic rights might, under certain circumstances, give rise to an international protection claim. This has

[658] See *supra*, Chapter 2, para 2.1.
[659] *Supra*, para 1.

occurred, for instance, by means of a 'recharacterization' of socio-economic rights violations into breaches of the prohibition of inhuman or degrading treatment.[660]

In the previous Chapter, it was already pointed out that the effects of climate change and disasters mostly affect the enjoyment of socio-economic rights, impacting on individuals' general living conditions.[661] For the purposes of this work thus, a key issue that needs to be addressed is whether, and when, the living conditions arising out of climate impacts and disaster settings may reach a point at which return to such conditions would be inadmissible under human rights law. This would be the case when the potential harm to which an individual would be exposed upon return amounts to a threat to life or of cruel, inhuman or degrading treatment. As such, the following analysis focuses on whether, and to what extent, it may be possible to construe a *non-refoulement* obligation in cases of return to threatening conditions that directly or indirectly involve the effects of disasters and climate change. Given its relevance as the first international ruling on these issues, the HRC' views on the *Teitiota* case are taken as the starting point of reference for the remainder of the enquiry.

3.1. Climate-related harm and *non-refoulement* before the UN Human Rights Committee

Without delving into the already outlined factual background of the case,[662] sufficient is to say that Teitiota's claim generally relied on the effects of sea-level rise, identified in particular 'in the scarcity of habitable space, which has in turn caused violent land disputes that endanger the author's life, and environmental degradation, including saltwater contamination of the freshwater supply'.[663] Before assessing the merits, the Committee made some relevant observations in order to confirm the claim's admissibility. In response to the State party's arguments,[664] it referred to its victim status threshold, according to which 'any person claiming to be a victim of a violation of a right protected under the Covenant must demonstrate either that a State party has, by act or omission, already impaired the exercise

[660] McAdam, *Climate Change, Forced Migration, and International Law*, op. cit., p. 65. Cassese too has observed that 'the scope of Article 3 [ECHR] is very broad; nothing could warrant its possible limitation to only physical or psychological mistreatment in the area of civil rights'. A. Cassese, 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?', in *European Journal of International Law*, 2(2), 1991, p. 143.

[661] See *supra*, Chapter 2, para 3.2.

[662] The evidence brought before the HRC was overall the same as that presented in the domestic courts. See *supra*, Chapter 2, para 3.1.

[663] HRC, *Teitiota v. New Zealand*, cit., para 3.

[664] See ivi, paras 4.5.-4.7.

of his or her right or that such impairment is imminent'.[665] The Committee then went on to note that since the case at hand concerned the author's deportation, the question before it is centered on whether he substantiated the claim that, upon removal, he faced 'a real risk of irreparable harm to his right to life'. In that connection, the Committee clarified that 'in the context of attaining victim status in cases of deportation or extradition, the requirement of imminence primarily attaches to the decision to remove the individual, whereas the imminence of any anticipated harm in the receiving State influences the assessment of the real risk faced by the individual'.[666] On these grounds, the Committee held that the conditions forming the background on Teitiota's claim did not indicate 'a hypothetical future harm', but rather a 'real predicament', and that therefore he sufficiently demonstrated, for the purpose of admissibility, that he faced a real risk of impairment to his right to life.[667]

In assessing the merits of the claim, the Committee made some preliminary references to its removal case-law, recalling that generally the risk of irreparable harm faced by the author must be personal, and that only in the most exceptional cases it can derive from the general conditions in the receiving state.[668] It then engaged more closely with the broad interpretation of the right to life by referring to its General Comment 36, remarking that states' duty to protect extends to reasonably foreseeable threats and life-threatening situations, and reminding that a violation of Article 6 may be found 'even if such threats and situations do not result in the loss of life'.[669] The Committee moved then to analyze each element of Teitiota's claim separately. As regards to the violent land disputes originating in the scarcity of habitable land, it noted that the required threshold was not met, given the 'sporadic' nature of such disputes, the fact that Teitiota was never involved in one of them, and the absence of information regarding the effectiveness of state protection from these acts of violence.[670] Then, the Committee examined the issue of access to potable water: considering the evidence according to which the majority of residents in South Tarawa received fresh water through water rationing, the Committee held that the author failed to demonstrate that 'the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death'.[671] Similar observations were

[665] Ivi, para 8.4.
[666] Ivi, para 8.5.
[667] Ivi, para 8.6.
[668] Ivi, para 9.3. These standards were also recalled in General Comment 36, para 30.
[669] Ivi, para 9.4.
[670] Ivi, para 9.7.
[671] Ivi, para 9.8.

made in respect to means of subsistence, the availability of which, in the Committee's view, was not completely beyond the reach of the author. In fact, there was no evidence that Teitiota, upon removal, would be 'exposed to a situation of indigence, deprivation of food and extreme precarity that could threaten his right to life, including his right to a life with dignity'.[672] Finally, as regards to life-threatening situations deriving from overpopulation, as well as sea-level rise effects such as frequent and increasingly intense flooding and breaches of sea walls, the Committee, while accepting the author's comments that Kiribati would become uninhabitable within 10 or 15 years, noted that this time frame 'could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population'. Furthermore, in line with what had been observed by the domestic courts, the Committee noted that, as a matter of fact, Kiribati is already 'taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms'.[673] On the basis of these elements, the Committee concluded that 'the facts before it do not permit it to conclude that the author's removal to Kiribati violated his rights under article 6(1) of the Covenant'.[674]

Setting aside the case' epilogue, some observations made by the Committee are worthy of scrutiny: while, in some aspects, they reflect a progressive development on the legal understanding of the climate-migration nexus, they also raise a number of controversies.

Firstly, besides recognizing, in line with its General Comment 36 as well as with broader practice within the human rights systems,[675] the risks raised by climate change and environmental degradation for human rights enjoyment, the Committee elaborated on this by erasing the difference between slow-onset and sudden-onset events, at least in terms of their harmful impact. Along these lines, the HRC admitted that '[b]oth sudden-onset events, such as intense storms and flooding, and slow-onset processes, such as sea level rise, salinization and land degradation, can propel cross-border movement of individuals seeking protection from climate change-related harm'.[676] This is interesting, not only because the HRC's approach reflects consistency with contemporary understandings of disasters,[677] but particularly as it confirms that both of these phenomena can give rise to forced forms of migration with similar protection and assistance needs. The issue indeed was – and still is –

[672] Ivi, para 9.9.
[673] Ivi, para 9.12.
[674] Ivi, para 10.
[675] See *supra*, Chapter 1, para 3 ff.
[676] Ibid, para 9.11.
[677] See *supra*, Chapter 1, para 5.2. ff.

a contested one, with slow-onset hazards often associated with voluntary forms of migration. That the HRC was going to accept this broader approach to hazards in terms of their effect, especially in view of the different position adopted on the matter by the authorities at the domestic level,[678] was thus not self-evident.

Secondly and relatedly, the Committee shows a valuable engagement with the particular situation of small island states and the threat represented by sea level rise, which is a typical slow-onset process. Although it does not touch upon issues of state disappearance and related legal implications[679] – if not only implicitly –, it nonetheless acknowledged that 'given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized'.[680] Framing the problem, as the Committee appears to do, as one of 'uninhabitability' of territory rather than territorial loss, anticipates the moment at which the violation of the right to life materializes and thus the point at which individuals might be considered in need of international protection against these risks. At the same time, this framing also welcomes a more comprehensive understanding of the context, where living conditions are not only defined with reference to the existential threat represented by rising sea levels, but also by other, non-environmental pressures such as weak infrastructures, political and economic instability, and social disorder.[681] Along these lines, the HRC also referred to the right to life with dignity, which in turn reinforces the socio-economic dimension of the right to life, confirming that the protection of that right entails the entitlement to minimum living conditions.

