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**ENVIRONMENTALLY DISPLACED PERSONS:  
ALTERNATIVE SOLUTIONS FOR LEGAL PROTECTION**  
Master thesis

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## ABBREVIATIONS

CBA	Community-Based Adaptation
ECHR	European Court of Human Rights
EC	European Commission
EDP	Environmentally Displaced Person
EU	European Union
ExCom	Executive Committee
GHG	Greenhouse gas
ICJ	International Court of Justice
IDP	Internally Displaced Person
IOM	International Organisation for Migration
IPCC	Intergovernmental Panel on Climate Change
LiSER	Living Space for Environmental Refugees network
NGO	Non-Governmental Organisation
NZ	New Zealand
OHCHR	Office of the High Commissioner for Human Rights
PAC	Pacific Access Category
PNG	Papua New Guinea
TPS	Temporary Protected Status
UDHR	Universal Declaration of Human Rights
UDI	Norwegian Directorate for Immigration
UN	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNU-EHS	United Nations University, Institute for Environment and Human Security
US	United States
USSR	Union of Soviet Socialist Republics
1951 [Refugee] Convention	Convention relating to the Status of Refugees as amended by 1967 Protocol

## INTRODUCTION

People are moving due to various push and pull factors. One of the main messages now being spread through the international society is about the phenomenon of a new threat to human security – environmental migration. This is a matter of scale and scope not experienced in human history ever before. Yearly more and more people in the world are forced to leave their home due to environmental extremes: man-made or natural. However, there is no precise information how many people, who had to flee because of environmental issues, are there in the world. Scholars predict that statistics will grow in the future enormously. Environmental “refugees” are already the largest group of asylum seekers, e.g. in 1995, they were estimated to have totaled up at least to 25 million, and their numbers have been increasing<sup>1</sup>. The most widely cited estimate of 200 million by 2050 suggests that environmentally induced migration could soon involve almost 3 percent of the world population in just four decades from now<sup>2</sup>. British environmentalist and Oxford University Professor Dr. Norman Myers claimed that there could be up to 200 million environmental refugees already by this year.

Firstly environmental “refugees” were mentioned back in 1970s. People were said to leave habitats because of environmental displacement in Asia, Africa and South America. Later term was evolved, but until nowadays environmental migrants are not defined in any legally binding international document.

What is more, even though 1948 Universal Declaration of Human Rights acknowledges the right for everyone to seek and to enjoy in other countries asylum<sup>3</sup>, but international legal tools do not yet cover all latest problems that international society faces and asylum can not be granted in all cases. Therefore, international protection of environmental asylum seekers is limited. This is because international refugee law has always been a dynamic, fast developing field. Few factors that evidence seriousness of fast changing field of refugee law are: increasing migration caused by environmental displacement, flows of people who do not qualify for a refugee status, however still need protection, other obstacles that arise due to countries’ internal legal systems.

The cohesion of environment and human security is nowhere else more pronounced<sup>4</sup>. After the Second World War international law, as a field of social science, moved from state-centred to people-centred perception of legal structure. Actors of international law hardly

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<sup>1</sup> N. Myers. Environmental refugees: a growing phenomenon of the 21<sup>st</sup> century // Philosophical Transactions of The Royal Society. 2001, B. vol. 357, p. 609-613.

<sup>2</sup> O. Brown. Migration and Climate Change // International Organization for Migration: Research Series. 2008, No. 31.

<sup>3</sup> Universal Declaration of Human Rights, adopted 10 December 1948 UN GA Res 217 A (III), Article 14.

<sup>4</sup> F. Renaud, J. J. Bogardi, O. Dun, K. Warner. Control, Adapt or Flee: How to Face Environmental Migration? // InterSecTions. 2007, No. 5.

changed<sup>5</sup>, but as never before individuals were put in the core of international legislation. Human security was seen as the main concern in contemporary international law.

Environmental problems as such are inherently global, crossing boundaries, related to over-exploitation of global commons and so on.<sup>6</sup> What is more, environmental problems cause danger not only to the planet, but also it is essential to the security of communities or even entire nations. It can be a push factor for forced migration. The great importance is that the world can face situations of vanishing countries as subjects of international law because of environmental disasters.

Since 1970s issue of environment protection is dragging attention of scholars and state leaders, international, national and transnational (multinational corporations, financial institutions, non-governmental etc.) organizations, individuals, and media. Hence, legal basis of environmental protection nowadays is rich with international agreements regulating commercial<sup>7</sup>, maritime relations<sup>8</sup>, greenhouse gas, CO<sub>2</sub> emissions<sup>9</sup>, conservation of environment<sup>10</sup>, combating desertification<sup>11</sup> and others. However, there is no single international legally binding document that would regulate human migration induced by environmental extremes.

The linkage between environmental degradation/impacts and migration was discussed extensively by number of social science scholars<sup>12</sup> as well as advocacy groups. The outcome was that environmental hazards are one of the reasons why people migrate. Former UN High Commissioner for Human Rights Mary Robinson has said that “human rights advocates need to do more thinking about climate change as a rights issue”. She stresses that the lack of innovative ideas is as a result for concentrating only on humans without concern for environmental

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<sup>5</sup> Apart from states and international organisations, in some circumstance international legal personality is also possessed by human beings (International Criminal Court, European Court of Human Rights etc.). Moreover, non-governmental organisations and national liberation movements have also been said to possess international legal personality, but it is not implemented yet.

<sup>6</sup> Greene O. *Environmental Issues* // Baylis J., Smith S. with Owens P. *The Globalization of World Politics*, Third edition. Oxford: Oxford University Press, 2006. p. 452.

<sup>7</sup> E.g. International Convention on Civil Liability for Oil Pollution Damage, adopted 29 November 1969, Brussels. Entered into force 19 June 1975, amended in 2000.

<sup>8</sup> E.g. Convention on the Protection of the Marine Environment of the Baltic Sea Area, adopted in 1992, Helsinki. Entered into force 17 January 2000, last amended in 2008.

<sup>9</sup> E.g. Kyoto Protocol, adopted 11 December 1997, Kyoto.

<sup>10</sup> E.g. Convention on Biological Diversity, adopted in June 1992, Rio de Janeiro.

<sup>11</sup> E.g. Convention to Combat Desertification, adopted 17 June 1994, Paris.

<sup>12</sup> R. Black. *Environmental refugees: myth or reality?* // *New issues in refugee research*, working paper. 2001, No. 34; F. Renaud, J. J. Bogardi, O. Dun, K. Warner. *Control, Adapt or Flee: How to Face Environmental Migration?* // *InterSecTions*. 2007, No. 5; Human Development Report 2009. *Overcoming barriers: Human mobility and development*, available at <[http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf)>, last entered 19 May 2010; etc.

stewardship that underpins so many social and economic rights<sup>13</sup>. It has been clear that there is a direct relation between human rights and environmental problems.

Moreover, environmental issues belong to so called third – the youngest – generation. They are also known as “Solidarity rights”. These include the right to political, social and cultural self-determination; the right to peace; the right to environmental sustainability, as well as the right to economic, social and environmental development. Consequently, every person has not only the right to clean environment, but also to stay and live in this environment with comfort. To guarantee that there is a need of legal instruments.

**Actuality of the topic** is illustrated by the arguments mentioned above; topic of environmental displacement is one of the most relevant topics in contemporary international law.

**Problem** analysed in master thesis is that there is no international legally binding document which protects environmentally displaced people and that alternative methods of protection shall be used. As there is no international document, there are no international minimum standards implemented. Therefore legal status of environmentally displaced person (EDP) is usually subject of domestic legislature of the country where he seeks asylum. Gaps of protection might occur.

Prof. Dr. Norman Myers is a scholar who has written nearly the most about environmentally displaced persons. His main target of work is legal recognition of environmental refugee status. United Nations University’s Institute for Environment and Human Security, UNHCR has also published papers on environmental displacement. UNDP Development Reports and NGOs as Friends of the Earth International have too contributed to the field. These and others different **sources** were used in **the thesis** to analyse theoretical and practical part of the problem. Sources from international, regional and national level are studied in this writing. Most attention is concentrated on the international legislation.

In international refugee law there is a common practice and understanding of who might be entitled for refugee status and who – not. Practical **significance** of the thesis is that it presents the niche of specific cases where environmental disasters are an element to apply refugee status.

**Purpose of the thesis** is to provide comprehensive understanding what alternatives for protection do persons, who do not qualify for refugee status under 1951 Refugee Convention, receive. In particular those who flee environmental disasters.

**Thesis’ tasks** are:

1. Description of *ratione personae* of environmentally displaced persons. Do they always fall outside 1951 Refugee Convention’s frame?

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<sup>13</sup> Steiner, H. J., Alston, Ph., Goodman, R. International Human Rights in Context. Law, Politics, Morals. Third edition. Oxford: Oxford University Press, 2007. p. 1460.

2. What legal protection does EDP get in international, regional and national levels?
3. What legal status EDP can expect?

Consequently the **objective of the thesis** is the protection and alternative solutions to environmentally displaced persons under international, regional and national legal norms.

The **subject of this thesis** is international law and other measures applicable in order to protect or assist to individuals who are in need of help, but do not qualify for refugee status as defined in 1951 Refugee Convention. Specifically, alternative methods of protection of individuals will be analysed who flee away their habitats due to man-made or natural environmental issues.

Term “environmentally displaced person” is not officially legal, but for the integrity of **terminology** of this thesis it is going to be used. Notion comprehends main issue that international law has to deal with – forced displacement due to environmental issues.

Raised **hypothesis** is that there is no specific legal status and protection provided to persons, who fled because of environmental disaster.

The **structure** of the writing is divided into four main sections. Chapter 1 provides analyses of terminology and *ratione personae* of “environmentally displaced persons”. It will be analysed how to name people who are forced to leave their home or country of origin because of environmental disasters. Also weather EDPs always fall out from 1951 Refugee Convention frame. In Chapter 2 author analyses legal grounds for protection in international, regional and national law systems. Chapter 3 brings analyses of legal statuses that EDPs can be entitles to. Last Chapter provides with case study. At the end of the thesis, conclusions and suggestions are drawn.

**Methodology:** methods used in the thesis are analogy, analyses, comparative, deduction, induction. The research is based on examination of particular legal systems of different levels, cases where alternative methods were used for providing legal protection. Research is based on currently the main issue – alternative solutions of legal protection of persons displaced internally or internationally by environmental disasters.

## **1. *Ratione personae* of environmentally displaced persons**

Estimates of environmental migration fluxes have been published, and there is a growing consensus that migration will increase substantially in the future<sup>14</sup>. Depending on the methodology of calculating the number of potential or existing environmentally displaced persons, the result usually is different, but in general figures are huge (most cited – 200 million by 2050). Scholars predict that environmentally displaced people, not refugees under 1951 Refugee Convention, will amount most of asylum seekers in the world. All this shows that issue of environmental displacement is significant and needs to be taken care of. To talk about alternative solutions for legal protection to environmentally displaced persons, firstly it is rational to describe who falls under this notion.

Forced environmental migration relates to and is in between of international refugee law and international migration law. This is the reason why participants of environmentally motivated migration were called either “environmental refugees” or “environmental migrants”. By far these two terms are not the only ones found in academic literature. Therefore author reviews terminology in the present Chapter, defines EDP and points out what are the elements that single out environmentally displaced persons from other individuals.

### **1.1. *Definition, history, sources***

In 2002 UN Office of High Commissioner for Refugees (UNHCR) has reported that there were approximately 24 million people around the world who have already fled because of floods, famine and other environmental factors<sup>15</sup>. Environmental displacement involves larger or smaller groups of people and in rare extreme cases even entire nations have to be relocated to another State. International law constantly develops and analyses new topics that emerge causing vulnerability to society. Such new topics usually are too new phenomenon to be regulated by international legal norms and initiate great public and scientific debates. Academics, lawyers, governments, international institutions, non-governmental organizations<sup>16</sup>, media turned attention to environmentally displaced persons.

**HISTORY.** The concept of environmental displacement is not new. The controversial term “environmental refugee” emerged about the time, when people started to speak about environmental problems as new world’s issue. In 1970s issue of environmental displacement was found in environmentalist literature as a side effect of environmental problems. Environmental

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<sup>14</sup> N. Myers. Environmental refugees: a growing phenomenon of the 21<sup>st</sup> century // Philosophical Transactions of The Royal Society. 2001, B. vol. 357, p. 609-613.

<sup>15</sup> UNHCR. A critical time for the environment // Refugees. 2002, No. 127, p. 12.

<sup>16</sup> E.g. Friends of the Earth International, Report of June 2003.

scientists pointed out that more and more people are becoming “refugees” because of the natural disasters. Hence, since 1970s situation has developed and it was acknowledged that not only people were forced to leave home because of natural, but because of man-made disasters as well.

Scholars and international institutions little by little started to develop the issue of environmentally related migration of people after the Cold War. Back in 1992, in a preparatory meeting of the UN Conference on Environment and Development, it was stated that environmental degradation has increasingly become both a cause and symptom of population movements<sup>17</sup>. Discussions and academic research on linkage between environmental factors and human security was started to be developed extensively as a separate field of study.

There were three main dimensions pointed out to the debate surrounding the notion of environmental migrants/refugees:

- first, there is the definitional debate over the terminology “environmental refugee” and who can be classified under such a definition;
- second, there is the debate over whether such people even exist, *i.e.* can environmental factors be identified as a root cause of displacement?
- third, there is the debate over who will provide protection to such a category of people if they exist<sup>18</sup>.

Abovementioned dimensions are analysed in this part. Third aspect will be also analysed in the following Chapter.

**SOURCES & REVIEW OF TERMINOLOGY.** There is no official international legislation on environmental displacement, hence terminology is ambiguous and brings vagueness into the subject. The main source of terminology is not legal instruments<sup>19</sup>, but rather the extensive writings of scholars. Consequently, there might be agreement to use one particular notion, but in general scientists are free to form and use their own definitions. As a result, people who are forced to flee are not listed under single conventional term, but rather referred by several.

In environmental displacement literature there are few definitions that can be found most commonly: environmental, ecological or climate (change) refugees/migrants, environmentally displaced persons and others. It is noticed that certain definition might stress particular reason why inhabitants migrate (e.g. exceptionally ecological issue, catastrophe – “tsunami refugees” etc.), but in general they all mean the same type of persons who migrate overall due to natural or man-made hazards.

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<sup>17</sup> S. Ogata. Statement to the UN Conference on Environment and Development. Rio de Janeiro, 10 June 1992, p. 3.

<sup>18</sup> F. Renaud, J. J. Bogardi, O. Dun, K. Warner. Control, Adapt or Flee: How to Face Environmental Migration? // InterSecTions. 2007, No. 5, p. 14-15.

<sup>19</sup> See Chapter 2.

Term “refugee” is widely used in environmental displacement studies, but at the most it would represent *lato sensu* meaning: the general need of protection and assistance<sup>20</sup>. All elements of definition in 1951 Refugee Convention are integrated and need to be fulfilled. Official interpretation of international legal instruments can be done only by International Court of Justice (ICJ, Fr. *Cour internationale de Justice*). Up to now there were no cases appealed to ICJ concerning interpretation of “refugee” definition.

On the other hand, few scholars<sup>21</sup> disagree with this statement and interpret notion. They note that environmental migrants require resettlement for reasons of a well-founded fear. These reasons are not necessarily caused by humans (representatives of legal authorities etc.), but also by nature. For example, EDPs can be threatened of being inundated if their domicile is in an island which is sinking. This is why environmentally displaced people should not receive less protection than others who fear political persecution. Moreover, it might be presumed that EDPs can be persecuted or threatened even before migrating because essential recourses in the area they live begin to decrease due to environmental degradation. Other problem is that persons might be threatened or persecuted because they are using recourses of the hosting state, when they already move to new place.<sup>22</sup> In 1993 UNHCR has written that destruction of habitat could qualify as a form of persecution if legal authorities are responsible for intentional action or wilful negligence without helping displaced persons.<sup>23</sup> The environmental factor comes as a form of persecution. The “social group” ground can be also explored. There are two main theories regarding what constitutes a social group: one arguing that it is crucial that the group has fundamental or inherent protected characteristics, the other emphasising (external) social perception. Environmental or climate refugees may constitute “a social group composed of persons lacking political power to protect their own environment”.<sup>24</sup>

These are all controversial and challenging insights. Still at least part of them can be interpreted as legal grounds. There are situations, when environmentally displaced persons could fall under 1951 Refugee Convention’s definition. So far definition is used in a strict and narrow way, but in cases where asylum seeker can prove that environmental degradation was used or initiated intentionally in order to persecute him because of reasons listed in the Convention, then such person can fall under notion of *de jure* meaning of refugees.

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<sup>20</sup> Term “refugee” is analysed in Chapter 2, section 2.1.1. 1951 Refugee Convention.

<sup>21</sup> See F. Biermann and I. Boas. Protecting Climate Refugees: The Case for a Global Protocol // Environment. 2008, November-December.

<sup>22</sup> E.g. long-lasting Darfur situation, when armed conflict was initiated due to mixed reasons. One of them was competition for resources due to new migrants from areas which were uninhabitable because of desertification. See HTSPE Ltd. Resources, Development and Politics in Darfur. Resource paper. 2004.

<sup>23</sup> UNHCR. The state of the World’s Refugees: 1993 the challenge of protection.  
<<http://www.unhcr.org/4a4c6da96.html>> entered 16 April 2010, p. 18.

<sup>24</sup> Kolmannskog. V. O. Future Floods of refugees. A comment on climate change, conflict and forced migration. Norwegian Refugee Council, 2008.

All in all, the terms “environmental refugee” and “climate refugee” have no legal power in international refugee law and should be avoided<sup>25</sup>. Probably the best way to describe EDPs is “people, suffering from environmental disaster”. Moreover, in literature such people are sometime called “environmental migrants”. The United Nations University (UNU) uses the International Organization’s for Migration working definition of environmentally induced migration:

Environmental migrants are persons or groups of persons who, for compelling reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad<sup>26</sup>.

