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Climate change, environmentally displaced persons and post-sovereignty: an assessment of normative gaps and potential solutions in international law

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Climate Change, Environmentally Displaced Persons and Post-sovereignty:
An Assessment of Normative Gaps and Potential Solutions in International Law

A Thesis
Presented in
Partial Fulfillment of the
Requirements for the Degree of
Master of Arts

November, 2019

BY
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Table of Contents

<i>Introduction</i>	3
<i>1. Environmentally Displaced Persons</i>	9
1.1 Features of Environmentally-related Displacement.....	10
1.2 Socio-environmental Vulnerability and Climate Change.....	16
1.3 Environmental and Climate Justice.....	20
1.4 Terminologies and Concepts	23
<i>2. The Existing Regulatory Gaps in International Protection</i>	29
2.1 Why Not Refugees?	30
2.2 The General Contribution of International Human Rights Protection Instruments	34
2.3 Toward a Specific Human Rights Approach	38
2.4 The Link Between the Normative and Policy Protection Gap and State Sovereignty.....	42
<i>3. International Legal Protection for Environmentally Displaced Persons: Current and Upcoming Initiatives</i>	49
3.1 Current Promising Initiatives at the Global Level.....	50
a. 2013 Mechanism for Loss and Damage	52
b. 2012 Nansen Initiative	53
c. 2016 New York Declaration	55
3.2 Treaty Law and the Normative Foundation for the International Protection of Environmentally Displaced Persons.....	57
3.3 A New Global Treaty: The Construction of a Binding-based Protection	61
3.3.1 Draft Convention on the International Status of Environmentally Displaced Persons.....	63
3.4 Re-conceptualizing the Traditional Sovereignty Paradigm.....	72
<i>Conclusion</i>	76
<i>Bibliography</i>	80

Introduction

The twenty-first century has been experiencing an increase in a type of migration that occurs since the very beginning of human history, but which for legal and political purposes, is considered new in the proportions that have been presented currently, the emergence of environmentally displaced persons.¹ The issue of human displacement due to environmental factors is complex mainly because of the scope of the topic, the current global context, and the speed with which environmental issues have influenced human migrations. This broad topic involves internal and international displacements triggered by environmental issues, with causes that may be natural, anthropogenic or the combination of both, from sudden events or gradual processes of environmental degradation and whose consequences may be temporary or permanent. In addition, it is necessary to consider that this is a multicausal phenomenon, even if the environmental element plays a preponderant role as a displacement factor, this feature hardly appears in isolation, but rather interacts with other economic, cultural and social aspects capable of interfering in the decision of the migratory movement.

It is commonly assumed that forced migrations due to environmental causes are characterized by temporary and short-lived situations, in which individuals can return home after the risk is over. In many cases, this applies. However, it is not the reality of a part of displacements resulting from climate change. While events such as hurricanes and earthquakes present themselves as abrupt processes with short-term return possibilities, desertification, chemical contamination, and rising sea levels can pose obstacles to survival conditions in a given location for months, years to come or even the utter impossibility of return.

The environment-migration nexus pose an unquestionable reality. Additionally, the process of climate change presents itself as a complex and intense dynamic, mainly due to the massive action of human interference on the earth's ecosystem. These transformations have economic, political, and mainly social consequences. One of the most relevant issues in this context is centered on the increase in the number of individuals forced to move because of the impossibility of inhabiting certain areas due to natural and anthropogenic environmental degradation. Accordingly, it is

¹ There is no internationally accepted terminology for individuals or groups who have had to relocate or migrate because of environmental changes. In this thesis, the term "environmentally displaced persons" will be used to define this category of people. The issue will be addressed in more detail in the first chapter of this study.

acknowledged that one of the main impacts of climate change will be on human mobility.² Climate change and migratory flows resulting from this phenomenon render the challenge of dealing with new international cross borders situations that encompass contemporary human rights issues.

It is estimated that about 20 million people are displaced from their homes each year due environmentally-induced disasters.³ In 2018, it corresponded to sixty-one percent of all new displacements recorded, a total of 17.2 million people.⁴ Projections made by numerous international organizations point to an ever-growing trend, as environmentally-induced displacement is likely to become one of the greatest humanitarian and potentially existential challenges of the twenty-first century.⁵ From a worst-case-scenario perspective, it has been estimated that by around 2050 more than 200 million people will be displaced due to climate change, extreme weather conditions, rising sea levels, declining water supplies, and agricultural land degradation.⁶ Most of them will be from poor or less democratic countries in Asia and Africa and will amount to around two percent of the total world's population.⁷ Once these expectations are confirmed, there will be a much larger number of environmentally displaced persons than the sum of any other displaced group. This alarming situation occurs while it is witnessed the highest

² Simperingham, Ezekiel. "State responsibility to prevent climate displacement: The importance of housing, land, and property rights." In: *Climate Change, Migration, and Human Rights: Law and Policy Perspectives*, edited by Dimitra Manou and Anja Mihr. (London: Routledge, 2017), p. 87.

³ According to data of United Nations High Commissioner for Refugees. Available at: <<http://www.unhcr.org/pages/49c3646c10a.html>> Accessed May 08, 2019. Numbers correspond to internally displaced persons in the context of environmental disasters and climate change.

⁴ Comprehensive records on environmental displacement are practically non-existent at the international level and the most complete information available only track newly internal environmentally displaced persons each year; Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), "Global Report on Internal Displacement" (2018), p. 6. Available at: <<http://www.internaldisplacement.org/sites/default/files/publications/documents/2019-IDMC-GRID.pdf>> Accessed May 10, 2019.

⁵ Simperingham, "State responsibility to prevent climate displacement," p. 86; Nansen Initiative. "Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change" (2015), p. 14. Available at: <<https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>> Accessed May 08, 2019.

⁶ Laczko, Frank, and Christine Aghazarm. "Migration, Environment, and Climate Change: Assessing the Evidence." (Geneva: IOM, UNU, and Institute for Environment and Human Security, 2009), p. 5, 9; Rigaud, Kanta Kumari, Alex de Sherbinin, Bryan Jones, Jonas Bergmann, Viviane Clement, Kayly Ober, Jacob Schewe, Susana Adamo, Brent McCusker, Silke Heuser, Amelia Midgley. "Groundswell: Preparing for Internal Climate Migration." (Washington, DC: World Bank, 2018). Available at: <<https://openknowledge.worldbank.org/handle/10986/29461>> Accessed May 08, 2019.

⁷ Mihr, Anja. "Climate justice, migration, and human rights." In: *Climate Change, Migration, and Human Rights*, p. 52.

levels of displacement on record. An unprecedented 70.8 million people around the globe have been forced from home,⁸ and nearly one person is forcibly displaced every two seconds.

The issue of environmentally-induced displacement addresses complex and pressing challenges at both national and international levels. Despite this complexity, the issue is considered a problem beyond the focus of the international agenda. Negotiations that comprise global environmental initiatives are almost exclusively limited to the control of greenhouse gas emissions, temperature increase, and economic aspects of the problem. The human dimension of climate change is little explored in international fora. As a result, the international system response to the challenges of environmentally displaced persons remains grounded in Ad Hoc alternatives to mitigate the consequences of these migratory flows. Hence, these solutions respond only – and often partially – to circumstances in which there is a possibility of a return. In the case of permanent environmental degradation events, the international system is very resistant to putting in place the creation of a normative protection arrangement. As there is currently a complete absence of any international protection framework, environmentally displaced persons remain subject to restrictive state migration laws and all sorts of human rights violations.

While the United Nations and national governments have begun to recognize that climate change and its consequences do have an impact on human mobility, as well as to organize examinations for a more in-depth discussion on the issue, there is no concrete alignment about the appropriate commitments that should be adopted by states and international organizations to address this problem. Thus, one of the most significant difficulties in this debate is to make the human dimension a priority, since economic and political interests are directly involved. Addressing the challenges posed by climate change without considering the social and human consequences do not seem reasonable, as the issue of human mobility in this context will eventually have to be confronted.

Moreover, it is essential to identify the basis for the construction of a specific protection system that formally recognizes an international legal status for environmentally displaced persons. This will require new institutional strategies, different forms of cooperation, and long-term commitment, as existing international legal mechanisms and instruments are not sufficient to meet this new global demand. Nonetheless, due to the complexity of this debate, no consensus has yet

⁸ UNHCR. “Global Trends: Forced Displacement in 2018.” Available at: <<https://www.unhcr.org/globaltrends2018/>> Accessed May 10, 2019

been reached on a possible definition of responsibilities for states and competencies for international organizations dealing with migration, refugee, human rights and environmental issues.

Also, the environmental causes or pressures that induce displacement comprise a much larger domain than climate change and are often associated or exacerbated by non-environmental factors, which makes the investigation even more complex. Therefore, the complexity of this matter goes beyond the capacity of existing international instruments and active multilateral bodies to deal with this issue, which includes its multiple dimensions as well as the protection of human rights and the affected environment. Thus, the solution to the problem depends on coordinated responses based on international cooperation. These responses should establish standards of protection and rights for environmentally displaced persons to bridge the existing regulatory gap, taking into account specific vulnerabilities and human rights violations. Such protection is the core argument that inspires and permeates the accomplishment of the present work. Additionally, the focus will be primarily on the nexus of human-induced climate change and displacement as well as internationally environmentally displaced persons, since internal displacements, because they are under the support of domestic jurisdiction, require from the international community mainly actions of humanitarian cooperation.

Regarding the methodological aspect of the thesis, its primary method of data gathering was based on archival research. Thus, the understandings of the most qualified specialists on the theme has been utilized, as found in official publications from international organizations, books, articles, and publicly available studies and reports. These archives are essential to delineate the phenomenon of environmentally displaced persons and to identify the need for specific international protection. Therefore, the thesis builds on a critical review of the relationship between environmentally-induced displacement and the legal gap in international migration law. Moreover, it has been employed an interpretative perspective, as a way to comprehend the issue through an interdisciplinary approach. All the assessment is based on reflective, qualitative, and quantitative analysis of the problem.

Furthermore, the thesis examines relevant international mechanisms to show how approaches to natural and anthropogenic climate change and disaster-related mobility are evolving in more formal contexts. Concerning research sources on international law, the consultation of treaties, conventions, protocols, and other documents of international instruments have been crucial.

Through this method, the thesis evaluates contemporary international law and analyzes whether it offers adequate protection for environmentally displaced persons. Following this examination, it is addressed the question of how international law should be adapted in order to protect environmentally displaced adequately.

The arguments defended in this thesis, therefore, utilize the sources of international law, that is, the very bases of the discipline to verify existing possibilities of an international protection system for environmentally displaced persons under international law. The materials selected are established primary sources, especially Treaty Law. Thus, by examining scholarly, legal, and political literature around traditional debates on the topic, the nexus between environmental degradation, human mobility and its complexities can be understood thoroughly.

The thesis structure is composed of three chapters, which aim to demonstrate the complexity and extent of the challenge to be faced. Chapter 1 describes and discusses the general features and magnitude of environmentally-induced displacement. It specifically focuses on the problem of the high-level socioeconomic vulnerability faced by most people displaced due to environmental reasons as well as the role that environmental and climate justice play to determining the urgent need for international protection. Moreover, this chapter reviews several different perspectives among researchers concerning the definitions and terminologies employed for individuals displaced due to environmental-related issues. As will be exposed, the lack of a universal definition represents a significant gap. Additionally to evaluating the complexity of defining environmentally-induced displacement, and the distinct approaches towards it, the study emphasizes “environmentally displaced person” as the most appropriate term to conceptualize this specific group of people, and consequently, also the term that will be used throughout the thesis. Chapter 2 begins with a reflection about the non-allocation of environmentally displaced persons in the UN Refugee Convention. It will be clarified why extending the scope of the 1951 Refugee Convention is neither an adequate nor effective approach to deal with the issue. Furthermore, this chapter analyses the gaps and limitations of contemporary international law that directly relates to environmentally-induced displacement. Notably, international human rights law will be assessed in further details, and the current limitations in its application and protection will be considered. Additionally, the study will examine to what extent the power of sovereignty in the international system has been used as a justification by many states for exempting themselves from human rights responsibilities.

The third and last chapter assesses possible means of filling the gaps identified in the study through current and future international instruments. The first section focuses on three relevant global initiatives to the future of environmentally-induced displacement. These new global developments could constitute the first step towards more widespread international efforts, especially on building consensus about a protection agenda. Additionally, it is reviewed the capacity of new legal frameworks to address the needs of people displaced in the context of environmental disruptions and climate change. It is also suggested ways in which international law might be progressively adapted to this new demand and the role of international treaty law in this process, as it can provide a solid foundation for building lasting alternatives. In order to address the existing international legal vacuum on the issue, the formulation of a specific legally binding convention on the rights of environmentally displaced persons will be further discussed. Finally, the last section seeks to challenge the traditional role of state sovereignty in an increasingly interdependent world.

From a critical and multidimensional view of the problem, this study intends to present essential tools to assist the various actors involved in the challenge of building an international legal protection system for environmentally displaced persons, filling thus an essential gap in international law currently.

This thesis was produced as a contribution to advance current debates on the topic, as well as to promote its dissemination and better understanding. Also, it is expected to contribute to raising awareness to the importance and urgency of the need to seek means of prevention and lasting solutions to environmentally-induced displacement, in order to ensure adequate and sufficient levels of protection for those human beings affected by this form of displacement.

1. Environmentally Displaced Persons

Environmentally displaced persons are individuals or groups who are forced to migrate to other regions of their country or to other states, temporarily or permanently, in a situation of vulnerability due to natural or anthropogenic environmental reasons, of sudden or slow-onset changes that – associated with various other factors (i.e., economic, political and social) – have threatened their lives or made it unsustainable.⁹ Nevertheless, there are numerous different approaches and concepts for this group of migrants. This is because even if a given environmental event becomes the main driver of a migratory movement, environmental disruptions are not necessarily the only reason why people relocate to other areas inside or outside their countries of origin.¹⁰ Indeed, people rarely migrate for a single reason.¹¹ Environmentally-induced migration is an indirect relationship that usually involves a complex combination of other factors, such as population growth, environmentally unsustainable development, lack of alternative economic opportunity, political repression, conflict over resources (e.g., access to land and water), among others.¹² Also, the decision to move has to be analyzed in the context of viable options, which depend, inter alia, on individual, social and even cultural capacity to cope with and adapt to environmental distresses. This large number of variables makes it challenging to adopt a concept with reasonable explanatory power, as well as to develop more qualitative studies that can contribute to the expansion of legal and political responses that effectively meet the needs of environmentally displaced persons.¹³ Furthermore, it is difficult to isolate the impact of anthropogenic climate change from other natural environmental factors that may also cause migration, such as some cases of soil degradation or a major adverse event resulting from natural processes.¹⁴ Thus, among the reasons that can trigger environmentally-related displacements, both natural and anthropogenic causes stand out.

⁹ Definition created by the thesis' author based on other definitions presented in this study.

¹⁰ Black, Richard, W. Neil Adger, Nigel W. Arnell, Stefan Dercon, Andrew Geddes, and David Thomas. "The effect of environmental change on human migration." *Global Environmental Change* 21, no. 1 (2011), p. 21.

¹¹ Stojanov, Robert. *Development, Environment and Migration: Analysis of Linkages and Consequences*. (Olomouc: Palacky University, 2008), p. 124.

¹² Manou, Dimitra and Anja Mihr. *Climate change, migration and human rights: Law and Policy Perspectives*. (London: Routledge, 2017), p. 3.

¹³ Mayer, Benoit. "Critical perspective on the identification of 'environmental refugees' as a category of human rights concern." In: *Climate Change, Migration and Human Rights*, edited by Dimitra Manou and Anja Mihr. (London: Routledge, 2017), p. 29.

¹⁴ Zetter, Roger. "Protecting People Displaced by Climate Change: Some Conceptual Challenges." In: *Climate Change and Displacement: Multidisciplinary Perspectives*, edited by Jane McAdam. (Oxford: Hart Publishing, 2010), p. 138.

1.1 Features of Environmentally-related Displacement

Currently, many environmental issues can be accountable for displacement. They are usually categorized according to temporal dynamics. Accordingly, anthropogenic environmental events that may influence human mobility are distinguished between slow and sudden-onset environmental changes. The category of slow-onset environmental degradation is usually represented by environmental processes that develop gradually as well as interact and are driven by human activities. The causes of slow-onset changes related to anthropogenic-induced climate change would be rising sea levels, increased salinization of groundwater and soil, progressive effects of recurrent flooding, thawing of permafrost, droughts and desertification or other forms of reduced water resources.¹⁵ Norman Myers points to the existence of about 135 million people threatened by severe desertification and 550 million people facing chronic water shortages in developing countries.¹⁶ On the other side of the spectrum, rising sea levels threaten some Small Pacific island countries – such as Kiribati, Maldives, and Tuvalu – with the possibility of complete disappearance in just a few decades.¹⁷ This phenomenon has also affected the population of Bangladesh, where annual floods from monsoon rains have been shifting to an ever-increasing scope and duration.¹⁸

The second category, designated as sudden-onset disasters or rapid-onset environmental changes, is usually represented by natural processes that develop rapidly as well as interact and are driven by anthropogenic activities. Among the causes of rapid-onset changes to the climate are flooding, windstorms, landslides, dry mass movements, and extreme temperatures. This type of environmental change can trigger large human displacements and result in enormous economic costs.¹⁹ Additionally, there is evidence that directly relates rapid-onset environmental disasters, such as the hurricane Harvey in Houston, occurred in August 2017, with anthropogenic climate change and global warming. Scientist Michel Mann claims that anthropic activities influence the

¹⁵ Kalin, Walter and Nina Schrepfer. “Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches.” (UNHCR, 2012), p. 14.

¹⁶ Black, Richard. “Environmental refugees: myth or reality?” *New Issues in Refugee Research* 34, (University of Sussex, 2001), p. 610; Stojanov, *Development, Environment and Migration*, p. 131.

¹⁷ Kalin and Schrepfer, “Protecting People Crossing Borders,” p. 15.

¹⁸ Kelman, Ilan. “Island evacuation.” *Forced Migration Review* 31 (2008), p. 20.

¹⁹ Kalin, Walter. “Conceptualising Climate-Induced Displacement,” In: *Climate Change and Displacement. Multidisciplinary Perspectives*, edited by McAdam, Jane. (Oxford: Hart Publishing, 2010), p. 85.

worsening of extreme weather events, asserting that in the case of Hurricane Harvey, the unusual rising of temperature on the maritime surface in that region increased the humidity of the air.²⁰ Moreover, he states that “there is a thermodynamic relationship known as the Clausius-Clapeyron equation that tells us there is a roughly 3% increase in average atmospheric moisture content for each 0.5C of warming,” this vast amount of moisture has the potential to create very intense rains and floods. Thus, the combination of heavy rains and coastal flooding caused the calamity in Houston, one of the several harmful results of global warming.

Furthermore, in recent decades there has been a considerable increase in the annual frequency and intensity of natural disasters across the globe. Just in the last three decades, the number of natural disasters has doubled from 200 to over 400 per year and keep increasing.²¹ If this scenario persists, the number of communities at risk will grow and, given the scarcity of natural resources and the difficulty of providing livelihoods as a result of environmental disasters, these populations will be severely prone to mass displacement.

In the figures below it is presented the significant intensification of natural disasters in the past century as well as how human activities are drastically influencing the growing amounts of environmental disruptions for the past 50 years:

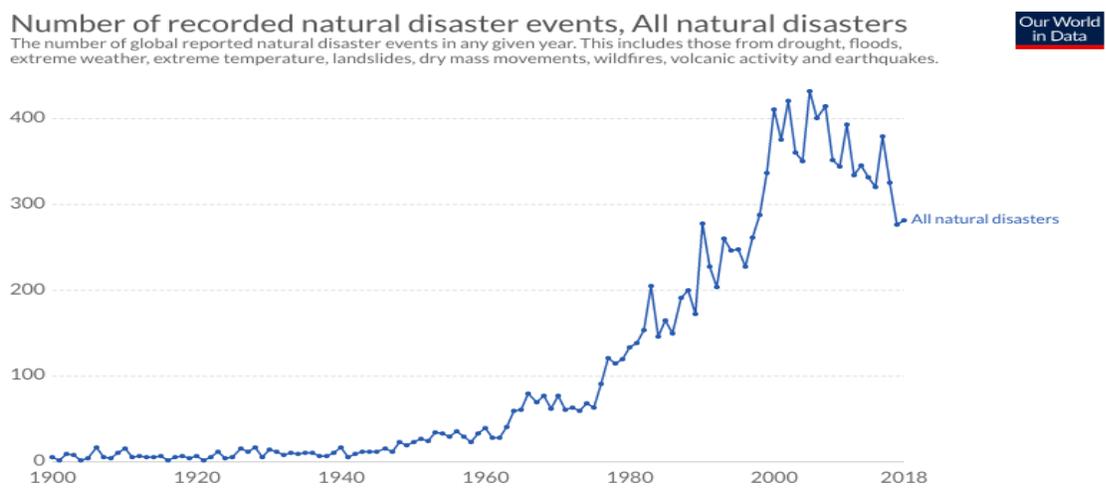


Figure 1 – Number of all natural disasters since 1900.

Source: EMDAT (2019): OFDA/CRED International Disaster Database (Université catholique de Louvain, Brussels, Belgium)

²⁰ Mann, Michael. “It’s a fact: climate change made Hurricane Harvey more deadly.” *The Guardian*. August 28, 2017. Available at: <<https://www.theguardian.com/commentisfree/2017/aug/28/climate-change-hurricane-harvey-more-deadly>> Accessed May 20, 2019.