Thirdly, building on these grounds, the Committee made the remarkable pronouncement that 'without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligation of sending States'.[682] The significance of this statement lies in the first-ever recognition that climate change and related effects may *themselves* constitute a source of harm to which individuals cannot be returned,

[678] The IPT had affirmed that Teitiota's migration to New Zealand constituted 'a voluntary adaptive migration', which, in spite of some degree of compulsion, cannot be considered 'forced' (*AF Kiribati*, para 49). See also discussion in Kälin, 'Conceptualising Climate-Induced Displacement', op. cit., pp. 81-104.

[679] For a thorough analysis on these issues, see generally Stoutenburg, *Disappearing Island States in International Law*, op. cit.

[680] HRC, *Teitiota v. New Zealand*, para 9.11.

[681] For discussion on the 'uninhabitability' framing, see C. Storr, 'Islands and the South: Framing the Relationship between International Law and Environmental Crisis', in *European Journal of International Law*, 27(2), 2016, p. 533 ff.

[682] HRC, *Teitiota v. New Zealand*, para 9.11.

regardless of the receiving state's acts or omissions.[683] This is consistent with General Comment 36's characterization of environmental degradation and climate change as 'some of the most pressing and serious threats' to the enjoyment of the right to life. Reinforcing the implications of this finding, the Committee also clarified that state parties have a 'continuing responsibility [...] to take into account in future deportation cases the situation at the time in Kiribati and new and updated data on the effects of climate change and rising sea levels thereupon',[684] suggesting that, while this particular claim did not reach the required threshold, future claims may succeed as a result of ongoing, worsening environmental degradation. Furthermore, the HRC has also referred to 'international efforts' and to 'the assistance of the international community' to intervene through affirmative measures of protection.[685] On the one hand, this is a strong recalling of the international community's duty to cooperate in order to address climate change and its negative impacts through both mitigation and adaptation measures, including, in particular, the specific obligations of industrialized states in providing technical and financial assistance to developing states.[686] On the other hand, by linking states' obligations under climate change law to the duty to protect life, the HRC provides further authoritative recognition of the normative interrelation between the climate change and the human rights regime.[687]

That being said, one cannot but wonder whether such a recognition holds more of a symbolic, rather than a legal, weight. Indeed, as noted by some scholars, the Committee's observations in this respect do not represent a 'legal revolution' for a number of reasons.[688] In addition to those pointed out by commentators, it should also be once again remarked that,

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[683] See J. McAdam, 'Protecting People Displaced by the Impacts of Climate Change: the UN Human Rights Committee and the Principle of *Non-Refoulement*', in *American Journal of International Law*, 114(4), 2020, p. 710; A. Maneggia, '*Non-refoulement* of Climate Change Migrants: Individual Human Rights Protection or "Responsibility to Protect"? The Teitiota Case before the Human Rights Committee', in *Diritti umani e Diritto internazionale*, 2, 2020, p. 637.

[684] HRC, *Teitiota v. New Zealand*, para 9.14.

[685] Ivi, paras 9.11, 9.12, 9.13.

[686] In accordance with the principle of common but differentiated responsibilities, recognized in the Preamble of the UNFCCC at Recitals 3 and 6: 'Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs'; 'Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions'.

[687] On which see the arguments developed *supra*, Chapter 1, para 3 ff.

[688] See M. Cullen, 'The UN Human Rights Committee's Recent Decision on Climate Displacement', February 2020, available at https://www.asyluminsight.com/c-miriam-cullen?rq=cullen#.XlcOITIzaOU#.YF4DZmhKjb0; S. Behrman, A. Kent, 'The Teitiota Case and the Limitations of the Human Rights Framework', in *Questions of International Law*, 75, 2020, pp. 25-39; McAdam, 'Protecting People Displaced by the Impacts of Climate Change', op. cit., pp. 709-710.

as a matter of human rights law, the central question concerns the severity of the harm to which an individual would be exposed upon removal. As already remarked,[689] the prohibition of *refoulement* has developed beyond the classical tenets of refugee law: whereas protection in the latter system is premised upon the existence of a persecutory risk, which is inevitably linked to human agency, under human rights law what matters is the existence of a real risk of irreparable harm to an individual's (fundamental) rights. Thus, in principle, as long as such a risk is established, the *source* of harm, as opposed to its *nature* and *severity*, should be irrelevant.

As a matter of fact, that conditions not related to acts of state or non-state actors may give rise to a protection claim had already been recognized by the ECtHR through the so-called 'medical case' jurisprudence.[690] Legal scholars have frequently argued that these cases laid the grounds for future claims based on the effects of climate change: the HRC's views have proven these scholars right. However, the HRC seems to have set a particularly high threshold for *non-refoulement* to apply in this context, akin to the 'exceptional circumstances' threshold adopted by the ECtHR in its medical case jurisprudence. This is evident from the language used in some parts of the views: the reference to a situation of *indigence, deprivation of food* and *extreme precarity*, the requirement that fresh water be *inaccessible, insufficient* or *unsafe* to produce a life-threatening risk indicate that for *non-refoulement* to operate in this context, conditions in the receiving country would need to be so dire to render life intolerable – arguably, to a level that is well below to that of a dignified life that the Covenant seeks to protect.[691]

Such a high threshold is questionable under at least two aspects: firstly, as noted by some commentators, a cumulative assessment of the risks faced by the author would have been more appropriate, since Teitiota's claim touched upon the enjoyment of a range of different rights.[692] By examining each of the claim's elements independently, the Committee failed to consider their cumulative impact on the right to life, which arguably could have given rise to a *non-refoulement* obligation on the part of New Zealand (and even if not, it would have been more nuanced and consistent with an overall evaluation of risk). Secondly and relatedly, the high threshold set by the HRC as a result of this independent assessment

[689] See *supra*, para 1.

[690] This case-law is grounded on Article 3 ECHR prohibiting cruel, inhuman or degrading treatment or punishment. See *infra*, para 3.2.1. ff.

[691] As observed by Committee Member Muhumuza in his dissenting opinion. *Teitiota v. New Zealand*, Individual opinion of Committee Member Duncan Laki Muhumuza (dissenting), para 5.

[692] McAdam, 'Protecting People Displaced by the Impacts of Climate Change', op. cit., p. 714.

of risk seems also to be at odds with the Committee's own observation that the conditions of life in Kiribati may become incompatible with the right to life with dignity *before* the country becomes submerged.[693] Arguably, the Committee here attempted to 'strike a balance between the relatively high threshold that constitutes a violation of the right to life with the need to avoid an unattainable standard'.[694] In doing so, however, the views add a layer of uncertainty as to where exactly the tipping point might lie, and thus as to when complementary protection might be triggered. This intersects with the issue of timing, which, as anticipated earlier,[695] is crucial in the assessment of risk in *non-refoulement* jurisprudence. Although the Committee makes several references to the fact that the protection of the right to life extends to *reasonably foreseeable* threats, thus suggesting the confirmation of the use of a 'foreseeability' standard in assessing the existence of a real risk of irreparable harm, some elements in the Committee's reasoning indicate that the 'imminence' requirement continues to influence the assessment of risk. This is evident, for instance, in the Committee's observations on admissibility, where it is stated that 'the imminence of any anticipated harm in the receiving State influences the assessment of the real risk faced by the individual'.[696] Furthermore, the 'foreseeability' test in climate-related claims is highly dependent on the mitigating and adaptive measures put in place by the receiving state: in short, the more governments of receiving states are considered to be willing to protect their citizens against climate-related threats through positive measures, the more the possibility that a threat to life occurs becomes a 'speculation' rather than a supposition.