Practice shows that in general migrants, compared to refugees, have liberty of action: to move or not. United Nations Convention on the Rights of Migrants<sup>27</sup> Article 2 defines migrant worker as:

A person who is to be engaged is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

From this a broader definition of migrants follows that term “migrant” should be understood as covering all cases where the decision to migrate is taken freely by the individual concerned, for reasons of “personal convenience” and without intervention of an external compelling factor<sup>28</sup> (emphasis added).

This definition indicates that migrant does not refer to refugee, forced to leave his home. Migrants are people who make choices about when to leave and where to go, even though these choices are sometimes extremely constrained. Indeed, some scholars make a distinction between

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<sup>25</sup> See Comments and Proposed Revisions to the negotiating text prepared by the Chair of the UNFCCC *Ad Hoc* Working Group on long-term cooperative action by the Office of the United Nations High Commissioner for Refugees, the International Organization for Migration, the Norwegian Refugee Council, the United Nations University and with the support of the Representative of the Secretary General on the Human Rights of Internally Displaced Persons to the 6<sup>th</sup> session of the *Ad Hoc* Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA 6) from 1 until 12 June 2009. Bonn, para. 3.

<sup>26</sup> Definitional Issues, <<http://www.iom.int/jahia/Jahia/definitional-issues>>, last entered 21 May 2010.

<sup>27</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by UN GA Res 45/158 of 18 December 1990, Geneva.

<sup>28</sup> Measures to improve the situation and ensure the human rights and dignity of all migrant workers. Report of the working group of intergovernmental experts on the human rights of migrants submitted in accordance with Commission on Human Rights Res 1997/15. Commission on Human Rights, 54<sup>th</sup> session, intergovernmental working group of experts on the human rights of migrants. 1998.

voluntary and involuntary migration. While certain refugee movements face neither external obstacle to free movement nor is impelled by urgent needs and a lack of recourses in the country of present residence, others may blend into the extreme of relocation entirely uncontrolled by the people on the move.<sup>29</sup>

As further studies were developed, the Special Rapporteur of the UN Commission on Human Rights has proposed that the following persons should be considered as migrants:

- 1) Persons who are outside the territory of the State of which they are nationals or citizens, are not subject to its legal protection and are in the territory of another State;
- 2) Persons who do not enjoy the general legal recognition of rights which is inherent in the granting by the host State of the status of refugee, naturalised person or of similar status;
- 3) Persons who do not enjoy either general legal protection of their fundamental rights by virtue of diplomatic agreements, visas or other agreements.<sup>30</sup>

This broad definition of migrants reflects the current difficulty in distinguishing between migrants who leave their countries because of political persecution, conflicts, economic problems, environmental degradation or a combination of these reasons and those who do so in search of conditions of survival or well-being that does not exist in their place of origin. It also attempts to define migrant population in a way that takes new situations into consideration. In the glossary, concluded by UNESCO it is stated that nowadays there are a lot of different classifications of international migration. One type of it is forced migration. In a broader sense, this includes not only refugees and asylum seekers but also people forced to move due to external factors, such as environmental catastrophes or development projects. This form of migration has similar characteristics to displacement.<sup>31</sup>

As research shows neither refugee definition nor migrant completely fulfils the need of demonstrating the elements of what makes people environmentally displaced and signals them out of other groups of people. This leaves EDPs in-between of terminology.

DEFINITION. First clear, though non-legal, definition of the term was provided by UNEP researcher Essam El-Hinnawi, who said that:

Environmental refugees are people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental

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<sup>29</sup> UNSECO information, entered 15 April 2010, <[http://portal.unesco.org/shs/en/ev.php-URL\\_ID=3020&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/shs/en/ev.php-URL_ID=3020&URL_DO=DO_TOPIC&URL_SECTION=201.html)>

<sup>30</sup> G. Rodríguez Pizarro, Special Rapporteur of the Commission on Human rights. Human rights of migrants. // Note by the Secretary-General. 9 August 2002, A/57/292.

<sup>31</sup> Castles, S. International migration at the beginning of the twenty-first century. *International Social Science Journal*. 2000, Vol. 165.

disruption (natural and/or triggered by people) that has jeopardized their existence and/or seriously compromised the quality of their life.<sup>32</sup>

In addition, British environmentalist and Oxford University Professor Dr. Norman Myers, who has published extensively on the subject<sup>33</sup> and James Kent, describe such refugees as “persons who no longer gain a secure livelihood in their traditional homelands because of what are primarily environmental factors of usual scope”<sup>34</sup>. These two definitions are cited the most in academic literature and are known to be the most influential despite the fact there are other later ones.

When term “refugee” is used, usually it is understood, the person has crossed international boarder and seeks asylum in other country. “Internally displaced person” or IDP is a notion used to describe an individual who can not longer stay in his home area, but does not cross international boarder. There is also no legal body possessing binding power toward member parties that would deal with internal displacement issues. Despite that, in 1998 United Nations Commission on Human Rights released Guiding Principles on Internal Displacement<sup>35</sup>. In the introduction of Principles the following definition was adopted which clearly takes environmental causes into consideration:

For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or *natural or human-made disasters*, and who have not crossed an internationally recognized State border (emphasis added).

Natural or man-made disasters are included because during disasters some governments respond by discriminating or neglecting certain groups of victims on political or ethnic grounds or by violating their rights in other ways. On the other hand, Guiding Principles are not legally binding instrument, therefore, can not be considered as international legislation. As there is no international legal definition of a term, author found legal definitions of internally displaced

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<sup>32</sup> Gibney M. J., Hansen R. Immigration and asylum: from 1900 to the present. Santa Barbara: ABC-CLIO Inc., 2005, p. 173.

<sup>33</sup> N. Myers these days is one of the main activists in dealing with new form of refugees, even though he comes from “ecological” background, not studies in asylum or similar.

<sup>34</sup> Gibney M. J., Hansen R. Immigration and asylum: from 1900 to the present. Santa Barbara: ABC-CLIO Inc., 2005, p. 173.

<sup>35</sup> UNHCR. Guiding Principles on Internal Displacement. 22 July 1998, E/CN.4/1998/53/Add.2.

persons in legislation of few states. Russian Federation law on internally displaced persons<sup>36</sup> Article 1 provides that IDP is a citizen of the Russian Federation, who left the residence because against him or his family members violence or harassment in other forms was committed, either because the real risk of persecution on grounds of race or national origin, religion, language, and also on grounds of membership of a social group or political opinion, which was the subject of hostile campaigns against a specific person or group of persons, mass violations of public order. According to the quoted law, IDP constitutes:

- 1) a citizen of the Russian Federation, who was forced to leave the residence in a foreign country and arrived at the territory of the Russian Federation;
- 2) a citizen of the Russian Federation, who was forced to leave the residence on the territory of one member of the Russian Federation and arrived at the territory of another member of the Russian Federation.

The law also provides that IDP is a foreign citizen or stateless person permanently and lawfully residing in the territory of the Russian Federation and changed the place of residence within the territory of the Russian Federation due to circumstances stipulated in above-mentioned definition of IDP.<sup>37</sup> Forced displacement is specified in the law as due to violence, real risk of persecution or mass violations of public order.

Another definition is provided by Georgia. According to Georgian law on internally displaced persons, IDP is the citizen of Georgia or stateless person permanently residing in Georgia, who was forced to leave the place of his/her habitual residence and was displaced (within the territory of Georgia) as a result of threat to his/her or his/her family member's life, health or freedom due to the aggression of foreign country, internal conflicts or mass violation of human rights.<sup>38</sup>

Law on internal displacement in Republic of Colombia<sup>39</sup> gives definition of internally displaced persons. They are persons who have been forced to migrate within the national territory, abandoning his place of residence or usual economic activities, because his life, physical integrity, safety or personal freedom have been violated or are directly threatened, in connection with any following situations: internal armed conflict, internal disturbances and

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<sup>36</sup> РОССИЙСКАЯ ФЕДЕРАЦИЯ ЗАКОН О ВЫНУЖДЕННЫХ ПЕРЕСЕЛЕНЦАХ, 19 февраля 1993 года N 4530-1, last amended December 23, 2003.

<sup>37</sup> Also reference to citizens of USSR is made, which demonstrates that broader concept of IDP notion: "IDP is recognized as a citizen of former USSR permanently residing in the territory of the former republics of the Soviet Union granted refugee status in the Russian Federation has lost this status in connection with the acquisition of Russian citizenship, under the circumstances that prevented the person during the term of refugee status in settlement in the territory of the Russian Federation".

<sup>38</sup> საქართველოს კანონი იძულებით გადაადგილებულ პირთა-ძევნილთა შესახებ (Law No. 335-II S On internally displaced persons – persecuted, adopted on 28.06.1996, in force since 28.06.1996, last updated 18.12.2001), Article 1.

<sup>39</sup> Poder Público – Rama Legislativa Nacional, Ley 387 de 1997 (Julio 18), El Congreso de Colombia Decreta, Article 1.

tensions, violence widespread, massive violations of human rights, breaches of law International Humanitarian Law or other circumstances arising from previous situations, which can dramatically alter or disturb public order. Regulation of this law<sup>40</sup> gives more detailed definition of the concept and states there are two broad classes of Internal Displacement. Article 4.1 (b) includes one of mentioned classes that constitute “displacement and evacuation, caused by violent action of agents or unforeseen natural disasters caused by humans”.

Taking abovementioned definitions into account, it is seen that neither country points out environmental disasters in a way as 1998 Guiding Principles do. Definitions are narrower and solely orientated to conflict situations. Colombian law takes disasters into account, but only those which are intentionally caused by humans. Presumably used as a means to violate human rights of persons involved. Therefore, as Guiding Principles on Internal Displacement were created with intention to implement the broaden version of notion of internally displaced persons, in the national level it does not mirror all the elements of the term. Nevertheless, in cases of environmental disasters IDPs should receive protection and assistance from national authorities in accordance with 1998 Guiding Principles on Internal Displacement<sup>41</sup>.

**ELEMENTS OF EDP.** From all stated above, few basic elements can be pointed out, that are common for all EDPs. Firstly, all notions are centred on the fact of forced migration due to environmental factors. Environmentally displaced persons have no opportunity to choose. Secondly, scholars who analyse EDPs’ issue usually do not distinguish whether persons, while migrating or fleeing, have crossed an international boarder or not. Some EDPs can experience threat in earlier or later stage of migration. Persons also might become EDPs and refugees under 1951 Refugee Convention because of intentional aggravation of environment by legal authorities or usage of naturally aggravated environment to oppress particular groups of people which amount to persecution.

**ENVIRONMENTAL FACTORS.** There was a debate whether environmental factors can be identified as a root cause of displacement/forced migration. It is a fact that people who migrate might do this because of mixed reasons – political, economical, environmental etc. Solely environmental reasons were sometimes doubted. Nevertheless, in the bulk of forums where the link is discussed, scientists and other participants are in the stage where all have agreed the bond inevitably exist. Natural disasters were recognised as a root cause of forced migration by UN, UNHCR, EC, NGOs and other actors.

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<sup>40</sup> Reglamento de la ley sobre desplazamientos internos (Ley N° 28223, Ley sobre los desplazamientos internos) Decreto supremo N° 004-2005-MIMDES, Article 4.

<sup>41</sup> UNHCR Policy Paper. Climate change, natural disasters and human displacement: a UNHCR perspective. 19 August 2009.

To conclude this section it can be said that a lot of discussions were held considering whether “environmental refugees”, as separate group of migrants, exist at all. Prof. Dr. N. Myers claims that they definitely exist<sup>42</sup>. Since man-made and natural disasters were recognized as a root cause of forced migration<sup>43</sup>, it is just the matter of time when they will be recognized internationally.

## ***1.2. Classification***

Since the start of developing field of environmental migrants, many various classifications were suggested. Environmentally displaced persons are categorised into various different groups based on adequate factors as: disaster due to which they migrate (soil degradation, sea level rise etc.), source of hazard (man-made or natural), length of displacement (temporarily or permanently displaced), area of migration (people who flee outside the country of origin and people who are displaced to a safe surrounding in the same state) and others. As examples few classifications will be listed in this thesis.

One of the first divisions of EDPs was made in 1985, in E. El-Hinnawi’s report where he described three major types of environmental refugees:

- 1) those temporarily dislocated due to disasters, whether natural or anthropogenic;
- 2) those permanently displaced due to drastic environmental changes, such as the construction of dams; and
- 3) those who migrate based on the gradual deterioration of environmental conditions<sup>44</sup>.

El-Hinnawi also included people, who were displaced by the destruction of their environment by the warfare. He gave rough descriptions but established no generic criteria for distinguishing one type of environmental refugee from another. The literature that developed after this seminal report has retained El-Hinnawi’s vague system of classification. To rectify this problem, the current classification distinguishes environmentally displaced persons based on criteria related to the characteristics of the environmental disruption:

- 1) its origin (natural or technological),
- 2) its duration (acute or gradual),
- 3) and whether migration was planned outcome of the disruption (intentional or not)<sup>45</sup>.

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<sup>42</sup> N. Myers. Environmental refugees: a growing phenomenon of the 21<sup>st</sup> century // Philosophical Transactions of The Royal Society. 2001, B. vol. 357, p. 609-613.

<sup>43</sup> Kortsaris P. People in need of international protection: alternatives in Europe for the status of refugees: doctoral dissertation, social science, law. Universiteit Antwerpen, Faculteit Rechten, 2003.

<sup>44</sup> E. El-Hinnawi. Environmental Refugees. Nairobi: United Nations Environmental Programme. 1985.

Classifying EDPs into groups enriches database of scientific knowledge about this type of displacement and help to create system of legal grounds. For example, depending on whether migration was planned outcome of the disruption or not, EDPs can even gain refugee status under 1951 Refugee Convention. Case study in Chapter 4 is presented in a frame of the first criteria of abovementioned classification of environmentally displaced persons while over viewing cases of internal and external displacement.

### ***1.3. The role of international organizations in providing solutions to EDPs (UNHCR, IOM, IPCC, IDMC)***

This last sub-section is about international organizations that are concerned with the problem of forced migration due to environmental issues and work on this topic. There is none global institution that would be accredited to deal specifically with environmentally displaced persons, but there are various bodies involved in improving the situation and at least partially working with EDPs. Among international and intergovernmental institutions, NGOs and other foundations some are more influential than others.

In 2005 the humanitarian reform process was launched by the international humanitarian community. By this reform it was sought to improve the effectiveness of humanitarian response through ensuring greater predictability, accountability and partnership<sup>46</sup>. As part of this reform, the system of division of assistance and protection to people in need was introduced. This system of task division was called the Cluster Approach. Cluster Approach was proposed as a way of reducing possible protection and assistance gaps and also strengthening the effectiveness of humanitarian response through building partnerships. There were eleven fields pointed out where international organizations ought to co-operate. Every category has its global cluster leading organizations. Environmental disasters were included in three of them: Camp Coordination/Management (UNHCR and IOM), Emergency Shelter (UNHCR and International Federation of Red Cross and Red Crescent Societies) and Protection (UNHCR and OHCHR/UNICEF).

Refugees are the principle concern of UN Office of High Commissioner for Refugees. UNHCR was established as of 1 January 1951<sup>47,48</sup> in order to deal with refuge seekers after the Second World War. According to the Statute of UNHCR, the High Commissioner is called upon, *inter alia*, to provide international protection, under the auspices of the United Nations, to refugees falling within the competence of his Office. The work of the High Commissioner is

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<sup>45</sup> D. C. Bates. Environmental Refugees? Classifying Human Migrations Caused by Environmental Change // Population and Environment. 2002, Vol. 23, No. 5.

<sup>46</sup> Humanitarian Reform <<http://ocha.unog.ch/humanitarianreform>>, last entered 21 May 2010.

<sup>47</sup> Decision to establish UNHCR was implemented in UN GA Res 319 (IV), adopted on 3 December 1949.

<sup>48</sup> Statute of the Office of the United Nations High Commissioner for Refugees, UN GA Res A/RES/428 (V), 14 December 1950.

humanitarian and social and of an entirely non-political character. Chapter II, paragraph 6 of the Statute contains definitions of those persons to whom the High Commissioner's competence extends. Thus, a person who meets the criteria of the UNHCR Statute qualifies for the protection of the United Nations provided by the High Commissioner, regardless of whether or not he is in a country that is a party to the 1951 Convention or the 1967 Protocol or whether or not he has been recognized by his host country as a refugee under either of these instruments. However, the Statute of UNHCR does not provide reasons for protection or assistance of environmental nature unless they fall under one of the categories of refugees.

Moreover, UNHCR uses 1951 Refugee Convention as a source of law. Therefore, UNHCR's working norms and principles do not include protection to EDPs as to separate group of refugees. This Convention has other scope then protecting EDPs as it was concluded straight after the War in order to take care of millions of people that suffered from the hostilities. Environmental issues were not highlighted as important factor for human security. Later UNHCR's activities were extended (1967 Protocol), but Convention was never amended since.

In 1973 UN General Assembly adopted resolution<sup>49</sup> by which UNHCR could offer its "good offices" for persons in need of help. During years, UNHCR constantly widened its competence and now agency recognises that it is a leading institution of the UN responsible for and possessing the expertise in the area of forced displacement<sup>50</sup>. Hence, now UNHCR do emphasise general forced displacement, not only for reasons stated in 1951 Refugee Convention. Even though, structural functions of UNHCR still do not include protection to environmentally displaced people, Office is promoting the issue of environmental displacement. The involvement of UNHCR in the case of disaster is decided on *ad hoc* basis. According to UNHCR, High Commissioner's Office had offered the support to authorities as a sign of solidarity and as a contribution to broader international and UN relief efforts in the case of environmental disaster<sup>51</sup>.

As environmental displacement is directly related to migration, International Organization for Migration (IOM) is another important actor dealing with EDPs. IOM was established in 1951 because of similar issues as UNHCR – to take care of displaced people after the Second World War. Still it is different form UNHCR as IOM deals with broader area of migrating people (weather or not migration is voluntary). IOM is also not an entity of UN. This intergovernmental organization is in charge of encouraging social and economic development through migration. In general International Organization for Migration does not hold formal protection mandate as UNHCR does. Main sources of legislation are related to migrant workers.