²¹ IFRC. (Geneva, 2015), p. 220; EMDAT: OFDA/CRED. “International Disaster Database.” (Université catholique de Louvain, Brussels, Belgium, 2019). Available at: <<https://ourworldindata.org/natural-disasters>> Accessed May 20, 2019.

Global reported natural disasters by type

The annual reported number of natural disasters, categorised by type. This includes both weather and non-weather related disasters.

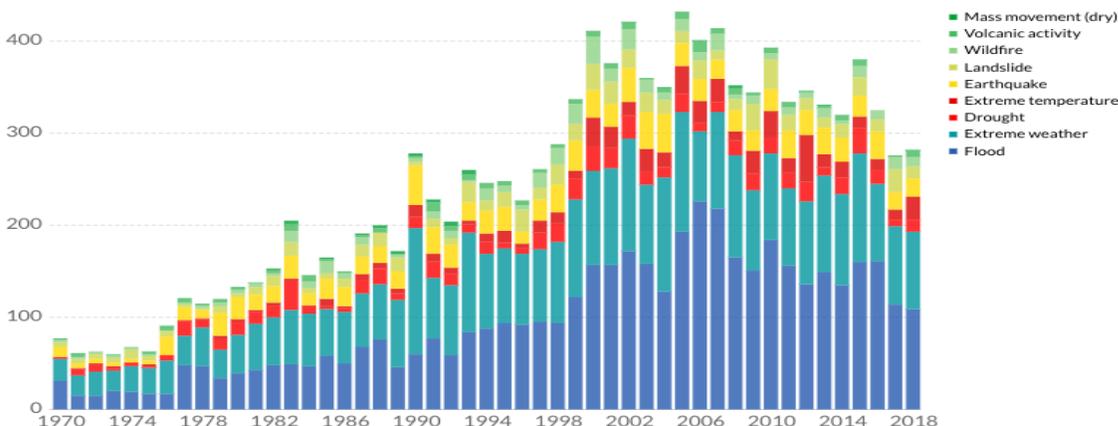


Figure 2 – Global reported natural disasters by type.

Source: EMDAT (2019): OFDA/CRED International Disaster Database (Université catholique de Louvain, Brussels, Belgium)

In addition to the speed of environmental change itself, environmentally-induced displacement involves different variables, such as: forced or voluntary, permanent or temporary, and internal or cross-border migration. In the case of environmentally displaced persons, depending on the combination of these variables, individuals can fit into different migration profiles and might be guaranteed, or not, the protection of their fundamental rights, as will be discussed in more detail later on this chapter. In the Table below the different variables within this type of displacement can be grasped:

Table 1

SCENARIOS	PROCESSES	MOVEMENTS	TYPE OF EDP
Sudden-onset environmental changes	<ul style="list-style-type: none"> - Flooding; - Windstorms; - Landslides; - Dry mass movements; - Extreme temperatures. 	<ul style="list-style-type: none"> - “Voluntary” and forced; - Temporary (most cases) or permanent; - Internal displacement (most cases) and cross-border migration. 	<ul style="list-style-type: none"> - Internally displaced (usually protected by IDP guidelines); - International migrant (unknown legal status).
Slow-onset environmental changes	<ul style="list-style-type: none"> - Rising sea levels; - Increased salinization of groundwater and soil; - Progressive effects of recurrent flooding; - Thawing of permafrost; - Droughts and desertification. 	<ul style="list-style-type: none"> - “Voluntary” and forced (extreme cases); - Temporary or permanent; - Internal and cross-border displacement. 	<ul style="list-style-type: none"> - Internally displaced (extreme cases of degradation); - International migrant (unknown legal status).

Two subcategories linked to the speed of environmental changes can be established to distinguish the variability of these movements. The first one is related to sudden-onset disasters or degradation that is in an advanced stage and which renders a region uninhabitable.²² This type of change generally results in forced and permanent movements, since the displacement in a specific geographic area occurred against the population's will and, in general, as a mean of ensuring their own survival.²³ In the case of sudden-onset disasters, it is easier to perceive the climate event as the cause of displacement,²⁴ and thus easier to categorize those people as environmentally displaced.

The second subcategory is related to cases of disasters and degradations that are still in the initial stage – also more complex to analyze than the first case. In this group, individuals may choose to migrate “voluntarily” inside or outside their country as a way of adapting to environmental changes and also to seek better economic opportunities and quality of life – conditions that have been shaken by environmental changes in their region of origin. Here the term “voluntary” is relatively tricky, since the distinction between forced and voluntary movements in the case of environmentally-induced displacement is rather controversial. Although some authors²⁵ consider that this type of movement can be voluntary, when the individual chooses to migrate because of environmental changes before the situation becomes despairing, there is a perception among other political leaders, humanitarian agents and researchers that environmental issues absolutely force migration.²⁶ Indeed, it is difficult to imagine a case where the migrant decides to leave voluntarily based primarily on environmental factors that threaten their lives.

Nevertheless, as described earlier, migration is a multi-causal phenomenon. Even when the environment is the major driver of displacement, it is normally influenced by social, economic, and political factors. Accordingly, Norman Myers points out the difficulty in establishing a line between migrants for environmental reasons and those who migrate for economic causes.²⁷

²² E.g., permanent desertification, flooding of coastal areas, among others.

²³ Zetter, “Protecting People Displaced by Climate Change,” p. 140; Williams, Angela. “Turning the Tide: Recognizing Climate Change Refugees in International Law.” *Law & Policy* 30, no. 4, (2008): 502-529.

²⁴ Keane, David. “The Environmental Causes and Consequences of Migration: a search for the meaning of ‘environmental refugees’.” *The Georgetown International Environmental Law Review* 16, (Washington DC, 2004), p. 214-215.

²⁵ Kalin, Walter. “Conceptualising Climate-Induced Displacement,” p. 85.

²⁶ Zetter, “Protecting People Displaced by Climate Change,” p. 140; Williams, “Turning the Tide”, p. 504.

²⁷ Myers, Norman. “Environmental Refugees: An Emergent Security Issue.” (13th Economic Forum, Czech Republic, Prague, May 23-27, 2005). Available at: <<https://www.osce.org/eea/14851?download=true>> Accessed May 21, 2019.

Stephen Castles also discusses the obscurity of the differentiation between forced and economic migrants and emphasizes that, while governments particularly want to make a clear distinction between them, many individuals are forced to leave their homes and families due to mixed motivations.²⁸

Thus, the difficulty arises primarily in cases of slow-onset environmental degradation, in which other socioeconomic factors are considered to potentially influence the choice for relocation. In situations of slow-onset changes, migration can be considered environmentally induced when, among all the elements of influence, the environmental aspect is the decisive factor.²⁹ However, it is recognized that this assumption is sometimes challenging to prove. Thus, in order to differentiate between environmentally displaced persons and political or economic migrants, Frank Biermann and Ingrid Boas identify four distinctive aspects to environmentally-induced displacement:³⁰ (i) EDPs are unable to return to their homes; (ii) are likely to migrate in large numbers and collectively, (iii) are predictable, since the need to move as a result of environmental impacts in certain areas is evident. Lastly, (iv) they have the moral right to assistance from industrialized countries that historically have emitted greenhouse gases³¹ which directly triggered climate change and global warming.

Additionally, there is a consensus among many researchers that the vast majority of people who have lost their homes or livelihoods due to environmental disasters remain within the borders of their own country,³² and can, therefore, be classified as internally displaced persons. This group is covered by The Guiding Principles on Internal Displacement which incorporates nation-state's

²⁸ Castles, Stephen. "Confronting the Realities of Forced Migration." (Migration Policy Institute, 2004). Available at: <<https://www.migrationpolicy.org/article/confronting-realities-forced-migration>> Accessed May 22, 2019.

²⁹ Renaud, Fabrice, Janos J. Bogardi, Olivia Dun, and Koko Warner. "Control, adapt or flee: how to face environmental migration?" *InterSecTions*, no. 5 (2007), p. 25.

³⁰ Hodgkinson, David, Tess Burton, Heather Anderson and Lucy Young. "The hour when the ship comes in: A Convention for Persons Displaced by Climate Change." *Monash University Law Review* 36, no. 1 (2010), p. 10.

³¹ A greenhouse gas absorbs and emits radiant energy within the thermal infrared range. The primary greenhouse gases in Earth's atmosphere are water vapor, carbon dioxide, methane, nitrous oxide, and ozone. Greenhouse gases cause the greenhouse effect, a process that occurs when gases in Earth's atmosphere trap the Sun's heat. This process makes Earth much warmer than it would be without an atmosphere.

³² Biermann, Frank and Ingrid Boas. "Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees." *Global Environmental Politics* 10, no. 1 (The MIT Press, 2010), p. 66; Kalin, "Conceptualising Climate-Induced Displacement," p. 86-88; Hodgkinson et al., "The hour when the ship comes in," p. 13; McAdam, Jane. "Swimming Against the Tide: why a climate change displacement treaty is not the answer." *International Journal of Refugee Law* 23, no. 1 (2011), p. 5; Simonelli, Andrea. *Governing Climate Induced Migration and Displacement: IGO Expansion and Global Policy Implications*. (London: Palgrave Macmillan, 2016), p. 50; Ferris, Elizabeth. "Governance and climate change-induced mobility International and regional frameworks." In: *Climate Change, Migration and Human Rights*, edited by Dimitra Manou and Anja Mihr. (London: Routledge, 2017), p. 19.

sovereign responsibilities and obligations to protect internally displaced populations in its territory. Nevertheless, both slow and sudden-onset disasters can result in human displacement across international borders. This movement occurs when this is the only escape route encountered by individuals, because the protection and assistance capabilities of their own country are entirely running out, or even because they choose to leave their country solely in the hope of finding better protection and assistance in another state.³³ In this case, the legal status of these individuals is uncertain and, consequently, it culminates on them depending on the generosity of destination countries.

Particularly, a few states, such as Sweden, do have in their domestic law devices that provide protection to migrants based on environmental factors.³⁴ However, generally these legal texts exclude situations of slow-onset environmental degradation that would not qualify as disasters, and grants protection only to victims of sudden large-scale events.³⁵ In addition, this type of protection is in principle temporary. Other governments, for humanitarian reasons, have allowed these group of people to remain in their territories until the situation in the country of origin once again brings security and dignity back to their citizens. One of the examples of this practice is the humanitarian visa.³⁶ However, this Ad Hoc practice of complementary humanitarian protection has not been uniform because it has not yet been recognized internationally and, consequently, many of these people may end up in a legal and operational limbo.³⁷ Walter Kalin points out that, in some rare cases, environmentally displaced persons resulting from sudden-onset disasters might qualify as refugees. This may occur, for instance, when individuals cross international borders

³³ Kalin, "Conceptualising Climate-Induced Displacement," p. 87.

³⁴ Sweden's immigration law in its Chapter 4, Section 2, paragraph 1, point 3 expressly qualifies people who "cannot return to his or her homeland because of an environmental disaster" as "persons in need of other protection." However, even temporary residence visas for environmentally displaced persons are subject to restrictions. According to Chapter 5, Section 25, paragraph 1 of the law, the Swedish Government has the right to prohibit the granting of temporary residence permit to environmental displaced persons if there is an inability of the state to receive more foreigners.

³⁵ McAdam, Jane. *Climate change displacement, and international law: complementary protection standards*. (Geneva: UNHCR, 2011), p. 41.

³⁶ Humanitarian visas are granted by some states to fulfill their international obligation to protect migrants from persecution. The 1951 Refugee Convention is often used as the main criteria in assessing whether or not there is a legitimate claim for protection; The Finnish Aliens Act 301 from 2004 is an example of this practice, in its Chapter 6, Section 88a, paragraph 1, which provides for a residence permit based on humanitarian protection if the migrant does not qualify for other status and if return to their home country is not possible "as a result of an environmental catastrophe or a bad security situation which may be due to an international or internal armed conflict or a poor human rights situation." Similarly to the Swedish law, there is only express protection here for sudden-onset environmental disasters, limiting its scope. The guarantee of Finnish protection is also temporary with maximum legally established time of three years.

³⁷ Kalin, "Conceptualising Climate-Induced Displacement," p. 89

because, in addition to the sudden disaster, their government has deliberately prevented or denied them assistance in order to punish or marginalize them on the basis of race, religion, nationality, social group or political opinions – as established by the 1951 Refugee Convention.³⁸

Also, it must be considered that climate change has implications in political and social spheres. Experts believe that the effects of a warming world and more frequent extreme weather events may exacerbate existing vulnerabilities, mainly in the global South, in the realm of food security, health issues, and freshwater supply.³⁹ Phenomena such as acceleration of the urbanization process and population displacement are predicted and, as a result, social tensions and political conflicts are likely to increase both internally and between countries.⁴⁰ It is in this context that one can speak of an environmental-migration crisis. When people are forced to leave temporarily or permanently their traditional habitat due to a visible decline of environmental resources in such a way that their survival is in danger.

1.2 Socio-environmental Vulnerability and Climate Change

The adoption of an unsustainable development model, based on the conception of nature as an endless supplier of resources, has led to drastic costs such as climate change and environmentally-induced migration as its adverse effects. The sociologist Ulrich Beck, in his work *Risk Society*⁴¹ argued that environmental hazards had become the predominant product and side-effect of modern industrial society. Furthermore, the theory of world risk society supports that climate change will affect all regions of the world, rich and poor, and it is part of the globalization of risks dynamics. Such global risks present three characteristic features:⁴² (i) delocalization: their causes and consequences are not limited to one geographical location or space; they are in principle omnipresent; (ii) incalculability: their consequences are in principle incalculable; and (iii) non-

³⁸ Ibid.

³⁹ IOM. “IOM outlook on migration, environment, and climate change.” (Geneva: International Organization for Migration, 2014), p. 38.

⁴⁰ “Line between migrants and refugees is blurring, UN official says.” *UN News*. Available at: <<http://www.un.org/apps/news/story.asp?NewsID=24216&Cr=UNHCR&Cr1=>> Accessed May 16, 2019; UNHCR. “Cambio climático, desastres naturales y desplazamiento humano: la perspectiva del ACNUR,” (August 14, 2009). Available at: <<https://www.refworld.org/docid/4ad7471b2.html>> Accessed May 16, 2019.

⁴¹ Beck, Ulrich. *Risk Society: Towards a New Modernity*. (New Delhi: Sage, 1992).

⁴² Beck, Ulrich. “World at Risk: The New Task of Critical Theory.” *Development and Society* 37, no. 1 (2008), p. 5.

compensability: the harms caused by human activities cannot be regarded as compensable any longer.

Factually, environmental degradation and its consequences, such as mass displacements, which are more rapidly generated as a by-product of modern society, have as main characteristic its collective and democratic dimension, with the potential to reach everyone indistinctly, regardless of social class. However, some will have better capacity and resources to deal with such extreme events than others.⁴³ Beck acknowledges this and points out that certain social groups, because of their low purchasing power, are more vulnerable to certain aspects of environmental degradation, which means that wealth accumulates at the top, risks at the bottom.⁴⁴ The global poor are exposed to more risks than the global wealthy, which include not just notably rich groups, but the quasi-totality of the population of core areas, or post-industrial societies. Additionally, the wealthy – in terms of income, power, and education – have access to more information on how to avoid risks. Thus, a population's ability to cope with extreme environmental events will depend on their adaptive capacity as well as how vulnerable they are – which takes into account how social, economic, technological, cultural, and institutional factors affect the ability of individuals to respond and adapt to the effects of any environmental disruption.⁴⁵

Consequently, while the cause of environmentally-induced mass displacements would be the degradation of the environment, it is imperative to analyze the social dimension of such migratory movements. Researcher Hugo Graeme argues that poorer individuals and countries can be at a disadvantage because they do not have the resources to put in place sophisticated warning systems or to fund a rapid, planned, well-provisioned escape from the disaster site as well as to subsequently assist victims to recover.⁴⁶ It is, therefore, becoming apparent that some regions, especially those in less developed countries, are particularly vulnerable to environmental degradation and consequently are the ones that produce most environmentally displaced persons, who migrate within and outside their borders.⁴⁷

⁴³ Beck, *Risk Society*, p. 40.

⁴⁴ *Ibid*, p. 35.

⁴⁵ Biermann and Boas, "Preparing for a Warmer World," p. 67; Barnett, Jon and John Campbell. *Climate Change and Small Island States: Power, Knowledge and the South Pacific*. (London and Washington DC: Earthscan, 2010). p. 9.

⁴⁶ Graeme, Hugo. "Migration, development, and environment." *IOM Immigration Research Series*, no. 35. (Genebra: IOM, 2008), p.14.

⁴⁷ Rigaud et al., "Groundswell," p. 6.

Nonetheless, in the examination of the impact of environmental degradation, it is essential to consider that migration is only one of the ways in which affected populations respond. It can be argued that there needs to be more attention paid to other responses,⁴⁸ since decisions to migrate or stay in the affected area are individual and generally influenced by the socioeconomic situation of the victims. Those who choose to stay are, in general, poorer and more vulnerable, who, because of a lack of health, skills and financial capacity, end up finding no other choice but to stay where they live, even though it has been strongly affected by environmental changes.⁴⁹ In addition to producing harmful environmental outcomes, climate change increases pre-existing vulnerabilities that will eventually be the cause of migratory movements. The problem is even more significant in regions of high socio-environmental vulnerability and high population concentration, as seen below:

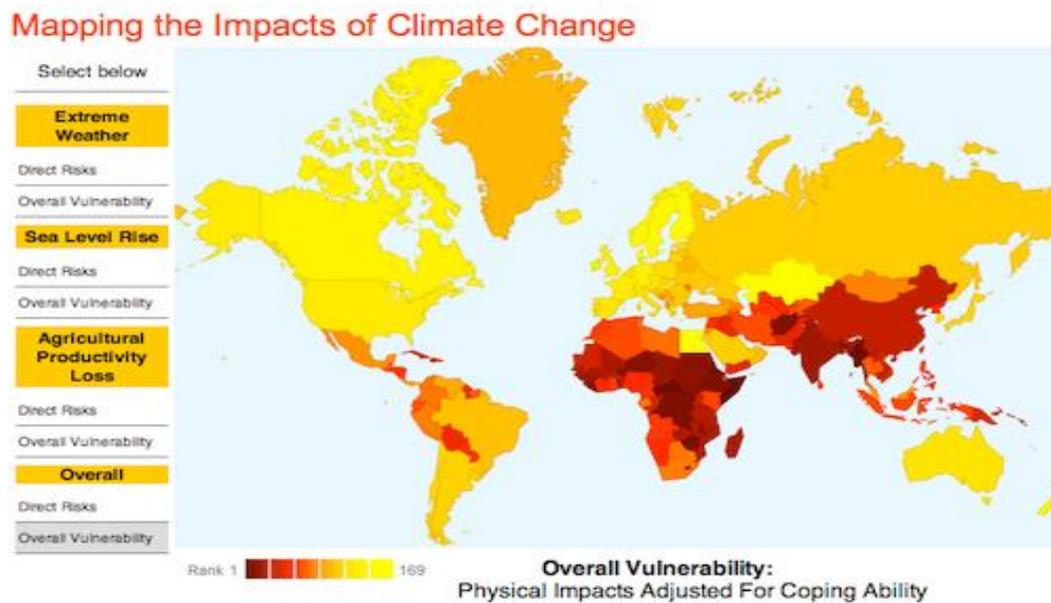


Figure 3 - Map provided by Center for Global Development displaying global impacts of climate change, especially on vulnerable countries with little coping abilities.

According to the Internal Displacement Monitoring Center (IDMC) most of the new displacements in 2018 occurred in high-risk environments characterized by low coping capacity, high levels of socioeconomic vulnerability, and high exposure to natural and human risks.⁵⁰ Although Asia is the

⁴⁸ Graeme, "Migration, development, and environment," p. 14.

⁴⁹ McAdam, Jane. "Environmental Migration Governance." *UNSW Law Research Paper*, no. 1 (2009), p 5.

⁵⁰ NRC/IDMC. "2018 Global Report on Internal Displacement - Spotlight: DRC" (2018). Available at: <<https://www.refworld.org/docid/5b28b72e0.html>> Accessed May 09, 2019.

most affected continent by environmental disasters, studies indicate that extreme poverty in Africa has worsened the consequences of disasters and climate change.⁵¹ It has been well-documented that low-income communities bear the burden of flooding, droughts, famine, and other climate change-related distresses, but also researches reveal that most of the poorest countries on the planet are significantly poorer than they would have been without global warming.⁵² Climate change, therefore, can be considered the world's most substantial regressive tax, as the poorest pay for the behavior of the rich.⁵³ Additionally, many wealthy countries have effectively benefited economically from global warming.⁵⁴ Human vulnerability to environmental changes has global, local, social and economic dimensions as people in low-income communities and developing countries who have a lesser impact on the environment are often the ones who are most affected by the costs of degradation. The world's poor face an inexorable increase in climate-related risks and vulnerabilities as they are less able to protect themselves, while barely contributing to global greenhouse gas emissions.

It is worth mentioning that environmentally displaced persons often face systematic violations or loss of their human rights (e.g., right to live with dignity, health, food and housing, lack of access to assistance and education, loss of documentation, trafficking, lack of protection for women and children, among others). Also, as forced migrants, they find the adjustment in destination areas more complicated than those who have moved voluntarily in a planned way.⁵⁵ Besides, migrants who experience environmental distresses tend to be a forgotten group, facing some unique challenges once they go internationally, such as the lack of legal status that will be addressed thoroughly in chapters 2 and 3. Thus, human-induced climate change can be placed among the various causes of human rights violations in the post-industrial era, particularly as the poorest

⁵¹ According to data from the UNHCR, from November 2016 to April 2017, a total of 615,000 people were displaced as a result of the drought in Somalia.