The lack of clarity surrounding the idea of a 'reasonably foreseeable threat', combined with the high threshold required to activate protection obligations, have been evidenced by the views' two dissenting opinions. In particular, regarding the availability of water, Committee Member Muhumuza pointed out that '[t]he considerable difficulty in accessing fresh water because of the environmental conditions should be enough to reach the threshold of risk, without needing to reach the point at which there is a complete lack of fresh water'.[697] Indeed, a complete lack of water would inevitably lead to a premature death in a relatively short period of time, signaling that protection should be activated well before the materialization of such a risk. Along these lines, Muhumuza argued that '[i]t would indeed be counter-intuitive to the protection of life to wait for deaths to be very frequent and

[693] HRC, *Teitiota v. New Zealand*, para 9.11.
[694] Cullen, 'The UN Human Rights Committee's Recent Decision on Climate Displacement', op. cit.
[695] See *supra*, Chapter 2, para 2.3.
[696] HRC, *Teitiota v. New Zealand*, para 8.5.
[697] Ivi, Individual opinion of Committee Member Duncan Laki Muhumuza (dissenting), para 5.

considerable in number in order to consider the threshold of risk as met'.[698] Committee Member Sancin was also of the opinion that the dire conditions in Kiribati already reach the required threshold and focused in particular on the issue of water, arguing that 'it falls to the State party, not the author, to demonstrate that the author and his family would in fact enjoy access to safe drinking (or even potable) water in Kiribati, to comply with its positive duty to protect life from risks arising from known natural hazards'.[699]

The author's claim concerned exclusively Article 6. This is unfortunate, given that the Committee explicitly affirmed that Article 7 too could trigger protection obligations of state parties in the context of a climate-related case.[700] The treatments proscribed by Article 7 are not defined in the HRC's jurisprudence, which considers not desirable to 'draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied'.[701] If not life-threatening, could have the general living conditions in Kiribati, exacerbated by environmental degradation, been considered to amount to ill-treatment by the HRC? Arguably, the Committee might have been more flexible in assessing the existence of a risk of such treatment. Indeed, drawing a parallel to the ECtHR, it is within Article 3 ECHR that the Court has produced its most developed *non-refoulement* jurisprudence, suggesting that the notion of ill-treatment leaves greater room for progressive interpretation. It is to this jurisprudence that the following paragraphs turn to. Although no climate-related claim has been so far brought before the ECtHR, some of its case-law is instructive in attempting to provide speculations about what line of reasoning the Court might apply to threats linked to climate change and disasters. The following paragraphs examine, in particular, claims based on harm stemming from 'naturally occurring' situations and from generalized insecurity or severe destitution. While the case-law on naturally occurring situations has been developed in respect to the specific case of seriously ill migrants, the language used by the Court in its leading case, referring to 'factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country',[702] does not rule out the possibility

[698] Ibid.

[699] Ivi, Individual opinion of Committee Member Vasilka Sancin (dissenting), para 5.

[700] Ivi, para 9.11. McAdam also notes that '[i]t would have been interesting to see how the Human Rights Committee might have approached an Article 7 claim, especially since its jurisprudence does not expressly limit cruel, inhuman, or degrading treatment to positive acts or omissions'. McAdam, 'Protecting People Displaced by the Impacts of Climate Change', op. cit., p. 715.

[701] HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para 4.

[702] ECtHR, *D. v. United Kingdom*, Application no. 30240/96, 2 May 1997, para 49, also stating that 'given the fundamental importance of Article 3 […] in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article (art. 3) in other contexts which might arise'.

that the 'medical case' line of reasoning might be adopted in the context of climate-related risks of harm.[703] As will be seen, the cases reviewed below also touch upon the relationship between socio-economic rights and civil and political rights, confirming that when the latter are not guaranteed at a bare minimum, an issue under Article 3 might arise.

3.2. *Non-refoulement*, 'naturally occurring' phenomena and poor living conditions in the case-law of the European Court of Human Rights

While no removal claim has ever succeeded solely on the ground of Article 2 ECHR, the ECtHR has an extensive *non-refoulement* jurisprudence on Article 3. Differently from the HRC, the ECtHR has examined in more detail the terms contained in Article 3, even though, it should be stressed once again, these interpretations are not static: indeed, the Court has recognized that, consistently with the progressive and dynamic character of human rights protection standards, treatments that where once considered inhuman or degrading might over time be regarded as torture.[704] Furthermore, in *refoulement* cases, the Court does not usually analyze explicitly the type of treatment to which the applicant may be exposed on return. This is not surprising, as in these cases the Court is called to assess the possibility of harm occurring in the future.[705] Drawing from the overall case-law of the ECtHR, it can be summarized that generally, ill-treatment involves 'actual bodily injury or intense physical and mental suffering'.[706] Torture usually requires an element of intent and has been described as 'deliberate inhuman treatment causing very serious and cruel suffering',[707] while inhuman or degrading treatment has been considered that which 'humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.[708] The ill-treatment must attain a 'minimum level of severity', which will depend on 'all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the

[703] This can also be inferred from the Court's admission that 'there may be other very exceptional cases [i.e. apart from those concerning seriously ill migrants] where the humanitarian considerations are equally compelling'. ECtHR (Grand Chamber), *N. v. United Kingdom*, Application no. 26565/05, 27 May 2008, para 43.

[704] ECtHR, *Selmouni v. France*, Application no. 25803/94, 28 July 1999, para 101. This, in turn, implies that treatments once excluded from the scope of *non-refoulement* protection might through time raise an issue under Article 3 ECHR.

[705] See C.W. Wouters, *International Legal Standards*, op. cit., pp. 238-239.

[706] ECtHR, *Pretty v. United Kingdom*, Application no. 2346/02, 29 April 2002, para 52.

[707] ECtHR, *Aksoy v. Turkey*, Application no. 21987/93, 18 December 1996, para 63.

[708] Ibid.

victim'.[709] Moreover, a *non-refoulement* obligation is normally triggered when 'the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection'.[710] This is not however always the case: an international protection need, and a corresponding protection obligation, may also arise independently of the direct or indirect responsibility of the state, as the following analysis demonstrates.

3.2.1. 'Medical' cases and the 'exceptionality' standard

In *D v. the United Kingdom*, the ECtHR recognized that, in light of the fundamental importance and absolute nature of Article 3, a *non-refoulement* obligation might arise in cases where 'the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article'.[711] The case concerned a St. Kitts citizen who had received treatment for HIV while in the UK and was in the advanced stages of AIDS at the time of his application. The Court found that the withdrawal of the undergoing treatment consequent to the removal would have resulted in 'the most dramatic consequences' for the applicant,[712] and concluded that a *non-refoulement* obligation had emerged.[713] Such a conclusion was reached because of the exceptional circumstances concerning the case: first, the Court noted that the applicant's medical conditions indicated a life expectancy that was already short and that would have been furtherly diminished in the eventuality of return. Second, there was no evidence of any form of moral and social support that the applicant would have benefited from in his country of origin. Third, it was acknowledged that, given the general poor living conditions existing in St. Kitts characterized, *inter alia*, by 'a number of serious environmental problems, such as inadequate disposal of solid and liquid waste – especially untreated sewage – into coastal lands and waters, resulting in coastal zone degradation, fish depletion and health problems',[714] any form of medical treatment eventually available there

[709] ECtHR (Grand Chamber), *N. v. United Kingdom*, Application no. 26565/05, 27 May 2008, para 29.
[710] ECtHR, *D. v. the United Kingdom*, para 49. That risk of treatment contrary to Article 3 can emanate from non-state actors was first recognized in ECtHR, *H.L.R. v. France*, Application no. 24573/94, 29 April 1997, para 40.
[711] ECtHR, *D. v. the United Kingdom*, para 49.
[712] Ivi, para 52.
[713] Ivi, para 53.
[714] Ivi, para 32.

would have been undermined, considering the applicant's 'lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts'.[715] Fourth, the Court noted that the UK had assumed responsibility for treating the applicant's condition, and that the applicant had become reliant on the UK's medical and palliative care.[716] On these grounds, the Court held that '[a]lthough it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 […], his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment'.[717] Thus, it was the implementation of the decision to remove the applicant, as a 'crucial element in the chain of events',[718] to constitute a breach of the prohibition of inhuman treatment under Article 3.