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<sup>49</sup> UN GA Res 3143, 28 UN GAOR Supp. (No. 30) at p. 85, UN Doc.A/9030 (1973).

<sup>50</sup> UNHCR Policy Paper. Climate change, natural disasters and human displacement: a UNHCR perspective. 19 August 2009.

<sup>51</sup> *Ibid.*

Same as in the case of UNHCR, by the time IOM was created environmental matters were not taken into account. Therefore, now all system of organization changes to adjust to new international situation. IOM produces reports and shows other initiatives on the issue. As the world's leading migration agency, IOM is committed to building on its existing programmes, experience and global network to make a meaningful contribution to the development of environmental displacement. International Organization for Migration strives to ensure adequate assistance to and protection of people affected by climate change, including people on the move as a result of environmental factors. It also works to ensure that migration is recognized and used as one possible adaptation strategy (more on adaptation strategies in Chapter 2)<sup>52</sup>.

Intergovernmental Panel for Climate Change (IPCC) is a scientific foundation created by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) in 1989. This intergovernmental organisation provides to the world detailed empirical evidence relating to the current state of climate change and its potential environmental and socio-economic consequences. IPCC have various working groups on different subjects and also produces reports on climate change-related issues. As IPCC is the leading body for the assessment of climate change it also has great influence in debate over environmental displacement. In 1999 IPCC has stated that one of the gravest effects of climate change may be those on human migration. Although IPCC does not provide protection or assistance to EDPs, it creates awareness of the topic and enriches database of environmental displacement with scientific proofs.

Internally displaced forced migrants due to environmental issues have separate body which work in the field of internal displacement. Internal Displacement Monitoring Centre (IDMC) is created to help promote issue of internal displacement and to trace the changes of this movement. Monitoring function is based on awareness of the state of a watched system. Therefore, IDMC merely observes situation for any changes which may occur over time. It is not an institution which makes binding decisions towards States.

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<sup>52</sup> Comments and Proposed Revisions to the negotiating text prepared by the Chair of the UNFCCC *Ad Hoc* Working Group on long-term cooperative action by the Office of the United Nations High Commissioner for Refugees, the International Organization for Migration, the Norwegian Refugee Council, the United Nations University and with the support of the Representative of the Secretary General on the Human Rights of Internally Displaced Persons to the 6<sup>th</sup> session of the *Ad Hoc* Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA 6) from 1 until 12 June 2009. Bonn, para. 3.

## **2. Legal grounds for protection of environmentally displaced persons**

Universal Declaration of Human Rights (UDHR) Article 3 states that “everyone has the right to life, liberty and security of person”<sup>53</sup>. UDHR, other international legal documents related to the protection and rights of individuals only re-confirmed the scope of law in general and why legal norms are being created. After the Second World War international law, as a field of social science, moved from state-centred to people-centred perception of legal structure. Actors of international law hardly changed, but as never before individuals were put in the core of international legislature. People-centred conception made a great effect to the level of awareness and development of Human Rights. Human security was seen as the main concern in contemporary international law. Environmental displacement, as a threat to human security, is an area where international legal grounds should be set<sup>54</sup>. As already known, there is no single international document that would provide norms or action in situation of internal or transnational displacement due to disasters. Therefore in this chapter author is analysing what possibilities of assistance or protection do people in need get, *i.e.* what mechanisms are there created in international, regional and national levels.

### ***2.1. International level***

International legal system provides most general legal rights and obligations. An important rationale for international protection and assistance is that some of the states most vulnerable to climate change impacts may be unwilling or unable to protect the migrants. International protection is a subsidiary measure to national. As Supreme Court of Canada<sup>55</sup> embraced, refugee law provides surrogate or substitute protection of basic human rights: “International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only when that protection is unavailable, and then only in certain situations”<sup>56</sup>. International mechanisms set the minimum standards of legal grounds how foreigners should be treated while in other than country of nationality. These mechanisms start to work when national protection fails to provide decent aid. Moreover, asylum seeker does not have to exhaust all measures on national level before turning for help on international level, contrary to procedure in e.g. ICJ. Developed

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<sup>53</sup> Universal Declaration of Human Rights, adopted 10 December 1948 UN GA Res 217 A (III).

<sup>54</sup> Baylis J., Smith S. with Owens P. *The Globalization of World Politics*, Third edition. Oxford: Oxford University Press, 2006.

<sup>55</sup> *Canada v. Ward* (1993) 103 DLR 4<sup>th</sup> 1 (Can. SC, June 30, 1993).

<sup>56</sup> Hathaway J. C. *The rights of refugees under international law*. Cambridge: Cambridge University Press, 2005.

countries tend to acknowledge treatment to foreigners which fulfils minimum standards and developing countries state foreigners shall be treated the same as nationals. The standards of favourable treatment are established in three main and two subsidiary formal sources: international conventions; international customs, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations and judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law<sup>57</sup>. Therefore, international standards are officially binding towards subjects of international law. In addition, national law has to be in line with international legal norms.

However, existing international law in regulating environmental displacement issues is complex and it is found as inadequate basis for dealing with the challenges of environmental migration. Current international law does not require states to provide asylum to those displaced by environmental degradation. For example, there are no legal protection mechanisms neither in the UN Framework Convention on Climate Change, nor its Kyoto Protocol includes any provisions concerning specific assistance or protection for those who will be directly affected by the effects of climate change.<sup>58</sup> This allows governments to refuse great amounts of persons in need of help.

Wide spectrum of scientific articles and report of international institutions are written about this issue, but international bodies of legislature (eg International Law Commission) are not yet opening new sessions for creating new Convention on environmental displacement. The main reason is that so far there was no overall official agreement by members of United Nations that international society needs this international treaty.

As in most cases there are two sides of the scale.

First, concluding international instrument would be a brave move as international treaties are legally binding over the parties to them. International law in general and especially the field of international migration includes much debated question of states' sovereignty. Ever since the Treaty of Westphalia<sup>59</sup> (1648), state sovereignty is one of the attributes which shows that state is both an actor of international community and a subject of international law. Permanent Court of International Justice in Lotus case has stated that "restrictions upon the independence of State

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<sup>57</sup> ICJ Statute, adopted on 26 June 1945, Article 38.

<sup>58</sup> Climate Change, Migration and Displacement: Who will be affected? Working paper submitted by the informal group on Migration/Displacement and Climate Change of the Inter-Agency Standing Committee (IASC), 31 October 2008.

<sup>59</sup> Peace of Westphalia ended the Thirty Years' War (1618–1648) in the Holy Roman Empire, and the Eighty Years' War (1568–1648) between Spain and the Republic of the Seven United Netherlands. The treaties resulted from the first modern diplomatic congress, thereby initiating a new political order in central Europe, based upon the concept of a sovereign state governed by a sovereign.

cannot <...> be presumed”<sup>60</sup>. Moreover, sovereignty is characterised, *inter alia*, by the right of a state to deny foreign nationals access to the territory. Conclusion would be that the state reserves the right to deny access to foreigners as there cannot be restrictions. Nonetheless, as international law developed and was concentrated on human security, certain limitations on State sovereignty were implemented. This was done in order to promote and implement Principles of Human Rights. Limitations were evidenced by acknowledgement that international treaties were supranational. Treaties have to be obeyed and in the situation of flow of EDPs hosting state would have to follow the legislature and to exercise the duty to accept newcomers. Tension between state’s complete control over sovereignty and restraint of sovereignty in order to obey international norms still remains. Therefore, it is logical governments do not yet show consent on creating a treaty as this is an issue of hundreds of millions of persons<sup>61</sup> moving to new areas. Such immigration would respond to every field of hosting country, it would change state’s economics, also social, cultural, political and even ethnical situation.

States’ practice is that Australia and New Zealand have so far rejected requests by Kiribati and Tuvalu to accept their entire populations (about 100 000 and 10 000 respectively) when the rising sea-level renders these tiny atoll States of the Pacific uninhabitable.<sup>62</sup> Looking from international law perspective, they have full disposition of action in this situation, no wrongful act was done. Moreover, in later chapters it will be seen, that New Zealand in working on strategy to provide assistance to environmentally displaced persons.

Even though states adopted Convention, it can not be assured document would be effectively used worldwide. For instance, the UN International Convention on the Protection of Rights of All Migrant Workers and Members of their Families<sup>63</sup> contains substantial new protection for migrant workers, possibly this is why Convention has not been ratified by major countries who are hosting large numbers of migrants.

Second, international community accepts that not dealing with environmental displacement issue is not a solution as well. Number of researches show that figures of EDPs are expected to grow to more than 250 million people. This shows the great importance of subject as it affects significant number of global society. The shortage of resources and the high number of displaced persons will increase tensions all over the areas they resettle. It is already seen in

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<sup>60</sup> Lotus Case (1927), PCIJ Series A, No. 10.

<sup>61</sup> Predicted there are 200 million EDPs by 2010. N. Myers. Environmental refugees: a growing phenomenon of the 21<sup>st</sup> century // Philosophical Transactions of The Royal Society. 2001, B. vol. 357, p. 609-613.

<sup>62</sup> B. Opeskin. The Influence of International Law on the International Movement of Persons // MPRA Paper No. 19200. 11 December 2009.

<sup>63</sup> Adopted by UN GA Res 45/158 of 18 December 1990.

practice that armed conflicts arise<sup>64</sup> or tensions continue<sup>65</sup>. The role of international law is to set standards that would assure humans would be granted basic human rights in every country.

It is important to mention, that the text which had to be debated in United Nations Climate Change Conference (COP15) in Copenhagen, Denmark in December 2009, included a provision to offer “means to protect people displaced by the impacts of climate change”.<sup>66</sup> As Dr. Saleemul Huq, a head of the climate change group at the London-based International Institute for Environment and Development (IIED) has stated the mention in the proposed text, which had to form the basis of the final climate deal, had to mark the start of debate on “climate refugees” in the “formal” talks. However, productive results were not reached during the Conference; “formal” talks are postponed. In international law is understood as last option in many cases. Nevertheless, in current situation persons fleeing natural or man-made disasters have no this possibility of last option.

International Refugee and Migration law are not as rich in international legislation as e.g. Human Rights or Environmental Law. Treaties related to migration<sup>67</sup> will not be analysed deeper as these international instruments are mostly concerned with migrant workers. Migrant workers usually have freedom of action – they choose to leave their countries on voluntary basis. Legal grounds in the Convention do not refer to forced displacement. The main reason why EDPs are migrating is by contrast the involuntary factor. Therefore, treaty which would suit the most for EDPs is 1951 Refugee Convention.

### *2.1.1. 1951 Refugee Convention*

The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951. The Conference was convened pursuant to UN GA Res 429 (V), adopted by the General Assembly of the United Nations on 14 December 1950. Refugee Convention was approved on 28 July 1951. It entered into force on 22 April 1954. The Convention was initially limited to protecting European refugees after World War II but a 1967 Protocol removed the geographical and time limits, expanding the Convention’s scope. There are now 147 signatories worldwide to either the

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<sup>64</sup> E.g. Darfur situation. See C. Boano, R. Zetter, T. Morris. Environmentally displaced people. Understanding the linkages between environmental change, livelihoods and forced migration. Oxford: Refugee Studies Centre, University of Oxford, 2008.

<sup>65</sup> E.g. Carteret islands and Bougainville Autonomous Region (PNG) case. See Chapter 4.

<sup>66</sup> IRIN, humanitarian news and analysis, a project of the UN Office for the Coordination of Humanitarian Affairs <<http://www.irinnews.org/Report.aspx?ReportId=85017>>, last entered 21 May 2010.

<sup>67</sup> E.g. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by UN GA Res. 45/158 of 18 December 1990 and others.

Convention or the Protocol or to both.<sup>68</sup> So far it is the only international document related to refugee status.

As observed, 1951 Refugee Convention is the most important instrument dealing with refugee status and protection. However, Article 1 (A) (2) of the Convention provides with a very narrow definition of term “refugee”. People who flee due to environmental disasters do not meet criteria of a refugee as it is stated in 1951 Refugee Convention. According to the Convention’s Article 1 (A) (2) the term “refugee” shall apply to:

any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country<sup>69</sup>.

Taking definition into account, it was agreed that it is far not consistent with the actual meaning to put all environmental migrants under the term “refugee”. One of the most important criteria for a person to be recognised as a refugee is to be outside the country of nationality. EDPs sometimes do not cross the boundary of the country. People displaced outside the country are also only half way of meeting criteria of becoming refugees. A person, who wants to obtain refugee status, has to be persecuted for the reasons listed in Convention. This list is exhausted and environmental disasters are not on it. Other basic and core element of obtaining refugee status is well-founded fear of persecution. The 1951 Refugee Convention itself does not provide with an answer “What is persecution?”, but in Article 33, paragraph 1 there is a reference to the term. Article refers that persecution is when one’s life or freedom would be threatened on account of five above-mentioned reasons. Hence, a person, who wants to obtain refugee status, has to meet certain criteria. List of conditions is exhausted and environmental disasters are not on it. “Refugee” is not an umbrella term for all individuals who need protection and assistance.

Looking from another perspective, 1951 Refugee Convention can not help in situation of environmental migration as it had other scope. Convention was concluded almost straight after the Second World War. By that time nations and leaders of the world had to take care of millions of people that suffered from the hostilities. Nations decided to cooperate, to put effort in developing international law and to initiate collective governance. When states were concluding 1951 Refugee Convention, they were thinking how to help people. By the time of Treaty’s

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<sup>68</sup> UNHCR. States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. 1 October 2008.

<sup>69</sup> Convention relating to the status of refugees. UN GA Res 429 (V), adopted on 14 December 1950, entry into force 22 April 1954.

conclusion, State Parties did not consider nature as important factor for human security. Naturally, attention was dragged to that time matters.

Even though refuge seekers due to environmental disasters do not meet criteria to become refugees under international law, they do not fall out from getting assistance or protection on other basis. ICJ Judge Christopher Weeramantry in Gabčíkovo-Nagymaros case has stated: “Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application”.<sup>70</sup> It can be said that even if environmental reasons were not considered as important factor for forced migration, Convention can not constitute any kind of denial of protection or assistance to environmentally displaced persons. EDPs hold the universally accepted human rights as to life, liberty and security of person, they are also entitled to human rights protection granted by treaties and customary law, yet these rights are held by every person. Conclusion is that international law does not set any specific legal status to EDPs.

Even though it is not explicitly stated in the Convention, that environmental reasons are factor for gaining refugee status, some cross-boarder movement may be dealt within the existing international refugee framework<sup>71</sup>. First of all, the main body working with displaced people – UNHCR – in 1964 noticed that persons fleeing natural or ecological disasters normally have a need for relief assistance rather than protection<sup>72</sup>. On the other hand, since 1964 it has been proven that persecution sometimes might be deliberate action of the government of aggravating the environment where certain community lives because of five reasons stated in 1951 Refugee Convention. When refugee is forced to leave because of man-made cause, then he is entitled for the protection, not merely assistance. Also it is noted that environmental ground for displacement often is mixed with other reasons. Those reasons could be economic, ethnic, social, and others, *inter alia* political – which is one of the reasons to gain refugee status. Therefore, in case where environmental degradation is caused by the will of legal authorities due to the reason in 1951 Refugee Convention and person is forced to flee the country, then Refugee Convention could be applied.

Even if refugee status would not be given, there is possibility to gain complimentary protection. There is no legal definition, what is complimentary protection. The term has emerged over the last decade as a description of the increasingly-apparent phenomenon in industrialised countries of relief from removal being granted to asylum seekers who have failed in their claim

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<sup>70</sup> Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgement, ICJ, Separate Opinion of Vice-President Weeramantry, 25 September 1997, p. 114.

<sup>71</sup> UNHCR Policy Paper. Climate change, natural disasters and human displacement: a UNHCR perspective. 19 August 2009.

<sup>72</sup> Executive Committee of the High Commissioner’s Programme. Sub-committee of the whole on International Protection. III Observations and recommendations, para. (H). 12 August 1991, EC/SCP/64.

for 1951 Convention refugee status. It is essentially a generic phrase, with the actual terminology used by states to describe such forms of protection in their territory, including any attached immigration status. Most commonly used terms are “subsidiary protection” (in EU), “humanitarian protection”, “temporary asylum” or others.

### 2.1.2. *Soft Law*

Term “soft law” refers to international documents, which do not have binding power towards actors of international law. Formal sources of law<sup>73</sup> are constantly supplemented by the soft law. Especially in a field of forced displacement, due to the lack of statutory sources, soft law is alternative measure of field development. It consists of various documents: most Resolutions and Declarations of the UN General Assembly; statements; principles; codes of conduct; codes of practice; often found as part of framework treaties; action plans (for example, Agenda 21); recommendations; accords of international organizations and conferences; other non-treaty obligations. Even though such statements are not legally binding, they are very influential in forming State practice. It can evolve into international norm as well.

Soft law has also been a potential source of development of international migration/refugee law. In practice, various acts of soft law have made influence on developing a particular treaty, but in a field of international migration and refugee law, states tend to keep soft law regulations as it is.

Examples of soft law which could be mentioned as related to forced migration are Guiding Principles on Internal Displacement<sup>74</sup> and Declaration on Territorial Asylum<sup>75</sup>.

Guiding Principles on Internal Displacement are not specifically about environmental migration, yet Principles directly state that disasters are one of the factors to endorse forced migration. Therefore, Principles comprehend environmentally displaced persons inside the country of origin. Document is composed of 30 Guiding Principles and is used as a subsidiary measure to Humanitarian and Human Rights regulations. Refugee law by analogy has been incorporated into Guiding Principles, e.g. Principle 15 (d)<sup>76</sup> states IDP’s protection equivalent of *non-refoulement*. The Principles identify the rights and guarantees relevant to the protection of the internally displaced in all phases of displacement. Guiding Principles include thorough survey how states have to operate in the case of internal displacement. Principles also include protection aspect. Entire Section III is about principles related to protection of persons during the

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<sup>73</sup> As constituted in ICJ Statute, adopted on 26 June 1945, Article 38.