⁵² Diffebaugh, Noah S. and Marshall Burke. "Global warming has increased global economic inequality." *PNAS* 116, no. 20 (Stanford University, 2019). Available at: <<https://web.stanford.edu/~mburke/papers/DiffebaughBurke2019.pdf>> Accessed May 10, 2019.

⁵³ "Apologies: Who's sorry now?" *The Economist*. October 02, 2008. Available at: <<https://www.economist.com/international/2008/10/02/whos-sorry-now>> Accessed May 09, 2019.

⁵⁴ Provenly, global warming has worsened global economic inequality. Between 1961 and 2010, warming temperatures have significantly slowed economic growth in southern countries like India and Nigeria, while adding economic growth in cooler countries like Canada and the U.K., according to the previous cited Stanford University study. The historical data revealed that crops are more productive, people are healthier and more productive at work when temperatures are neither too hot nor too cold. This means that in colder countries, a little bit of warming can actually help.

⁵⁵ Aghazarm and Laczko, "Migration, Environment, and Climate Change," p. 297.

groups to suffer from the absence of basic rights are the primary victims of environmental risks and costs.

1.3 Environmental and Climate Justice

Climate change is fundamentally an issue of human rights that connects local problems to global behaviors. With rising temperatures, human lives – mostly people of color, low-income, and indigenous communities – are affected by compromised health, financial burdens, and social, cultural and environmental disruptions. As seen before, people who are most affected and have the fewest resources to adapt to climate change-related disruptions, in general, are also the least responsible for the majority of greenhouse gas emissions.

Consequently, the term environmental injustice has been enshrined to designate the phenomenon of the disproportionate imposition of environmental risks on populations less endowed with financial, political and information resources.⁵⁶ Also used for those who are denied access to good natural environments or those excluded from decision-making or contestation processes.⁵⁷ Like this, environmental injustice occurs when most of the environmental damage caused by development falls on low-income populations and discriminated ethnic groups who are continuously in a situation of vulnerability.⁵⁸

As a counterpoint, the notion of environmental justice was coined to name a conceivable paradigm in which this environmental dimension of social injustice is overcome, that is, an attempt of achieving environmental equity for all groups within society.⁵⁹ Environmental justice is, thus, the set of principles in which no group of people should be subjected to disproportionately burden the negative environmental consequences of post-industrial economic decisions and activities.⁶⁰

While there are potential risks of environmental disasters for all, the distribution of costs and benefits in the short and medium term will be far from uniform. Environmental and social risks are unevenly distributed, leading to environmental injustice, as the countries that are responsible

⁵⁶ Acselrad, Henri, Cecilia Campello Amaral Mello, and Gustavo das Neves Bezerra. *O que é justiça ambiental*. (Rio de Janeiro: Garamond, 2009); Newton, David. *Environmental Justice: a reference handbook*. (Santa Barbara, California: ABC-CLIO, 2009), p. 291.

⁵⁷ Shrader-Frechette, Kristin. *Environmental Justice: creating equality, reclaiming democracy*. (New York: Oxford University Press, 2002), p. 3.

⁵⁸ Newton, *Environmental Justice*, p. 291.

⁵⁹ Ibid.

⁶⁰ Acselrad, et al., *O que é justiça ambiental*, p. 09.

and directly contribute to environmental degradation will be the least affected, while developing countries, which are subject to the same environmental risks, will be most affected because of the relationship between poverty and vulnerability.

Environmental justice ideas were taken up by climate justice activists after climate change became a more prominent topic, as its impacts started to increasingly shape the environmental justice movement. According to David Schlosberg and Lissette Collins, several scholars and advocates began to perceive climate change as another environmental condition that demonstrates the broader social injustice for poor and minority communities.⁶¹ Thus, climate justice, generally, represents the expansion of environmental justice.⁶² The connection between environmental damage and the continued vulnerability of communities brought more energy and significance to the issue of climate change and the concern for environmental justice grew into a concern for climate justice.⁶³ Hilary Moore and Joshua Russell argue that as a form of environmental justice, climate justice is the fair treatment of all people as well as freedom from inequity with the formulation of policies and projects that address climate change and the systems that produce environmental disruptions and perpetuate discrimination.⁶⁴ Climate justice, therefore, aims to provide an alternative to the irresponsible environmental mismanagement that governments and businesses commonly have supported since the Industrial Revolution of the nineteenth century. Accordingly, the importance of the notion of both environmental and climate justice branches from the realization that the increasing scarcity of natural resources and the destabilization of ecosystems affect disproportionately and often unfairly different social groups and geographical areas. That is, the relationship between society and nature reflects, to a greater or lesser extent, political, social and economic asymmetries, which are specific to a given historical moment and spatial configuration at the local and international level, as in the case of climate change. Therefore, it is not difficult to identify that the multiple forms of environmental degradation occur, predominantly, where the lower income populations live, as the unbalance of power influences the

⁶¹ Schlosberg, David and Lissette B. Collins. "From environmental to climate justice: climate change and the discourse of environmental justice." *Wiley Interdisciplinary Reviews: Climate Change* 5, no. 3 (2014), p. 362.

⁶² Schlosberg, David. "Climate Justice and Capabilities: A Framework for Adaptation Policy". *Ethics & International Affairs* 26, no. 4 (2012): 445–461.

⁶³ Meikle, Mandy, Jake Wilson and Tahseen Jafry. "Climate justice: between Mammon and Mother Earth." *International Journal of Climate Change Strategies and Management* 8, no. 4 (2016); Schlosberg and Collins, "From environmental to climate justice," p. 362.

⁶⁴ Moore, Hilary and Joshua K. Russell. "Organizing Cools the Planet: Tools and Reflections to Navigate the Climate Crisis." *PM Press Pamphlet Series*, no. 11 (2011).

origin and multiplication of environmental impacts. The environmental problematic incorporates social, race, gender and class inequalities, which closely follows the hegemonic logic of capital accumulation and restriction of opportunities.⁶⁵

Furthermore, David Griffin has appealed to the moral obligations that humanity has towards future generations.⁶⁶ He compares the necessity to change global politics in relation to fossil-fuel economy and behavior towards climate change with the campaign to abolish slavery in the nineteenth century, regardless of its economic or other consequences.⁶⁷ Griffin argues that our obligations regarding global warming are implicit in the understandings of human rights principles. For him, it is intergenerational justice that calls upon today's generation to act fast and decisively in order to save the planet for our descendants.⁶⁸ This means we ought to transcend our narrow physical and political boundaries, as well as our mindsets of narrowly defined self-interest, and act globally. There is, thus, a moral obligation for environmental protection, as a principle of climate justice, and people can make a difference at all levels. Consequently, not only human rights and security issues but also climate change should be included in ongoing campaigns for global justice.⁶⁹

Moreover, it is essential to note that the vulnerability of environmentally displaced persons increases not only because of their socioeconomic situation, for those with less financial resources, or because of the compulsory nature of displacement, but also because of restrictive state policies, the securitization that involves migratory flows across borders, especially in more developed countries, and the precarious conditions in which many migrants are received in the country of transit or destination.⁷⁰

Also, in the context of the environment-migration crisis and the search for environmental justice, it must be considered, among the actions to halt human-induced climate change, actions to protect environmentally displaced persons. This is imperative because, as seen, environmental problems are typically not democratic. The causal link between anthropogenic environmental change, vulnerability, and environmental justice is fundamental to determining the need for protection of environmentally displaced persons. This assertion is particularly crucial in the area of international

⁶⁵ Acselrad, et al., *O que é justiça ambiental*.

⁶⁶ Griffin, David. *Unprecedented: Can Civilization Survive the CO2 Crisis?* (Atlanta: Clarity Press, 2015).

⁶⁷ *Ibid*, p. 239.

⁶⁸ *Ibid*, p. 231.

⁶⁹ *Ibid*, p. 418.

⁷⁰ McAdam, *Climate Change and Displacement*, p. 41-42.

responsibility, to be discussed on chapter 2 and 3, to determine the extent to which states or private entities are responsible for the existence of such migrants.

1.4 Terminologies and Concepts

Individuals or groups associated with environmentally-induced displacement are known in various ways in the literature on the topic, without there being consensus on the nomenclature to be used for them. Nor is there a single concept applicable to all situations in which these migrants are defined with specific characteristics about their migratory movements. This thesis opted for the term “environmentally displaced persons,” because it better reflects the diversity of causes, its collective character and forms of displacement, as well as it offers clarity that this is a type of forced and not a spontaneous kind of migration.

The term “environmental refugee” is not recognized under international law by the 1951 Convention Relating to the Status of Refugees.⁷¹ However, a clear and universally accepted definition of environmentally displaced persons cannot yet be determined neither by legal doctrine nor jurisprudence. Several authors offer their definitions, sometimes creating more specific subcategories of migrants for each situation of environmental adversity.⁷² Consequently, there are numerous suggestions in the specialized literature, such as “environmentally forced migrants,” “environmentally motivated migrants,”⁷³ “environmentally induced migrants,”⁷⁴ “environmentally displaced persons,”⁷⁵ “ecomigrants,”⁷⁶ “environmental migrants,”⁷⁷ “climate

⁷¹ There is a great deal of insufficiency in designating such individuals in a particular category, since the UN Refugee Convention does not consider migrants for environmental reasons as refugees. Without recognition, the victims of displacements resulting from environmental changes and disasters have no legal framework to protect them, which creates a legal vacuum that directly harms these people.

⁷² King, Tracey. “Environmental Displacement: coordinating efforts to find solutions.” *The Georgetown International Environmental Law Review* 18, no. 3 (Washington D.C., 2006): 556-557.

⁷³ Rechkemmer, Andreas, Ashley O'Connor, Abha Rai, Jessica L. Decker Sparks, Pranietha Mudliar, and James M. Shultz. “A complex social-ecological disaster: Environmentally induced forced migration.” *Disaster Health* 3, no. 4 (2016), p. 3.

⁷⁴ Renaud et al., “A Decision Framework for Environmentally Induced Migration.” p. 14.

⁷⁵ Prieur, Michel. “Draft Convention on the International Status of Environmentally-Displaced Persons.” *Urban Lawyer* 42, no. 4, (2011).

⁷⁶ Wood, William B. “Ecomigration: linkages between environmental change and migration.” In: *Global Migrants, Global Refugees: problems and solutions*, edited by Aristide R. Zolberg and Peter M. Benda. (New York: Berghahn Books, 2001), p. 46.

⁷⁷ IOM. “Glossary on Migration,” 2nd Edition. *International Migration Law*, no. 25 (Geneva. 2011), p. 33.

Available

<http://publications.iom.int/bookstore/index.php?main_page=product_info&cPath=56&products_id=1380>

Accessed May 20, 2019.

at:

migrants,” “environmental refugees,” “climate refugees,” “climate displacees,” “disaster refugee,” “ecological refugee,”⁷⁸ among many others.

The concept of environmentally-related displacement is relatively new and undoubtedly displays some degree of confusion. Lester Brown described the first official definition for this category of migrants in 1976,⁷⁹ but it only acquired international projection when Essam El-Hinnawi, of National Research Center, from Cairo, Egypt, wrote a report⁸⁰ about the issue for the United Nations Environment Programme (UNEP)⁸¹ published in 1985. The author used the term “environmental refugees” when referring to a person or group of people who “have been forced to leave their traditional habitat, temporarily or permanently, because of a marked natural or human-triggered environmental disruption that jeopardized their existence or seriously affected the quality of their life.”⁸² Following the author, there was an exponential increase in research and mention of environmentally-related migrations in the 1990s and the first decade of the twenty-first century, when the issue became more prominent on the international agenda due to the political pressure of these migrants’ origin countries.⁸³

Furthermore, Norman Myers and Jennifer Kent have described and conceptualized “environmental refugees” in their work as “persons who can no longer gain a secure livelihood in their traditional homelands because of what are primarily environmental factors of unusual scope.”⁸⁴ According to them, these factors involve, inter alia, drought, floods, deforestations, land degradation, resource shortages, decline of urban environments, climate change, and natural disasters with impacts intensified by human mismanagement.

Hence, from the time the expression “environmental refugee” was coined in the 1980s, it has since been commonly disseminated in both political and academic circles mostly by environmental lobby groups to draw attention to the most harmful aspects of carbon emissions.⁸⁵ As forcedness

⁷⁸ Simonelli, *Governing Climate Induced Migration and Displacement*, p. 6.

⁷⁹ Black, *Environmental Refugees*, p. 1.

⁸⁰ El-Hinnawi, Essam. *Environmental Refugees*. (Nairobi: UNEP, 1985).

⁸¹ UNEP, based in Nairobi, Kenya, was established in 1972 and is the UN System Program responsible for developing, establishing and catalyzing international actions to protect the environment, aiming to achieve sustainable development.

⁸² El-Hinnawi, *Environmental refugees*, p. 4-5.

⁸³ Gemenne, Francois. “How they became the human face of climate change. Research and policy interactions in the birth of the ‘environmental migration’ concept.” In: *Migration and climate change*, edited by Etienne Piguet, Antoine Pécoud and Paul de Guchteneire. (Cambridge University Press, 2011), p. 239.

⁸⁴ Myers, Norman and Jennifer Kent. *Environmental Exodus: An Emergent Crisis in the Global Arena*. (Washington DC: Climate Institute, 1995), p. 18; Black, *Environmental Refugees*, p. 1.

⁸⁵ McAdam, “Swimming Against the Tide,” p. 5.

is inherent in the notion of a refugee,⁸⁶ many believe that it could be broadly defined as someone in flight, seeking to escape conditions found to be intolerable. This would occur not in the juridical sense of the term, but in the sociological and etymological sense of the word according to which all those who seek shelter or protection outside their place of origin are refugees. The general public, therefore, understands the term as the most suitable to illustrate the situation of those who seek refuge to ensure survival due to environmental damages that temporarily or permanently prevent adequate living conditions and the exercise of fundamental human rights.

One of the most critical authors in the debate on the subject of “environmental refugees,” Richard Black points out the difficulties arising from the plurality of concepts and typologies that, according to him, reveals the lack of precision and usefulness in the attempts to describe the phenomenon.⁸⁷ According to him, the production of statistical data depends on a firm definition for “environmental refugees,” which considers environmental deterioration as the leading or only cause for the migratory flow. Likewise, Stephen Castles criticizes “environmental refugees” as a rather simplistic, one-sided and misleading expression, which indicates a mono-causality that hardly ever occurs in practice.⁸⁸ Furthermore, critics of the denomination “environmental refugees” consider it harmful to those legally protected as refugees under the 1951 Convention because they may damage the institution’s strength and create confusion about it.⁸⁹ Therefore, this erroneous concept may be creating a common misunderstanding for merging the term with the notion of political refugees, reducing the complexity of both situations.⁹⁰ It also would lead to the search for a protection approach which would be inefficient and inadequate,⁹¹ as the official concept of refugee, under the 1951 Convention, does not protect environmentally displaced persons. Similarly, for Frank Laczko and Christine Aghazarm, even though the term

⁸⁶ Goodwin-Gill, Guy S. and Jane McAdam. *The Refugee in International Law*. (Oxford University Press, 2007), p. 15.

⁸⁷ Black, *Environmental Refugees*, p. 13-14.

⁸⁸ Castles, Stephen. “Environmental Change and Forced Migration: making sense of the debate.” *New Issues in Refugee Research*, no. 70. (UNHCR, 2002), p. 8.

⁸⁹ Guterres, António. “Millions Uprooted: Saving refugees and the displaced.” *Foreign Affairs Magazine* 87, no. 5 (2008).

⁹⁰ A refugee is described as a person who has crossed an international border “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” (Article 1 of the 1951 Convention relating to the Status of Refugees).

⁹¹ Mayer, Benoit. “Pour en finir avec la notion de ‘réfugiés environnementaux:’ Critique d’une approche individualiste et universaliste des déplacements causés par des changements environnementaux.” *Revue Internationale de Droit et Politique du Développement Durable de McGill* 7, no. 1 (2011), p. 37; Gemenne, François. “What’s in a name: social vulnerability and the refugee controversy in the wake of Hurricane Katrina.” In: *Environment, Forced Migration, and Social Vulnerability*, edited by Tamer Afifi and Jill Jager. (Heidelberg: Springer, 2010), p. 36.

“environmental refugee” is widely used by the media, this category does not exist under international law and thus risks undermining the legal definition of refugee and its protection regime.⁹² Both authors suggest that, as the majority of environmentally-induced displacement tends to happen within countries rather than between them, it makes more sense to talk of internally displaced persons due to environmental reasons than refugees, a concept which is categorized considering cross-border movement.⁹³

Furthermore, Gaim Kibreab argues that such a denomination was created in order to de-politicize the motives of displacements triggered by human-induced climate change as well as its use might weaken the protection of actual refugees covered by the 1951 Convention.⁹⁴ However, while the designation “environmental refugee” is not recognized under international law and is persistently opposed by refugee advocates and governments of potential receiving countries, the term does have an evident popular resonance that others do not possess. Indeed, despite its legal uncertainties, this expression is seen as applicable precisely because of its emphasis on the forced nature of displacement.⁹⁵

The United Nations High Commissioner for Refugees (UNHCR) recognizes that climate, environmental degradation, and natural disasters increasingly interact with the drivers of refugee movements.⁹⁶ Nonetheless, the terms climate or environmental refugee are not endorsed by the institution who believes that it is more accurate to refer to “persons displaced in the context of disasters and climate change.”⁹⁷ Whereas the International Organization for Migration (IOM), proposed the term “environmental migrants” to refer to people who migrate, temporarily or permanently, within their own country or abroad, because of sudden or progressive changes in the environment that negatively affect their lives.⁹⁸ Also, according to IOM, they can choose to leave their place of origin or be forced to leave because of lack of means of survival and, finally, they do not move just because of an environmental event, but also as a result of political, economic and social conflicts, within an environmental disruption context. This broad definition would allow the

⁹² Aghazarm and Laczko, “Migration, environment, and climate change,” p. 18.

⁹³ Ibid.

⁹⁴ Kibreab, Gaim. “Environmental causes and impact of refugee movements: a critique of the current debate.” *Disasters* 21, no. 1 (1997), p. 21.

⁹⁵ Ferris, “Governance and climate change-induced mobility,” p. 15.

⁹⁶ UNHCR. “Global Compact On Refugees.” (December, 2018). Available at: <https://www.unhcr.org/gcr/GCR_English.pdf> Accessed June 20, 2019

⁹⁷ UNHCR. “Climate change and disaster displacement.” Available at: <<https://www.unhcr.org/climate-change-and-disasters.html>> Accessed June 20, 2019

⁹⁸ IOM, “Glossary on Migration,” p. 33.

organization to adapt to possible changes in international law as well as to assist decision makers and professionals in the adoption of joint responsibilities and solutions.

In a balanced understanding to what was exposed so far, the geographer William B. Wood proposes the use of the term “ecomigrants” in opposition to the term environmental refugees “as a broader concept to include anyone whose need to migrate is influenced by environmental factors.”⁹⁹ The author justifies the use of this terminology from two pertinent analyzes: (i) the first falls on the legal impropriety of the use of the term “environmental refugee,” since international law, as currently updated, still does not include refugee status for individuals or groups who are forced to move because of environmental issues; (ii) the second reason is based on the use of the prefix “eco” in the expression “ecomigrants.” It refers to the ecological issues that motivate forced displacement and to the economic nature of these migrations, which are usually profoundly intertwined and practically impossible to separate. Namely, the so-called “ecomigrants” are frequently in a similar situation to that of migrants forced due to economic reasons. This idea highlights the fact that environmental factors influence migrations as well as migrants modify environments and this has always been part of the human condition.¹⁰⁰

Furthermore, Michel Prieur proposes using the term “environmentally displaced persons,” when referring to “individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions and results in their forced displacement, at the outset or throughout, from their habitual residence and requires their relocation and resettlement.”¹⁰¹ Prieur clarifies his choice for this terminology rather than “ecological refugees” or “environmental refugees” because he accurately understands that the term “displaced” better reveals the variety of forms and causes of this type of migration, as well as its forced and collective character. Furthermore, he also argues that the term “refugee” could cause confusion with the situation of those covered by the 1951 Convention as well as it would be inapplicable for the protection of environmentally displaced persons.¹⁰² The preference for the term “environmental” rather than “ecological” aims to reinforce the perception that these

⁹⁹ Wood, “Ecomigration,” p. 46.

¹⁰⁰ Ibid.

¹⁰¹ Prieur, “Draft Convention on the International Status of Environmentally-Displaced Persons,” p. 254.

¹⁰² Prieur, Michel. “Quel statut pour les déplacés environnementaux?” In: *La protection internationale et européenne des réfugiés*, edited by Anne-Marie Tournepiche. (Paris: Editions Pedone, 2014), p. 130.

displacements do not come only from natural phenomena, but above all from anthropic action and the influence it exerts on the degradation of entire populations habitual residence.¹⁰³

Accordingly, the term “refugee” might have a higher symbolic weight as it draws attention from governments and the media to the need to protect this category of people. Nonetheless, the concept “environmentally displaced persons” would still be the most appropriate to avoid possible misunderstandings. In addition, considering that the refugee status requires, among others, the condition to have a founded fear of persecution, it would be impossible to sustain that the environment is such an agent and that it is forcing people to leave their habitual place of residence because of “race, religion, nationality, social group or political opinion” as required by the 1951 Convention.

As seen previously, the debates on environmentally-related displacement are often marked by ambiguous and contested terminology mainly because there is a legal vacuum regarding official mechanisms to deal with this impending crisis.¹⁰⁴ Accordingly, the lack of a universal definition represents a major gap in the contemporary normative framework, and formulating a clear definition of individuals displaced due to environmental-related issues, therefore, appears to be a fundamental starting point for international protection. The absence of appropriate official terminology and apparatuses for those who are forced to migrate as a result of environmentally-related disruptions reveals the poor visibility and consideration given to the vulnerabilities that surround these people.¹⁰⁵ It also reveals a lack of commitment on the part of governments and, above all, the international community to take responsibility for the problem.