Ten years later, the principles set forth in *D. v. the United Kingdom* were further elaborated by the ECtHR in *N. v. the United Kingdom* and have since been followed in subsequent jurisprudence. The facts of the case were very similar to the ones considered in *D. v. the United Kingdom*, as they concerned a Ugandan woman suffering from HIV/AIDS whose life expectancy would have been reduced upon return to her country of origin. The Court engaged closely with the question brought before it by analyzing the issues raised by the case, which, according to the judges, had to be identified in the applicant's entitlement to continue to benefit from the sending state's health care. As a consequence, the Court emphasized that '[a]liens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State', and that '[t]he decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling'.[719]

Although the ECtHR accepted the evidence brought before it, it concluded that the facts did not reach the 'exceptionality' threshold required to activate protection obligations on the

[715] Ivi, para 52.
[716] Ivi, para 53.
[717] Ibid.
[718] W. Kälin, J. Künzli, *The Law of International Human Rights Protection* (2nd edition), Oxford, Oxford University Press, 2019, p. 533.
[719] ECtHR, *N. v. the United Kingdom*, para 42.

part of the UK. This was because, differently from *D.*, *N.* was not considered 'critically ill' in spite of evidence indicating that, were the applicant to be deprived of her treatment, 'her condition would rapidly deteriorate and she would suffer ill heath, discomfort, pain and death within a few years'.[720] The Court also easily dismissed the other circumstances described by the applicant indicating that she would not have access to antiretroviral medication due to its cost and unavailability in the rural area where she comes from, and the limited support from family members:[721] the Court in fact affirmed that '[t]he rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, must involve a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and Aids worldwide'.[722]

The considerations made by the Court in this case raise a number of observations, a part of which have been voiced by the joint dissenting opinion of judges Tulkens, Bonello and Spielmann. In adopting a very restrictive approach and high threshold, justified by the fact that 'the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country',[723] the Court carried out a controversial line of reasoning, which does not seem to be fully consistent with legal standards, as well as with the ECtHR's own previous jurisprudence. The bulk of such reasoning is encapsulated at para 44, which warrants quoting at length:

> 'Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights (see *Airey v. Ireland* [...]). Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights [...]. Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without

[720] Ivi, para 47.
[721] Ivi, para 48.
[722] Ivi, para 50.
[723] Ivi, para 43.

> a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States'.[724]

From the outset, this statement indicates that the Court has approached the applicant's claim as if it were a question concerning the deprivation of a socio-economic right, rather than a fundamental civil right.[725] In doing so, the Court drew a differentiation between these two categories of rights where only the latter would be included under the protective umbrella of the ECHR. However, the Court, in an attempt to reinforce its argument in this respect, inappropriately quoted its earlier judgement in *Airey v. Ireland*, where the issue of the socio-economic dimension of the ECHR was considered for the first time. In that occasion, the Court actually affirmed that:

> 'Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention'.[726]

Thus, as early as 1979, the ECtHR had endorsed the theory of the indivisibility of human rights, which entails that, even if the source of harm originates in a deprivation of socio-economic rights, this does not rule out the possibility of recognizing a risk of inhuman or degrading treatment. As seen earlier,[727] this is because socio-economic rights have a 'minimum core' to be respected at all times, the lack of which may, under certain circumstances, lead to a risk of ill-treatment. By referencing to the 'provision of free and unlimited health care' and to the disproportionate 'burden' placed on host states, the judgment in *N v. the United Kingdom* appears to have rejected the 'integrated' approach to human rights, and to have 'recharacterized' a breach of Article 3 into a violation of the right to health.[728] This has led the Court to controversially mention the exercise of a balancing test between the general interest of the hosting community and the individual's protection interests, which would be inadmissible in the context of Article 3 given its absolute and non-derogable nature. In that connection, as pointed out by the joint dissenting opinion, the Court's reasoning underlies its real concern regarding 'worrying policy considerations' about

[724] Ivi, para 44.

[725] See ECtHR, *N. v. the United Kingdom*, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para 6.

[726] ECtHR, *Airey v. Ireland*, Application no. 6289/73, 1979, para 26.

[727] *Supra*, Chapter 1, para 3.2., Chapter 2, para 2.1.

[728] As argued also by H. Ragheboom, *The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective*, Leiden, Brill Nijhoff, 2017, pp. 379-380.

floodgates of 'medical tourists' and budgetary constraints, which not only undermine the scope of Article 3 but are also misconceived.[729]

3.2.2. Extreme poverty and humanitarian crises: the 'predominant cause' standard

In addition to the remarks outlined above, the joint dissenting opinion in *N. v. the United Kingdom* raised another relevant point by claiming that 'the additional grounds advanced by the Court in *D. v. the United Kingdom* and related to a lack of medical and palliative care as well as a lack of psychological support, in the home country, might be equally relevant to the finding of a separate potential violation of Article 3 of the Convention'.[730] This suggests that the level of deprivation in the country of origin *itself* may amount to inhuman or degrading treatment. As frequently emphasized by the ECtHR, although the ECHR certainly does not entail obligations on state parties to address general poverty, human dignity must always be secured at a bare minimum, not least because '[i]t would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence'.[731]

In *M.S.S. v. Belgium and Greece*, the Court accepted that 'a situation of extreme material poverty can raise an issue under Article 3'[732] and found that the living conditions of the applicant amounted to ill-treatment. In particular, the Court highlighted the particularly serious situation of the applicant, who did not have access to any means of subsistence and most basic needs,[733] and concluded that this had rendered him 'the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation'.[734]

[729] ECtHR, *N. v. the United Kingdom*, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para 8. The limited understanding of Article 3 in relation to socio-economic deprivations in the removal context has also been criticized by scholars, who have argued that it leads to a 'differentiated understanding of the same right depending on whether the person is a European Union citizen seeking protection against violation of Art 3 of the ECHR within a state party, or a non-citizen liable to removal'. M. Foster, '*Non-Refoulement* on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law', in *New Zealand Law Review*, 2, 2009, p. 295. See also McAdam, *Complementary Protection*, op. cit., p. 168.

[730] ECtHR, *N. v. the United Kingdom*, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para 21.

[731] UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 2003, para 29.

[732] ECtHR (Grand Chamber), *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para 252.

[733] Ivi, para 254.

[734] Ivi, para 263.