<sup>74</sup> UNHCR. Guiding Principles on Internal Displacement. 22 July 1998, E/CN.4/1998/53/Add.2.

<sup>75</sup> UN GA Res 2312 (XXII) of 14 December 1967.

<sup>76</sup> Principle 15 (d): The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

period of displacement. Document intended to serve as an international standard to guide governments, international organizations and all other relevant actors in providing assistance and protection to IDPs. Although they do not constitute a binding instrument, the Principles reflect and are consistent with international law. In fact, now Guiding Principles are said to be strong international instrument as they are analysed together with Humanitarian and Human Rights law.

Declaration on Territorial Asylum was adopted by UN General Assembly in 1967. Article 2 states that “Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State”. This paragraph implied the duty for all states to take action in granting asylum. Declaration does not specify forced migration participants; therefore, conclusion might be drawn that environmental displacement would fall under the Declaration. In the Resolution of GA it was stated, that Declaration is adopted considering the work of codification to be undertaken by the International Law Commission. Probably this refers to potential sessions of International Law Commission while creating Convention on Territorial Asylum. However, the result was that Declaration conspicuously failed to impose a duty on countries to grant asylum. In 1977 an attempt to draft a more progressive convention at UN Conference on Territorial Asylum also faltered<sup>77</sup>.

Other soft law instruments are documents about general human rights and freedoms. Most well-known and commonly used soft law instrument is Universal Declaration of Human Rights. Among 30 Principles there are values as: “Everyone has the right to life, liberty and security of person”, “Everyone has the right to freedom of movement and residence within the borders of each state”, “Everyone has the right to leave any country, including their own, and to return to their country” and “Everyone has the right to seek and to enjoy in other countries asylum from persecution”.

In 1973 UN General Assembly adopted resolution<sup>78</sup> by which UNHCR received a mandate to offer “good offices” for persons in need of help. This mandate was granted because even before 1973 it was seen that unconventional refugees’ number is growing and situations needs to be adjusted. Since then UNHCR has been providing its “good services”. In 1984 on the occasion of a drought in east of Africa, UNHCR did not make a difference with regards to aid distribution between those who fled the rebellion in the State of Eritrea and those coming from Republic of Sudan through Kenya because of famine.<sup>79</sup>

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<sup>77</sup> Hathaway J. C. The rights of refugees under international law. Cambridge: Cambridge University Press, 2005.

<sup>78</sup> UN GA Res 3143, 28 UN GAOR Supp. (No. 30) at p. 85, UN Doc.A/9030 (1973).

<sup>79</sup> Kortsaris P. People in need of international protection: alternatives in Europe for the status of refugees: doctoral dissertation, social science, law. Universiteit Antwerpen, Faculteit Rechten, 2003, footnotes, p. 62.

Conclusion is that documents of soft law are important in formulating state practice, but as they are not legally binding, could be used as general guidelines of behaviour.

### *2.1.3. Proposed legislation*

Initiatives are shown to create internationally binding tools. Mostly Protocols to the 1951 Refugee Convention are proposed. There are also suggestions to create new international Convention on environmentally displaced persons or to amend existing 1951 Refugee Convention.

In 2006 a meeting attended by representatives of governments of the Maldives, Tuvalu and other small island developing states, NGOs and international organizations was held in the Republic of Maldives with this theme and produced the “Protocol on environmental refugees: recognition of environmental refugees in the 1951 Convention and 1967 protocol relating to the status of refugees” (Unpublished Working Draft of the Proposal prepared by Michael See)<sup>80</sup>. Even though it did not come into force, the initiative has shown and it was evidenced that environmental factors contribute to migration.

After abovementioned meeting, Living Space for Environmental Refugees network (LiSER) started to promote the protocol. It was called the LiSER initiative. It builds on momentum generated by the Toledo Initiative on Environmental Refugees and Ecological Restoration. Describing environmental refugees as “persons displaced by impacts on the environment, which include, but are not limited to, climate change, *force majeure*, pollution, and conditions that are forced upon the environment by state, commercial enterprises or a combination of state and commercial entities”, LiSER aims to establish a Working Group to explore how to incorporate environmental refugees into the 1951 Convention. Their objective is to include within the defining characteristics of a refugee a well-founded “fear of life endangerment, harm or loss of life due to severe environmental impact, or due to materials left, existent or being released in the displacement grounds by the state, commercial entities, or both.”<sup>81</sup>

Other proposal was made by two scientists in 2008<sup>82</sup>. Prof. Dr. F. Biermann and Ingrid Boas proposed a Protocol on the Recognition, Protection, and Resettlement of Climate Refugees

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<sup>80</sup> F. Renaud, J. J. Bogardi, O. Dun, K. Warner. Control, Adapt or Flee: How to Face Environmental Migration? // InterSecTions. 2007, No. 5, p. 21.

<sup>81</sup> C. Boano, R. Zetter, T. Morris. Environmentally displaced people. Understanding the linkages between environmental change, livelihoods and forced migration. Oxford: Refugee Studies Centre, University of Oxford, 2008.

<sup>82</sup> F. Biermann and I. Boas. Protecting Climate Refugees: The Case for a Global Protocol // Environment. 2008, November-December.

to the United Nations Framework Convention on Climate Change (UNFCCC). They claimed this protocol should be added to UNFCCC, not 1951 Refugee Convention because developed state parties to later convention already put constant pressure on conventional refugee regime. They are not looking forward to interpret provision and it can be guessed these state parties would not want to extend same level of protection to a new group 20 times larger than those currently under UN oversight and equal to half the population of the European Union.

Scientists wrote about it in “The Environmentalist” magazine and the project of Proposal on Climate Refugees comprehended five main principles.

First, at the core of the agreement must be the objective of a planned and voluntary resettlement and reintegration of affected populations.

Second, climate refugees must be seen and treated as permanent immigrants to the regions or countries that accept them. Climate refugees cannot return to their homes as political refugees can (at least in theory).

Third, the climate refugee regime must be tailored not to the needs of individually persecuted people (as in the current UN refugee regime) but of entire groups of people, such as populations of villages, cities, provinces, or even entire nations, as in the case of small island states.

Fourth, an international regime for climate refugees will be targeted less toward the protection of persons outside their states than toward the support of governments, local communities, and national agencies to protect people within their territories. Essentially, the governance challenge of protecting and resettling climate refugees involves international assistance and funding for the domestic support and resettlement programs of affected countries that have requested such support.

Fifth, the protection of climate refugees must be seen as a global problem and a global responsibility. In most cases, climate refugees will be poor, and their own responsibility for the past accumulation of greenhouse gases will be small. By a large measure, the wealthy industrialized countries have caused most past and present greenhouse gas emissions, and it is thus these countries that have the greatest moral, if not legal, responsibility for the victims of global warming. This does not imply transnational migration of 200 million climate refugees into the developed world. Yet it does imply the responsibility of the industrialized countries to do their share in financing, supporting, and facilitating the protection and resettlement of climate refugees.

Protocol would include governance mechanisms as administrative areas (such as villages, islands, or districts) under the jurisdiction of member states. Also, an analogy to UNHCR system, there would be executive committee, which would be responsible to state parties and

have functions of determine the inclusion of affected areas, as well as the types of support measures, only upon formal proposal from the government of the affected country. It would be decision making self governing body. EDPs' resettlement would be requiring big funds. Therefore resettlement mechanism would be funded by specially established global fund "Climate Refugee Protection and Resettlement Fund." As scholars state, the governance of the fund should be independent and stand under the authority of the meeting of the parties to the climate refugee protocol. To generate the funds needed, the Climate Refugee Protection and Resettlement Fund could be coupled with currently proposed, novel income-raising mechanisms, such as an international air-travel levy.<sup>83</sup> Prof. F. Biernamm and I. Baos assume that World Bank, UNDP and UNEP should be agencies that take care of implementing the Protocol and UNHCR should help with experience sharing.

There are more initiatives for creating international instruments on environmentally displaced persons' protection and assistance. Yet so far these initiatives have role of promoting the topic rather than actually being the cause of starting the legislature process. Not all actors of international law are willing to cooperate. They have their own interest and position. What is more, a strong push actors in environmental displacement issue are non-state, though powerful, subjects as transnational organizations (multinational corporations, non-governmental organizations, financial institutions, etc.), national organizations, local authorities and scholars/individuals. After starting negotiating, decision making might take dramatically long period of time. All this shows that it is complicated to adopt legal instrument which should operate in the worldwide spectrum.

## ***2.2. Regional protection***

It has been observed, that people are environmentally displaced mostly in certain regions – Africa, Asia and Latin America. Therefore these regions implemented the extended version of "refugee" notion in their regional legal system. 1969 Organization of African Unity Convention and 1984 Cartagena Declaration is analysed in this Chapter. Moreover, author demonstrates whether European Union (EU) structure provides protection/assistance to environmentally displaced persons.

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<sup>83</sup> F. Biermann and I. Baos. Protecting Climate Refugees: The Case for a Global Protocol // Environment. 2008, November-December.

### *2.2.1. EU legislation: subsidiary and temporary protection*

It is important to analyse what legislation European Union implements in the field of forced migration as EU is important region to host forced migrants. In 1994 European Commission (EC) released a Communication from the Commission to the Council and the European Parliament on Immigration and asylum policies<sup>84</sup> where EC stated that environmental considerations should be counted in while examining incidental or long-term migration pressure. EC pointed out that humanitarian assistance would have to be offered to help persons after incidental or natural disasters. European Parliament called for the development of instruments and policies of prevention regarding environmental displacement (Report European Parliament 2002). According to the European Commission, climate migration “should also be considered in the broader EU reflection on security, development and migration policies” (White Paper of the Commission 2009)<sup>85</sup>.

European Council Directive 2004/83/EC<sup>86</sup> (also – Qualification Directive) gives common view how to deal with refugee status issues. This Directive introduces minimum standards of refugee treatment. Moreover, directive is based on 1951 Refugee Convention. Article 2 (c) of Qualification Directive provides refugee definition. It is analogous to 1951 Refugee Convention apart directive refers to third country nationals and stateless persons, not every individual, eg from another Member State. This is a problematic aspect as definition is narrowed down. Other reference in the definition is to Article 12. This article sets exclusion clauses from getting a refugee status. Environmental factors are not stressed in the definition or nowhere in the document. Therefore, EDPs would not qualify as refugees under 2004/83/EC directive.

EU has instruments for granting subsidiary or temporary measures.

Subsidiary protection is provided to persons who do not qualify for refugee status, but otherwise need international protection. Article 15 of Qualification Directive states that subsidiary protection would be provided to persons who would suffer from serious harm. There are three cases, when subsidiary protection might be granted: death penalty or execution; torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in

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<sup>84</sup>European Union, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies. COM (94) 23 final, 23 February 1994, p. 18 para. 66.

<sup>85</sup> N. de Moor, A. Cliquet. Environmental displacement: a new challenge for European migration policy. Paper prepared for the international conference “Protecting people in conflict and crisis: responding to the challenges of a changing world”, organized by the Refugee Studies Centre at the University of Oxford, in collaboration with Humanitarian Policy Group at the Overseas Development Institute (HPG), 22-24 September 2009, available at: <<http://www.rsc.ox.ac.uk/PDFs/sessionIIIgroup5nicoledeemoor.pdf>>, last entered 22 May 2010.

<sup>86</sup> Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted.

situations of international or internal armed conflict. Taking all cases into account it is seen that subsidiary protection to environmentally displaced persons would not be granted as there are no legal grounds for that, unless EDPs would experience human rights violations, because environmental displacement was initiated by human factor.

Temporary protection is implemented in EU Directive 2001/55/EC<sup>87</sup>. It is the only document which sets obligation towards Member States to provide temporary protection. This protection is used when a large number of asylum seekers enter foreign country at the same time (mass influx) and all applications for granting refugee status are temporarily stopped. As Directive is supranational legal instrument, European Council has power to decide whether mass influx situation amounts to temporary protection and to activate it. Then Member State in which territory mass influx happened provides required procedures. Directive provides that “temporary protection” means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection<sup>88</sup>. Therefore in the situation of mass influx EDPs should get temporary protection which consists of free residence in a hosting Member State, visas (if necessary), access to education for asylum seekers who are less than 18 years old etc. Temporary protection shall not prejudice recognition of refugee status under the 1951 Refugee Convention. Environmentally displaced persons usually are migrating in groups. This is why most probably they would receive temporary protection in European Union countries. Protection can be set for the period of one year with possibility to extend for two periods of 6 months and additional year if European Council agrees.

On the other hand, temporary protection does not influence what legal status after term of this protection finishes should environmental refugees get. Moreover, in the event of individual or small scale arrivals temporary protection would not be granted and then the gap of legal system still remains. Status determination procedures in these cases are analysed in Chapter 3.

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<sup>87</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

<sup>88</sup> *Ibid.* Article 2 (a).

### 2.2.2. 1969 Organization of African Unity Convention, 1984 Cartagena Declaration

Two regions – Africa<sup>89</sup> and Latin America – due to growing number of people in need of protection and assistance extended the version of refugee definition. Convention and Declaration provides minimum standards of protection (as duty to *non-refoulement*, guaranteeing human security) also rights to employment, family reunification and others to those who fall outside the scope of 1951 Refugee Convention.

In both regional documents the notion of refugee, *inter alia*, include people who have been compelled to flee their countries due to seriously disturbed public order. These extensions come closest to some form of official international recognition which could potentially encompass those compelled to leave their countries due to environmental factors.

However, both 1969 Organization of African Unity Convention and 1984 Cartagena Declaration are regional documents therefore are applied to individuals within Africa and Latin America. In addition, definitions do not refer to environmental displacement specifically. Therefore, it would be difficult to grant refugee status for EDPs in above-mentioned regions.

### 2.3. National legislation

National governments have the primary responsibility for people on their territory<sup>90</sup>. State's mechanisms of protection and assistance should be the main tools for forced migrants. Depending on a state, these mechanisms may be different. Also, interaction between international legislation and national law has to be completed. However in this case, the lack of framework of international law results to gaps in national system.

There are two cases of national legislation – legal instruments of environmentally disturbed country and legislation of EDPs receiving country.

#### 2.3.1. Measures by environmentally damaged state

National legislation is binding towards its citizens. On the grounds of principles of international law, citizens are primer concern of the state. State establishes scheme of action and

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<sup>89</sup> In Africa, an estimated 10 million people have migrated or been displaced over the last two decades mainly because of environmental degradation and desertification. See S. A. Zelaya-Bonilla. Land degradation, desertification and drought, forced migration and social vulnerability.

<<http://www.unccd.int/science/desertsandmigration/docs/welcomenoteunccd.pdf>>, last entered 22 May 2010.

<sup>90</sup> Kolmannskog, V. O. Future Floods of refugees. A comment on climate change, conflict and forced migration. Norwegian Refugee Council, 2008.

released due decrees to provide solutions to environmentally displaced persons. Depending on disaster – whether it is long-term, short-term or permanent – action plans involve resettlement strategies and adaptation programmes. These documents are binding towards people concerned (e.g. in case of catastrophe or development projects) or they can be as complimentary measure to law regulations. In case of disaster, legal authorities also refer to international instrument – Guiding Principles on Internal Displacement<sup>91</sup>. This document includes resettlement and reintegration of IDPs.

Resettlement and adaptation mechanisms are for internal displacement and encompass variety of forms. Usually legal acts are created *ad hoc* for every case separately. In some cases, in particular at early stages of environmental degradation, migration may be used as one of the adaptation mechanisms. Leaving places of habitual residence on their own or being evacuated or relocated may be the only survival options which need to be managed by national authorities in cooperation with the international community to ensure adequate assistance to and protection of the persons concerned<sup>92</sup>.

In legal sense not much change as people resettled are citizens of the country. More changes are in policy development, social security, and other internal affairs. Still after relocation IDPs get special status under which they are entitled to rights (as to permanent residence, education, allowance etc.) and duties (to obey laws and regulations). Most likely durable solution would be integration in the places of displacement or relocation to new areas inside the country, since return would not be possible<sup>93</sup>. After relocating community to new surrounding adaptation period has to pass. According to the technical paper submitted to the UNFCCC Secretariat on “Climate Change, Migration and Displacement: Who will be affected?” it suggested the following definition of adaptation strategies:

The adaptation [framework] [programme] shall support and enhance the implementation of national adaptation plans. Adaptation action includes: [...] (e)

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<sup>91</sup> Global Database. Guiding Principles on internal displacement <<http://www.idpguidingprinciples.org>>, last entered 22 May 2010.

<sup>92</sup> Comments and Proposed Revisions to the negotiating text prepared by the Chair of the UNFCCC *Ad Hoc* Working Group on long-term cooperative action by the Office of the United Nations High Commissioner for Refugees, the International Organization for Migration, the Norwegian Refugee Council, the United Nations University and with the support of the Representative of the Secretary General on the Human Rights of Internally Displaced Persons to the 6<sup>th</sup> session of the *Ad Hoc* Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA 6) from 1 until 12 June in Bonn, para. 2.

<sup>93</sup> UNHCR Policy Paper. Climate change, natural disasters and human displacement: a UNHCR perspective. 19 August 2009.

Activities related to national and international migration and displacement or planned relocation of persons affected by climate change.<sup>94</sup>

It was also suggested to add the following sentence:

The same [framework] [programme] shall acknowledge the need to identify modalities of inter-State cooperation to respond to the needs of affected populations who either cross an international frontier as a result of or find themselves abroad and are unable to return due to the effects of climate change.<sup>95</sup>

Hence, national authorities use measures: social as education, cultural exchange, awareness of climate change or technical as diversification of livelihood options and community based natural resource management to prevent overexploitation of marginal and rehabilitate lands.