¹⁰³ Ibid, p. 250.

¹⁰⁴ Cournil, Christel and Benoît Mayer. *Les Migrations Environnementales*. (Paris: Presses de Sciences Po, 2014), p. 22.

¹⁰⁵ Gemenne, “What’s in a name,” p. 38-39.

2. The Existing Regulatory Gaps in International Protection

Despite the importance of the topic, there is no specific legal framework that protects environmentally displaced persons at an international level. The fact that there is no guaranteed legal protection for such cases is a severe shortcoming in international law. The need to clarify or even develop a normative framework applicable to this category of migrants is another issue that is much discussed today – and also very controversial.

After more than four decades since the beginning of a discussion about the issue on environmentally-induced displacement, these migrants continue to have no legal status of their own and, at the international level no specific type of protection is legally required. Also, attempts to protect environmentally displaced persons through the enlargement of institutes already enshrined in international law have turned out to be unsuccessful, as we shall see next. Accordingly, there is no international legal document making it possible for international environmentally displaced persons to have the right to be recognized as refugees or to secure them specific rights. Also, no text of current international law has binding capacity in this regard. Specifically, there exists a very significant gap in fundamental protection and policy-making on environmentally-induced displacement. Thus, located in legal limbo, those displaced due to environment-related events are still waiting for an international rights-based solution that recognizes and assists them.

In contrast, many authors argue that current international law makes it possible to protect this category through general rules found mainly in international human rights law. However, most of these documents are not binding and do not specifically address this kind of displacement. Therefore, it remains up to the states that receive such migrants to decide whether or not they will protect environmentally displaced persons who require such guarantees.

In the current context, when the number of forced displaced migrants is increasing exponentially and rising “closed doors” policies make countries such as the United States, United Kingdom, Hungary, Austria, and Italy build walls at their borders to prevent migrants from entering, it is exposed the enormous difficulty to find lasting solutions to the problem. Thus, in the absence of an international protection system, it depends on the domestic effort of governments and political will of states to guarantee environmentally displaced persons their fundamental human rights.

2.1 Why Not Refugees?

Throughout the first half of the twentieth century, some entities were created, and several historical treaties were developed to systematize and internationalize the refugee protection configuration. However, it was only with the end of the Second World War, the advent of the United Nations (UN) and, in particular, the establishment of the United Nations High Commissioner for Refugees (UNHCR)¹⁰⁶, that the international refugee protection became legally binding, as it was created the 1951 Convention Relating to the Status of Refugees.¹⁰⁷

Despite the popularization of the expression “environmental refugee” and its broad discussion in Academia, it is still not possible to identify a legally recognized status for people displaced due to environmental reasons. Although some scholars try to classify them as refugees, environmentally displaced persons generally do not qualify for such status. First, it must be accepted that individuals moving to other countries strictly based on environmental-related motivations do not fall within the definition of refugees established in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, considering that article 1 of this document states as a requirement for obtaining refugee status a well-founded fear of persecution “on grounds of race, religion, nationality, social group or political opinion.”¹⁰⁸

The first requirement of the article, persecution, is not proven in most cases of environmentally-induced displacement. Although the term “persecution” is not defined in the 1951 Convention, the UNHCR – which describes persecution as serious violations of human rights or threats to freedom or life of an individual based on one of the five criteria of the Convention – specified that to characterize persecution, such threats and violations must be committed or tolerated by state authorities.¹⁰⁹

Some argue that the pure omission conduct of governments related to providing adequate infrastructure to prevent or minimize the effects of environmental disasters is already a form of

¹⁰⁶ UN. “General Assembly.” Resolution 428 (V) (December 14, 1950).

¹⁰⁷ Amended later on by a Protocol in 1967 to cover situations of refuge past and after the period of the Second World War and outside Europe.

¹⁰⁸ According to Article 1 A (2), a refugee is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his 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.”

¹⁰⁹ UNHCR. “Handbook of procedures and criteria for determining refugee status under the 1951 convention and the 1967 protocol relating to the status of refugees.” (Geneva: UNHCR, 1992), p. 13, 15.

persecution, causing migrants to seek refuge not only from these extreme events but also from their governments.¹¹⁰ However, it should be noted that many countries affected by environmental damage suffer from a general lack of infrastructure and resources concerning the population as a whole, and not only to a specific group based on race, religion, nationality, or political opinion. Although certain marginalized populations tend to suffer more from the consequences of disasters and environmental degradation, a valid link between such suffering and an effective refusal by the state to assist the group must be demonstrated. It would only constitute a form of persecution if the government is purposely negligent in protecting an individual's human rights based on one of the classifications defined by the 1951 Convention. In this case, such individual could qualify for refugee status.¹¹¹ Nevertheless, the categories listed in article 1 of the 1951 Convention represent yet another obstacle to the characterization of "environmental refugees." The text of this article clearly intends to restrict the classification of refugees to those five grounds. This is all the more evident when we consider that the only proposed amendment extending the scope of article 1 formulated by the delegation of the former Yugoslavia in 1951 was rejected.¹¹²

Within the Convention on the Status of Refugees' restrictive scope, migration motivated by environmental factors is not addressed by any of its established grounds. Even if it is argued that an environmentally displaced person belongs to a particular social group, which is one of the criteria of the Convention, this claim is commonly not accepted. International refugee law requires that the social group should be connected by substantial and immutable characteristics beyond the sole risk of persecution.¹¹³ Although individuals affected by environmental conditions may coincidentally belong to the same social group before the environmental event, they will only belong to the environmentally displaced group after the occurrence of given event – specifically, there is no particular social group before the environmental degradation or extreme event happens.

¹¹⁰ Cooper, Jessica B. "Environmental refugees: meeting the requirements of the refugee definition." *New York University Environmental Law Journal* 6, no. 2 (1998), p. 502.

¹¹¹ High Court of Australia. "Minister for Immigration and Multicultural Affairs v. Khawar." (April 11, 2002), p. 41. Available at: <<http://www.refworld.org/docid/3deb326b8.html>> Accessed June 22, 2019.

¹¹² This proposal expanded the article to consider changes that had occurred as a result of the war and other events that caused similar changes as factors for granting refugee status. Available at: <<https://www.refworld.org/docid/3ae68ce62c.html>> Accessed June 22, 2019.

¹¹³ High Court of Australia. "Minister for Immigration and Multicultural Affairs v. Khawar," p. 9; United States of America. "Department of Justice Executive Office for Immigration Review: Board of Immigration Appeals. In re Fauziya kasinga, applicant. File A73 476 695: Elizabeth." (June 13, 1996) p. 10. Available at: <<http://www.justice.gov/sites/default/files/eoir/legacy/2000/03/28/kasinga7.pdf>> Accessed June 22, 2019.

Thus, in the majority of cases, the link between the deliberate negligence of the state based on race, religion, nationality, political opinion or social group and environmentally-induced displacement is not proven, which makes it impossible to grant refugee status under the 1951 Convention. This same understanding was reiterated by several government courts when faced with requests for asylum from environmentally displaced persons from Kiribati,¹¹⁴ Tuvalu,¹¹⁵ Tonga,¹¹⁶ and Haiti.¹¹⁷ The Australian Supreme Court has stated that, regardless of the severity of the environmental disaster, an individual who escapes this type of event cannot be considered a refugee.¹¹⁸

Furthermore, environmentally displaced persons are also not considered refugees under regional instruments that provide a more comprehensive definition of the refugee protection system, such as the 1969 African Convention of the Organization of African Unity (OAU), which governs specific aspects of refugee problems in Africa, and the 1984 Cartagena Declaration on Refugees. Both documents extend the definition of refugees to include migration in order to escape “events that seriously disrupt public order” as the basis for granting such status. While environmental degradations and disasters can be seen in theory as occurrences that could meet this requirement, the *Opinio Juris* of the member states are not in accordance with this notion.¹¹⁹ As clarified by Hathaway and Edwards, the African Convention intended to extend the protection of refugees to victims of events caused by human actions, such as armed conflict, not environmental events.¹²⁰ For this reason, States Parties rarely declare that they are receiving such victims following the obligations of the 1951 Convention, but willingly. Similarly, the group of experts for the

¹¹⁴ High Court of New Zealand. “Ioane Teitiota V. The chief executive of the Ministry of Business Innovation and Employment.” (November 26, 2013). Available at: <<http://climatecasechart.com/non-us-case/ioane-teitiota-v-the-chief-executive-of-the-ministry-of-business-innovation-and-employment/>> Accessed June 22, 2019.

; Australia. “Case n. 0907346. Refugee Review Tribunal of Australia.” (December 10, 2009). Available at: <<http://www.austlii.edu.au/au/cases/cth/RRTA/2009/1168.html>> Accessed June 22, 2019.

¹¹⁵ Australia. “Case N99/30231. Refugee Review Tribunal of Australia.” (January 10, 2000). Available at: <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/RRTA/2000/17>> Accessed June 23, 2019; New Zealand. “Refugee Appeal n. 72315/2000. Refugee Status Appeals Authority.” (October 19, 2000).

¹¹⁶ Australia. “Case n. 1004726. Refugee Review Tribunal of Australia.” (September 30, 2010). Available at: <<http://www.austlii.edu.au/au/cases/cth/RRTA/2010/845.html>> Accessed June 23, 2019

¹¹⁷ Brazil. “Triplicação número de estrangeiros em busca de refúgio no Brasil.” *JusBrasil*. April 26, 2013. Available at: <<http://mj.jusbrasil.com.br/noticias/100481594/triplicacao-o-numero-de-estrangeiros-em-busca-de-refugio-no-brasil>> Accessed June 24, 2019.

¹¹⁸ Australia. “High Court of Australia. A and Another v Minister for Immigration and Ethnic Affairs and Another.” (February 24, 1997). Available at: <<http://www.refworld.org/docid/3ae6b7180.html>> Accessed June 24, 2019.

¹¹⁹ McAdam, “Environmental migration governance,” p. 13-14.

¹²⁰ Hathaway, James. *The Law of Refugee Status*. (Oxford: Butterworths, 1991), p. 16-21; Edwards, Alice. “Refugee Status Determination in Africa.” *African Journal of International and Comparative Law* 14, no. 2 (2006), p. 225-226.

International Conference on Central American Refugees, which was established to assess progress in the area of refugee protection in Latin America, emphatically states that the Cartagena Declaration does not cover the situation of environmentally displaced persons.¹²¹ Also, even if it did, the instrument would not be legally binding.

The only regional treaty expressly adopting the concept of “environmental refugees” was the 1994 Arab Convention on Regulating Status of Refugees in the Arab Countries,¹²² which, in article 1, considers as refugees not only those that correspond to the definition of the 1951 Convention, but also the ones who, against their will, leave their country of origin as a result of environmental disasters. Nevertheless, this Convention has not been ratified by any country and therefore holds no binding capability. The absence of ratifications, especially considering that the final text was adopted more than twenty years ago, also makes it not viable to use the Arab Convention as a means of proving a regional custom towards the recognition of “environmental refugees.”

Hence, there is no regional or international legal organization that allows the classification of environmentally-induced displacement as a reason for granting refugee status. However, the term “environmental refugee” continues to be widely used as a way of calling attention to the vulnerable situation of this group. This approach does not seem to have generated effective results, since after more than four decades of the term’s creation these migrants remain without a legal status in addition to a specific and consistent international protection. As seen before, the insistence on identifying this group as “environmental refugees” is not only believed to be harmful to those considered refugees under the 1951 Convention, which undermine the institute’s strength and create confusion about it,¹²³ but also leads to the search for an approach that is both inadequate and inefficient at protecting these people.¹²⁴

According to Benoît Mayer, grounding the international protection of environmentally displaced persons on an analogy with refugee protection is harmful.¹²⁵ Such a comparison has proved to be precarious since the circumstances that lead to migration are too distinct between environmentally

¹²¹ CIREFCA. “Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America.” (January 1990), p. 11, 13. Available at: <<https://www.refworld.org/docid/4370ca8b4.html>> Accessed June 8, 2019.

¹²² League of Arab States. “Arab Convention on Regulating Status of Refugees in the Arab Countries” (1994). Available at: <<https://www.refworld.org/docid/4dd5123f2.html>> Accessed June 12, 2019.

¹²³ Guterres, António. “Climate change, natural disasters, and human displacement: a UNHCR perspective.” (Geneva: UNHCR, 2009), p. 7.

¹²⁴ Mayer, “Pour en finir avec la notion de réfugiés environnementaux,” p. 37.

¹²⁵ Ibid, p. 39-40.

displaced persons and refugees, as well as the needs of each category.¹²⁶ He argues that while refugees demand more individualistic and uniform protection, environmentally displaced persons would need a specific form of protection.¹²⁷ Other experts also accept that, given the different factors that cause migration, each situation of environmentally-induced displacement will require a different treatment.¹²⁸ Regardless of the proposed solution, it must have to address the particularities of the various cases of environmentally-induced displacement rather than relying on the existing refugee institution – which would be inadequate and therefore inefficient –, as it is unable to produce concrete results in the protection of environmentally displaced persons. Consequently, individuals who leave their countries of origin because of environmental factors do not, for the most part, have special status under contemporary international law.

2.2 The General Contribution of International Human Rights Protection Instruments

Although there is no legally binding protection for environmentally displaced persons in international law, nor do any of existing international legal instruments make specific provisions for those who migrate because of the effects of environmental disruptions, they can technically be sheltered by the general norms, principles and customs of international human rights law or, where applicable, by special norms established by mechanisms of different states, such as domestic legislation. As seen, the protection of environmentally displaced persons has been the subject of numerous discussions on the literature worldwide. It is, therefore, crucial to bring to this debate and examine the importance of International Human Rights Law (IHRL).

The 1948 Universal Declaration of Human Rights (UDHR) is considered the milestone text in the history of human rights. It was drafted by representatives with various legal and cultural backgrounds as a common standard of achievements for all nations and, for the first time, it set out fundamental human rights to be universally protected. Also, it postulates human rights protection with special characteristics such as universality, indivisibility, complementarity, and

¹²⁶ Ibid, p. 47-48.

¹²⁷ Ibid, p. 55-56.

¹²⁸ McAdam, “Environmental migration governance,” p. 7-8.

interdependence, as well as the right of all people to a social and international order in which rights and freedoms can be fully realized.¹²⁹

According to the Declaration, everyone has the right to a standard of living capable of providing themselves and their family with health and well-being, including food, clothing, medical care, and essential social services, as well as the right to security in cases of loss of means of subsistence beyond their control.¹³⁰ However, forced displaced people generally are often deprived of some, if not, all of these rights. In this regard, the document provides a minimum standard of treatment for migrants as it asserts that migratory flows deserve treatment and international protection, including two specific articles on migration,¹³¹ which incorporate the right to internal and international movement and the right to seek asylum or refuge outside the migrant's origin country. When established, the international human rights regime was intended to offer protection against autocratic countries and primarily governments and state authorities that violate and abuse human rights. The demand to protect and enhance human rights in the face of natural disasters, floods, desertification, sea level rise or droughts was not explicitly contemplated at the time. Hence, the perpetrators or violators of human rights arising from climate change or any other environmental disruption were not clearly named or identified. Furthermore, international human rights law does not explicitly provide legal protection for victims of environmental disasters or climate change, however, it is argued that, both protection and assistance to such persons are implicit in it as rights related to their human condition,¹³² since environmental changes can directly affect the full exercise of individual and collective rights, especially fundamental human rights enshrined by international law.¹³³

¹²⁹ UN Universal Declaration of Human Rights (1948), article 28: "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

¹³⁰ Ibid, article 25(1): "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

¹³¹ Ibid, articles 13.1 and 13.2. (1) "Everyone has the right to freedom of movement and residence within the borders of each State. (2) Everyone has the right to leave any country, including his own, and to return to his country."

¹³² Kent, George. "The human right to disaster mitigation and relief." *Environmental Hazards*, no. 3 (2001), p. 137-138.

¹³³ McLnerney-Lanford, Siobhán; Mac Darrow, and Lavanya Rajamani. "Human Rights and Climate Change." (Washington, D.C.: The World Bank, 2011); Barnett, Jon. "Human Rights and Vulnerability to Climate Change." In: *Human Rights and Climate Change*, edited by Stephen Humphreys. (Cambridge University Press, 2010), p. 257-271.

Therefore, as environmentally displaced persons do not experience specific protection, they can find certain legal accommodation in general instruments of international human rights law.¹³⁴ These include, besides the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), Vienna Declaration and Program of Action (1993), among other global instruments of broad protection. Specific instruments of international human rights law concerning women,¹³⁵ children,¹³⁶ indigenous peoples¹³⁷ and other groups¹³⁸ considered vulnerable are also applicable to particular environmentally displaced persons since these apparatuses have been developed as responses to human rights violations of different natures. Additionally, United Nations resolutions and recommendations of other international organizations that concern them directly or indirectly can be applied.

Since the ratification of the Universal Declaration of Human Rights, many norms and instruments dealing with specific social groups and providing different forms of protection of migrants' human rights have been created at the international level.¹³⁹ In this context, the International Convention for the Protection of All Migrant Workers and Members of Their Families (1990) may relate to them. Other specific instruments dealing with migration include the Convention relating to the Status of Refugees (1951) and its Protocol (1967), Statute of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961), as well as Guiding Principles on Internally Displaced Persons (1998). In some particular cases, an environmentally displaced person may be granted a refugee, internally displaced, or perhaps even a stateless status. These three categories receive international protection through the UNHCR and, therefore, environmentally displaced persons who legitimately also fall into one of these categories can acquire international protection status. Nevertheless, not all forms of environmentally-induced displacement fit the mandate of the UNHCR. Most environmentally displaced persons, particularly those who migrate to other countries, are deprived of specific international protection since they do not fit into the protection

¹³⁴ Zetter, "Protecting People Displaced by Climate Change," p. 132.

¹³⁵ Convention on the Elimination of All Forms of Discrimination Against Women (1979).

¹³⁶ Convention on the Rights of the Child (1989).

¹³⁷ United Nations Declaration on the Rights of Indigenous Peoples (2007).

¹³⁸ International Convention on the Elimination of All Forms of Racial Discrimination (1965).

¹³⁹ Zetter, Roger. "Climate Change and Displacement: Legal and normative frameworks." *Forced Migration Review*, no. 31. (2008), p. 63.

offered by international refugee law and are relegated to a similar position to those displaced for economic reasons.

Likewise, to address the specific cases of environmentally-induced displacement, the current international legal structure presents the concept of “complementary protection,” which aims to protect individuals through complementarity between international refugee law and international human rights law, so that when the former does not guarantee protection to a particular individual or group, the latter does so.¹⁴⁰ Consequently, once it has been established that no specific protection at the international level is legally binding for environmentally displaced persons, there remains the complementary protection, which may be given by states to those who do not qualify for refugee status, but who still require protection, which originates mainly from general human rights norms.¹⁴¹ In this sense, rules recognized in treaties by States Parties, and norms of customary international law shall apply, including the prohibition of subjecting someone to cruel, inhuman or degrading treatment, as well as the application of the non-refoulement principle.¹⁴²

International human rights law also includes international humanitarian law (IHL). While international humanitarian law similarly does not offer a specific response to environmentally-induced displacement, it advocates evacuation and relocation of civilians for security reasons, as well as their return to their place of origin as soon as the motives for displacement cease to exist.¹⁴³ International humanitarian law is also known as the law of war, since is the legal framework applicable to circumstances of armed conflict and occupation. As a set of rules and principles, it purposes, for humanitarian reasons, to limit the effects of armed conflict as well as to protect individuals and their goods who are victims of these kind of events, whether or not they have been displaced. This might become relevant to the case of environmentally displaced in certain circumstances, given the fact that armed conflicts may – at least in part – result from environmental disruptions. Commonly, environmentally displaced persons can find protection in international humanitarian law through humanitarian assistance, established by article 5 of the International

¹⁴⁰ McAdam, Jane. “‘Complementary’ or ‘Subsidiary’ Protection? The Convergence of International Refugee and Human Rights Law.” (13th Annual Conference of the Australian and New Zealand Society of International Law, Canberra, 2005), p. 6-7.

¹⁴¹ Ibid, p. 1

¹⁴² Non-refoulement is a fundamental principle of international law (IHRL and IRL) that prohibits a country receiving asylum seekers from returning them to a state in which they would be in imminent danger of persecution.

¹⁴³ McAdam, “Environmental Migration Governance,” p. 22.

Federation of Red Cross and Red Crescent Societies (ICRC) Statute,¹⁴⁴ in which the same governing principles of international humanitarian law operate and could be directed towards the protection of people in situations of environmental disasters. Consequently, all norms, principles, and customs relating to the international protection of human rights in times of peace or war should theoretically apply to environmentally displaced persons.

2.3 Toward a Specific Human Rights Approach

Following seven decades of the historical declaration of human rights, international human rights law continue to face challenges regarding the scope of international protection, the issues it reaches, and the effectiveness of its monitoring instruments. Faced with this concern, Susan Marks points out that the discussion currently is not merely of the organized promotion and protection of human rights, it is also of the specification and implementation of a human rights approach to global policy-making.¹⁴⁵

In the process of international law development, there are constant manifestations to reaffirm the commitment to the protection of human rights both domestically and internationally, especially in periods of history marked by severe episodes of attacks on human existence and dignity. Alongside this permanent commitment, the rapid and constant changes in the functioning of relations and in the international system demand a new look at the protection of human rights, which should address the current needs of its recipients. For this reason, it is crucial not only to assess the valuable contribution of the instruments that integrate the current system of international protection of the human person, but likewise identify its gaps as a result of the demands generated by the new international dynamics, and the need for new protection strategies.