A few months later, the ECtHR decided upon the case of *Sufi and Elmi v. the United Kingdom* concerning two Somali nationals facing deportation towards a situation of generalized violence and insecurity. The Court considered that the alarming humanitarian conditions existing in the refugee camps to which the applicants would have likely sought refuge if returned to Somalia, including the exceptionally limited access to water, food, shelter and sanitation facilities, were 'sufficiently dire to amount to treatment reaching the threshold of Article 3'.[735] Importantly, the Court expanded on the threshold applied to conclude in favor of the applicants, stating that, instead of the test adopted in *N. v. the United Kingdom*, the one used in *M.S.S. v. Belgium and Greece* had to be preferred.[736] This was because

> '[i]f the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N. v. the United Kingdom* may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict'.[737]

This statement elaborates on the distinction, introduced in *N v. the United Kingdom*, between dire socio-economic conditions and harm predominantly resulting from acts or omissions of public authorities or non-state bodies, and dire socio-economic conditions and harm resulting from naturally occurring situations.[738] In the former case, the threshold is set at a lower level as it 'requires it to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame',[739] while in the latter case protection is granted when there are exceptional circumstances of a compelling humanitarian nature. However, the legal basis for such a distinction, which in turn has implications for the scope of *non-refoulement* obligations creating a 'double standard' depending on the source of risk, has been questioned.[740]

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[735] ECtHR, *Sufi and Elmi v. the United Kingdom*, Applications nos. 8319/07 and 11449/07, 28 June 2011, para 291.

[736] Ivi, para 283.

[737] Ivi, para 282.

[738] See M. Hesselman, 'Sharing International Responsibility for Poor Migrants? An Analysis of Extra-Territorial Socio-Economic Human Rights Law', in *European Journal of Social Security*, 15(2), 2013, p. 202.

[739] ECtHR, *Sufi and Elmi v. the United Kingdom*, para 283.

[740] See, *inter alia*, C. Bauloz, 'Foreigners: Wanted Dead or Alive? Medical Cases before European Courts and the Need for an Integrated Approach to Non-Refoulement', in *European Journal of Migration and Law*, 18, 2016, pp. 409-441. See also K. Greenman, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law', in *International Journal of Refugee Law*, 27(2),

3.2.3. The *Paposhvili v. Belgium* case: a 'halfway' standard?

The gap between the two approaches described above has to some extent been recently bridged through *Paposhvili v. Belgium*, which signaled an important development of the Court's 'medical' case law. Although the applicant died before the hearing, the Grand Chamber decided not to struck out the case in light of the general importance of the issues at stake.[741]

The Court began its analysis by significantly recognizing that the threshold established in *N. v. the United Kingdom* for a breach of Article 3, found only in cases where the applicant was close to death, 'has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that provision'.[742] Given the importance of interpreting the Convention in a manner that is 'practical and effective',[743] the Grand Chamber clarified and revised its test by stating that the 'other very exceptional cases' raising an issue under Article 3 might also refer to situations where the applicant, 'although *not at imminent risk of dying*, would face a real risk [...] of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy'.[744] This is important, firstly, as it reflects a more nuanced engagement with the notion of inhuman or degrading treatment, which does not need to amount to a certain or forthcoming loss of life.[745] Secondly, the Court has realigned with the foreseeability test in the assessment of risk, which requires to focus on how the applicant's conditions 'would evolve *after* transfer to the receiving State'.[746] In that connection, the Court has thus rejected the approach adopted in *N v. the United Kingdom,* where the possibility of doing an 'after-removal' risk assessment was implicitly dismissed in light of the 'speculative' nature of such an assessment.[747] Indeed, the *Paposhvili v. Belgium* judgment points out that a 'clear proof' of exposure to ill-treatment is not required precisely because, consistently with the foreseeability test, 'a certain degree of speculation is inherent in the preventive purpose of Article 3'.[748]

2015, pp. 264-296, who argues that this inconsistency is due to the ECtHR's failure to develop a legal basis for including a *non-refoulement* obligation into the prohibition of torture and other ill-treatment.

[741] ECtHR (Grand Chamber), *Paposhvili v. Belgium*, Application no. 41738/10, 13 December 2016, paras 124-133.

[742] Ivi, para 181.

[743] Ivi, para 182.

[744] Ivi, para 183 (emphasis added).

[745] See Foster, '*Non-Refoulement* on the Basis of Socio-Economic Deprivation', op. cit., p. 294.

[746] ECtHR, *Paposhvili v. Belgium*, para 188 (emphasis added).

[747] ECtHR, *N. v. the United Kingdom*, para 50.

[748] ECtHR, *Paposhvili v. Belgium*, para 186.

Additionally, and perhaps more importantly in terms of the scope of *non-refoulement*, the Grand Chamber explicitly framed the protection from *refoulement* as a negative obligation,[749] observing that

> 'the issue is not one of any obligation for the returning State to alleviate the disparities between its health-care system and the level of treatment existing in the receiving State through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. The responsibility that is engaged under the Convention in cases of this type is that of the returning State, on account of an act [...] which would result in an individual being exposed to a risk of treatment prohibited by Article 3'.[750]

The issue of the nature of *non-refoulement* obligation is a contested one,[751] in respect to which the ECtHR had until *Paposhvili v. Belgium* remained silent. The characterization of *non-refoulement* as a negative obligation reinforces the absolute nature of Article 3 by ruling out the 'fair balance' test referred to in previous jurisprudence. In fact, by confirming that medical cases are not about the host state's positive duty to provide health care, the ECtHR shifts the focus back to the conditions awaiting the applicant upon removal, and thus to the evaluation as to whether such conditions reach the required level of severity for activating protection under Article 3.[752]

In spite of the overall relaxation of the threshold so far applied in medical cases, it is to be noted that the ECtHR in the *Paposhvili v. Belgium* case has maintained the language of the 'very exceptional circumstances' that would give rise to a breach of Article 3 in such cases. Although the intent of the Court was indeed to clarify its approach to claims made by critically ill migrants, this retention of the exceptionality standard in respect to naturally occurring harm, and the precise legal basis justifying it, is not touched upon by the Court. Thus, the major criticism raised by the ECtHR's medical jurisprudence has not been addressed; if anything, the Court has even added a further layer of inconsistency in so far as the 'exceptionality' threshold is maintained alongside the characterization of *non-refoulement* as a negative obligation. If, as emphasized by the Court, the responsibility of the

[749] Ivi, para 188.
[750] Ivi, para 192.
[751] See discussion in Greenman, 'A Castle Build on Sand?', op. cit., pp. 278-285.
[752] This implies a number of procedural duties on the part of returning states: they in fact are required to verify both the general availability of care, which must be 'sufficient and appropriate in practice', and the specific accessibility to care by the applicant, the evaluation of which includes the 'cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care'. Furthermore, if after this assessment serious doubts persist as to the existence of a real risk, returning states 'must obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3'. ECtHR, *Paposhvili v. Belgium*, paras 189-191.

returning state is engaged on account of the act of removal, which would result in the applicant's exposure to ill-treatment prohibited by Article 3, then why should the source of harm be considered relevant to the point of even requiring an exceptionally high threshold?[753] As a matter of human rights law, if a minimum level of severity of the ill-treatment is attained in the factual circumstances, the focus should not be on whether 'the "lack of sufficient resources" in the receiving State occurs as a consequence of some malign influence by that State or because of benign matters'.[754] Arguably, the retention of a varying threshold reintroduces through the 'back door' the concerns implicitly made in *N v. the United Kingdom* about 'floodgates' of migrants. In this perspective, it thus seems that the Court finds itself in the uncomfortable position to somehow strike a balance between the potentially broad scope of protection implied under Article 3, and the practical implications of such a wide scope of application.[755]

3.3. Climate-related harm and Article 3 ECHR. Possible scenarios

In *D v. the United Kingdom*, after having observed that *non-refoulement* traditionally operates against direct infliction of harm, the Court admitted that 'given the fundamental importance of Article 3 […] in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article […] in other contexts which might arise'.[756] This statement at once encapsulates the primacy of the prohibition of inhuman and degrading treatment, including its *non-refoulement* component, as a human rights' 'standard bearer', and the relevance of decision-makers' role as vehicles of expansive interpretation of the norm's scope in accordance with the protective object of the ECHR. It is on these grounds that the potential role of the ECtHR in further delineating the legal

[753] For further analysis, see V. Stoyanova, 'How Exceptional Must "Very Exceptional" Be? *Non-Refoulement*, Socio-Economic Deprivation, and *Paposhvili v Belgium*', in *International Journal of Refugee Law*, 29(4), 2017, pp. 580-616.