Community-Based Adaptation (CBA) provides a crucial approach to development activities, practices, research and policies. A pivotal project in developing these approaches is in villages in the Philippines at risk from rising sea levels and tropical cyclones. In partnership, CBA has developed community-based monitoring of changes in coastal areas, created community early warning systems and promoted traditional knowledge, encouraged sea use zoning, promoted alternative livelihood development as well as eco-waste management and has helped to provide secure property rights and micro-finance schemes that enhance the adaptive capacity of vulnerable groups<sup>96</sup>.

An understanding of adaptation and resilience, as the counterpart to vulnerability and forced migration, demands an approach that is wider in scope than much current impact driven sectoral adaptation research and programmes. It fosters the recognition of non-climatic factors, including sources of livelihoods, assets, access to resources, institutional networks, education, gender, race, ethnicity, and poverty that delineate vulnerable populations. It allows for complementary adaptation measures to be conceived that either reduce human sensitivity and

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<sup>94</sup> Climate Change, Migration and Displacement: Who will be affected? Working paper submitted by the informal group on Migration/Displacement and Climate Change of the Inter-Agency Standing Committee (IASC), 31 October 2008.

<sup>95</sup> Comments and Proposed Revisions to the negotiating text prepared by the Chair of the UNFCCC *Ad Hoc* Working Group on long-term cooperative action by the Office of the United Nations High Commissioner for Refugees, the International Organization for Migration, the Norwegian Refugee Council, the United Nations University and with the support of the Representative of the Secretary General on the Human Rights of Internally Displaced Persons to the 6<sup>th</sup> session of the *Ad Hoc* Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA 6) from 1 until 12 June in Bonn, para. 5.

<sup>96</sup> C. Boano, R. Zetter, T. Morris. Environmentally displaced people. Understanding the linkages between environmental change, livelihoods and forced migration. Oxford: Refugee Studies Centre, University of Oxford, 2008.

exposure, or minimise adverse non-climatic factors that, in turn, lessen sensitivity to climate-related stressors. And it recognises the ways in which gradual direct or indirect environmental change or degradation contributes to the decision to migrate, but relates this to coping mechanisms and available assistance.<sup>97</sup>

When disaster is of large scale and people have to cross international borders, bilateral agreements are negotiated. When there are no such agreements, EDPs have to rely on receiving country's national legislation.

### *2.3.2. Measures by EDPs receiving state*

If person is displaced internally he is under full disposition of his country with reference to international principles on internal displacement. In case of cross-boundary displacement, all states are under obligation of customary international law not to ill-treat foreign nationals present in their territory. This customary obligation is owed by one state to another. Some countries have legislation which sets special status for these involuntary displaced persons. When the threat to life, liberty and freedom is a result of a disaster, person is qualified for protection. Protection may establish similar status to 1951 Refugee Convention as this is disposition of hosting state. Exceptional measures or humanitarian assistance are usually set *ad hoc* after large number of EDPs enters the country. It is related to mass influx; therefore in EU such migrants would have the right to temporary protection. Outside European Union, countries have right to deny access as discussed above, but temporary or subsidiary protection may be granted. Knowing that, governments, that are experiencing environmental degradation, usually establish bilateral or immigration agreements with possible hosting states, e.g. Tuvalu and New Zealand.

Tuvalu is a small Polynesian island state in the western Pacific Ocean facing one of the biggest environmental disasters – atoll is submerging. For this reason government of Tuvalu initiated discussion with New Zealand. Countries concluded The Pacific Access Category (PAC) immigration agreement. New Zealand has decided yearly to accept up to 75 citizens of Kiribati, 75 citizens of Tuvalu and 250 citizens of Tonga via The Pacific Access Category Ballot<sup>98</sup>. The PAC does not employ the term environmental or climate refugee, nor does it mention the threat of climate change or state any responsibility for the displacement of these populations.<sup>99</sup> It is not very different from ordinary migration arrangements. Yet, for now it is one of the alternative ways to resettle community of Tuvalu inhabitants.

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<sup>97</sup> *Ibid.*

<sup>98</sup> Pacific Access Category, <<http://www.immigration.govt.nz/migrant/stream/live/pacificaccess>>, last entered 22 May 2010.

<sup>99</sup> Kolmannskog, V. O. Future Floods of refugees. A comment on climate change, conflict and forced migration. Norwegian Refugee Council, 2008.

Some countries, as Australia, are criticized for not accepting environmentally displaced persons. On the other hand, accepting environmental migrants is firstly national policy question rather than national law.

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To conclude this Chapter it is needed to say that legal grounds for protection of and assistance to environmentally displaced persons are poorly developed in international law. In the most global level, such displaced persons are not more protected as other individuals – they are entitled for human rights protection, they have rights to life, liberty and human security. They do not qualify for 1951 Refugee Convention. Therefore, they can look forward to humanitarian assistance. In regional level persons in EU are entitled for temporary protection. In regions of Africa and Latin America EDPs can expect to be acknowledged as refugees because these regions have extended “refugee” notion. However, the notion does not imply that EDPs would be necessarily recognised. EDPs are included into internally displaced persons’ definition. Therefore on national level governments have to follow this piece of legislation (even though it is not legally binding). Resettlement and adaptation strategies are established. In other cases bilateral agreements are concluded. All in all, there is no much certainty for EDPs to receive decent protection and assistance. Other Chapter is about what legal status EDPs get when they are forced to relocate.

### 3. Legal status of environmentally displaced persons

#### 3.1. Meaning and scope of refugee status

Status itself means the condition of a person. Legal status entitles individuals to certain rights and the state protection. Legal status is granted based on whether individual matches criteria specifically defined to that particular status.

Under Refugee law refugee status refers to a set number of privileges and international protection which have been assigned for a certain group of individuals who qualify for refugee definition. Person can hold more than one status. For example, there are cases when status is not affected because of fleeing the country. In 1951 Refugee Convention Article 14, personal (such as marital) status of a refugee is said to be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

1951 Refugee Convention and the 1967 Protocol establish various rights such as right to religion, same treatment to refugees as accorded to aliens generally, housing, public education, movable and immovable property rights, artistic rights and industrial property rights, right of association, access to courts rights, wage-earning employment rights and other that would guarantee normal everyday life to persons. These rights are guaranteed in a host country as substitute for the protection refugees can not receive from the government of their state. After gaining refugee status, individual should come as close to *status quo* he or she would have in the country of origin as possible.

This international status not only grants privileges and protection, but also demands to obey duties, that are implemented into host country's national law. Article 2 of the 1951 Refugee Convention specifies that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order. National laws are obligatory to every person equally on the territory of the country or at least to all foreigners with no discrimination (eg regulations for visas, registration etc.). If refugee breaches valid law of the country, this breach can not be used as a ground for the withdrawal of rights established under the 1951 Refugee Convention<sup>100</sup>.

Refugee status is defined, but as it binds hosting states to take care of new comers, which influences country's economy, social life, ethnical consistency, it is a sensitive issue in determination of the status. The part played by the UNHCR is important in the sense that Commissioner's Office works to improve the procedures for the determination of refugee status

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<sup>100</sup> Hathaway J. C. The rights of refugees under international law. Cambridge: Cambridge University Press, 2005, p. 98.

established by Governments. UNHCR Executive Committee (ExCom)<sup>101</sup> in its Conclusion<sup>102</sup> stated that State Parties should interpret the criteria for refugee status in the 1951 Convention and/or its 1967 Protocol in such a manner that all persons who fulfil these criteria would be duly recognized and protected under mentioned instruments, rather than being accorded a complementary form of protection.

The case of defining status of environmentally displaced persons is even more difficult. There are some rare cases when EDP can be qualified as a refugee as discussed in previous Chapters. United Nations Climate Change Conference COP15 has had an issue of EDPs on the agenda, which would have put more clearness into the question of their status. However, environmental displacement was not discussed thoroughly. One thing is clear – unless there is fundamental institutional change and consideration given to the development of appropriate instruments and norms, those who are motivated to move because of environmental degradation will continue to lack legal status.

### ***3.2. EDP status***

In general, environmentally displaced persons do not have separate internationally recognised legal status. All scientists consent that victims of environmental displacement need international recognition and legal status definition. Universal Declaration of Human Rights, 1951 Refugee Convention, and other related documents do not directly include EDPs nor do they describe their legal status. Since there is no legal status determined EDPs might face the gap of legal protection under existing international legislation. Particular status for EDP is given according to State's national law, not international.

Among others, there are two categories of EDPs – those who migrate internally and those who cross international boarder. Environmental displacement specialists usually do not make distinction whether boarder was crossed or no, the essence is forced migration due to the factor of environmental change. Nevertheless, the act of crossing the boarder has a great effect on the status these people obtain. Being outside the country of one's nationality is important in nominating who should provide help to migrants and what protection they are entitled to receive.

First category encompasses internally displaced persons. Several governments have adopted legislation providing for the creation of a national status for IDPs or selected groups of

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<sup>101</sup> Currently made up of 78 members, UNHCR's governing ExCom meets in Geneva annually to review and approve the UNHCR's programmes and budget, advise on international protection and discuss a wide range of other issues with UNHCR and its intergovernmental and non-governmental partners.  
<<http://www.unhcr.org/pages/49c3646c83.html>>, last entered 8 May 2010.

<sup>102</sup> Conclusion on the Provision on International Protection Including through Complementary Forms of Protection. 2005, para. (b), <<http://www.unhcr.org/refworld/docid/43576e292.html#1>>, last entered 8 May 2010.

IDPs. These statuses should not deprive IDPs of their rights under human rights and humanitarian law. Such statuses have been created by law in e.g. Azerbaijan, Bosnia and Herzegovina, Colombia, Croatia, Georgia and the Russian Federation<sup>103</sup>. For example, in the law on internally displaced persons in Georgia, basic elements of IDP are similar to refugee definition under 1951 Refugee Convention but with broader application as forced displacement due to threat to person's or his family member's life or freedom due to the aggression of foreign country, internal conflicts or mass violation of human rights<sup>104</sup>.

Though not required under international law, such national IDP status usually provides for the registration of those entitled to the status and provides beneficiaries with social, economic and legal assistance to safeguard rights endangered by displacement and support the implementation of durable solutions<sup>105</sup>. Internal displacement is internal affair of a country. IDPs can not claim any additional rights to those given to all citizens of the state unless IDP status is directly implemented in the legal system of the country. According to Georgian law, IDPs have a right to residence, one-time free public transportation to the place of temporary residence and luggage transportation, free access to public services, food products within quantity determined for IDPs, vulnerable IDP shall enjoy free medical treatment and also IDPs should receive lump sum financial and other governmental assistance<sup>106</sup>.

There is no data how many individuals are displaced internally particularly because of environmental disasters. It is hard to achieve this statistics as natural or man-made disasters might be short (like yearly floods), when people temporarily leave home and come back afterwards and disasters might be long or even irretrievable, when people have to be dislocated permanently. This is why statistics would constantly change. As it can be seen, national law usually encompass political reasons of displacement. Meanwhile international soft law version of IDP's notion is much broader and encompasses environmentally displaced persons as well.

Guiding Principles for Internal Displacement are part of non-binding law. Principles set recognition of vulnerability of individuals while they are removed from their homes and that the treatment of such people should be in line with human rights and humanitarian law. It is general guidance for governments on displacement legislation.

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<sup>103</sup> The definition of an internally displaced person (IDP), <[www.internal-displacement.org](http://www.internal-displacement.org)>, last entered 21 May 2010.

<sup>104</sup> საქართველოს კანონი იძულებით გადაადგილებულ პირთა-დევნილთა შესახებ (Law No. 335-II S On internally displaced persons – persecuted, adopted on 28.06.1996, in force since 28.06.1996, last updated 18.12.2001), Article 1.

<sup>105</sup> The definition of an internally displaced person (IDP), <[www.internal-displacement.org](http://www.internal-displacement.org)>, last entered 21 May 2010.

<sup>106</sup> საქართველოს კანონი იძულებით გადაადგილებულ პირთა-დევნილთა შესახებ (Law No. 335-II S On internally displaced persons – persecuted, adopted on 28.06.1996, in force since 28.06.1996, last updated 18.12.2001), Article 3.

Typically, state is interested to help their national in any case of public disorder, hence in the case of environmental displacement countries do take action in favour of victims. Difficulties arise when national authorities have little interest in satisfying needs of IDPs or even use/create environmental degradation as means of persecution. Consequently if legal status is not given to these individuals, a potential lack of protection may occur. In the case of disaster foreign countries or international institutions may offer their assistance on humanitarian grounds, but there may also be a rejection of legal assistance by the state.

To conclude, internally displaced persons due to environmental disasters have more international recognition in legislation compared to EDPs outside their country. This outcome is conditional as international definition is non-binding and national law sets legal status usually to people, who flee home rather due to political reasons, not environmental.

Second category is internationally displaced people. Most academic commentators continue to agree with the comments made by Dr. Astri Suhrke in the 1990s that “giving refugee status to environmental refugees would only distort the definition and strain the desperately scarce resource of the international refugee regime”<sup>107</sup>. Therefore, name and scope of status granted to EDPs varies from state to state, usually it is given on *ad hoc* basis, but in general status remains unclear.

EDPs can arrive individually, in small groups or in large number. In case of individual or small group arrival, procedure is vague and depends on particular State. Usually EDPs arrive in large groups. Whenever there is a mass influx of environmentally induced migrants, states decide to establish special status to these people or deal with situation on other grounds. Ministry of Social Welfare of Ghana Republic in mid-1980s had established procedure *ad hoc* when mass influx of EDPs arrived to the country. This influx according to Ghanaian law was illegal as EDPs did not pass legal procedure. Government did not set specific status for these persons, but they did set a scheme of registration of individuals and provided residence<sup>108</sup>. In European Union and United States of America<sup>109</sup> procedure would be to grant temporary protection until case is analysed. 1990 US Immigration and Nationality Act for the first time established a statutory scheme for the temporary refuge of aliens<sup>110</sup>. Temporary Protected Status (TPS) allowed the US government to designate certain nationalities as eligible for TPS because of conditions in their

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<sup>107</sup> C. Boano, R. Zetter, T. Morris. Environmentally displaced people. Understanding the linkages between environmental change, livelihoods and forced migration. Oxford: Refugee Studies Centre, University of Oxford, 2008; A. Suhrke. Environmental degradation and population flows // Journal of International Affairs. 1994, No. 47 (2), p. 437-496.

<sup>108</sup> Kortsaris P. People in need of international protection: alternatives in Europe for the status of refugees: doctoral dissertation, social science, law. Universiteit Antwerpen, Faculteit Rechten, 2003.

<sup>109</sup> Immigration and Nationality Act, para. 224A9b) <<http://www.uscis.gov/propub/DocView/slbid/1/2>>, last entered 21 May 2010; US Code, Title 8 (Aliens and nationality), Chapter 12, para. 1254a <[http://www.law.cornell.edu/uscode/uscode08/usc\\_sec\\_08\\_00001254---a000-.html](http://www.law.cornell.edu/uscode/uscode08/usc_sec_08_00001254---a000-.html)>, last entered 8 May 2010.

<sup>110</sup> *Ibid.*

home countries. Amongst such crises are “nuclear disasters and natural catastrophes and extreme recourse depletion”. It can be assumed that famine, earthquakes and floods are grounds upon which TPS could be granted.

Migration to foreign state is forced by short or long term environmental events or permanent degradation of homeland. In case of short term displacement, states sometimes give special immigration status to people displaced by catastrophic events, as an act of humanitarian assistance. Draft Principles of international relief in natural disaster situations provide that “humanitarian assistance” means the provision of commodities and materials required to prevent and alleviate human suffering, and does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict bodily harm or death<sup>111</sup>. No government has yet expressed its willingness to accept large flows of persons displaced by long term climate processes.

Humanitarian, stateless person’s and people in need of international protection statuses are few examples of what legal recognition could EDPs expect.

### *3.2.1. EDPs under Humanitarian status*

Quite a few national legislations now acknowledge the possibility of granting temporary protection on humanitarian grounds to those falling under this category. Persons enjoying humanitarian status are formally permitted, under national law, to reside in a country on humanitarian grounds. EDPs can be included if they do not qualify for refugee status. Many EU countries have introduced subsidiary forms of protection, *i.e.* “humanitarian status” for people fleeing natural catastrophes. In Sweden the Migration Board may grant “residence permits on humanitarian grounds”<sup>112</sup> to persons who do not qualify for refugee status, but who should not be returned. Sweden’s Aliens Act<sup>113</sup> does not define “humanitarian grounds”, but according to the UN High Commissioner for Refugees, persons who have been granted residence on humanitarian grounds include those with “strong links to Sweden, persons who are old or infirm, and unaccompanied children”<sup>114</sup>. Norwegian Directorate for Immigration (UDI) also states that “if [asylum seeker is] not granted protection, the UDI must always consider whether [individual]

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<sup>111</sup> R. J. Hardcastle, A. T. L. Chua. Humanitarian assistance: towards a right of access to victims of natural disasters // International Review of the Red Cross. 1998, No. 325, p. 589-609.

<sup>112</sup> World Refugee Survey 2003 Country Report <<http://www.refugees.org/countryreports.aspx?id=1780>>, last entered 21 May 2010.

<sup>113</sup> Sweden’s Aliens Act, <<http://www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf>>, last entered 21 May 2010.

<sup>114</sup> World Refugee Survey 2003 Country Report <<http://www.refugees.org/countryreports.aspx?id=1780>>, last entered 21 May 2010.

can be granted a residence permit on grounds of strong humanitarian considerations or a special connection to Norway. In such cases, UDI will always make an overall assessment of the case”<sup>115</sup>. European Court of Human Rights (ECHR, Fr. *Cour Européenne des Droits de l'Homme*) in the case *Batalov v. Lithuania*<sup>116</sup> notes that under Lithuanian legislation applicant was allowed to stay in Lithuania on humanitarian grounds because he did not fulfil criteria for refugee status.