¹⁴⁴ (ICRC), article 5: “Relations with the other components of the Movement: 1. The ICRC shall maintain close contact with the National Societies. In agreement with them, it shall cooperate in matters of common concern, such as their preparation for action in times of armed conflict, respect for and development and ratification of the Geneva Conventions, and the dissemination of the Fundamental Principles and international humanitarian law. 2. In situations foreseen by Article 4, paragraph 1 d) which require coordination of assistance provided by National Societies of other countries, the ICRC, in cooperation with the National Society of the country or countries concerned, shall coordinate such assistance in accordance with the agreements concluded with the other components of the Movement. 3. The ICRC shall maintain close contact with the International Federation of Red Cross and Red Crescent Societies. It shall cooperate with the latter in matters of common concern in accordance with the Statutes of the Movement, and the agreements concluded between the two organizations.”

¹⁴⁵ Marks, Susan. “Human rights in disastrous times.” In: *The Cambridge Companion to International Law*, edited by Crawford, James and Martti Koskeniemi. (Cambridge University Press, 2012), p. 313.

Human rights instruments have legally developed in the same way as responses to human rights violations of different kinds. It is therefore not surprising that certain gaps arise as the growing need for protection is realized. Recent experiences of major climate disruptions around the world have raised many concerns about the situation of human rights protection, as well as the need to assert and fill the protection gaps in these exceptional situations. Michel Prieur notes that the treatment of environmental disasters at the international level has, generally, been done in a predominantly practical and operational approach, by coordinating efforts to obtain the necessary means to provide concrete assistance to victims after the environmental disaster.¹⁴⁶ In this sense, the author advocates for a deeper reflection on the matter from the perspective of human rights in order to integrate the protection of these individuals with strategies for prevention and response to various types of catastrophes. Thus, he identifies the need to guarantee an extensive list of rights not only during and after the occurrence of a disaster, but also to strengthen the preventive dimension of protection.

Likewise, Roger Zetter points out that besides the highly developed international humanitarian capacity to respond to the millions of people forcibly displaced by extreme environmental events, there is a lack of a systematic empirical examination of their appropriateness.¹⁴⁷ As well as how given analysis might be adapted to the types of environmentally-induced displacements and how governments most affected by these events are contemplating their potential human rights obligations.

The universality of human rights, proclaimed in many international treaties and non-binding political declarations throughout the past century may be one of the great legacies of modernity to the legal field. However, reality shows that the practice of these rights is very far from the ideal enunciated in these agreements, since not only human rights are systematically violated by individuals and states, but also it cannot be denied that many countries disregard their obligation to it, by either state action or omission.

Although the legal principles contained in the Declaration of Human Rights prioritize equality and human dignity at the international level, it is incumbent upon all states to incorporate and legitimize their actual realization. Nonetheless, not all states put into practice humanitarian premises, and this

¹⁴⁶ Prieur, Michel. "Le Conseil de l'Europe, les catastrophes et les droits de l'homme." *Vertigo*, no. 8 (2010), p. 4.

¹⁴⁷ Zetter, Roger. "Protecting environmentally displaced people: developing the capacity of legal and normative frameworks." (Refugee Studies Centre Research Report, 2011), p. 13.

creates instability and confusion with regard to the protection of human rights. Also, the fragility of the system is due to the voluntary aspect of its rules, which become extremely utopian in face of reality itself, as easy principles to circumvent when affecting national policy decisions.¹⁴⁸ Consequently, international human rights law, within its structural dynamics, is capable of filling gaps but it also works as a system which, in conflict with the national rule, leads domestic courts to consider that the application of national law has supremacy over international human rights principles.

Accordingly, the critical problem that halts a complete fulfilment of human rights is precisely the fact that it usually has an openly flexible orientation – regularly divested of binding agreements – which allows space for states to accede or not to them, as they are conveyed simply by a set of principles and not legally sanctioned rules.¹⁴⁹ This political aspect makes the proposal of grounding the current international scenario for the protection of environmentally displaced persons based solely on human rights apparatuses impossible. Unlike climate events that result only in movements within national borders, international environmentally-induced displacements are directly related to the principle of state sovereignty. Internal displacements, because they are under the support of domestic jurisdiction, require from the international community mainly actions of humanitarian cooperation. However, as they transcend the limits of the national space, sovereignty and territorial management are confronted with the entry of these migrants. Thus, it is more convenient for states to treat the issue as an exception or a condition that it is not usual within the scope of forced displacement – even if the evidence shows otherwise.

Consequently, dealing with the protection related to human beings as a humanitarian issue causes states to place themselves in the position of donors through acts of solidarity, without this implying any kind of international responsibility on their part. When in fact the right to protection for victims of environmental disruptions should be considered a fundamental human right since most individuals crossing their country's borders are deprived, inter alia, of the rights to health, essential social services, housing and dignity.¹⁵⁰ Besides the fact that most of these migrants are

¹⁴⁸ Bittar, Eduardo C. B. *Ética, Educação, Cidadania E Direitos Humanos*. (Barueri: Saraiva, 2004), p. 224.

¹⁴⁹ Ibid, p. 124.

¹⁵⁰ Jakovljevic, Bosko. "Right to Humanitarian Action and State Sovereignty." In: *Humanitarian Action and State Sovereignty. Refugees: a continuing challenging*, edited by Baldini, Stefania and Guido Ravasi. (San Remo: Edizioni Nagard, 2001): 95-101.

predominantly affected by climate change and degradation created by wealthy countries of the global North, as previously observed.

It is essential that, on the one hand, both origin and receiving countries act through diplomatic protection, and on the other hand, the general instruments of human rights are applied and respected in all situations. In this way, a minimum of protection would have been ensured, while trying to match the interests of states with the needs of migrants to elaborate a more specific legally binding protection instrument.

Climate change is perceived as an environmental and socioeconomic threat that causes human rights violations, particularly against the poor and the marginalized.¹⁵¹ It is therefore clear that the particular situation of environmentally displaced persons lies among those that require differential treatment under international law, as special protection is needed, in addition to that provided by the general instruments of human rights. Thus, while these general apparatuses consider the individual an abstract being that deserves equal treatment, incompatible with any discrimination, special conventions focus on the specificities and differences between persons – factors that justify a particularized treatment.¹⁵² Additionally, the subject of law ceases to be generic to gain specificity due to race, age, gender, or any other reason that needs to be observed in a particular way. Vulnerable social groups demand attention by the legal system for the singularities they possess in an attempt to safeguard their basic human rights. This process inevitably leads to the creation of new rights, since the previous unknown differences require regulation to comprehend the uniqueness they embody.

Furthermore, it is expected that human rights-based approaches contribute to broaden the notion and understanding for an environmental justice and, thus, trigger crucial legal, policy and political reforms at the national and international levels. Accordingly, there is no contradiction between the general and special instruments for the protection of human rights. The relationship between the two is marked by the complementarity that binds them in a systematic and coherent whole. Thus, the universal protection established by general instruments of human rights, centered on the fundamental principle of the dignity of the human person, is the first and last reason for the protection of environmentally displaced persons. Nonetheless, it is necessary to establish, with due

¹⁵¹ Cameron, Edward, Tara Shine, and Wendi Bevins. “Climate Justice: Equity and Justice Informing a New Climate Agreement.” (World Resources Institute, Washington DC and Mary Robinson Foundation Working Paper, 2013), p. 2.

¹⁵² Amaral Jr., Alberto do. *Curso de Direito Internacional Público*. (São Paulo: Atlas, 2011), p. 489.

urgency, a global, fair and comprehensible legal mechanism to provide, without any discrimination, the support to their particular needs. Setting, thus, a worldwide commitment based on the shared responsibility among states and solidarity between state and non-state actors concerning environmentally displaced persons. In this way, a new integrated approach to the protection of human rights – sensitive to the new global challenges of contemporary times – is essential to deal adequately with the specificities and multiple facets of the problem.

2.4 The Link Between the Normative and Policy Protection Gap and State Sovereignty

While affecting certain groups of people in more or less defined geographical areas, human displacements forced by environmental reasons concern all states. Although environmental issues, damage and disasters are a common challenge to the international order – as they have origins and consequences beyond individual territories –, there is still much resistance to the recognition of this category of forced displaced people.

As examined before, the only international legal instrument on refugees does not include people displaced due to environmental disruptions, which is why legal debates on the subject are often limited to the rejection of the term “environmental refugees.” Since the status of refugee from environmental causes does not reach a consensus, many states, under their sovereignty and in the absence of specific international regulations, refuse to shelter and protect these groups of people in their territories. Thus, the inadequacy of refugee status and the inability of states to plan an adequate environmentally-related migration process require answers to understand the problem of the existing normative vacuum and legal limbo on the subject.

The lack of a comprehensive normative international framework to protect the rights of environmentally displaced person constitutes a substantial gap on the issue. Several initiatives have been developed over the last few years around the topic but, still, prove to be far from an international instrument of protection. In addition to normative, legal, and definition issues, the main barrier lies in the political will of states to commit themselves to a binding agreement that may entail responsibilities and duties. Given this, it is essential to reflect on to what extent the traditional role of state sovereignty and the protection of human rights result in an incompatible

relationship and present the main obstacle to international measures regarding the protection of environmentally displaced persons.

The 1998 Guiding Principles on Internal Displacement exclusively deal with protection for those within national borders, including internal environmentally displaced persons. Consequently, states' obligations under international law will primarily apply to individuals present in their territory. Therefore, normative gaps exist mainly for those moving across international borders and in the case of a total disappearance of a territory.¹⁵³ Laura Westra argues that, despite the great importance of guiding principles for the protection of internally displaced persons (IDPs), the legal protection of environmentally displaced in the face of the absence of specific regulations remains problematic mostly because of the uncertainties imposed by climate change and international political migratory tension.¹⁵⁴

Nevertheless, the inadequacy of any international legal framework to secure the protection of environmentally displaced persons results in a large protection gap on the subject. This gap is emphasized even more if compared with some other categories of displaced persons and migrants. Accordingly, the existence of protection gaps for environmentally displaced is surprising given the scope of protection (i.e., concepts, norms, and legal instruments) offered to other groups of forcibly displaced and vulnerable populations in domestic and international human rights law¹⁵⁵ – which comprehends refugees,¹⁵⁶ internally displaced persons,¹⁵⁷ stateless persons¹⁵⁸ and indigenous peoples,¹⁵⁹ while current existing instruments and norms are insufficient to address protection concerns for the ever-increasing number of environmentally displaced persons.

Usually, an understandable concern with the short-term impacts of sudden-onset extreme events dominates the debates of government and civil society actors rather than a general preoccupation with the long-term consequences and the gradual deterioration of essential environments which many people depend on.¹⁶⁰ As a result, there is a deficiency of comprehensive legal and normative frameworks to protect the rights of environmentally displaced persons.

¹⁵³ Mainly due to rising sea levels.

¹⁵⁴ Westra, Laura. *Environmental Justice and the Rights of Ecological Refugees*. (London: Earthscan, 2009).

¹⁵⁵ Zetter, "Protecting environmentally displaced people," p. 13.

¹⁵⁶ Convention relating to the Status of Refugees (1951) and its Protocol (1967).

¹⁵⁷ Guiding Principles on Internally Displaced Persons (1998).

¹⁵⁸ Statute of Stateless Persons (1954) and Convention on the Reduction of Statelessness (1961).

¹⁵⁹ United Nations Declaration on the Rights of Indigenous Peoples (2007).

¹⁶⁰ Zetter, "Protecting environmentally displaced people," p. 57.

Remarkably, the protection gap is not only legal but also one of policy implementation. This policy gap is symptomatic of the more specific challenges of developing needed protection frameworks for environmentally displaced persons. Structural limitations, including historical experiences and contemporary contextual aspects underpin the difficulty in developing more effective protection that mediate how displacement and human rights discourse and policy are framed in many countries.¹⁶¹ As a result, active policy development and implementation are inhibited. According to Roger Zetter, this protection gap is mostly noticed in what governments do, or fail to do, in terms of specifying and protecting rights before displacement (i.e., rights related to mitigation, adaptation and resilience strategies) and after displacement (i.e., rights related to return and, more especially, related to resettlement).

Thus, with the increasing propensity for people to migrate, in part as a result or in anticipation of environmental degradation, this evidence raises a concern about the capacity of many countries to develop policies that respond effectively to these changing processes and patterns of migration and displacement. In particular, to develop and consider how the rights of these individuals might best be protected. A lack of legal status will continue unless there is fundamental institutional change and consideration given to the development of appropriate instruments and standards.

Besides all the aforementioned issues, there is an apparent and problematic disconnect between activity at the intergovernmental and national levels. At the intergovernmental level, many agencies have been actively engaged in addressing the issues of environmentally-induced displacement as well as policy and normative gaps in protection. Nonetheless, little if any of the activity that is occurring at the intergovernmental level connects with national governments. At the domestic level, there is little progress and less willingness to engage the issues of a rights-based protection.¹⁶² Consequently, there is a significant challenge in creating synergy between these two levels. The protection gap is, therefore, evident in the lack of political will to provide protection, the absence of normative apparatus, weak structural capacity, and limited public resources dedicated to responding to the issue.

¹⁶¹ Ibid, p. 58.

¹⁶² Ibid, p. 59.

Concerns about international migration are extremely valid insofar as international migration governance is practically non-existent,¹⁶³ regarding migrant institutions and protective standards. Rather, there exists a set of non-binding bilateral and regional agreements, no mandate to establish norms and a plethora of international bodies and agencies that deal with numerous aspects of migration. While the UNHCR is universally accepted as the international institution with a mandate for the protection and assistance of refugees, there is no particular organization recognized as playing a comparable role regarding migration governance. The UN intergovernmental migration agency, IOM, is the primary international body dealing with migrants, however it was initially conceived to be as a service organization that would provide support for states, and, thus, has no mandate to develop normative standards.¹⁶⁴

Hence, in the name of the principle of sovereignty, it is state governments that individually establish migratory policies and accept or not the entry of migrants into their territory. Therefore, it is up to advocates and mostly migrants to solely adapt to the requirements of entry and, through the instigation of public opinion, denounce migrants' human rights violations and demand better treatment at borders, airports or within the host country's territory. As discussed before, from the perspective of an international set of principles, norms, and rules, only refugees are assigned a specific regime. Not only migration governance has scarce norms and principles, but, above all, migratory issues tend to remain under the domestic law and policy of states, on the grounds of sovereignty and national security regarding whom is allowed to enter and remain in their geographic space.

According to Robert Walker, sovereignty institutionalizes a political space that delimits the application of common ethical principles in the international scope and can exercise the dual function of solution of problems as well as an obstacle to many relevant questions to the international community.¹⁶⁵ This ambiguity of the principle of state sovereignty creates logics of

¹⁶³ Ferris, "Governance and climate change-induced mobility," p. 12; Badie, Bertrand, Rony Brauman, Emmanuel Decaux, Guillaume Devin et Catherine Wihtol de Wenden. *Pour un autre regard sur les migrations: construire une gouvernance mondiale*. (Paris: Éditions La Découverte, 2008), p. 15.

¹⁶⁴ Although these limitations are shifting as IOM's membership continues to expand (it presently has 165 member states) and its global presence increases (it has about 8,000 staff working in 150 countries). More than any other international body working on migration, IOM has played a leadership role since 1992 in conceiving a forum for discussion of environmentally-related migration, and it has published various working papers and books on the link between climate change and displacement. According to information retrieved from the International Organization for Migration website available at: <<https://environmentalmigration.iom.int>> Accessed June 15, 2019.

¹⁶⁵ Walker, Robert. *Inside/Outside: International Relations as Political Theory*. (Cambridge University Press, 1992), p. 64.

inclusion and exclusion that are consolidated by legitimizing specific spatial forms of discrimination where they can be authorized in time and space. These contours of sovereignty reproduce specific ways of literally drawing the lines through territorial or physical aspects and expressions of legal principles. Boundaries in space and territory express limits on laws, as they manifest demarcations of power, authority, community, responsibility, and freedom.¹⁶⁶

Nonetheless, political life has not always depended on specific forms of discrimination, such as those practiced in the modern system of sovereign states. These discriminations are not natural or universal, but they were culturally and legally conceived and therefore made universal. Sovereignty, in this case, is used to justify authority over a given territory, deciding on what is legitimate and what constitutes exceptionality.¹⁶⁷ Thus, the traditional principle of sovereignty commonly exercised by states is based above all on the constitutive distinction between legitimacy/illegitimacy, insiders/outside, a dichotomy that legitimizes and authorizes spaces of exclusion that are established above human rights.¹⁶⁸

Moreover, the logic of inclusion and exclusion are primarily based on the idea of political belonging through nationality. In this context, migrants represent the image of the Other, the possible representation of a threat. According to Seyla Benhabib, the basilar point of the principle of state sovereignty lies precisely in the monitoring and protection of borders and,¹⁶⁹ therefore, measures are applied to obstruct the entry of migrants, environmentally displaced persons, refugees and asylum seekers in general. This process creates an area of tension between the guarantee of human rights and the maintenance of the crucial element of territorial borders, which is migration control.

The question of nationality, under the perspective of state sovereignty, has the function of supporting the creation of norms and rules by specific groups within the concept of nation, especially regarding the themes of migration, not considering the impact of these norms to the individuals they refer. Further excluding these groups of people and exempting states from commitments to the human rights of those who do not allegedly belong to that particular territory.¹⁷⁰

¹⁶⁶ Walker, Robert. *After the Globe, Before the World*. (New York, Routledge, 2010).

¹⁶⁷ Walker, *Inside/Outside*, p. 111.

¹⁶⁸ Ibid.

¹⁶⁹ Benhabib, Seyla. *The Rights of Others: Aliens, Residents, and Citizens*. (New York: Cambridge University Press, 2004), p. 2.

¹⁷⁰ Ibid.

Condemning this process, however, does not mean defending the end of state sovereignty, but criticizes the basis on which it was conceived in the realm of modernity by establishing formal boundaries between the domestic and international domains, which ignores the relationships that always have permeated these two spheres, since interactions between human communities are constant and demonstrate the interdependence between individuals in a global society. Because it is often understood as a concept rooted in national territory, the individual's political sovereignty is fragmented in favor of the exacerbation of the national's. Similarly, Walker argues that state sovereignty must adapt to the corresponding transformations and new challenges in the world over territories, human rights, and mobility.¹⁷¹ Sovereignty and human rights can be considered distinct but directly related legal principles and therefore, must be shaped together to lead a more just and effective implementation of human rights guidelines, as the balance in the relationship between sovereignty and human rights presupposes sovereign equality between state-territory and individuals.¹⁷²

Regardless, migration policy is still predominantly determined by national political processes, and no major destination country has a proactive policy designed to resettle individuals adversely affected by slow onset environmental changes.¹⁷³ However, since this is a more political rather than a legal issue, advances in the instruments aimed at the protection of environmentally displaced persons are at odds with the lack of state willingness to comply with greater commitments, as previously seen. Jane McAdam points out that many political obstacles for a new treaty are mostly grounded in the absence of political will by countries of the global North.¹⁷⁴ Furthermore, overcoming this political impasse is difficult because it would include an acknowledgment of responsibilities for anthropogenic climate change and its consequences.¹⁷⁵ Resistance in devising specific protection instruments for environmentally displaced persons, thus, becomes a way of undermining the possibility of demanding accountability from potential host states to receive and protect these migrants. As a result, discussions on forced displacement due to environmental

¹⁷¹ Walker, *After the Globe, Before the World*.

¹⁷² Cohen, Jean. *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*. (Cambridge University Press, 2012).

¹⁷³ Martin, Susan. "Climate Change, Migration, and Governance." *Global Governance* 16, no. 3 (2010), p. 410.

¹⁷⁴ McAdam, "Swimming against the tide," p. 15.

¹⁷⁵ McNamara, Karen. E. "Conceptualizing discourses on environmental refugees at the United Nations." *Population & Environment*, no. 29 (2007), p. 12–24.

reasons are based on voluntary, non-binding instruments and commonly preventive recommendations.

Accordingly, it is clear that specific international protection is very precarious not only concerning environmentally displaced persons but migrants in general, which must be reviewed. Furthermore, reconciling legal and political praxis in relation to environmentally-induced displacement with knowledge of the migratory impacts of climate and environmental change lies at the heart of bridging the protection gap. A fundamental aspect of this process relies on determining what forms of protection for environmentally displaced persons currently exist and, more significantly, what type of protection could be developed as this population movements increase. It is essential to develop a concept of protection based on international human rights law as well as to advocate the creation and development of a specific new international instrument and legal apparatus to face the problem.

Moreover, given the risks associated with climate change reaching beyond the borders of states and consequently past their managing capacity, it is evident that the dogma of absolute sovereignty of national states must be overcome. As long as states utilize the classic concept of sovereignty argument – based solely on the recognition of state borders integrity – it will be much more challenging to address the issue of environmentally-induced displacement adequately. Therefore, the traditional concept of sovereignty, of origin linked to the modern state, must be redefined at a deeper level, since it is influenced by political and philosophical conceptions over time and thus can be adapted to different historical moments. Such analysis corroborates that sovereignty is both a flexible and a relative concept within the international order.

Faced with the need to maintain certain state sovereignty, the impracticability of absolute sovereignty in the traditional manner, and the recognition of the individual as a subject of human rights, a new paradigm of sovereignty – or post-sovereignty – capable of resolving current tensions in the international realm must be developed. This flexible notion of state sovereignty would operate to the benefit of the enforcement of international human rights law. Thus, considering the new international reality, one concludes that the classic concept of sovereignty, understood as unlimited, one and indivisible, which is not subject to any external order, must be overcome. It will create a more favorable scenario for broader protection motivated by new demands arising in the international order, which includes environmentally displaced persons.