[754] *RS (Zimbabwe) v. Secretary of State for the Home Department*, EWCA Civ 839, United Kingdom: Court of Appeal (England and Wales), 18 July 2008, para 31.

[755] These concerns have already emerged in the first post-*Paposhvili v. Belgium* case, *Savran v. Denmark*, which concerned the expulsion of a person suffering from paranoid schizophrenia. Decided by a slight majority in favour of the applicant, the joint dissenting opinion was of the view that the majority inappropriately pushed 'wide open' a door that *Paposhvili* 'for sound legal *and policy reasons* decided only to open slightly': this, according to the dissenting judges, raises 'significant implications for the member States in cases concerning the removal of persons suffering from mental illnesses'. ECtHR, *Savran v. Denmark*, Application no. 57467/15, 1 October 2019, Joint Dissenting Opinion of Judges Kjølbro, Motoc and Mourou-Vikström, paras 9, 21 (emphasis added). The case has been referred to the Grand Chamber, which has recently overturned the previous decision by excluding the violation of Article 3 and finding instead a breach of Article 8. ECtHR (Grand Chamber), *Savran v. Denmark*, Application no. 57467/15, 7 December 2021.

[756] ECtHR, *D. v. the United Kingdom*, para 49.

conceptualization of the environment-migration nexus in international human rights law should be understood.

On the one hand, claims grounded on climate change and disasters may fall under the category of risks of harm which do not engage either directly or indirectly the responsibility of the receiving state. Thus, it is very likely that, like medical cases, these claims would trigger the 'exceptionality' threshold, as cases where harm would originate from a 'naturally occurring' phenomenon and the lack of resources to deal with it. Indeed, the HRC has characterized *Teitiota*'s claim on the basis of a similar approach, admitting in principle that climate change impacts themselves may expose individuals to life-threatening or degrading conditions and thus trigger *non-refoulement* obligations on the part of sending states. As seen earlier, the HRC – although deciding upon a claim grounded on the right to life – has also adopted a very high threshold in *Teitiota*, suggesting that in order to activate protection obligations the applicant would have needed to substantiate that he or she would be removed to a situation of indigence and extreme deprivation of foodstuff and drinking water. It is very likely that a similar level of deprivation would be required within the ECtHR, in addition to some personal characteristics of the applicant that could more strongly substantiate the 'compelling humanitarian' circumstances of the claim. Moreover, just like in the *Teitiota* views, the time dimension of the claim would play a decisive role in determining whether the risk of harm reaches the required level of severity. Interestingly, both the HRC in *Teitiota* and the ECtHR in *Paposhvili v. Belgium* show a slight departure from the 'imminence' requirement, realigning with the foreseeability test in assessing the risk of harm. Hypothetically, one could imagine, for instance, that the ECtHR would assess the existence of a real risk of harm stemming from climate and disaster impacts by employing a test akin to the 'serious, rapid, and irreversible decline' used in *Paposhvili v. Belgium*, with the difference that, in the climate context, this would refer to the general environmental conditions in the receiving state rather than to the state of health of the individual. In any case, it seems however that the slight relaxation of the imminence requirement operated by *Paposhvili v. Belgium* falls short of encompassing the gradual nature of a degrading environment and its consequences in terms of human impacts: the uncertainty as to when climate impacts will be most severe so as to reach a 'tipping point', combined with the presence of mitigating and adaptive measures, do not square well with the short timeframe that the Court appears to have set in order to evaluate the existence of risk.[757]

[757] This was equally problematic in the HRC's *Teitiota* views: see *supra*, para 3.1.

On the other hand, climate-related claims may be considered as falling into the category of cases in which the risk of harm is predominantly caused by the acts or omissions of state or non-state actors, which should require a lower threshold of severity. Some scholars have already argued that emphasis on the anthropogenic nature of climate change should support this interpretation, as it recalls the responsibility of industrialized states in causing global warming through uncontrolled GHG emissions.[758] In this connection, the *Teitiota* views, in their reference to the assistance duties of the international community, represent an authoritative ground to provide further support for a similar argumentative strategy, which may claim that harm emanates from omissions of the sending state resulting from its failure to provide funding and technical assistance for climate change adaptation.[759]

Another option would be to focus instead on the indirect responsibility of the receiving state, similarly to the situation dealt with by the Court in *Sufi and Elmi v. the United Kingdom*. The credibility of this approach would certainly benefit from the appreciation of current conceptualizations of disasters,[760] which emphasize that they do not result from the occurrence of natural hazards alone, but rather from the capacity of populations to deal with them. This understanding, in highlighting the role of humans in responding to the impacts of extreme weather events, privileges a focus on both the influence of state and non-state actors in exacerbating disasters, and on individuals' position of vulnerability to disaster-related harm. With regards to the first element, namely the role of state actions and omissions, the 'environmental jurisprudence' of the ECtHR reviewed above would be in line with this approach and support its applicability, as it has identified a number of positive obligations as part of states' duties to protect the right to life against the harmful effects not only of hazardous activities, but also of foreseeable or recurring natural hazards.[761] As such, there would be scope to argue, in a removal context, that the risk of ill-treatment derives from the contributing role of states' authorities in exacerbating a disaster because of their failure to put in place preventive measures to protect against its foreseeable consequences. Equally relevant would be, for instance, an eventual state's denial or failure to seek international assistance for its population when confronted with a disaster.[762]

[758] McAdam, *Climate Change, Forced Migration, and International Law*, op. cit., p. 76 footnote 156; Scott, 'Natural Disasters, Climate Change and *Non-Refoulement*', op. cit., p. 422 ff.

[759] See McAdam, *Climate Change, Forced Migration, and International Law*, op. cit., p. 72.

[760] On which see *supra*, Chapter 1, para 5.2. ff.

[761] See *supra*, Chapter 1, para 3.1.

[762] These duties on the part of disaster-affected states have been affirmed in the ILC Draft Articles on the Protection of Persons in the Event of Disasters at Articles 11-17. Draft Article 11, in particular, states that: '[t]o the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to

As for the individual's vulnerability to the harmful impacts of disasters, it is to be noted that the ECtHR seems to have embraced an increasingly broad characterization of this notion.[763] While in *M.S.S. v. Belgium and Greece* the particular vulnerability of the applicant was anchored to his belonging to the group of asylum seekers,[764] in *Sufi and Elmi v. the United Kingdom* the vulnerable group concerned has been identified in the generality of persons faced with the direst consequences of the humanitarian crisis, which amounted to a total of two million people (more than a quarter of Somalia's population).[765] In such a situation, the applicants were not required to 'personalize' the risk of ill-treatment by demonstrating that they would be more at risk than the rest of the population, as the Court accepted that the existence of risk could be deduced purely from their presence in the refugee camps on account of the dire humanitarian conditions prevailing there.[766] Drawing a parallel from the context of Somalia as a 'failed state' to climate and disaster-affected states, it might, in principle, be possible to argue that environmental degradation and its effects have reached a point at which the mere presence of any individual in certain parts of the country, such as rural areas or other territories faced with a total lack or extremely difficult access to basic means of subsistence, would place them under a risk of ill-treatment. That being said, the extent to which a Court might be ready to determine whether the general situation of a given state has reached such a point so as to be considered a 'collapsed' state no longer able to protect its citizens in light of the overwhelming effects of climate change, is not fully clear.[767]

4. Concluding remarks

It has been observed that '[u]ntil there is serious curial consideration of the broader global forces that may trigger displacement, it is unlikely that protection on socio-economic

seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors', while Draft Article 13 highlights the obligation not to arbitrarily withhold consent to foreign aid.