There are states which grant humanitarian status to persons exceptionally on compassionate grounds having no relation to refugees. Citizenship and Immigration Canada provides that humanitarian and compassionate grounds exist when unusual, undeserved or disproportionate hardship would result if the applicant had to leave Canada. Person, who is allowed to stay in a country on humanitarian grounds, may apply for permanent residence as required by the Immigration and Refugee Protection Act<sup>117</sup>. There is no exhaustive list what factors add up to “humanitarian grounds”.

Mostly, when humanitarian grounds are applied, given status amounts to temporary protection and appears in cases of natural catastrophes as earthquakes, hurricanes, tsunamis etc. For example, Danish government let Turkish minors and elderly persons who were homeless after the İzmit earthquake (August 17, 1999) stay in Denmark for three months<sup>118</sup>. This was an exceptional measure set solely for humanitarian reasons. In some EU Member States humanitarian status is given as a subsidiary form of protection or assistance.

When situations arise where environmental disaster are long-term or it is almost impossible to return to the domicile or unreasonable to expect anyone to return (permanent displacement situation), then such people could be granted with humanitarian asylum or some other protected status. Yet again, much depends on the state, which accepts arrivals.

Environmental disruption does not necessarily mean that victims with the need of international protection will be produced. In cases where international protection is nevertheless needed, general rule is that it ceases as soon as national law starts to function properly. In the case of catastrophic event humanitarian status ceases to exist, when country of origin can host its nationals again. In case of long-term displacement on humanitarian grounds, status would cease when reasons for granting humanitarian status would disappear, other reasons which depend on hosting state’s national law.

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<sup>115</sup> UDI. Protection or residence permit on grounds of humanitarian considerations.

<<http://www.udi.no/Norwegian-Directorate-of-Immigration/Central-topics/Protection/Asylum-seekers-and-refugees/Asylum-protection-and-residence-permit-on-humanitarian-grounds/#residence>>, last entered 21 May 2010.

<sup>116</sup> *Bislan Batalov v. Lithuania*, ECHR decision No. 30789/04, 2005.

<sup>117</sup> Immigration and Refugee Protection Act <<http://laws.justice.gc.ca/en/I-2.5/index.html>>, last entered 21 mai 2010.

<sup>118</sup> *The Economist*. Testing Danish Tolerance. 28 August 1999, p. 24.

### 3.2.2. EDPs under Stateless person's status

Statelessness and attempts to deal with statelessness is not a new phenomenon. According to a Refugees Magazine with a special report on the stateless, the official figure of stateless persons in the world today is 5.8 million, while the United Nations High Commissioner for Refugees estimates that the true total is probably closer to 15 million<sup>119</sup>. According to 1954 Convention relating to the Status of Stateless Persons<sup>120</sup>, term “stateless person” means an individual who is not considered as a national by any State under the operation of State's law. Usually, person becomes stateless after collapse of his country (e.g. USSR<sup>121</sup>, Yugoslavia). Rather rare phenomenon would be the complete extinction of a state without any successor. This may happen in situations of environmental degradation, though so far there is no such a precedent. For instance, already mentioned Tuvalu. IPCC has thus indicated that “rapid sea-level rise that inundates islands and coastal settlements is likely to limit adaptation possibilities with potential options being limited to migration”. It has also confirmed that rising sea-levels are unavoidable.<sup>122</sup> Tuvalu is not the only nation to experience such disaster. For example, Republic of Kiribati, Republic of Maldives and other small island states are experiencing this.

From law theory it is known, that main elements for existence of a country are: people (nation *populus*), governing institutions and territory. In international law there is also fourth element pointed out – *de jure* recognition of a county by international community<sup>123</sup>. Consequently, if territory disappears from the map of the world, then the existence of the state is put in a difficult situation<sup>124</sup> and nationals become as stateless as they can be. Even if states continue to exist in legal terms as their governing institutions continue to govern from another states, it is unclear how would such Governments be able to ensure rights of its citizens. If they could not ensure the right of nationals to return to own country or to obtain a passport, statelessness considerations would also arise.

In this case, people could be recognised as *de facto* stateless persons. There is no universally accepted definition of *de facto* statelessness. It has been referred to in different instruments as well as by publicists. The Final Act of the 1961 Convention on Reduction of

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<sup>119</sup> UNHCR. The excluded: the strange hidden world of the stateless // Refugees Magazine. 2007, No. 147, p. 2.

<sup>120</sup> Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954, entry into force 6 June 1960.

<sup>121</sup> Sisojeva and Others v. Latvia, ECHR, 15 January 2007, 60654/00.

<<http://www.unhcr.org/refworld/docid/4667e00a2.html>>, last entered 3 May 2010.

<sup>122</sup> Intergovernmental Panel on Climate Change. Report of the International Working Group. Impacts, Adaptation and Vulnerability. 2007, p. 733, <<http://www.ipcc.ch/ipccreports/ar4-wg2.htm>>, last entered 8 May 2010.

<sup>123</sup> This represents capability to start international relations with other states.

<sup>124</sup> In this thesis aspect of statehood as such will not be analysed deeper as this is not the object of this work.

Statelessness<sup>125</sup> indicates that “persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality”, thus indicating that lack of effective nationality would be considered as a form of *de facto* statelessness<sup>126</sup>.

As mentioned before, statelessness so far is a threat and it has not arisen yet. In event where statelessness would arise, international law principle of prevention of statelessness<sup>127</sup> would be applicable. Principle of prevention would constitute various scenarios. UNHCR proposes that those scenarios might be to relocate community to another territory, to unite with another state, to decide scenario on *ad hoc* case basis, and other. Any scenario would have to provide *inter alia* for the right of residence, military obligations, health care, pensions and other social security benefits to newcomers<sup>128</sup>.

In EU Qualification Directive Article 2 (d) it is stated that “refugee status” means the recognition by a Member State of a third country national or a stateless person as a refugee. Hence, in EU stateless person can obtain refugee status. However, same directive Article 2 (c) acknowledges that “refugee” means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality <...> or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it. Therefore, stateless person would be granted with refugee status only in specific situations. If statelessness would originate due to environmental degradation, it would have to be proven that persons match with criteria in definition.

People under stateless persons’ status enjoy rights and freedoms that are very similar to Refugee status. These persons can enjoy rights that are provided in 1954 Convention relating to the Status of Stateless Persons and 1961 Convention on Reduction of Statelessness.

The European Court of Human Rights in the case on statelessness<sup>129</sup> has noted that the machinery for the protection of fundamental rights <...> is subsidiary to the national systems

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<sup>125</sup> United Nations. Treaty Series. Vol. 989, p. 175.

<sup>126</sup> Submission climate change and statelessness: an overview. Submitted by the United Nations High Commissioner for Refugees, supported by the International Organization for Migration and the Norwegian Refugee Council to the 6<sup>th</sup> session of the *Ad Hoc* Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC) 1 to 12 June 2009, Bonn, Germany.

<sup>127</sup> UNHCR Policy Paper. Climate change, natural disasters and human displacement: a UNHCR perspective. 19 August 2009.

<sup>128</sup> Submission climate change and statelessness: an overview. Submitted by the United Nations High Commissioner for Refugees, supported by the International Organization for Migration and the Norwegian Refugee Council to the 6<sup>th</sup> session of the *Ad Hoc* Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC) 1 to 12 June 2009, Bonn, Germany.

<sup>129</sup> Sisojeva and Others v. Latvia, ECHR, 15 January 2007, 60654/00.

<<http://www.unhcr.org/refworld/docid/4667e00a2.html>>, last entered 3 May 2010.

safeguarding human rights. This principle applies to immigration matters as well as in other spheres. Therefore rights rising from statelessness are up to national law first.

Consequently, when person is acknowledged as stateless, it does not mean him or her automatically will have residence permit. Firstly, there are certain obligations under national law that one has to meet. In *Sisojeva and Others v. Latvia* case the ECHR has reaffirmed on several occasions that right to respect for private and family life cannot be construed as guaranteeing, as such, the right to a particular type of residence permit. The Court noted that where the domestic legislation provides for several different types of residence permits, the legal and practical implications of issuing a particular permit must analysed. If it allows the holder to reside within the territory of the host country and to exercise freely there the right to respect for his or her private and family life, the granting of such a permit represents in principle a sufficient measure to meet the requirements of that provision.

### 3.2.3. *EDPs under People in need of international protection status*

Some scientists think that in certain conditions definition “people in need of international protection” could be used for setting EDPs’ legal status. This is a very board perception of a notion to define legal status. This term was used mainly by UNHCR and it had broader meaning then refugee term in the Convention. It embodied the need of protection not only when individuals presented themselves to authority of foreign country, but also understanding that they are in need of protection even before coming to foreign country. Back in 1991 UNHCR Executive Committee observed that “a large number of persons who cross national borders in need of international protection, but who fall outside the scope of the refugee definition contained in the 1951 Convention/1967 Protocol, are receiving some protection and assistance from the international community through UNHCR and on an *ad hoc* basis, from individual States”<sup>130</sup>. ExCom presumably meant “good offices” as protection and assistance through UNHCR. This shows that EDPs are at least partly falling under this notion.

In 1997 the European Commission submitted a proposal to the EU Council for a “joint action” on “temporary protection of displaced persons”. According to Article 1 of the Commission’s proposal, “persons in need of international protection” meant, *inter alia*, persons who for other reasons [then armed conflict or human rights abuses] specific to their personal situation are presumed to be in need of international protection. Proposal was orientated to mass influx, but term could be understood as encompassing all persons – covered or not by 1951

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<sup>130</sup> Kortsaris P. People in need of international protection: alternatives in Europe for the status of refugees: doctoral disseratation, social science, law. Universiteit Antwerpen, Faculteit Rechten, 2003.

Refugee Convention. This proposal, however, was discarded by the Council. The Council opted for the term “displaced persons” instead of “persons in need of international protection”.

In 2005 Executive Committee introduced Conclusion on the Provision on International Protection Including through Complementary Forms of Protection. This Conclusion addressed only the situation of persons who fell under the mandate of UNHCR. As UNHCR’s mandate has extended compared to original functions of the Office, EDPs would fall under their mandate at least partially. ExCom acknowledged that complementary forms of protection provided by States to ensure that persons in need of international protection actually receive it are a positive way of responding pragmatically to certain international protection needs.<sup>131</sup>

In the proposal for new asylum legislation in Norway the distinction between persons who cannot be returned due to international obligations such as *non-refoulement* and persons with refugee status (given only to those who meet the 1951 Refugee Convention’s criteria) ceased and both groups were considered refugees.<sup>132</sup> This is example of how national legislation ensures that people in need of international protection would actually receive legal protection.

It was noted, that once protection is granted by the host country, people should no longer, at a domestic level, be called “persons in need of international protection” as the term “international protection” suggests the existence of an international regime independent from mechanisms of national protection.<sup>133</sup>

All in all, notion is broad and needs specific interpretation to be used for EDPs. Nature of protection is orientated to made-man threats. Despite that, in certain circumstances environmentally displaced persons can qualify as “persons in need of international protection”. This would happen when EDPs would not qualify for refugee status, but it would be known that protection is needed to assure their basing human rights and security.

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<sup>131</sup> Conclusion on the Provision on International Protection Including through Complementary Forms of Protection. 2005, para. (b), <<http://www.unhcr.org/refworld/docid/43576e292.html#1>>, last entered 8 May 2010.

<sup>132</sup> Kolmannskog. V. O. Future Floods of refugees. A comment on climate change, conflict and forced migration. Norwegian Refugee Council, 2008.

<sup>133</sup> Kortsaris P. People in need of international protection: alternatives in Europe for the status of refugees: doctoral dissertation, social science, law. Universiteit Antwerpen, Faculteit Rechten, 2003.

## 4. Case study

This last Chapter of thesis is dedicated to case studies. Not like in other fields of law, issue of environmentally displaced persons so far has not been brought to ICJ or panels which have power to set binding decisions towards parties. Therefore, the goal of this Chapter is to present the situation and to show what legal aspects reflected in the situation and what protection was provided to environmentally displaced persons.

Origin of disaster is taken as a frame of the study. Technical definition of “disaster” is a sudden event, such as an accident or a natural catastrophe that causes great damage or loss of life<sup>134</sup>. In reality disaster can also be slow degradation of soil where people live. Such disasters often have a significant effect on human populations. To avoid it, persons are displaced. This is where legal aspects of granting particular status begin. Hence, both natural and man-made disasters will be analysed. Internal and international displacement of people is examined in cases of Papua New Guinea, Tuvalu, Myanmar and Ukraine.

### 4.1. *Natural disasters*

A natural disaster refers to “events such as volcanic eruptions, droughts, earthquakes and all other types of disaster generated by an unstable natural environment”<sup>135</sup>. A report produced by the International Federation of the Red Cross and Red Crescent Societies found that natural disasters affected 144 million people per year and contributed to the displacement of more persons globally than wars or other conflicts<sup>136</sup>. The question of predicting how many people might be forced to leave their homes in the future as a result of shoreline erosion, coastal flooding, and agricultural disruption linked to climate change is far from straightforward. A number of countries, including Bangladesh, Egypt, China, Vietnam, Thailand, Myanmar, Pakistan, Iraq, Mozambique, Nigeria, Gambia, Senegal, Colombia, Venezuela, British Guyana, Brazil and Argentina, are threatened by “a moderate degree of sea-level rise”<sup>137</sup>, not mentioning other types of environmental hazards.

Natural disasters usually displace people for a short-term period, but there might be situations when displacement is permanent. It is observed that natural disasters

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<sup>134</sup> The New Oxford Dictionary of English. Edited by Pearsall J., Chief Editor Hanks P. Oxford: Oxford University Press, 2001.

<sup>135</sup> D. Keane. The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees” // Georgetown International Environmental Law Review 211. 2004, No. 209.

<sup>136</sup> World Disasters Report 20, International Federation of the Red Cross and Red Crescent Societies 1999.

<sup>137</sup> Matthew J. Gibney, Randall Hansen, Immigration and asylum (ABC-CLIO, 2005), p. 175.

disproportionately have affected Africa, Asia and South America<sup>138</sup>. Moreover, it was noted that “ninety-six percent of all deaths from natural disasters occur in developing countries”<sup>139</sup>. These findings have enormous consequences for the international community as the Governments of developing nations not always can or want to provide protection to their citizens. Consequently these people already are looking to the international community for assistance, protection and legal cooperation.

When there is a situation of internal displacement, there are two ways of further course of action: either state itself works on the matter (if it is developing country, it can ask for international assistance) or the country is not willing to take measures therefore international interference is needed. First case is about internal displacement in Papua New Guinea.

#### *4.1.1. Internal displacement. Carteret islands (Independent State of Papua New Guinea) case*

Carteret islands<sup>140</sup> case sets on a lot of discussions among scholars of international law, human rights, environmental protection, biodiversity, politicians, activists and others. These islands are a part of Independent State of Papua New Guinea (PNG). They are located in the north east of Autonomous Region of Bougainville, Pacific Ocean. Nowadays Carteret Islands have about 3 300 inhabitants. The nearest place with connections to civilized world is 86 km away. Carteret Islands have no cars, nor electricity; contact with the outside world is through a cargo ship from Bougainville which brings supplies of foods.

It has been estimated that already by the year 2015 Carteret islands could be largely submerged and entirely uninhabitable<sup>141</sup>. One of the original six atolls has already been lost to the sea and another – Huene – has split into two. All islands in Carteret Atoll are only about 1.2 m above sea level, so every stronger storm can make huge destruction to the territory. After discovering that Atoll might vanish in the nearest future, scholars and media called inhabitants of Tulun “the world’s first refugees from the effects of global warming” or speaking shorter “environmental/climate refugees”.<sup>142</sup> Carteret Atoll is not the only place, where people are forced to move due to environmental problems. Kiribati also has begun an internal resettlement

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<sup>138</sup> D. Keane. The environmental causes and consequences of migration: a search for the meaning of “environmental refugees” // Georgetown International Environmental Law Review 211. 2004, No. 209.

<sup>139</sup> R. Hausmann. Prisoners of geography (landlocked countries, economies). Foreign Policy, 2001. <[http://www.hks.harvard.edu/fs/rhausma/editorial/fp01\\_prisoners\\_geog.htm](http://www.hks.harvard.edu/fs/rhausma/editorial/fp01_prisoners_geog.htm)> last entered May 12, 2010.

<sup>140</sup> Also known as Carteret Atoll, Tulun or Kilinailau Islands/Atoll.

<sup>141</sup> For e.g. see Submission to the OHCHR regarding human rights and climate change by Friends of the Earth Australia, the Australian Climate Justice Program and Climate Action Network Australia, 18 September 2008.

<sup>142</sup> As discussed, term “environmentally displaced persons” is rather used then “environmental refugees”.

program, moving people from the urban centre of Betio on Tarawa to outlying islands. In Tuvalu, several families have moved from a low-lying atoll to Niue.

There are several alternative theories, why islands are disappearing. Some sources claim, it is because of soil degradation<sup>143</sup>, others state islands are drowning due to global warming<sup>144</sup>.

Theory of soil degradation refers to the fact that Carteret Atoll is of volcanic origin and the tectonic instability of the area has led it to the sinking. Islands consist of a base of coral that sits atop an extinct volcanic mount<sup>145</sup>. In the usual geological course of events first proposed by Charles Darwin, such islands eventually subside due to weathering and erosion, as well as isostatic adjustments of the sea floor. Scientists claim that it is natural process and not much can be done about it.

Climate change scientists announce that global warming is causing ice melting in Arctic, Greenland and Antarctic. It is estimated that water yearly rise  $1.8 \text{ mm} \pm 0.1$ <sup>146</sup>. Global warming is caused by many factors; most important is greenhouse gas expulsion to the air. Greenhouse gases (GHGs)<sup>147</sup> are gaseous constituents of the atmosphere both natural and anthropogenic that absorb and emit radiation at specific wavelengths within the spectrum of thermal infrared radiation emitted by the Earth's surface, the atmosphere itself, and by clouds. This causes the greenhouse effect<sup>148</sup>. This very process and GHG emission was discussed a lot while signing 1997 Kyoto Protocol<sup>149</sup>. As the IPCC has announced, these nations, that live in Pacific islands are responsible for only 0.06% of global greenhouse gas emissions, nevertheless, they are recognised amongst the most vulnerable to climate change impacts<sup>150</sup>.