3. International Legal Protection for Environmentally Displaced Persons: Current and Upcoming Initiatives

In the face of the conceptual, political and normative controversies presented, the debate surrounding the absence of international legal status for environmentally displaced persons, despite the seriousness of the issue, has not yet achieved the expected success towards a legal regime and specific international protection apparatus. In the previous chapters, it was demonstrated that from the significant controversies surrounding forced migration induced by environmental issues, the fundamental debate lies in the legal (in)definition of the phenomenon by international law, which still presents itself as an obstacle to be overcome on the way to the formal recognition of the category of environmentally displaced persons. Also, it is reasonable to conclude, in the wake of the evidence presented, that the great difficulty in advancing the topic is motivated not by legal obstacles only but also by political reasons. Therefore, the examination of legal protection based on current and future international instruments becomes imperative to address the needs and peculiarities of these people.

Given this scenario, there is no other way forward than to rethink and revise concepts as well as the role of state and non-state actors in the international order to alert decision and policymakers about the urgency to create viable new multilateral strategies and institutional arrangements compatible with new international dynamics in order to provide an adequate response to this global challenge.

The formal recognition of environmentally displaced persons emerges, unquestionably, as a new normative and social demand in the international domain. Traditionally, as examined in this thesis, commitment with migration at both domestic and international level has been Ad Hoc and fragmented. At the national level, numerous governments lack comprehensive migration policies. Instead, they regularly focus on just one aspect of migration, such as the return of irregular migrants or advocacy on behalf of their citizens who are employed in other countries. Nevertheless, recently, there has been a move towards greater interstate cooperation on environmentally-induced displacement matters at both regional and international level.

Furthermore, the specific challenges arising from climate change are only slowly being acknowledged by international mechanisms and institutions. There are different reports and

resolutions of United Nations agencies as well as regional intergovernmental organizations, which recognize the impact of climate change on human mobility as well as several proposals for declarations and Conventions, from scientific and governmental initiatives, aimed at tackling the issue as it will be further addressed in this chapter. These proposals could constitute the first step towards institutional development on fundamental aspects of the matter as well as more widespread international efforts, especially on building consensus on a protection agenda. While most do not focus on creating an international legally binding instrument to protect environmentally displaced persons, they still recognize the problem, propose guidelines, and direct national actions and policies, which can precisely contribute with processes towards the development of normative frameworks that address the need of a legally binding treaty which would guarantee the protection of environmentally displaced persons.

The legal norms of international law, such as treaty law, are essential in this context, as they can provide a solid foundation for building lasting alternatives, since only a set of obligations compromising all actors involved will be able to achieve a global solution on the matter. In this regard, the proposal of a concrete framework to deal with the issue of environmentally displaced persons will be further explored at the third session of this chapter. Such a framework would contain guarantees of rights, assistance, burden-sharing mechanisms, and institutional provisions, which would offer a comprehensive remedy for the issues related to environmentally-induced displacement.

3.1 Current Promising Initiatives at the Global Level

There has been a progressive evolution in the international context in order to improve coordination between the different agendas on climate change and the inclusion of human mobility in them. Displacement in the context of disasters and climate change has become an increasingly recurrent theme of the contemporary global agenda, which contributes to the beginning of the creation of international guidelines to be incorporated into national and international policies and practices. This also may facilitate the provision of more effective responses for the recognition and protection of environmentally displaced persons in the future.

Historically, the inclusion of the environment as a topic of relevance on the international agenda took place after the 1970s with the Stockholm Conference and culminated, in the same decade, in

the creation of a UN body: The United Nations Environment Programme (UNEP). The discussions that emerged from this period on environmental issues focused mainly on the dynamics of human intervention as a way of exposing the damages caused to the environment through chemical contamination, oil leaks and, mostly, waste of natural resources.¹⁷⁶ Since then, numerous agreements have been drawn up to minimize the effects of human activity on the environment. At the Rio 92 United Nations Conference, a consensus was reached on the production of some critical official documents regarding the issue.¹⁷⁷ In this context, it was created the United Nations Framework Convention on Climate Change (UNFCCC).

While the debate concerning environmentally-induced displacements originated during the 1970s, the creation of more consistent initiatives focused on the issue intensified only after the 2000s. In 2015, there has been recent progress on the subject in the UNFCCC system through the Paris Agreement, effective as of 2016, which recognized the link between climate change and human mobility.¹⁷⁸ Despite not establishing specific rights, the Agreement recognized the existence of environmentally displaced persons, which represents substantial progress. In 2018, remarkably, the UN compact on migration recognized climate change as driver of displacement, also it was included a section on climate change which is in itself an innovation.¹⁷⁹ Both recognitions have a great terminological relevance by putting an end to the debate about the use of the refugee regime to protect environmentally displaced persons, consolidating the path for distinct and specific protection of a new regime, which will stimulate experts of the subject to focus on this line of research.

¹⁷⁶ Dalby, Simon. "What happens if we don't think in human terms?" In: *Global Politics: A New Introduction*, edited by Zehfuss, Maja and Jenny Edkins. (New York: Routledge, 2009), p. 45-69.

¹⁷⁷ The conference resulted in several relevant documents and agreements, including Agenda 21, a plan to rethink economic growth, promote social equity and guarantee environmental protection. It also presented the Rio Declaration on Environment and Development, the Statement of Forest Principles, the United Nations Framework Convention on Climate Change as well as the United Nations Convention on Biological Diversity, an compromise on the Climate Change Convention which in turn directed to the Kyoto Protocol. Moreover, the idea of sustainable development revolutionized the thinking of many and contributed to world leaders according to the Millennium Declaration in 2000, paving the way to the Millennium Development Goals.

¹⁷⁸ The Conference of the Parties (COP 21) decision requested that the Warsaw Mechanism Executive Committee take action to make recommendations for integrated approaches to minimize and deal with climate displacements. Summary available at: <http://www.climatefocus.com/sites/default/files/20160214%20Loss%20and%20Damage%20Paris_FIN.pdf> Accessed July 20, 2019.

¹⁷⁹ "Global Compact For Safe, Orderly And Regular Migration" (2018), p. 9. Available at: <https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf> Accessed July 20, 2019.

Several global initiatives are relevant to the future of environmentally-induced displacement. In this session, the thesis will focus on three main current initiatives: the Mechanism for Loss and Damage (UNFCCC), Nansen Initiative, and the New York Declaration on Refugees and Migrants (UN). These three instruments, which use different methodologies, create a historic opportunity to strengthen the response to protect and assist people at risk of displacement as a result of environmental disasters and climate change. Furthermore, they have the potential to shape the future of environmental-related mobility. To varying degrees, all three have engaged a range of actors – including states, international organizations, experts and civil society – in order to propose new recommendations as a basis for developing guidance for future policies and practices.

a. 2013 Mechanism for Loss and Damage

The Loss and Damage Mechanism was developed in 2013 during the Warsaw Conference of the Parties (COP19) in order to create an institutional compensation mechanism to minimize the losses and damages of states most affected by climate change and directly impacted by the changes of sea level, sudden events (e.g., hurricanes, tsunamis, earthquakes), and acidification of the oceans. The main functions of this mechanism were to promote knowledge and understanding of risk management approaches to deal with losses and damages arising from the adverse effects of climate change, as well as strengthen dialogue, coordination, coherence, and synergy among stakeholders and to increase actions and support, including financial, technological and capacity-building.¹⁸⁰

The development of this instrument was based on the fact that adaptation measures to natural disasters cannot respond to all the challenges posed by climate change, culminating in the inability of an adequate response in both economic and non-economic aspects.¹⁸¹ Non-economic losses encompass sectors of society as well as the environment and can be understood as losses related to life, health, displacement and human mobility, territory, cultural heritage, indigenous knowledge, biodiversity, and ecosystems.¹⁸²

¹⁸⁰ UNFCCC. “Warsaw international mechanism for loss and damage associated with climate change impacts.” (November, 2013), p. 06-07. Available at: <<http://unfccc.int/resource/docs/2013/cop19/eng/l15.pdf>> Accessed July 22, 2019.

¹⁸¹ IFDD. “Convención Marco de Naciones Unidas para el Cambio Climático: Guide for negotiators.” (Lima, 2014).

¹⁸² UNFCCC. “Non-Economic Losses in the Context of the Work Programme on Loss and Damage.” (Technical Paper, 2013). Available at: <<http://unfccc.int/resource/docs/2013/tp/02.pdf>> Accessed July 12, 2019.

The topic of migrations in the context of climate change had already been addressed during COP 16 in 2010 in the city of Cancun, stressing the need for measures to coordinate actions on these displacements at the national, regional and international levels,¹⁸³ but only in the context of the Loss and Damage Mechanism, human mobility as a consequence of environmental issues was included as a non-economic loss factor.

According to its action plan, the first year of activities, in 2015, focused on gathering evidence, collecting data, and improving knowledge about the issues established as areas of action.¹⁸⁴ Concerning the search for solutions to the problem of environmentally displaced persons, the first year of activities sought to improve understanding of the problem, collect data – primary on vulnerable populations – as well as examine lessons learned, and good practices from the activities carried out by organizations and specialists.¹⁸⁵

In the process leading up to the 2015 Paris Conference (COP20) negotiations, two proposals were presented on the subject of environmentally-induced displacement. The first dealt with the principle of common but differentiated responsibilities and the establishment of coordination to address actions related to mobility resulting from the impacts of climate change. The second option was to make no mention of the Loss and Damage Mechanism, deleting it from the final document.¹⁸⁶ The definitive agreement resulted in the creation of a task force to develop data coordination and cooperation to minimize the impacts of environmentally-induced displacement and planned relocations. Unfortunately, it was stated that this instrument should not involve any responsibility or compensation on the part of states,¹⁸⁷ also, no effective measures were actually taken to protect environmentally displaced persons.

b. 2012 Nansen Initiative

¹⁸³ UNFCCC. “Report of the Conference of the Parties on its sixteenth session.” (Technical Paper, 2010). Available at: <<http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>> Accessed July 15, 2019.

¹⁸⁴ UNFCCC. “Report of the Conference of the Parties on its Nineteenth Session: Addendum Part two: Action taken by the Conference of the Parties at its nineteenth session.” (January 2014), p. 07, 13. Available at: <<http://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf>> Accessed July 22, 2019.

¹⁸⁵ Ibid, p. 11.

¹⁸⁶ UN. “Draft Agreement and draft decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action.” (Technical Paper, 2015). Available at: <<http://unfccc.int/files/bodies/application/pdf/ws1and2@2330.pdf>> Accessed July 14, 2019.

¹⁸⁷ UNFCCC. “Adoption of the Paris Agreement.” (Technical Paper, 2015). Available at: <<https://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf>> Accessed July 16, 2019.

The creation of the Nansen Initiative in 2012 represented the most significant state-led instrument about the topic of environmentally-induced displacement. The Initiative emerged as a consultative process devised by the states of Switzerland and Norway and sought to discuss and work towards the creation of a global guiding framework on displacement relating to climate change and environmental disasters. There was no intention to create a convention or instrument of soft law but to promote internal measures of prevention and international solidarity through the construction of consensuses for the treatment of forced migrants due to environmental reasons.¹⁸⁸ The emergence of such institution was motivated by the recognition of environmentally-induced displacement as a consequence of climate change under COP16 in 2010 when the UNHCR created forums for discussion on the subject that could lead to the elaboration of commitments among states regarding migratory movements due to climate change on the occasion of the 50th anniversary of the Refugee Convention. However, the final document expressed a rejection by states in signing agreements aimed at solving the issue of environmentally-induced displacements for reasons of sovereignty, failure to consider the issue as a priority on the international agenda and the rejection of the UNHCR's role as a leader in this process.¹⁸⁹ Faced with these difficulties, the solution found was to implement a consultative instrument led by states and not by an international organization.

In 2015, the Nansen Initiative presented the Nansen Protection Agenda, resulting from consultative processes with recommendations and priority aspects in managing climate impacts on human mobility. This Agenda does not propose a new framework for cross-border disaster displacement, but rather offers a set of recommendations, good practices and useful tools that governments may use to prevent, prepare for, and better respond to displacements in the context of disasters and climate change, especially with regard to the protection of displaced persons and disaster risk management. As it is not a binding document, the Agenda was endorsed by 110 countries. Germany, Brazil, France, Australia, Canada, China, Chile, South Africa are some of the countries

¹⁸⁸ Nansen Initiative. "Global Consultation Report." (Technical Paper, 2015). Available at: <<https://nanseninitiative.org/wp-content/uploads/2015/02/GLOBALCONSULTATION-REPORT.pdf>> Accessed July 10, 2019.

¹⁸⁹ Kalin, Walter. "From the Nansen Principles to the Nansen Initiative." *Forced Migration Review*, no. 41 (2012), p. 48-49.

that have expressed support, while the United States, Russia, India, Argentina, and the United Kingdom are among the ones that did not endorse the Nansen Agenda.¹⁹⁰

The Nansen Initiative was conceived as a forum for discussions between states of a temporary nature and, therefore, after the completion of the Nansen Agenda, the Platform on Disaster Displacement was created in 2016 – a mechanism to follow up the efforts of the Nansen Initiative and to stimulate the implementation of regional and international measures on environmentally-induced displacement.¹⁹¹

The Nansen Initiative played an important role in providing the basis for discussions on the issue as well as putting the question of cross-border disaster displacement on the international agenda and highlighting concrete ways that governments may address this matter.¹⁹² Nevertheless, this instrument is considered as a way of maintaining the legal protection of environmentally displaced persons as a voluntary action. The positions taken by the Agenda prioritize humanitarian measures and ignore the responsibilities of states in the process of climate change, leaving for the most vulnerable countries the responsibility to resolve the issue of these migratory processes on their own.¹⁹³

As a development from the Nansen Initiative, in 2016, it was created the Platform on Disaster Displacement, which aimed at complementing the work started by the Nansen Initiative, and to apply the recommendations of the Protection Agenda. The Platform presents itself as “a toolbox to better prevent and prepare for displacement and to respond to situations when people are forced to find refuge, within their own country or across the border.”¹⁹⁴

c. 2016 New York Declaration

¹⁹⁰ IDMC. “Human Mobility in the Context of Climate Change.” (Technical Paper, 2015). Available at: <<http://internal-displacement.org/assets/Uploads/201510-human-mobility-advisory-group-bonn.pdf>> Accessed July 22, 2019.

¹⁹¹ McAdam, Jane. “From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters, and Displacement.” *University of New South Wales Law Journal* 39, no. 4 (2016).

¹⁹² Nansen Initiative, “The Nansen Initiative: Disaster-Induced Cross-Border Displacement.” (2015). Available at: <www.nanseninitiative.org> Accessed July 20, 2019.

¹⁹³ CPRD. “Climate-Induced Displacement and Migration: Policy Gaps and Policy Alternative.” (2015). Available at: <http://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/briefing_paper_climate_induced_displacement_and_migration.pdf> Accessed July 20, 2019.

¹⁹⁴ The Platform on Disaster Displacement. Available at: <<https://disasterdisplacement.org/>> Accessed July 20, 2019.

In 2016 the New York Declaration for Refugees and Migrants¹⁹⁵ conveyed the commitment of the United Nations 193 member states through its General Assembly to improve their policies and practices related to migration. The New York Declaration sought to highlight and strengthen cooperation and coordination among international actors involved in the governance of migration issues, such cooperation would include shared and equitable responsibilities between states.¹⁹⁶

According to the document, protection in case of displacement due to environmental events would only come into force if the country of origin is unable to provide necessary protection to the affected community and when the UN believes that such persons should have access to international protection.¹⁹⁷ The international community action would thus be necessary in order to ensure protection in a complementary manner.¹⁹⁸ This protection would be temporary or permanent, and one of the proposed means would be through humanitarian assistance.¹⁹⁹

This document gave rise to two agreements, known as Global Compacts: one on refugees and another one on migrants, adopted by an overwhelming majority in the UN General Assembly in December 2018. The two agreements are not legally binding instruments and are voluntary in nature. The creation of the Global Compact for Migration²⁰⁰ (GCM), which aims at the management of migration in a safe and orderly manner, takes place through principles, recommendations, and commitments to be applied by the member states concerning migratory movements in their most diverse spheres. It also recognizes that anthropogenic and natural environmental degradation increasingly interacts with the drivers of migratory movements.

In more general terms of protection, the GCM expresses concern and brings some specific determinations regarding environmentally displaced persons.²⁰¹ It also indicates, the need for the mapping of migratory routes, which may improve the identification of types of displacements.²⁰²

¹⁹⁵ UN. “New York Declaration on Refugees and Migrants.” (September, 2018). Available at: <<https://refugeesmigrants.un.org/declaration>> Accessed July 18, 2019.

¹⁹⁶ Ibid. Paragraph 68 mentions: “[...]To address the needs of refugees and receiving States, we commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees while taking account of existing contributions and the differing capacities and resources among States.”

¹⁹⁷ UNHCR. “Climate change, disaster, and displacement in the Global Compacts: UNHCR's perspectives.” (November 2017), p. 2. Available at: <www.unhcr.org/protection/environment/5a12f9577/climate-change-disaster-displacement-global-compacts-unhcrs-perspectives.html> Accessed July 22, 2019.

¹⁹⁸ Ibid, p. 3.

¹⁹⁹ Ibid.

²⁰⁰ UN. “Global Compact for Safe, Orderly, and Regular Migration.” (December, 2018). Available at: <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195> Accessed July 20, 2019.

²⁰¹ Ibid, p. 4.

²⁰² Ibid, paragraph 18 (h), p. 10.

Furthermore, it promotes international cooperation in disaster prevention and mitigation²⁰³ as well as proposes development adaptations and strategies of resilience to those who migrate due to environmental disasters, the adverse impacts of climate change, and environmental degradation, taking into account the potential implications on human mobility.²⁰⁴ There is a commitment to the development of rights for migrants who are victims of disasters, which may create or complement existing national and regional policies – such as granting humanitarian visas, private sponsorships, access to education for children, and temporary work permits – while adaptation or return to their country of origin is not possible.²⁰⁵

Although the document is voluntary in nature, it sets a precedent as it incorporates the issue of environmentally-induced displacement on the international migration agenda. Also, it guides the international community in supporting migrants, countries, and communities that host large numbers of environmentally displaced by mobilizing political will, broadening the base of support, and facilitating arrangements for burden-sharing and more equitable and predictable responsibilities. The GCM is considered to be the main driver of the measures taken concerning forced migration in the coming years, as some countries are beginning to utilize it as a policy reference.²⁰⁶ Furthermore, it is incredibly positive that the GCM aims to strengthen the international cooperation aspect on the issue of migration in a logic of shared responsibilities. Nonetheless, its non-binding character is a fragility. Moreover, despite the mentions and considerations about environmentally displaced persons in the GCM, the problem of the absence of a specific legal international protection remains unresolved.²⁰⁷

3.2 Treaty Law and the Normative Foundation for the International Protection of Environmentally Displaced Persons

²⁰³ Ibid, paragraph 18 (b), p. 9.

²⁰⁴ Ibid.

²⁰⁵ Ibid, paragraph 21 (g), p. 13.

²⁰⁶ The Comprehensive Development Plan, promoted by El Salvador, Guatemala, Honduras, and Mexico, emerged from the recommendations of the Global Migration Compact in order to change the paradigm of migration and development in Central America. The Plan will help improve joint actions and strategies between the countries, and it seeks to promote development and opportunities in the region, assisting the prevention of the migratory phenomenon and tackling its structural causes simultaneously. Available at: <<https://www.cepal.org/en/pressreleases/foreign-ministers-salvador-guatemala-honduras-and-mexico-presented-comprehensive>> Accessed June 12, 2019.

²⁰⁷ Chadwick, Vince. “Global Compact for Migration, not the answer for climate refugees: UN representative.” *Devex*, March 20, 2018.

International law provides the basis on which sets of rules, principles, agreements, and treaties govern the international relations of various actors that compose the international society. Thus, there are three main sources of international law: treaties,²⁰⁸ customs,²⁰⁹ and general principles of law.²¹⁰ Treaties are the strongest and most binding kind because they embody consensual agreements between the parties who sign them. Through this kind of arrangement, two or several actors in international law voluntarily commit to comply with certain rights and obligations regardless of the number of its instruments and terminology (e.g, treaty, agreement, convention, pact, protocol, among others).

The 1969 Vienna Convention on the law of treaties (VCLT) defines a treaty as “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”²¹¹ Hence, treaties are comparable to contracts between parties, where promises are exchanged, finalized in writing, and signed. Participants may debate the interpretation or execution of a treaty, but its written provisions are binding. The principles of *Pacta Sunt Servanda*, according to which a participant has a duty to respect the agreements it has entered into prevail.²¹² Failure to comply with an international treaty implies liability for the parties, as states or international bodies.²¹³ The degree of international liability and its type shall be determined by the extent of the damage caused in breach of the agreement.²¹⁴ Generally, when a state fails to respect its international commitments, it has a secondary obligation to cease the wrongful act, perform its international duty, and to make adequate reparation to any state harmed.²¹⁵

²⁰⁸ Statute of the International Court of Justice, article 38(1).

²⁰⁹ *Ibid*, article 38(1)(b); Norms of customary international law are constituted by the general practice of states accepted as law.

²¹⁰ *Ibid*, article 38(1)(c); The scope of “general principles of law” recognized by “civilized” nations, to which Article 38(1) refers, is considered unclear and controversial by several authors. The Guide to International Legal Research states that “this traditional naturalist approach provides a basis for decision when other sources offer no guidance, yet it is unclear what these general principles of law are.”

²¹¹ Vienna Convention on the law of treaties (VCLT), article 2(1)(a).