[763] For further discussion on the ECtHR's approach to vulnerability, see V. Flegar, 'Vulnerability and the Principle of *Non-Refoulement* in the European Court of Human Rights: Towards an Increased Scope of Protection for Persons Fleeing from Extreme Poverty?', in *Contemporary Readings in Law and Social Justice*, 8(2), 2016, pp. 148-169; U. Brandl, P. Czech, 'General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?', in F. Ippolito, S. Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework*, Oxford, Hart Publishing, 2015, pp. 247-270.

[764] ECtHR, *M.S.S. v. Belgium and Greece*, para 251.

[765] ECtHR, *Sufi and Elmi v. the United Kingdom*, para 284.

[766] Ivi, paras 291-293.

[767] On this point, see Maneggia, '*Non-refoulement* of Climate Change Migrants', op. cit., pp. 640-641, who argues that such a 'declaration of uninhabitability' or 'State collapse' would need some form of global consensus, for instance through a determination of the General Assembly or the UNHCR upon consultation with expert bodies such as the IPCC.

grounds will be forthcoming'.[768] Although the review of ECtHR's cases that have touched upon the socio-economic dimension of Article 3 reveals that questions of basic human dignity, which lie at the heart of minimum essential levels of socio-economic rights protection, deserve attention as a matter of fundamental human rights, it is also evident that these cases reflect 'the Court's reluctance to take Article 3 duties too far into the socio-economic realm'.[769] This holds true also in respect to the HRC's views on *Teitiota*, which can be seen as the first real 'test bench' of the innovative and progressive approach undertaken by the HRC in its General Comment 36 regarding the right to life. In fact, although the HRC has clearly developed a broad understanding of this right, the extent to which the positive duty to protect applies also to the lives of persons subject to removal towards dire environmental conditions – specifically the point at which it may be so – is not yet fully clear.

That being said, it is undeniable that the *Teitiota* views has set a remarkable precedent by explicitly treating climate change and related threats as potential triggers of protection obligations on the part of sending states. The HRC's views have already had some echo at the domestic level: in a 2021 court order, the Italian Supreme Court, in deciding upon an appeal against the Tribunal's rejection of an applicant's claim to international and subordinately humanitarian protection, affirmed that, in light of the HRC's views, the threat to the right to life and to a dignified existence needs to be assessed in light of the environmental conditions in the country of origin, and that the impairment of these rights 'is substantiated in all cases in which the socio-environmental context is so degraded as to expose the individual to the risk of seeing his fundamental rights to life, liberty and self-determination reduced to zero, or in any case to see them reduced below the threshold of their essential and inescapable core'.[770] A similar case has also been decided by the German Higher Administrative Court of Baden-Wuerttemberg, which found a ban on deportation of an Afghan national on the basis of German immigration law in conjunction with human rights law. In particular, the Court took into account the environmental conditions prevailing in Afghanistan in order to assess the country's general situation, and found that in light of the existence of a humanitarian crisis, further exacerbated by the COVID-19 pandemic,

[768] McAdam, *Complementary Protection*, op. cit., p. 169.

[769] N. Mavronicola, 'What is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights', in *Human Rights Law Review*, 12(4), 2012, p. 757.

[770] Corte di Cassazione, ordinanza no. 5022 of 24 February 2021 (our translation). It should be noted that, according to the Court, these evaluations are relevant in respect to the accordance of humanitarian protection.

Germany was bound by a *non-refoulement* obligation flowing from Article 3 ECHR.[771] In this connection, it should be recalled that at the time of writing, a rather anxious waiting is surrounding the ECtHR's decision of the *Duarte Agostinho and Others v. Portugal and Others* case, regarding which the Court itself raised an Article 3 issue.[772] This decision will contribute to delineate the way in which environmental degradation, climate change and disasters relate to the prohibition of inhuman and degrading treatment, and will likely constitute a further incremental step for the evolutionary interpretation of human rights protection, including in respect to removal cases, in the context of a changing climate.

[771] VGH Baden-Wuerttemberg, judgement of 17 December 2020 – A 11 S 2042/20. For discussion on the case, see C. Schloss, 'Climate Migrants – How German Courts Take the Environment into Account when Considering *Non-Refoulement*', in *Voelkerrechtsblog*, 2021, available at https://voelkerrechtsblog.org/climate-migrants/.

[772] See *supra*, Chapter 1, para 3.3.

General Conclusions

A general observation that can be made at the end of this work is that the environment-migration nexus raises sensitive questions, oscillating between ethics and law. The anthropogenic basis of climate change, and the increasing impact of its effects on human societies, are a constant reminder of developed states' long history of environmental exploitation and uncontrolled GHG emissions to the detriment of local livelihoods in the world's poorest and less developed countries. In this perspective, it is evident that climate change 'is not a legally or ethically neutral environmental problem'.[773] Should this, as a matter of ethics and law, create a duty on the part of states who have so far benefited from the disruption of the climate system to help other less responsible and yet more affected countries to cope with such disruption? More specifically, if such a duty exists, should it also extend to individuals who have anticipated the worst effects of climate change by migrating, or who cannot or do not want to return to increasingly disaster-affected countries and worsening living conditions? In a 'climate justice' perspective,[774] these are issues raising fundamental instances of equality, sustainable development, and human rights universality; however, the international legal machinery provides only limited responses, which in turn is symptomatic of the difficulty to conceptually situate the environment-migration nexus within the framework of international law.

In the awareness of these difficulties and limits, the present work has attempted to assess and advance some hypothesis on the transformative capacity of the law, particularly in the area of international protection, in times of climate change and increased incidence of disasters. The 'historical disjuncture' between the birth of contemporary international human rights and refugee law on the one hand, and the rise of environmental and climate change concerns within the international legal system on the other, is at the root of the problems encountered in this attempt. At the same time however, as has been emphasized several times in this thesis, human rights norms have an inherent dynamic character, which in turn goes hand in hand with the 'living nature' of the instruments containing them. This crucial characteristic has been seen at work in respect to different issues addressed throughout this thesis: from the way in which human rights bodies have addressed the environmental dimension of human rights, to the progressive interpretations and consequent expansion

[773] M. Burkett, 'Book Review of *Migration and Climate Change* (Edited by Etienne Piguet, Antoine Pecoud and Paul de Guchteneire)', in *Climate Law*, 3(3), 2012, pp. 314-318.

[774] On which see, amongst many, C.G. Gonzalez, 'Racial Capitalism, Climate Justice, and Climate Displacement', in *Oñati Socio-Legal Series*, symposium on Climate Justice in the Anthropocene, 11(1), 2021, pp. 108-147.

occurred in the area of refugee and human rights-based protection. In this context of 'legal dynamism', further reflections on the interrelation between climate change, disasters, human rights and international protection arise.