Despite the origin of the situation in Carteret islands, the outcome is degradation of the living environment and forced migration. Question is if displaced persons can gain refugee status and if not, what legal status, which would provide legal protection, could be granted?

Particularly in this situation, according to the facts, this is a matter of internal displacement. Therefore, refugee status could not be given. Even in situation of international

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<sup>143</sup> The Sydney Morning Herald, <<http://www.smh.com.au/articles/2002/03/29/1017206152551.html>>, last entered 18 May 2010.

<sup>144</sup> CNN information, <<http://edition.cnn.com/2009/WORLD/asiapcf/03/15/eco.climate Refugees/index.html#cnnSTCText>>, last entered 21 May 2010.

<sup>145</sup> The Island Encyclopedia <<http://www.oceandots.com/pacific/png/kilinaillau.php>> last entered 21 May 2010.

<sup>146</sup> B. C. Douglas. Global sea rise: a redetermination // Survey in Geophysics. 1997, Vol. 18, No. 2-3/May p. 279-292.

<sup>147</sup> Greenhouse gases are such as carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O) hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulphur hexafluoride (SF<sub>6</sub>).

<sup>148</sup> Intergovernmental Panel on Climate Change Report. IPCC AR4 SYR Appendix Glossary, <[http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_appendix.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_appendix.pdf)>, last entered 21 May 2010.

<sup>149</sup> Industrialized countries agreed to reduce their collective GHG emissions by 5.2% compared to the year 1990 (United Nations press release <<http://unfccc.int/cop3/fccc/info/indust.htm>>, last entered June 2, 2009). The agreement aimed, to lower overall emissions from a group of six greenhouse gases by December 2008, calculated, as an average over five years.

<sup>150</sup> Friends of the Earth International Report, June 2003.

migration, Carteret islands' community would face difficulties as the process of environmental destruction is not initiated by the legal authorities, which otherwise could lead to a form of persecution. Also, in the case of degradation Government does not use this disaster as a means of repression. Contrary, legal authorities provided relocation strategies for persons' replacement to a safe surrounding. From legal perspective there are no grounds for using refugee status as in 1951 Refugee Convention.

Knowing that, 1998 Guiding Principles on Internal Displacement have to be taken into account as a frame of protection to displaced persons. As Principles are not binding instrument, PNG is entitled to adopt national legislation to solve displacement situation.

According to Guiding Principles on Internal Displacement, IDP definition comprehends to basic element: involuntary character of movement and staying within national borders. Carteret islands' inhabitants match both elements. Atoll is territory of Papua New Guinea and community is forced to move. Moreover, natural and man-made disasters are one of the reasons to give IDP status for displaced persons. Under IDP status specific needs of individuals are satisfied, *i.e.* not only right to education, employment and other acknowledged to every national of the country, but also a right as receive residence, allowance, in cases – food distribution etc.

According to Friends of the Earth International PNG implements its obligation under international law to provide protection to nationals concerned. State has begun relocation of local people in 2003. On November 25, 2003 the Papua New Guinean Government authorized and allocated funds for government-funded total evacuation of the islands to Bougainville. Evacuation was expected to be completed by 2007, but access to funding caused numerous delays.

In October 2007 it was announced that the PNG Government would provide 2 million Kina (US\$ 760 000) to begin the relocation, to be organized by non-governmental organization Tulele Peisa<sup>151</sup> of Buka, Bougainville. The resettlement process from the Carteret islands to Bougainville was one of the first organised resettlement movements of forced migrants anywhere in the world. While creating the system of relocation, analogy and experience of other resettlements were used despite that they were unrelated to environmental factors. Such involved involuntary resettlement due to development and infrastructure projects, which have virtually always been unsuccessful<sup>152</sup>. However, relocation experiences delay as to date none of the funds allocated for this purpose were used for resettlement according to the Autonomous Bougainville Government. As a result, the funds were returned to the general budget unspent<sup>153</sup>.

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<sup>151</sup> Friends of the Earth Australia, <<http://www.foe.org.au/groups/affiliates/tulele-peisa/about-tulele-peisa>>, last entered 21 May 2010.

<sup>152</sup> The Bougainville Resettlement Initiative Meeting Report. Canberra, Australia, 11 December 2008.

<sup>153</sup> *Ibid.*

According to preliminary estimates by Tulele Peisa, some 14 million Kina (US\$ 5.3m) will be required during 2009 – 2019 to resettle all of those who wish to resettle on Bougainville<sup>154</sup>. As PNG is a developing country and its annual budget is not enough (US\$ 13.785b<sup>155</sup>), assistance from international community is expected and asked (e.g. Australia). This is where suggested Climate Refugee Protection and Resettlement Fund<sup>156</sup> would be an instrument for providing decent humanitarian assistance.

What is more, not only resettlement strategy is used in local level, but also adaptation and integration. Guiding Principles on Internal Displacement Article 18 states, that all internally displaced persons have the right to an adequate standard of living. But this is a challenge not only to newly moved ones, also to people, who have to accept new neighbourhood in their surrounding. It might happen that communities (Carteret islanders and Bougainville inhabitants) will experience higher level of political and social unrest even though Government agencies work to contain the increase in violence that is inevitable due to increased competition for limited resources, namely land, water, food, basic housing, education, shelter and employment opportunities<sup>157</sup>. To give effect the authorities concerned shall issue all documents necessary for the enjoyment and exercise of IDPs legal rights<sup>158</sup>.

1998 Guiding Principles 22 and 23 also provide legal right that improves integration and adaptation process. Most important implemented rights are the right to seek employment, to participate in economic activities, to associate freely and participate equally in community affairs, to vote and to participate in Governmental and public affairs, to exercise the right to education.

Other, more of legal nature, difficulty is that territory in Bougainville is managed by customary land rules and allotted using traditional land arrangements. In Asylum Case (Colombia v. Peru)<sup>159</sup> it has been acknowledged that local customs are binding in adequate geographical areas. As customs are of binding nature, and they are not beneficial to EDPs, it is very hard to negotiate for territory for new comers. What is more, serious cultural and other issues can arise. Adaptation strategy means, that a common platform and a win-win-win solution involving the islanders, the Government and the landowners (if people are resettled to certain

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<sup>154</sup> *Ibid.*

<sup>155</sup> International Monetary Fund. Retrieved 1 October 2009.

<sup>156</sup> See Chapter 2.

<sup>157</sup> Views on the Possible Security Implications of Climate Change to be included in the report of the Secretary-General to the 64<sup>th</sup> Session of the United Nations General Assembly, <[http://www.un.org/esa/dsd/resources/res\\_pdfs/ga-64/cc-inputs/PSIDS\\_CCIS.pdf](http://www.un.org/esa/dsd/resources/res_pdfs/ga-64/cc-inputs/PSIDS_CCIS.pdf)>, last entered May 18, 2010.

<sup>158</sup> UN High Commissioner for Refugees. Guiding Principles on Internal Displacement. 22 July 1998, E/CN.4/1998/53/Add.2, Article 20.

<sup>159</sup> Colombian-Peruvian asylum case, ICJ, Judgment of 20 November 1950. ICJ Reports 1950, p. 266.

location which is owned by a private person) should be proposed<sup>160</sup>. Indigenous population of Papua New Guinea is one of the most heterogeneous in the world<sup>161</sup>, therefore authorities' concern is to assure that balance, cultural identity, life sustainability, and peace is maintained.

Carterets Integrated Relocation Programme<sup>162</sup> has been initiated. 14 points of the relocation programme are:

- 1) Scoping out available land;
- 2) Identifying traditional land owners;
- 3) Negotiating with land title holders;
- 4) Engaging with landowners;
- 5) Exchange programmes;
- 6) Entering into land negotiations;
- 7) Carrying out social and resource mapping;
- 8) Planting gardens;
- 9) Identify families using objective selection criteria;
- 10) Prepare families for relocation;
- 11) Prepare host families for relocated arrivals;
- 12) Building homes;
- 13) Moving families to the new resettlement sites;
- 14) Exchanging traditionally valuable items such as shell money.<sup>163</sup>

From several points, as e.g. 10, 11 and 14 it is seen that plan has both elements of resettlement and adaptation.

While the resettlement process had been approved by the Government with considerable support, country's policy aspect remained fragile: the remnants of the internal armed conflict of the 1990s and subsequent political uncertainty regarding the future political status of Bougainville, had resulted in a lack of political will, administrative capacity and the financial means required to take it forward<sup>164</sup>.

Finalising this case study, refugee status is unlikely to be gained. Community is displaced internally. According to 1998 Guiding Principles to Internal Displacement, legal authorities have to assure security of persons in need. Internally displaced person's status, an adaptation and integration strategy of Carteret community are solutions in this case.

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<sup>160</sup> The Bougainville Resettlement Initiative Meeting Report. Canberra, Australia, 11 December 2008.

<sup>161</sup> Central Intelligence Agency, World Fact book: Papua N. Guinea <<https://www.cia.gov/library/publications/the-world-factbook/geos/pp.html>>, last entered 21 May 2010.

<sup>162</sup> Carterets Integrated Relocation Program. Project Proposal.

<<http://ourworld.unu.edu/en/wp-content/uploads/2009/06/carterets-integrated-relocation-program-proposal.pdf>>, last entered 21 May 2010.

<sup>163</sup> The Bougainville Resettlement Initiative Meeting Report. Canberra, Australia, 11 December 2008.

<sup>164</sup> *Ibid.*

#### 4.1.2. Resistance to assistance. Union of Myanmar case

Myanmar's situation is similar to PNG's as both countries experienced internal displacement issue due to environmental hazards. Despite that, if Carteret islands case is an example of successful, though with some obstacles, cooperation of national authorities, NGOs and compliance with international law norms, then case of Myanmar is example of lack of cooperation and unwillingness to provide legal protection and assistance to its nationals. EDPs in this case can amount to refugees.

Union of Myanmar (also known as Burma) is one of the biggest countries in south-east Asia. In May 2008 country experienced one of the severest natural disasters in state's history – cyclone Nargis. This catastrophe left around 130 000 casualties and more than 2m were displaced. For this thesis Myanmar case is important because of difficulties experienced in providing legal protection. Much influence to lack of protection was due to the political instability in the country. For years Myanmar's authorities abuses human rights and these violations are analysed in legal literature<sup>165</sup>. Moreover, in March 2008, the Human Rights Council stated that the Council “strongly deplores the ongoing systematic violations of human rights and fundamental freedoms of the people of Myanmar”<sup>166</sup>.

After cyclone Nargis catastrophe, humanitarian assistance was offered by international community. Government of Myanmar, which still is in hands of military force, went to the history, *inter alia*, because it refused offered assistance. In legal perspective, it is full disposition of a state whether to accept humanitarian assistance or not. On the other hand, in the situation of Myanmar, not only international assistance was rejected, but also Government itself did not provide decent protection to victims of the disaster. Furthermore, some donated aid items were found to be available in the country's black market. Myanmar's junta<sup>167</sup> warned that legal action would be taken against people who traded or hoarded international aid. After such warnings international community announced that Government of Myanmar<sup>168</sup> can not cope with the disaster and if it is left like it was, this omission can lead to crime against humanity. International institutions worked to guarantee protection and to ensure “full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, *i.e.* human

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<sup>165</sup> E.g. Report of International Human Rights Clinic, Harvard Law School. Crimes in Burma. Boston, 2009.

<sup>166</sup> Mandate of the Special Rapporteur on the situation of human rights in Myanmar, Human Rights Council resolution 7/31, UN Doc. A/HRC/RES/7/31, para. 1.

<sup>167</sup> Government led by a committee of military leaders.

<sup>168</sup> E.g. Human Rights Watch. Burma: cyclone donors should ensure transparency and accountability. <<http://www.hrw.org/en/news/2008/07/22/burma-cyclone-donors-should-ensure-transparency-and-accountability>>, last entered 21 May 2010.

rights law, international humanitarian law, and refugee law”, and prevent abuses of vulnerable groups, including women and children<sup>169</sup>.

Constant human rights abuses, human trafficking and persecution because of various reasons (as religion, political opinion etc.) are few examples of situation in Myanmar. In addition, certain national minorities were forced to move even before the catastrophe. Ten years of military campaigns in ethnic nationality areas in eastern Burma targeting civilians has been considered connected with the widespread practice of land confiscation throughout the country<sup>170</sup>. Knowing the complicated circumstances of Myanmar’s situation and the fact that forced migration can comprehend mixed reasons as economic, social, health, environmental, those listed in 1951 Refugee Convention, and others, some EDPs were entitled to gain refugee status under the Convention.

Firstly, it has been noted that military junta of Myanmar in this particular situation did not provide decent protection/assistance to people. Lack of action in case of natural disaster can amount to well-founded fear for life. Or as in this case, not dealing with consequences of disaster – and by that intentionally aggravating situation – can total up to persecution<sup>171</sup>. Secondly, after refugee camps for EDPs were finally established, governing power of Myanmar forcibly removed some individuals from camps<sup>172</sup>. This also represents persecution and well-founded fear. Reasons stated in 1951 Refugee Convention involve race, religion, political opinion, nationality and membership to particular social group. It is known that in Myanmar groups of people, who are confessants of certain religion, were constantly persecuted. Also political opinion was the reason to be ill-treated by the Government. What is more, there were people, who after the cyclone had to relocate to neighbouring countries, as they were left homeless. Taking everything into account, in cyclone Nargis case environmentally displaced persons could gain refugee status.

What is more, persons fleeing conflict situations, in the area of Myanmar with an environmental element can find protection in *non-refoulement*. In human rights law (which has a much broader application of the principle than refugee law) *non-refoulement* is an absolute and general ban on returning people to places where they risk certain ill-treatment. The principle has a prominent place in several human rights instruments. According to case-law, the European Convention of Human Rights and Fundamental Freedoms Article 3, the ban on torture and inhuman and degrading treatment, implies the duty not to expel a person to a place where he or

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<sup>169</sup> Mancini-Griffoli D., Picot A. Humanitarian negotiation. Geneva: Centre for Humanitarian Dialogue, 2004.

<sup>170</sup> The Special Rapporteur on the situation of human rights in Myanmar. Implementation of UN GA Res 60/251 of 15 March 2006. 2007, UN Doc. A/HRC/4/14, para. 54, p. 4.

<sup>171</sup> UNHCR Policy Paper. Climate change, natural disasters and human displacement: a UNHCR perspective. 19 August 2009.

<sup>172</sup> Report of International Human Rights Clinic, Harvard Law School. Crimes in Burma. Boston, 2009.

she could be in danger of being exposed to the prohibited treatment<sup>173</sup>. The Human Rights Committee has said the same about Article 7 in the International Covenant on Civil and Political Rights. Article 3 in the Convention against torture can also be relied upon by a person facing the danger of torture if returned. Most agree that the prohibition on torture is a customary principle, but there is disagreement regarding the extent to which one is protected by customary law against lesser ill-treatment<sup>174</sup>.

At some point one is dealing with more purely humanitarian considerations than hard legal obligations. The exact scope and interpretation of the peremptory norm may be contested, but clearly *non-refoulement* protection may be relevant in situations of climate change-related forced migration. The principle of *non-refoulement* could also protect persons against internal returns to certain areas within the same country<sup>175</sup>.

In case, when refugee status, despite the situation, would not be awarded, displaced persons could enjoy humanitarian status. Humanitarian status is given on humanitarian grounds. There is no exhaustive list what constitutes humanitarian grounds, but they usually appear in cases of natural catastrophes as cyclone Nargis.

#### *4.1.3. International displacement. Tuvalu case*

Polynesian state Tuvalu consists of a densely populated, scattered group of nine coral atolls with poor soil. The country has no known mineral resources, few exports and is almost entirely dependent upon imported food and fuel. Substantial income is received annually from the international Tuvalu Trust Fund established in 1987 by Australia, New Zealand, and the UK, supported by Japan and South Korea<sup>176</sup>.

Tuvalu is experiencing environmental degradation, *i.e.* Atoll is sinking. Theories, why this process is happening, are similar as in the case of Carteret islands. Tuvalu islands formed in a same way as Carterets, they are both very low from sea level and any stronger storm notably affects country. The vulnerability of the country to climatic change is among leading concerns for the nation<sup>177</sup>. Due to environmental degradation Tuvalu is expected to become uninhabitable by 2050. Not only the physical island, but all the institutions of a modern state – parliament,

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<sup>173</sup> See *Soering v. the United Kingdom*, ECHR, 7 July 1989, 14038/88; *Chahal v. the United Kingdom*, ECHR, 15 November 1996, 22414/93.

<sup>174</sup> Kolmannskog. V. O. Future floods of refugees. A comment on climate change, conflict and forced migration. Norwegian Refugee Council, 2008.

<sup>175</sup> *Ibid.*

<sup>176</sup> Central Intelligence Agency, World Fact book: Tuvalu, <<https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html>>, last entered 21 May 2010.

<sup>177</sup> *Ibid.*

police, law courts, state education, healthcare and other welfare institutions – may disappear. Despite the desire of the around 10 000 Tuvaluans to stay on the islands, and the fear that their cultural heritage might be lost, relocation to other states may be the only realistic option which they have reluctantly accepted<sup>178</sup>.

Tuvalu's leaders are actively seeking solutions to this problem<sup>179</sup>. The people of Tuvalu concluded bilateral agreement of relocation with New Zealand. Under this negotiated scheme NZ has undertaken the commitment to host the Tuvalu's population. On the other hand, Australia has refused to receive migrants from Tuvalu, and has been accused of "eco-terrorism" by the authorities of the sinking atoll<sup>180</sup>.

This case is important not only because there are thousands of persons who are forced to migrate abroad, but also there is a question of statehood. Theoretically, the citizens of Tuvalu could reconstitute their vanishing state elsewhere. Indeed, Tuvalu has considered the option of buying an island or piece of land from another country, but possible sellers, such as New Zealand, have not been very positive. Republic of Maldives has also considered possibility of buying land, yet so far these considerations did not come to reality.