²¹² According to Article 26 of VCLT, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

²¹³ The normative framework for the international responsibility of states has been a controversial item on the international political agenda (for reasons examined in the previous chapter) since the establishment of the UN. Only in the 1980s, the UN International Law Commission reached a virtually consensual text. The document was approved by General Assembly Resolution 81/2000.

²¹⁴ Villiger, Mark. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. (Leiden: Martinus Nijhoff Publishers, 2009).

²¹⁵ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, articles 29 and 31.

Accordingly, since hard law treaties have the apparent advantage of being legally binding, and to some extent – depending on available legal remedies – enforceable, these treaties are especially useful to fill legal gaps where international law does not provide an answer for essential questions, as in the case of cross-border movement resulting from environmental factors. Moreover, according to Hilary Charlesworth, “multilateral treaties drafted by international institutions often have a more obviously legal character than bilateral treaties in the sense that they set out broad statements of principle to be applied in many different contexts.”²¹⁶

Furthermore, international norms that regulate the protection of migrants, in general, are mostly made up of customary law and regional and universal agreements, as well as other instruments that refer to the concept of soft law.²¹⁷ Such as declarations, codes of conduct, guidelines of multilateral institutions, non-governmental organization resolutions, and other promulgations of political bodies related to the United Nations system. There is, however, a major international absence of binding legal force as well as political considerations on migrant protection. Indeed, there are many international instruments, which applied to the present time, cover a vast number of situations regarding human rights violations. Nevertheless, as seen, the main obstacle to protection, is not necessarily the absence of international norms, but the fact that many states do not respect existent non-binding agreements. Samantha Besson clarifies that as a result of the emergence of non-state actors in the international field and the normative creation undertaken by them in recent decades, international law has gone from subjective to more objective, from relative to universal and, in terms of normative degree, now it ranges from low intensity or soft law to imperative norms.²¹⁸

According to Ian Brownlie, “as objects of study, the sources of international law and the law of treaties [...] must be regarded as fundamental: between them, they provide the basic particles of the legal regime.”²¹⁹ For him, the distinction between the formal sources of law – as “legal procedures and methods for the creation of rules of general application which are legally binding on the addressees” – and the material sources of international law – the ones which “provide evidence of the existence of rules which, when proved, have the status of legally binding rules of

²¹⁶ Charlesworth, Hilary. “Law-making and sources.” In: *The Cambridge Companion to International Law*, edited by Crawford, James and Martti Koskenniemi. (Cambridge University Press, 2012), p. 191.

²¹⁷ The term soft law is used to express agreements, principles, and declarations that are not legally binding. Soft law instruments are principally found in the international field. On the other hand, hard law generally refers to legal obligations that are binding on the parties involved and which can be legally enforced before a court.

²¹⁸ Besson, Samantha. “Theorizing the Sources of International Law.” In: *The Philosophy of International Law*, edited by Besson, Samantha and John Tasioulas. (Oxford University Press, 2010), p. 165.

²¹⁹ Brownlie, Ian. *Principles of Public International Law*. 6th Edition. (Oxford: Oxford University Press, 2003), p. 3.

general application” – are difficult to maintain. Nonetheless, what matters is the variety of material sources, the all-important evidence of the existence of consensus among states concerning particular rules or practices. Thus, decisions of the International Court of Justice, resolutions of the General Assembly of the United Nations, and law-making multilateral treaties are very material evidence of the attitude of states toward particular rules, and the presence or absence of consensus. Moreover, there is a process of interaction which gives this evidence a status somewhat higher than mere material sources.

Although the international community has acknowledged the link between environmental degradation, displacement, and human rights violation the current set of norms of international law do not address the condition of environmentally displaced persons. Considering the flagrant high levels of socioeconomic vulnerability faced by the majority of these people, the failure of international law to tackle the problem is of great concern. The possibility of a legally binding treaty as a remedy to the issue of environmentally-induced displacement is still faced as a political challenge. However, it is of fundamental importance since it presents a practical and comprehensive means of international protection. Also, once an international treaty has global legal validity on the recognition and legal protection of environmentally displaced persons, the challenges of such recognition and protection will not be automatically resolved. It will be necessary to ensure as many ratifications as possible of this treaty, to internalize its text in the domestic legal order of states, ensure that the rights of environmentally displaced persons are fully respected, and establish accountability mechanisms for countries that might violate the treaty. There is substantial evidence that the option for an international treaty is the most legally binding of arrangements for the recognition and specific legal protection of environmentally displaced persons at the international level. Hence, this thesis argues that only a specific binding international treaty on the legal status of environmentally displaced persons can guarantee the full exercise of their rights worldwide.

In order to address this problem adequately, Jean Lambert affirms that it is vital that environmentally-induced mobility and environmentally displaced persons are recognized as a phenomenon in their own right.²²⁰ Thus, a conceptual framework is needed, thorough meaningful

²²⁰ Lambert, Jean. “Refugees and the Environment: the forgotten element of sustainability.” (Brussels: The Greens/ European Free Alliance in the European Parliament, 2002). Available at: <http://www.jeanlambertmep.org.uk/wp-content/uploads/2013/03/0206Ref_Env_Rep.pdf> Accessed July 28, 2019.

research into the phenomenon, for the issue to be understood and addressed at national, regional and international levels, and for the proper mechanisms to be implemented in order to deal with the consequences of environmentally-induced mobility.

Despite the existence of international human rights norms that should, theoretically, protect such persons, there remains a fundamental normative and institutional gap in the international system. However, while a specific binding international Convention on the subject is the ideal scenario in international law and policy, it should be considered the high resistance that the issue of migration faces in the international arena and that states and international bodies further oppose the debate on the legal recognition for protection of environmentally displaced persons in international fora. Dana Falstrom admits that such an international convention is not something that will happen overnight.²²¹ Moreover, too much delay in the stages of ratification of an international treaty²²² would prevent the effective protection of environmentally displaced persons until the agreement is in force, which, judging by the previous global deliberations on international migration, could take years or decades.

3.3 A New Global Treaty: The Construction of a Binding-based Protection

Whilst environmentally displaced persons become increasingly numerous due to the growing number of disasters and rising impacts of climate change, they still lack a legal status adapted to their situation. Faced with this complex debate on environmentally-induced displacement and the existing international legal vacuum on the matter, the ideal scenario would be the formulation of a specific binding international treaty on the rights and obligations of environmentally displaced persons. This system would be characterized by a standard definition, a binding international convention, and a designated United Nations agency. Therefore, the importance of Treaty Law must be emphasized in the case of the development of a future international Convention of global scope for the protection of environmentally displaced persons through international law.

For instance, an UN Secretary-General's Report on climate change and displacement highlighted that "[m]ultilateral comprehensive agreements would be the ideal preventive mechanism,

²²¹ Falstrom, Dana Zartner. "Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment." *Colorado Journal of International Law and Policy* 13, (2001), p. 13.

²²² The following phases carry the existence of international treaties: (i) negotiation, (ii) conclusion, (iii) ratification and, (iv) implementation.

providing where, and on what legal basis, affected populations would be permitted to move elsewhere, as well as their status.”²²³ Environmentally-induced displacement is a substantial contemporary issue which justifies its own legal regime with a comprehensive legal and policy framework specially projected to handle its particularities. However, it is worth pointing out that for this problem to be solved, such an instrument should be widely ratified and implemented as well as seen like part of a series of mechanisms to address the topic, and not the only solution to the problem. Other mechanisms should include regional initiatives, which are often used to complement and strengthen international instruments, and vice versa.²²⁴

As observed, from the perspective of international law, the treatment of environmentally displaced persons appears to be characterized by Ad Hoc solutions and individual approaches of nation-states, rather than by the development of a global solution, since the structure of migration governance, as a whole, is scarcely institutionalized and covers fewer internationally accepted norms and frameworks.²²⁵ However, in recent years, many proposals, mostly lead by non-state actors, have tried to close this blind spot in international law by advocating for an international protection regime for cross-border displacement due to environmental reasons.

According to the literature examined, it is possible to identify three different groups of proposals for the international legal protection of environmentally displaced persons:²²⁶ (i) amendment of the UN Convention on the Status of Refugees to contemplate EDPs as refugees; (ii) a specific binding global international treaty for the legal protection of EDPs; and (iii) international legal protection through a soft law UN resolution with specific guidelines such as the 1998 Principles of Internal Displacement. This thesis argues that options (ii) and (iii) are viable, which is not the

²²³ U.N. “Secretary-General, Climate Change, and Its Possible Security Implications: Rep. of the Secretary-General, U.N. Doc. A/64/350.” (2009), p. 20. Available at <<http://www.unhcr.org/refworld/pdfid/4ad5e6380.pdf>> Accessed July 28, 2019.

²²⁴ Williams, “Turning the Tide,” p. 518.

²²⁵ Ferris, “Governance and climate change-induced mobility,” p. 12.

²²⁶ Among the different academic initiatives that propose the adoption of an international standard to regulate environmental displacements, the most cited are: The Draft Convention for Persons Displaced by Climate Change (Hodgkinson et al. “The Hour When the Ship Comes in: A Convention for Persons Displaced by Climate Change.” *Monash University Law Review* 36, no. 1, 2010); a treaty connected to the United Nations Framework Convention on Climate Change (UNFCCC) (Biermann, Frank and Ingrid Boas. “Protecting Climate Refugees: the case for a global protocol.” *Environment Magazine* 50, no. 6, 2008); a proposal for a Convention on “Climate Refugees” (Docherty, Bonnie and Tyler Giannini. “Confronting a rise tide: a proposal for a Convention on Climate Refugees.” *Harvard Environmental Law Review* 33, 2009); and the Draft Convention on the international status of environmentally displaced persons (CRIDEAU; CRDP; OMIJ; CIDCE. “Draft Convention on the international status of environmentally displaced persons” (fourth version – 2018).

case of option (i), since environmentally displaced persons do not fall within the scope of the refugee regime created by the 1951 Convention, as explained in the previous chapter.

Most of these proposals argue for a new, virtually stand-alone, legal instrument by which to govern environmentally-induced displacement. Also, they incorporate human rights principles as a method to give universal applicability to a new system of rights and responsibilities. Nevertheless, these proposals differ as to the most appropriate mechanism to tackle the problem, as well as its scope and features. In this way, this session will focus exclusively on the Draft Convention on the International Status of Environmentally Displaced Persons, also known as the Limoges Project,²²⁷ by French researchers. Planned as a Framework Convention to contribute to the guarantee of the rights of environmentally displaced persons, the project emerges as one of the most complete proposals to date.

3.3.1 Draft Convention on the International Status of Environmentally Displaced Persons

The Draft Convention on the International Status of Environmentally Displaced Persons, developed by a group of legal scholars from the University of Limoges, France, emerged as a specific legal framework initiative for the protection and recognition of victims of environmentally-induced displacement with a human rights-based approach.²²⁸ The purpose of the Draft Convention is to establish a legally binding treaty in order to guarantee the rights of environmentally displaced persons and to organize their reception and eventual return, as well as the commitment of the parties to protect these people and ensure the full exercise of their rights.²²⁹ The project is a noteworthy contribution as it combines protection, assistance, and state responsibility, incorporating the principles of proportionality, nondiscrimination, and common but differentiated responsibilities.²³⁰

It establishes universal application, applying to internally and internationally environmentally displaced persons, due to anthropogenic or natural reasons, as well as includes among of causes of

²²⁷ CRIDEAU; CRDP; OMIJ; CIDCE. “Draft Convention on the international status of environmentally displaced persons” (fourth version - 2018). Available at: <<https://drive.google.com/file/d/14WccbpZwAjdIIzydujcknlWBYYx3MTs9o/view>> Accessed July 25, 2019.

²²⁸ Ibid.

²²⁹ Ibid, according to article 1 of the Draft Convention.

²³⁰ Fernandez, Maria Jose. “Refugees, climate change, and international law.” *Forced Migration Review* 49, (2015), p. 42-43.

displacement, gradual and sudden environmental distresses. The project also covers victims of environmentally-induced displacement triggered by armed conflicts or acts of terrorism.²³¹ This session aims to present the Project and specific aspects of its content, critically analyze it, and explore its future perspectives.

a. Definition and principles

The draft Convention sets out a definition of environmentally displaced persons which is at the heart of the proposal, helping to define and regulate its scope of application. Thus, environmentally displaced persons are individuals, families, groups, and populations affected by a brutal or subtle modification of their environment, which inexorably affects their condition of life and forces them to leave their habitual places of life, as a matter of urgency or over time.²³² A brutal modification is a sudden degradation of natural or anthropogenic origin. Its definition also highlights the forced nature of movement, that is to say, internally or internationally, temporary or permanent displacements that become unavoidable as a consequence of environmental changes.²³³

Furthermore, five principles should guide the implementation of the future convention: i) the principle of solidarity requires states and private actors to do their utmost to welcome environmentally displaced persons and contribute to the financial costs of reception;²³⁴ ii) the principle of common but differentiated responsibility establishes that states have a shared responsibility for reception, taking into account their respective capacities;²³⁵ iii) the principle of effective protection establishes the obligation of states and the World Agency for Environmentally Displaced Persons to adopt policies for the full exercise of the rights granted in the Convention,²³⁶ iv) the principle of non-discrimination provides that rights are guaranteed without distinction based

²³¹ According to Article 3 of the Draft Convention concerning the field of application.

²³² Article 2.

²³³ The Draft Convention does not specify how environmentally displaced status can be or should be proven. Recognition of the status is regulated by article 14 of the Project, providing that this status is granted upon demand of every person, family, group or population that falls within the definition of environmental displacement that appears in paragraph 2 of article 2 and according to the guidelines established by the High Authority foreseen in the Project. The National Commission for Environmental Displaced Persons is the body responsible for examining the demands for recognition of the status of environmental displaced persons. Details of this procedure can be found in Articles 16, 17 and 18.

²³⁴ Article 4.

²³⁵ Article 5.

²³⁶ Article 6.

on sex, sexual orientation, race, color, language, religion, opinions, national or social origin, membership of a national minority, birth, disability, age or another status;²³⁷ v) the principle of non-refoulement, enshrined in the legal status of refugees, is adapted to this new situation, which determines that states cannot reject a seeker for the status of environmentally displaced.²³⁸

It is therefore significant that this proposal has taken great consideration of collective rights and the common but differentiated responsibility principle, since most of the burden caused by environmentally-induced displacement might be supported by neighboring countries. This extremely unfair situation would create the risk of a “domino effect,” as bordering countries may themselves be affected by similar environmental degradation and become incapable to sustainably resettle other environmentally displaced persons.²³⁹ It is essential to stress the importance of upholding the need for a new global commitment based on broader support, balancing the allocation of responsibilities to states – grounded on the principle of common but differentiated responsibilities – and the duty of the entire international community – on the basis of the principle of solidarity – in order to grant non-discriminatory international protection for environmentally displaced persons.

Considering the varied contributions to the existing global environmental degradation, states have common but differentiated responsibilities. Primarily, developed countries must recognize their main responsibility in light of the pressures exerted by their industrial societies on the global environment as well as the technologies and financial resources they control. Thus, they have common moral obligations to assist the populations affected by the effects of climate change. For all this, rights-based protection as a response to environmentally-induced displacement is a principle accepted and embedded in the international responsibility of states, although they often have difficulty in accepting such accountability as well as creating and implementing mechanisms to protect affected victims.

b. Rights granted to environmentally displaced persons

²³⁷ Article 7.

²³⁸ Article 8.

²³⁹ E.g., Nigeria receives several migrants from Niger, although Nigeria is itself affected by land degradation and floods.

The Draft Convention establishes two categories of rights concerning their recipients: (i) the rights of persons threatened with displacement;²⁴⁰ ii) the rights of displaced persons, which include the common rights to internally and internationally environmentally displaced,²⁴¹ and a specific right of internationally displaced persons to nationality.²⁴² By assigning rights to people threatened with displacement a preventive strategy is adopted, as well as the guarantee of respect for the decision to move or refuse to do so.²⁴³

The Convention recognizes the right to have access, as far in advance as possible, to information concerning environmental threats and critical situations which may result from them.²⁴⁴ Individuals, families, groups, or populations threatened with displacement have the right to participate in the determination of policies and programs to prevent environmental disruption and to manage their consequences.²⁴⁵ States should ensure the right to information and participation in the development of common standards so that persons threatened with displacement can influence decisions regarding environmental threats that may lead to displacement.²⁴⁶ Also, states should report on the status of environmentally displaced and the conditions for its recognition.²⁴⁷

Regarding access to information, it is necessary to emphasize the importance of involving civil society in the negotiation process of possible actions to be taken to prevent and mitigate the impact of environmental changes as well as to offer assistance and protection to those who have been affected or forced to move. Civil society involvement has also been a growing trend in treaty development, which includes not only important participation in the creation and negotiation of a future agreement, but also in ensuring its ratification and implementation.²⁴⁸ In this way, individuals will have adequate access to reports from public authorities, including information about hazardous resources and activities in their communities, as well as the opportunity to participate in decision-making processes. The right to information and participation in developing

²⁴⁰ The rights guaranteed to persons threatened with displacement are foreseen in Chapter 3 of the Draft Convention, Articles 9, 10 and 11.

²⁴¹ The rights of displaced persons are contained in Chapter 4 of the Draft Convention. Article 12 indicates the common rights to internally and internationally environmentally displaced persons.

²⁴² The right to nationality is guaranteed to internationally environmentally displaced persons in Article 13 of the Draft Convention.

²⁴³ Article 10: the right to movement; and article 11: the right to refuse displacement.

²⁴⁴ Article 9 (1).

²⁴⁵ Article 9 (2).

²⁴⁶ Article 9 (3).

²⁴⁷ Article 9 (4).

²⁴⁸ Hodgkinson et al., "The Hour When the Ship Comes in," p. 3, 45; Docherty and Giannini, "Confronting a rise tide," p. 350.

strategies to address environmentally-induced displacement demands would not only help individuals decide whether or when to migrate, but would also allow local experiences to be considered in policy processes implementation.

Furthermore, the right to movement²⁴⁹ specified in the Draft Convention is an adaptation, for environmental crisis situations, of the right to freedom of movement enshrined in article 13 of the Universal Declaration of Human Rights.²⁵⁰ This right corresponds to the obligation of states to not hinder or let another party obstruct the displacement. Moreover, as seen, persons threatened with displacement are guaranteed the right to be consulted, and to consent or oppose to displacement by assuming the risks. During displacements promoted by public authorities, the consent of affected victims is still required, except in case of severe or imminent danger.²⁵¹

Also, states must develop and implement a permanent program of assistance to environmentally displaced persons.²⁵² The right to be rescued²⁵³ might relate to the right to humanitarian assistance, not yet recognized in any international treaty, but mentioned in international texts and documents.²⁵⁴ It may be linked to other human rights, such as the right to life and physical integrity. The rights accorded to environmentally displaced persons are, for the most part, human rights previously enshrined in international law and reinterpreted in the context of a binding Convention. The Draft Convention also includes the right to food assistance, health care, legal personality, civil and political rights, housing, right to return and non-refoulement, family unity, work, education, the maintenance of cultural specificities, and the right to private property.²⁵⁵ Additionally, international environmentally displaced persons are granted the right to maintain the nationality of their country of origin and to have their application for nationalization facilitated in the host

²⁴⁹ Article 10 of Draft Convention.

²⁵⁰ Also inspired by articles 9 and 12 of the International Covenant on Civil and Political Rights.

²⁵¹ Article 11.

²⁵² Provision for this obligation to have a program of assistance for environmental displaced persons is contained in Article 12 (1) of the Draft Convention.

²⁵³ Article 12, (1).

²⁵⁴ E.g., in 1996, the UN Secretary-General mentioned the right to humanitarian assistance in a report on emergency assistance to Sudan. United Nations. Secretary-General. Report on emergency assistance to Sudan, 1996, paragraphs 71 and 93; Also the principles on the right to humanitarian aid developed by the International Institute of Humanitarian Law (International Institute of Humanitarian Law. Guiding Principles on the Right to Humanitarian Assistance, 1992).

²⁵⁵ These rights derive from the Universal Declaration of Human Rights and specific instruments promoted by UN agencies and programs, like FAO (Food and Agriculture Organization), UN-HABITAT (The United Nations Human Settlements Programme), WHO (World Health Organization), UNESCO (United Nations Educational, Scientific and Cultural Organization) e ILO (International Labor Organization); They are foreseen in articles 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of the Draft Convention.

country, if requested,²⁵⁶ undoubtedly inspired by the Universal Declaration of Human Rights. It also institutes the right to family reunification, which is presented in international human rights law and in international refugee law.

In general, the Draft Convention does not create new rights or obligations but reinterprets – in a binding approach – human rights guaranteed at the international and national level in most countries to situations of environmentally-induced displacement and the specific needs of environmentally displaced persons. As a result, its adoption should not pose a problem in terms of resistance to the recognition of new rights and obligations.

c. Status recognition procedure

One of the highlights of the Draft Convention is the allocation of environmentally displaced person status through a specific procedure adopted by states in cooperation with the High Authority. Any person victim of environmentally-induced displacement can request this status.²⁵⁷ This recognition is necessary for the full attribution and enjoyment of the rights established by the Convention. Though the protection conferred by the environmentally displaced status ceases when the conditions for such recognition are no longer present.

Furthermore, the full protection represented by the set of rights granted to environmentally displaced persons is not automatically conferred in case of displacement due to environmental reasons. A request for recognition of status shall be forwarded and accepted by the competent authorities so that individuals, families, groups, or populations in this condition can benefit from such rights.²⁵⁸ The Draft Convention also establishes immunity to environmentally displaced, which prevents states from applying criminal sanctions to those who enter their territory without authorization, provided that they spontaneously present themselves to the host country's authorities within a month of their arrival.²⁵⁹

The request for status should be forwarded to the National Commission of Environmental Displacement instituted by the Draft Convention, which is the body responsible for granting environmentally displaced status. The general status recognition procedure, which must be detailed

²⁵⁶ The right to nationality is provided for in article 13 of the Draft Convention.