On the basis of some key scientific findings on climate change and related humanitarian impacts outlined in the Introduction, Chapter 1 has sought to provide a general background on the legal regime governing the conduct of states in respect to global warming. It has been shown that, although mitigation and adaptation duties are firmly established within the climate change regime, the latter is fundamentally premised upon a voluntary-based system in which each state autonomously determines the measures to be undertaken in order to avoid and cope with dangerous interference with the climate system. Both because of the weak legal obligations flowing from the regime, and in consideration of its far-reaching implications, other substantive regimes, organs and bodies of international law have started to become increasingly engaged with climate change in an overarching attempt to find a 'solution' to this long-term systemic 'problem'. In this connection, it is not surprising that the UNSC, as the only international body with the legal authority to make binding decisions upon states and enforce them coercively, has been called by many actors to take action against this 'creeping crisis'.[775] However, as has been discussed, the climate-security nexus is still contested within both the UNSC's membership and conflict studies, which ultimately makes the 'securitization' of climate change problematic. It has been thus argued that a radical intervention of the part of the UNSC through the characterization of climate change itself as a threat to international peace and security does not appear at this stage likely. Indeed, climate change raises primarily threats to human security rather than to the security of states:[776] in this respect, the growing attention dedicated to the issue in the UNSC agenda, and the consideration of climate-related risks under the UNSC's mandate on conflict prevention, should be seen as a more appropriate approach – akin to a shift from the 'securitization' of climate change to the 'climatization' of security.[777]

In parallel to the 'securitization' of climate change, there has been an increasing process of 'environmentalization' of human rights: in this case, however, climate change has been integrated within the practice of the human rights system to a much greater extent, compared to the UNSC practice. Indeed, it has been argued that the encounter between environmental

[775] For more on this concept, see generally A. Boin, M. Ekengren, M. Rhinard (eds), *Understanding the Creeping Crisis*, Cham, Palgrave Macmillan, 2021.

[776] See C. Gray, 'Climate Change and the Law on the Use of Force', in Rayfuse, Scott, *International Law in the Era of Climate Change*, op. cit., pp. 219-243.

[777] As discussed *supra*, Chapter 1, para 2.

issues and human rights protection is slowly, but nonetheless tangibly, determining a 'transformative change' of the human rights regime. The clearest indications of this process may be identified in the appreciation and recognition of the right to a healthy environment both as an autonomous right and as a fundamental component for the enjoyment of other rights; in the broadened interpretation accorded to fundamental rights and in particular to the right to life; in the integration of environmental law principles into the interpretation of the scope of human rights obligations; and in the recognition of extraterritorial human rights obligations in respect to transboundary environmental harm linked to climate change. Taken together, these developments are in turn increasingly reinforcing state obligations in respect to climate change, while simultaneously delineating with growing nuances the application of human rights norms in the context of environmental degradation and disasters.

In bridging the gap between these two branches of law, the first part of Chapter 1 has provided a sound legal basis that paves the way for consideration of the implications of climate impacts upon forced migration. It has in fact been made clear that, because climate change engenders human rights harms, the idea of situating the environment-migration nexus within discussions involving protection from such harms is not unreasonable. Indeed, as has been outlined, this understanding has been accepted by a number of actors within the human rights system, and is also indirectly reflected in the Global Compacts on Refugees and on Migrants. In analyzing these two instruments, we have started to introduce the concept of international protection, evidencing that, while refugees and migrants are two distinct categories also in terms of their treatment under international law, states' protection obligations extend to every person who would be at risk of serious harm upon removal. This begs the question of the circumstances upon which international protection needs may arise in the context of environmental degradation and disasters. Indeed, while it is undisputed that climate change hinders the enjoyment of human rights for several individuals, it would simply be unrealistic and legally flawed to argue that any person migrating because of the difficult environmental conditions experienced in the country of origin should be entitled to international protection and the rights attached to it. It is in this connection that the notion of disaster appears the most appropriate for teasing out the dynamics underpinning root causes of vulnerability, human rights detriment, and compelled movement.

When considered under the lens of disaster vulnerability, the relevance of international protection and related legal frameworks becomes more apparent under at least two aspects. Firstly, the disaster perspective helps to shift the focus from a vague recognition that climate change has negative effects on human rights, to a more in-depth representation of the way

in which preexisting vulnerabilities, including in terms of human rights deprivation, are exacerbated by climate and disaster impacts. Secondly, the social dimension of disasters is emphasized and becomes instrumental in displacing the idea that disasters are forces of nature that indiscriminately impact upon all individuals in a given community. These aspects are crucial to situate the environment-migration nexus within the international protection regime in respect to the protection accorded by both refugee and human rights law.

Chapter 2 and 3 represent the heart of the enquiry in that they have sought to explore whether the norms and principles governing the law of forced migration are in any way being affected by the progressively changing dynamics of displacement. We have started our examination by considering first the refugee protection regime, both at the international and at the regional level. Refugee law is often blamed for its narrowness and related incapacity to respond to 21st century population movements, and many scholars have often emphasized this inadequacy precisely in respect to 'environmental refugees'. Of course, there is some truth in such observations, not least in light of the simple fact that the Refugee Convention was the result of a 'compromise between the sovereign prerogative of states to control immigration and the reality of coerced movements of persons at risk'.[778] The refugee definition was instrumental in achieving this compromise, crystallizing a representation of refugeehood anchored to a number of requirements and characteristics. At the same time however, in assessing the applicability of the refugee definition to 'new' categories of forced migrants, 'to insist that the problem is purely one of positive law is to insist also that the refugee is reduced to a legal construction'.[779] This observation is instructive in shedding light on the fact that refugeehood is not a static condition the features of which can expected to be captured by an equally static interpretation of what constitutes a refugee under international law. Indeed, notwithstanding its boundaries, the refugee definition has proved capable of being reshaped and adapted to forms of displacement not reflecting the 'refugee identities' identified at the moment of the definition's drafting, which in turn confirms the ongoing relevance of refugee instruments. When confronted with displacement in the context of climate change and disasters, refugee law judges have started to accept, in principle, the applicability of the Refugee Convention, and have recently shown significant engagement with the issues relating to disasters, environmental degradation, vulnerability and international protection needs. Similar dynamics have been emerging at the regional level, where a (small) number of states have applied regional refugee law in cases where the

[778] Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', op. cit., p. 133.
[779] Thornton, 'Climate Change, Displacement and International Law', op. cit., p. 155.

effects of disasters were considered a contributing factor to the accumulation of a series of dangerous conditions triggering the need of protection.

If the refugee regime's transformative capacity in times of climate change is only starting to emerge to a very limited extent, the scope of international protection beyond such regime arguably reflects greater prospects of evolution. On the one hand, developments within the notion of temporary refuge demonstrate increasing acceptance of a broadened understanding of 'persons in need of international protection', which often include individuals displaced in the context of disasters. As has been shown, temporary refuge from disasters is quite well-established in some regional practice, even though the extent to which such practice reflects a regional customary rule is still questionable. On the other hand, most notably, complementary protection under human rights law appears to be going through a particularly dynamic moment. The HRC's views on the *Teitiota* case have arguably broken new grounds for climate litigation in the area of *non-refoulement*, environmental degradation and other adverse climate change impacts. It cannot be ignored that the HRC has set a very high threshold, indicating that state protection obligations in such contexts would be triggered in the harshest situations. As has been argued, here is where the most problematic aspects of protection claims based on environmental pressures arise, which overall reflect a yet unresolved dilemma between the reach of *non-refoulement* obligations as a positive duty to protect, and the implications that such a broadened construction of state protection obligations would determine. This has also been seen in respect to the ECtHR's case-law on Article 3 and seriously-ill migrants, where the Court appears to be in the difficult position to exercise a careful balance between the urgency to uphold basic humanitarian principles flowing from the spirit of the Convention, and the need not to stretch too far the potentially broad scope of protection deriving from Article 3.

The legal dimension of the environment-migration nexus is clearly under a process of increasing construction and development. The precise contours of this process, and the future possible evolution of the international protection regime in times of climate change, is however yet to be seen: whether innovative interpretations will consolidate, leading to further expansion of the scope of international protection, will necessarily need to be explored by future research. What can not unreasonably be observed for the time being is that the embryos for progress are already, albeit slightly, visible.

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