²⁵⁷ Procedures regarding recognition of status are described in Chapter 5 of the Draft Convention, articles 14 to 19.

²⁵⁸ According to article 14.

²⁵⁹ Article 15.

by each state, follows this order: (i) request to the Commission; (ii) public hearing in which the applicant and the host state present their observations; (iii) decision of recognition or refusal; (iv) appeal to the High Authority, specified below, which has suspensive effect and results in an extension of the temporary visa.²⁶⁰ It should be noted that any request for environmentally displaced status is entitled to a temporary visa until the final decision. Additionally, distinct applications motivated by the same environmental reason may be grouped together.

The existing deficiency of international law regarding the recognition and protection of environmentally displaced persons is also reflected in international governance. Considering that environmentally-induced displacement encompasses different legal and institutional frameworks, such as human rights, disaster risk reduction, humanitarian assistance, and environmental rights, no specific international body has as its primary function the management of environmentally-induced displacements, which generates a fragmentation, and an absence of international governance to address this problem.

The Draft Convention presents a proposal for an institutional framework for the management of environmental displacement through the creation of specific bodies:²⁶¹ the World Agency for Environmentally Displaced Persons, the High Authority and the Global Fund for Environmentally Displaced Persons. The effectiveness of the Draft Convention, therefore, calls for the creation of international governance specifically geared to environmentally displaced persons. The World Agency for Environmentally Displaced Persons, which has the status of a specialized UN body, is charged with the implementation of the Convention. This body has the following tasks: (i) to carry out potential studies on the progression of environmentally-induced mobility; ii) evaluate policies capable of generating environmental displacement; iii) mobilize means to reduce vulnerability aspects that may lead to environmental displacement; (iv) contribute to the organization of assistance to prevent and limit environmental displacement and promote the rapid return of environmentally displaced persons; v) evaluate the programs adopted in order to avoid environmental displacement and provide assistance to displaced persons; and, finally vi) support the organization of reception and return of displaced persons, when possible.²⁶²

²⁶⁰ Procedure established by article 16.

²⁶¹ Chapter 6 indicates the institutions to be set up for international governance of environmentally-induced displacement.

²⁶² Article 21.

The High Authority is composed of 21 recognized personalities in the field of human rights, environmental protection and peace, elected by the Conference of the Parties for a six years term. Its decisions are final and binding. Its competencies are related to the procedure of recognition of the status of environmentally displaced person, acting as a Board of Appeal and establishing procedure guidelines. The High Authority can make recommendations to the Conference of the Parties as well as propose amendments.²⁶³

The Global Fund for Environmentally Displaced Persons has as its mission the financial and material assistance for the reception and return of these migrants. The Fund will be fed by the voluntary contributions of states and private actors, as well as by mandatory contributions based on factors of sudden or gradual changes capable of causing environmental-related displacements.²⁶⁴

At the national level, a body responsible for analyzing the demands for recognition of environmentally displaced status must be created. Upon implementation of the Convention, States Parties shall establish a National Commission of Environmentally Displaced Persons, formed by nine independent personalities recognized in the field of human rights, environmental protection, and peace, appointed by the state's highest jurisdictional authorities. This Commission corresponds at the national level to the High Authority, which is the appeal body of the National Commission.²⁶⁵

Furthermore, the Draft Convention proposal is a breakthrough in the context of specific institutional needs for the proper care of environmentally displaced persons. Among the points that are significant highlighting is the fact that, while the World Agency for Environmentally Displaced Persons is an international intergovernmental organization, its High Authority – which is responsible for its operation and administration – will be made up of experts who are not representing their particular states of origin, but exercising a professional job. The requirement for them to be experts in the areas of human rights, environmental protection and peace underlines an accurate concern for the Agency's effectiveness and commitment to the objectives of the Convention.

²⁶³ Article 22.

²⁶⁴ Article 23.

²⁶⁵ Article 17.

d. A way forward to the Draft Convention

The Draft Convention presents itself as not just a proposal. But rather an interdisciplinary construction process aimed at raising public and political awareness and engagement around one of the main contemporary impasses, capable of provoking conflicts and instabilities, generating human rights violations, and intensifying preexisting vulnerabilities. Even in the face of the skepticism of some or an unfavorable international context to the adoption of instruments that imply rights and obligations,²⁶⁶ the importance and urgency related to the risks posed by environmentally-induced displacements and the lack of specific answers in the legal and institutional level justify the continuity of the discussion process towards an international Convention.

Also, it is significant to note that the system of international refugee protection emerged as an Ad Hoc solution to dealing with imbalances and security problems in Europe from the massive influx of people. The consolidation of this regime took place with the creation of the UNHCR, which became the main body concerning the assistance to victims of persecution and violence after the World War II. In this perspective, the concept of regime is based on a pattern of cooperation that includes international organizations, civil society, migrants and states.

Nonetheless, the creation of the refugee regime took place in a different political, social and economic context. The major challenge for the recognition and legal protection of environmentally displaced persons may be the articulation between the many and diverse needs of government authorities, international and non-governmental actors, and migrants themselves.²⁶⁷ Moreover, national and universal human rights norms, international protection regimes, and state governments still lack a common, articulated and coherent view of the political solution needed.

Considering these obstacles, a draft Universal Declaration on People Displaced by Environmental Factors was launched in 2014 from the Limoges Convention. The Declaration focuses on the rights accorded to environmentally displaced persons and the corresponding obligations of states. This would be a strategy to draw attention to the urgency of an international recognition and protection

²⁶⁶ Williams, "Turning the Tide," p. 510; McAdam, "Swimming Against the Tide," p. 4, 8.

²⁶⁷ Crepeau, François. "Preface." In: *Les Migrations Environnementales*, edited by Cournil, Christel and Benoît Mayer. (Paris: Presses de Sciences Po, 2014), p. 13.

of environmentally displaced persons, considering that the ultimate goal should be the adoption of a mandatory document.

This strategy is in line with the current stage in the process of recognition and protection of environmentally displaced persons, which will be developed in three steps. The first one includes the recognition of the problem and the relationships between human mobility, environmental degradation, climate change, and disasters. This recognition is expressed through the development of a common agenda,²⁶⁸ and the insertion of human mobility into already consolidated initiatives,²⁶⁹ through the adoption of non-binding agreements²⁷⁰ and the adaptation and use of existing instruments, mainly focused on the reception of migrants.

The second step incorporates international guidelines into regional and national policies and norms as well as the adoption of regional and bilateral agreements. The third one is the adoption of specific responses and self-regulation, evolving from non-binding documents to a mandatory framework establishing specific mechanisms and covering the entire environmental displacement cycle. The Declaration is consistent with the current stage of the process, or the first step, as a non-binding document of recognition and protection of environmentally displaced persons. A analysis from this process makes it possible to understand why the Draft Convention encounters resistance since it falls within the third step, which also requires an evolution on the issue, and that will be achieved through the practice and analysis of the results of the first and second phases.

3.4 Re-conceptualizing the Traditional Sovereignty Paradigm

As examined, concerns about climate change and its impacts remain very relevant within the political agenda currently. Moreover, these impacts and their consequences, such as the emergence of environmentally displaced persons, also reflect on the idea of sovereignty. Accordingly, this thesis defends that the traditional concept of sovereignty must be redefined to take into account the effects of a changing climate, in order to protect the rights of countries and people in the face of this global existential threat.

²⁶⁸ This is what has been called the Post-2015 Global Agenda, which encompasses the Sendai Framework for Disaster Risk Reduction (2015), Sustainable Development Objectives (2015), Nansen Agenda for Protection (2015), Paris Agreement on Climate Change (2015) and the New York Declaration on Refugees and Migrants (2016).

²⁶⁹ E.g., inclusion of human mobility within the UNFCCC, mainly through the Paris Agreement.

²⁷⁰ E.g., the Nansen Agenda, which was endorsed by 110 countries.

Given the growing interdependent relationship between states, sovereignty is also considered a relative element, potentially applicable to political communities other than the territorial state only.²⁷¹ The concept is dynamic and relative as it is embedded in different historical contexts.²⁷² Therefore, the traditional notion of sovereignty can be taken as adaptable because it is influenced by the political and philosophical conceptions of each historical moment. Given this, its concept can be shaped to meet the new world demands triggered by climate change. Since the current rigid notion of sovereignty, as well as the existing international protection framework, is inadequate to address this issue.²⁷³ This conceptual reconsideration could create a new form of understanding sovereignty, as its traditional principle, commonly exercised by states, is based on a dichotomy that legitimizes and authorizes spaces of exclusion that are established above human rights.²⁷⁴ Because it is often understood as a concept rooted in national territory, the individual's political sovereignty is fragmented in favor of the supremacy of the national's. Both human rights and sovereignty should be directly related legal principles and therefore, must be shaped together to lead a more just and effective implementation of human rights guidelines, principally following the changes brought about by the growing impacts of climate change, as the balance in the relationship between sovereignty and human rights presupposes sovereign equality between state-territory and individuals.²⁷⁵ It is in this scenario that a post-sovereignty paradigm must be established, as in coming years ever-larger numbers of environmentally displaced persons will be forced to leave their homes in search of safety in other parts of the world. A successful re-imagination of sovereignty in the situation of climate change "will require not only a reorientation of regional states' perceptions of each other but also a new understanding of the place of human societies as a wholly-owned subsidiary of the natural world."²⁷⁶ Now more than ever, one should witness global cooperation between states while discouraging egoistic self-interest.

²⁷¹ Inocencio, Flavio Gualter I. "Reconceptualizing Sovereignty in the Post-National State: Statehood Attributes in the International Order." (Nottingham Trent University, 2010), p. 47. Available at: <<https://pdfs.semanticscholar.org/e816/1d5a452726015cd10cf847eb6acc7ccc4c3a.pdf>> Accessed July 29, 2019.

²⁷² Von Bogdandy, Armin, and Dana Schmalz. "AJIL Symposium: Pushing Benvenisti Further – International Sovereignty as a Relative Concept." *Opinio Juris*, July 24, 2013. Available at: <<http://opiniojuris.org/2013/07/24/ajil-symposium-pushing-benvenisti-further-international-sovereignty-as-a-relative-concept/>> Accessed July 29, 2019.

²⁷³ Badrinarayana, Deepa. "International Law In a Time of Climate Change, Sovereignty Loss, and Economic Unity." *Proceedings of the ASIL Annual Meeting* 104 (2010), p. 256.

²⁷⁴ Walker, *Inside/Outside*, p. 111.

²⁷⁵ Cohen, *Globalization and Sovereignty*.

²⁷⁶ Habib, Benjamin. "Climate Change and the Re-imagination of State Sovereignty." *E-International Relations*, November 8, 2015. Available at: <<https://www.e-ir.info/2015/11/08/climate-change-and-the-re-imagination-of-state-sovereignty/>> Accessed July 30, 2019.

The development of more thorough frameworks such as the Draft Convention on Environmentally Displaced Persons provides a foundation for tackling climate change-related mobility problems, but this will only be possible via cooperation, communication, and burden sharing politics between states. The development of such agreements manifests when state self-interests converge towards tackling collective dilemmas that threaten themselves, in a redefinition of the sovereignty paradigm. Thus, solutions regarding the sovereignty-environmentally displacement duality should be considered. More importantly, the international community must provide a normative basis for a comprehensive framework with the ability to address the matter, rather than a rigid system premised on the traditional idea of territorial sovereignty solely,²⁷⁷ including an international binding Convention, as analyzed earlier.

Indeed, this single concept should not be considered as an obstacle to the search for the means necessary for the protection of environmentally displaced persons. It is necessary to understand the protection of these groups as a manifestation of post-sovereignty in an interdependent world, since sovereignty and the protection of human rights are not opposing concepts. However, its notion must be redefined, as the classic principle of sovereignty linked to the element of state supremacy has, presently, undermined the practical and concrete application of the protection of human rights. For this reason, discussions on environmentally-related displacement are based on voluntary, non-binding instruments and commonly preventive recommendations, as the national rule constantly deliberates its supremacy over international human rights principles. This political aspect demonstrates how international environmentally-induced displacement is directly affected by the traditional paradigm of territorial state sovereignty. One of the many recent examples of this issue presents through the Trump administration's "propaganda of fear" targeting environmentally displaced persons from the Bahamas following Hurricane Dorian,²⁷⁸ when the power of sovereignty in the international system is used as a justification for exempting states from human rights responsibilities. In this specific case, the president of the United States also uses the concept in favor of a dehumanizing discourse.

²⁷⁷ Willcox, Susannah. "A rising tide: the implications of climate change inundation for human rights and state sovereignty." *Essex Human Rights Review* 9, no. 1 (2012), p. 12.

²⁷⁸ Knowles, Rachel, Frances Robles, Caitlin Dickerson, and Patricia Mazzei. "Bahamas Hurricane Survivors, Desperate for Respite, Seek Passage to the U.S." *The New York Times*, September 9, 2019. Available at: <<https://www.nytimes.com/2019/09/09/us/bahamas-hurricane-immigration-visas-ship.html>> Accessed July 30, 2019

Faced with the risks related to climate change, a transformation of the sovereignty paradigm emerges as a means to address current demands and thus ensure the protection of environmentally displaced persons. Moreover, to rethink sovereignty in international law is to comprehend a post-sovereignty scenario not as a mere opposition to the supreme authority of states and the right to self-determination of peoples, but as a manifestation of ethics in the face of the refusal of certain states to admit fundamental human rights to vulnerable people.

Also, it is crucial to keep in mind that the regulations protecting human rights are not a natural fact, but a human invention in a constant process of construction and re-evaluation. Since the creation of the general protection of civil and political rights, the national and international agenda keeps incorporating new rights. Due to the transnational character of current environmental risks, it is expected from the international community to enact new rules of conduct for its members.²⁷⁹ Within the post-sovereignty paradigm, states must be in accordance with global environmental co-responsibility, cooperation and aligned with international human rights law. In this context, the protection of human rights becomes urgent given the vulnerable conditions of most environmentally displaced persons. Thus, the notion of guaranteeing dignity for individuals and the idea of international responsibility as a way of favoring the applicability of the principle of international solidarity should prevail. In this situation, responsibility for the protection of environmentally displaced persons requires collective and shared action.

Global problems cannot be dealt exclusively from a national perspective because the international effects of environmental damage go beyond territorial boundaries. Acceptance of such an assertion would be an indication that traditional sovereignty should not always prevail, as states cannot deny fundamental human rights protection on the grounds of preserving territorial sovereignty. Accordingly, the responsibility to protect should exist from a moral perspective.

²⁷⁹ Kakonen, Jyrki. *Perspectives on environmental conflict and international politics*. (London: Printer Publishers, 1992).

Conclusion

Amid the new situations that have emerged in the contemporary international scenario, transformations of the environment and its consequences undeniably represent a challenge, especially concerning environmentally-induced displacements. Human migrations are complex social phenomena because they usually involve more than one causal factor conditioning the migratory movement. Regarding the adverse effects that environmental disruptions have on the population, especially those associated with climate change and variability, migratory movements can gain much more problematic contours.

Indeed, the complexity of contemporary global challenges has been alarming the international community as well as challenging the ability of states and institutions to meet the growing demands arising from these new social dynamics. The shortcomings and limitations of international law in the face of unusual challenges promote a fundamental reconsideration of the functioning of the system as a whole, thus offering a comprehensible space for change. The issue of international protection for environmentally displaced persons is inserted in this context permeated by legal uncertainty, which reinforces the need for an integrated approach that takes into account not only the problem of environmentally-induced displacement itself but a solution consistent with the multiple specificities of this phenomenon.

While one should not disregard the forcible character of this type of migration, on the other hand, framing it as part of the refugee system has not proved to be the best solution. Initiatives to adapt existing international instruments in order to extend their application to reach new and complex legal situations face structural limitations inherent to the scope of the elaboration of these standards. In addition to the lack of “environmental rationale” as a persecution factor, changing the category of refugee could mean stricter measures for both refugees and environmentally displaced persons. Thus, the suggestion to broaden the refugee definition does not address the root causes of the issue and thereby neglects central aspects to solve the problem comprehensively.

Furthermore, the factual presence of environmentally displaced persons around the world creates unacceptable situations of flagrant violation of human rights, a direct reflection of the legal uncertainty they are placed. Positioned in a normative limbo, environmentally displaced are not included in any definition or category protected by a specific framework of protection, which is a severe shortcoming in international law.

Besides, one of the main challenges regarding this matter lies in circumventing the political and economic barriers that are posed as a priority in addressing human rights issues. Thus, state sovereignty appears to be the leading obstacle used as a way to contain advances regarding environmentally-induced displacement agreements at the international level, which targets at prioritizing the classification of environmental displacement occurrences as a form of humanitarian aid or a temporary situation. Most of the instruments related to human rights protection are conducted in view of the criteria of state sovereignty and do not encompass the reality of environmental displacements. As a result, environmentally displaced persons are maintained on the fringes of international apparatuses of protection due to a lack of consistent definition regarding their condition. Also, current human rights instruments do not create legal obligations for states neither address environmentally displaced specific needs.

Thus, relying exclusively on existing soft law texts like human rights agreements would not be the most effective method to guarantee protection for this group of people. Although human rights law does not address their specific needs, it nonetheless serves a basis and guideline for the Convention on the International Status of Environmentally Displaced Persons. Accordingly, this new international instrument must be developed independently but connected to these standards, incorporating principles, norms, and mechanisms that can be adapted to meet the complexity of the new demands. The general objective of the creation of an instrument such as the Convention targeting environmentally displaced persons is to guarantee fundamental rights for individuals who currently do not fall in any category of protected persons. Also, it presents itself as a comprehensive option, which would impose legally binding obligations and responsibilities assigned to states.

Consequently, this thesis defended the need to adopt measures at the global, regional and local levels capable of recognizing a new migratory status, establishing the rights of environmentally displaced persons and the forms of obtaining such status. It also delimited the fundamental structure and governance mechanisms utilized to regulate environmentally-induced displacement – including institutions, funds, and humanitarian assistance. In this sense, the adoption of a specific legal international instrument that establishes minimum standards of protection is urgent and necessary as well as their incorporation into regional standards and national legislation in an approach that integrates migration, environment, climate justice, prevention, adaptation strategies and human rights.

Accordingly, the adoption of a specific binding international convention, carefully designed to deal with the new category of environmentally displaced persons, is the best way to ensure broad protection. Regarding violations of human rights, the Draft Convention on the International Status of Environmentally Displaced Persons, if effectively adopted, could become a great example of articulation between environmental justice standards and human rights protection systems. From which the right to an ecologically balanced environment is raised to the condition of fundamental human right. Therefore, both protection systems must necessarily establish connections to address environmental vulnerabilities, achieve environmental justice, and create effective strategies for the prevention, management, and remediation of all aspects resulting from environmentally-induced displacements. This can be an essential tool for human rights protection as it might enable and integrate the environmental dimension into analyses of human rights violations during environmental disruptions.

Furthermore, this debate is deeply intertwined with global questions of our times, such as rising social injustices and the recognition of the need for transnational cooperation, which is essential to tackle the challenges posed by environmentally-induced displacement. The acknowledgment of historical accountabilities for climate change and global solidarity could too strengthen the pursuit of opportunities and solutions for environmentally displaced persons that also take into account climate justice aspects.

Thus, the adoption of a specific protection system advocated in this thesis is not only aimed at formally recognizing a new category of migrants but at a global commitment to protect people in this condition, favoring the future internalization of such commitments in domestic law as well. Responsibility for protection and assistance should be shared between the entire international community, based on the adoption of a global commitment grounded on norms of coexistence, cooperation, and solidarity. Therefore, it is crucial to reinforce the role of the state in the institutional process without which it will be impossible to recognize this new reality formally.

Although the great ability of some states to cope with processes of environmental degradation, either because of their territorial extension or financial capability, no country is immune to environmental changes. Neglecting this issue today may represent more significant problems in the future. Protective responses based on comprehensive and enduring strategies are required, taking into account the inherent challenges of these situations. Without a clear definition of guidelines to be jointly applied by countries about environmentally-induced displacement, the

protection of these group under the individual decision of each state cannot be done justly or effectively.

Consequently, it is time for international law to not only formally recognize the right of individuals to a healthy environment as a fundamental human right and protection for those fleeing, but also to enforce these legal duties on states. International protection of human rights cannot be denied on the grounds of preserving complete autonomy in an ever interdependent world. Sovereignty in its traditional concept of absolute and indivisible power does not fit current demands, in which the issue of environmentally displaced persons can only be addressed through cooperation by all members of the international community within a post-sovereignty perspective. Therefore, significant challenges surrounding the problem will require sensitivity from governments and international organizations so that responses given do not end up making the issue even more complex. Legal principles in this context are essential as they can provide a solid foundation for building lasting alternatives that involve the participation of people, states, and international organizations. Thus, despite the current radically unfavorable scenario, there is no other solution to the problem than the overcome of the traditional role of sovereignty as well as the elaboration of an international agreement capable of establishing independent standards for the protection of this new category of people.

Although the impossibility to address every particularity that such a broad theme embodies, this study tried to bring to attention the fundamental points necessary to comprehend the topic. Hence, the thesis was intended to allow the reader to visualize the high complexity this matter involves, warning of the urgency to overcome legal and political difficulties and also to the danger of neglecting the issue. Undoubtedly, the emergence, frequency, and intensity of these new migratory flows reveal the massive, imminent problems humanity will have to face. Consequently, recognizing and protecting environmentally displaced persons is an urgent task that needs to be addressed sooner than later.

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