In relocation period questions arise regarding the rights of the affected population and who would be responsible for protecting these stateless persons.

Individuals from Tuvalu together with the Carteret Islands were called "the world's first environmental refugees". Nonetheless, even if Tuvalu inhabitants cross international boarder, hardly they could become refugees. Analysing refugee inclusion clauses under 1951 Refugee Convention, criteria would not be fulfilled.

It can be proven that environmental hazards may be used as means of persecution. It also can be a factor of fear for life and freedom. Still, human factor is inevitable, *i.e.* human actors have to be the initiators of fear and persecution. For purely environmental threat 1951 Refugee Convention or any other international legally binding document does not foresee refugee status. In addition, environmental degradation is not addressed against particular group as listed in the Convention, but it affects entire community.

In this case, complimentary protection can be considered. Complimentary protection depends on hosting state as such protection is a part of its national legislation. New Zealand has brought a system, which primarily is not seen as protection tool. This state is accepting citizens from sinking Tuvalu under a "migration or labour programme", trying to keep the programme as

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<sup>178</sup> Kolmannskog. V. O. Future floods of refugees. A comment on climate change, conflict and forced migration. Norwegian Refugee Council, 2008.

<sup>179</sup> IDMC. Global overview of trends and developments in 2007, <[www.internal-displacement.org](http://www.internal-displacement.org)>, last entered 21 May 2010.

<sup>180</sup> Friends of the Earth Australia, Report 2005.

low-key as possible<sup>181</sup>. The New Zealand-Tuvalu bilateral agreement provides a model of international cooperation, global environmental responsibility and sharing of the burden of climate change induced relocation. Over the coming decades half of the Tuvalese population will relocate to New Zealand<sup>182</sup>. As already mentioned in Chapter 2, New Zealand has decided to accept fixed quota of Tuvalu citizens via The Pacific Access Category (PAC) Ballot yearly<sup>183</sup>. However, the PAC is classified as a labour programme rather than resettlement scheme and does not employ the term environmental or climate refugee, nor does it mention the threat of climate change or state any responsibility for the displacement of these populations.<sup>184</sup> Nevertheless, under a negotiated scheme, around 3 000 Tuvaluans have already migrated to New Zealand, many of whom were prompted at least in part by concerns about the environment<sup>185</sup>.

According to the PAC, Tuvalu nationals are considered as immigrants and have a right to permanent residence, employment, etc. Nonetheless, EDPs of Tuvalu could become stateless persons as well. If it happens that Tuvalu as such does not exist anymore, then EDPs could still be protected under the principle of *non-refoulement*. This principle can be applied broader, *i.e.* protecting human rights in general, then only in refugee law.

*Non-refoulement* means that person can not be returned to the country of origin. In Tuvalu case people simply could not return. One of the reasons is that the place they came from no longer exists. The question of statelessness may be partly addressed here. These persons could be granted humanitarian asylum or some other protected status.

#### 4.2. Man-made disasters

Man-made or technological disasters have dual origin. They can be unintentional, as industrial accidents, or they also can be created with purpose to aggravate living conditions of particular groups of people, which usually can amount to persecution. Man-made disasters often are short-term event – catastrophes, accidents etc. – but also can be long-term degradation. This section is about unintentional industrial accident which turned to be a long-term forced displacement issue.

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<sup>181</sup> Gemenne, F. Climate Change and Forced Displacements: Towards a Global Environmental Responsibility? Paper presented at the annual meeting of the International Studies Association, San Diego, California, USA. 2006, <[http://www.allacademic.com/meta/p98567\\_index.html](http://www.allacademic.com/meta/p98567_index.html)>, last entered 21 May 2010.

<sup>182</sup> Friends of the Earth International Report, June 2003.

<sup>183</sup> Pacific Access Category, <<http://www.immigration.govt.nz/migrant/stream/live/pacificaccess>>, last entered 22 May 2010.

<sup>184</sup> Kolmannskog, V. O. Future Floods of refugees. A comment on climate change, conflict and forced migration. Norwegian Refugee Council, 2008.

<sup>185</sup> Report by Environmental Justice Foundation. No place like home – where next for climate refugees? London: Environmental Justice Foundation. 2009.

It has been recorded that industrial accidents have resulted in the displacement of thousands of people. A nuclear accident forced to migrate 10 000 people in Three Mile Island in the United States (1979) while according to Greenpeace, a chemical incident displaced about 200 000 people in Bhopal, India (1984)<sup>186</sup>. However the most serious accidental environmental disruption occurred on April 26, 1986 in Chernobyl, Ukraine (USSR at that time). This accidental environmental disruption occurred when different operating human errors caused explosion of the fourth nuclear reactor of the power plant and radiation was released into the environment.<sup>187,188</sup> The ejection from this one reactor exceeded the radioactive contamination caused by the nuclear weapons used in Hiroshima and Nagasaki by one hundred times<sup>189</sup>. In total about 135 000 people were evacuated from a 750 square kilometres area around the city of Chernobyl, which is near the boarder with Belarus. Unlike displaced persons in other emergencies, many individuals displaced by Chernobyl accident could not return to their homes because the area continued to be contaminated by radio nuclides. The explosion had a devastating effect on the social and economic life of Ukraine and its neighbouring countries.

Thousands of people who were forcibly relocated as a result of the accident were called Chernobyl or nuclear refugees<sup>190</sup>. Nevertheless, it is highly unlikely that they would be awarded with refugee status. It is used as a social notion more. Similarly to “climate refugees”, legally this term would not have binding power.

Firstly, by that time Ukraine was part of Soviet Union. Despite that individuals fled or were relocated to areas which nowadays are Belarus and Russia then international boarder was not crossed. Secondly, it was widely criticised, that authorities did not inform community, living in the area about the threat to life straight after the accident or that they did not announce publicly numbers of casualties. Moreover, this environmental disruption was man-made. Nonetheless, there was no evidence found that this environmental disaster was intentionally initiated by the authorities as well as it was not noticed that environmental degradation was used as a means of repression, which otherwise could lead to persecution. Thirdly, for purely environmental threat 1951 Refugee Convention or any other international legally binding document does not foresee refugee status. In addition, environmental degradation is not addressed against particular group as stated in the Convention, but it affects entire community.

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<sup>186</sup> D. Keane. The environmental causes and consequences of migration: a search for the meaning of “environmental refugees” // *Georgetown International Environmental Law Review* 211. 2004, No. 209.

<sup>187</sup> E. B. Moynagh. The legacy of Chernobyl: its significance for Ukraine and the world // *Environmental Affairs Law Review*. 1994, No. 709, p. 715-716.

<sup>188</sup> Kortsaris, P. People in need of international protection: alternatives in Europe for the status of refugees: doctoral dissertation, social science, law. Universiteit Antwerpen, Faculteit Rechten, 2003.

<sup>189</sup> <http://www.greenpeace.org/raw/content/international/press/reports/chernobylhealthreport.pdf>

<sup>190</sup> Chernobyl refugees told they can't return to homes in Byelorussia // *Ottawa Citizen*, 17 Jul 1986; The first nuclear refugees come home <<http://discovermagazine.com/2007/jun/chernobyl-revisited>>, last entered 21 May 2010.

Therefore, even though residents of Chernobyl and of area around the place of the accident, experienced well-founded fear for their life and freedom, from legal perspective there are no more grounds for using refugee status as in 1951 Refugee Convention.

In situation of internal displacement because of man-made disaster, 1998 Guiding Principles on Internal Displacement should be used as a guideline for action. Knowing that by the time of the accident Principles were not established yet, community was evacuated to a new surrounding<sup>191</sup> on humanitarian grounds and this stipulated status of IDPs. Relocation due to heavy contamination was carried on by authorities of USSR and after 1991 – Ukraine, Belarus and Russian Federation. UN and its agencies joined to strengthen international cooperation in rendering assistance in environmental emergency. Humanitarian assistance to mitigate the consequences of the disruption was and still is provided<sup>192</sup>.

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<sup>191</sup> Village was completed for the displaced people // Ocala Star-Banner, 13 Mar 1987.

<sup>192</sup> International cooperation to address and mitigate the consequences of the accident at the Chernobyl nuclear power plant. UN GA Res A/RES/45/190, 21 December 1990; also see Report commissioned by UNDP and UNICEF with the support of OCHA and WHO. The human consequences of the Chernobyl nuclear accident: a strategy for recovery. 25 January 2002, <[http://chernobyl.undp.org/english/docs/strategy\\_for\\_recovery.pdf](http://chernobyl.undp.org/english/docs/strategy_for_recovery.pdf)>, last entered 23 May 2010.

## CONCLUSIONS AND SUGGESTIONS

1. Even though EDPs are often referred as “environmental or climate refugees” it does not imply automatic binding frame of the term. Prof. Dr. Norman Myers states that “environmental refugees” definitely exist only there is no international implementation of the term yet. Even though there is neither legal implementation, nor environmental reasons are separated as a ground to grant refugee status, the term is not void because sometimes international refugee law do regulate “environmental refugees” status.
2. It was also suggested to refer to these persons as “environmental migrants”. Notion “migrant” states that person have option of action to leave or not the place of residence. Environmental displacement is an issue of forced displacement. International migration law deals with migrant workers and do not regulate specifically “environmental migrants” status.
3. After the analyses of legal sources it was observed, that even though there is no legal document, which would deal specifically with environmentally displaced persons’ status, provisions are scattered in few other documents.
4. Environmental degradation was proved in specific circumstances to be a means of persecution. Action would amount to persecution, if living environment would be aggravated by authorities with intention to oppress certain group of people as listed in 1951 Refugee Convention (race, religion, nationality, social group, and political opinion). Moreover, if in aftermath of environmental disruption authorities do not take action in order to protect and assist community concerned, this might amount to persecution as well. Then EDPs would gain refugee status and legal protection under 1951 Refugee Convention.
5. In addition, State Parties should interpret the criteria for refugee status in the 1951 Convention in such a manner that all persons who fulfil these criteria would be duly recognized and protected, rather than being accorded a complementary form of protection.
6. Forced displacement can comprehend mixed reasons for movement: political, economic, social, environmental etc. and only in some cases displacement would be solely environmental. Merely environmental threat with no additional circumstances does not constitute refugee status to displaced persons.
7. In case of environmental disaster displaced persons can have protection under other statuses then refugee: humanitarian status, stateless person’s status, IDP status, legal

status under complementary protection etc. There is no specific status set for environmentally displaced persons.

8. UNHCR received a mandate from UN GA to provide good offices to people in need of legal protection but who fall outside the definition of 1951 Refugee Convention. Therefore EDPs are not left out and a tendency to possible international recognition is seen.
9. Raised hypothesis that there is no specific legal status and protection provided to persons, who flee environmental disasters is partially confirmed. There is no specific legal status for EDPs, but there can be protection granted on the grounds of 1951 Refugee Convention or complimentary protection, humanitarian asylum. However, international system needs improvement.
10. Hence, problem still remains. The shortage of resources and the high number of displaced persons (predicted to increase to more than 250 million) will inevitably increase tensions all over the world therefore legal measures have to be implemented in order to regulate the legal status of EDPs and their protection.
11. Author suggests consolidating legal norms which refer to environmental displacement to one document for the sake of clearness and in order to avoid scattered provisions.
12. Environmental threat should be incorporated into legal binding norms that regulate displacement issues and provide with appropriate status to avoid gaps in protection. Legal frameworks may be developed within rights-based and humanitarian approaches.
13. Strengthening institutions or establishing new branches to deal specifically with EDPs' issues is also important task in order to ensure safe displacement.

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## SUMMARY

People are moving due to various push and pull factors. Phenomenon of a new threat to human security is environmental migration. Environmental disasters were recognized as a root cause for forced displacement.

As there is no legally binding definition established members of environmental migration are usually referred as “environmental refugees” or “environmental migrants”. Main difference between two terms is that people who migrate have an option of action – to leave home or not and refugees are forced to move. 1951 Refugee Convention defines refugee as “any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country”. According to definition it seems that Convention does include neither specific legal status nor protection provided to persons, who flee because of long-term or short-term environmental disasters. Nevertheless, depending on the origin of environmental hazard, environmentally displaced person can sometimes qualify for refugee’s status. In 1993 UNHCR has declared that destruction of habitat could qualify as a form of persecution if legal authorities are responsible for intentional action or wilful negligence without helping displaced persons (e.g. cyclone Nargis case in Myanmar).

In case when refugee status would not be granted, depending on circumstances EDP can qualify for other statuses of legal protection, e.g. humanitarian status, IDP status (e.g. Carteret islands case), even stateless person’s status or status under complimentary protection. Subsidiary or temporary protection can be granted in cases when person does not qualify for refugee status, but still needs international protection.

Raised hypothesis that there is no specific legal status and protection provided to persons, who flee environmental disasters is partially confirmed. There is no specific legal status for EDPs in international law system, but there can be protection granted on the grounds of 1951 Refugee Convention, in other cases – complimentary protection, humanitarian asylum. However, international system needs improvement.

## SANTRAUKA

Žmonės migruoja dėl įvairių veiksnių. Naujas grėsmės žmonių saugumui fenomenas yra migracija dėl aplinkos sukurtų aplinkybių. Ekologinio pobūdžio nelaimės buvo pripažintos priverstinių žmonių persikėlimų priežastimi.

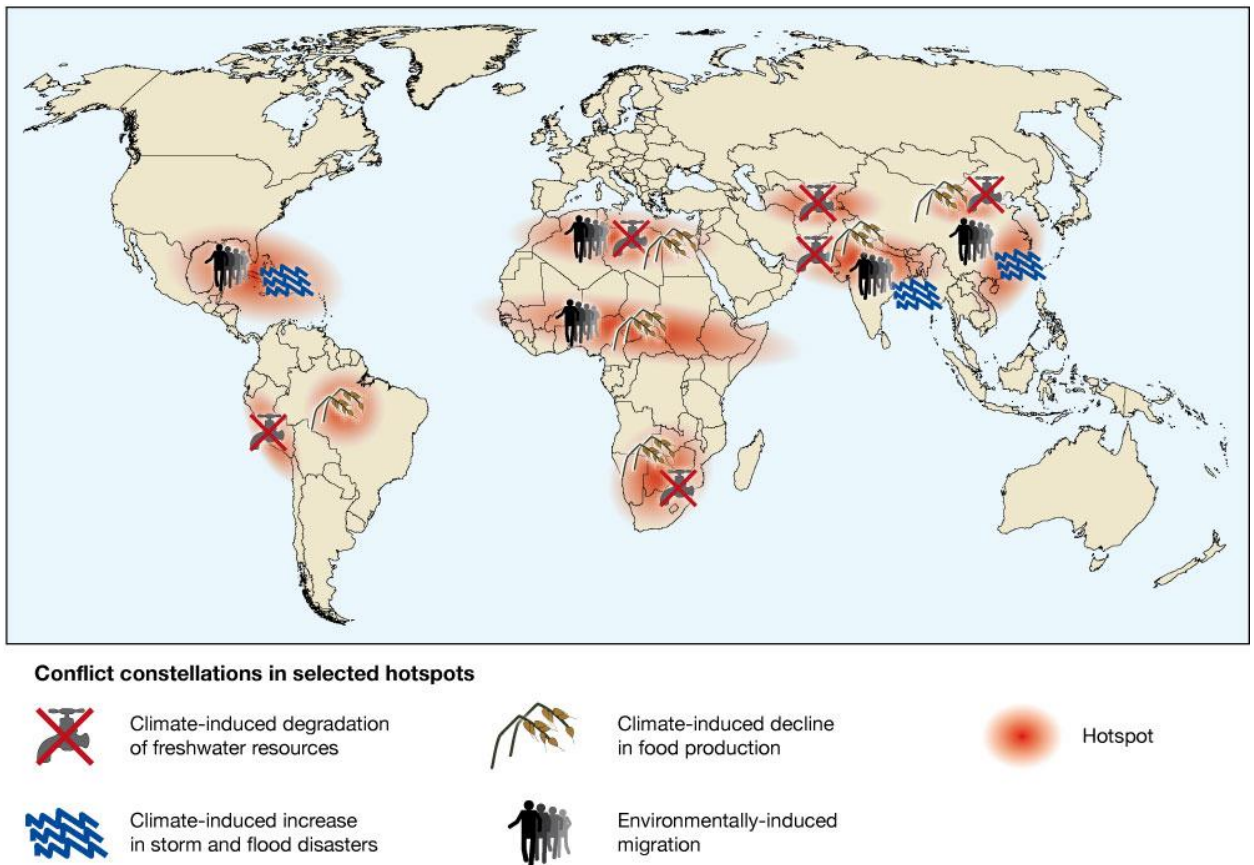
Kadangi tarptautinėje teisėje kol kas nėra teisiškai reglamentuoto apibrėžimo, priversitnės migracijos dėl aplinkosauginių priežasčių dalyviai paprastai yra vadinami „aplinkos pabėgėliais“ arba „aplinkos migrantais“. Pagrindinis skirtumas tarp šių dviejų sąvokų yra tas, kad žmonės, kurie migruoja, turi veiksmų pasirinkimo laisvę – pasilikti namuose ar ne, tačiau pabėgėliai tokio pasirinkimo neturi. 1951 m. Pabėgėlių konvencija apibrėžia pabėgėlį kaip „asmenį, kuris dėl visiškai pagrįstos baimės būti persekiojamam dėl rasės, religijos, pilietybės, priklausymo tam tikrai socialinei grupei ar politinių įsitikinimų yra už šalies, kurios pilietis jis yra, ribų ir negali arba bijo naudotis tos šalies gynyba“. Remiantis apibrėžimu, galima teigti, kad Konvencija nenumato nei konkretaus teisinio statuso, nei apsaugos tiems asmenims, kurie bėga nuo ilgalaikių ar trumpalaikių ekologinių nelaimių. Vis dėlto, atsižvelgiant į pavojaus aplinkai kilmę, perkeltasis asmuo kartais gali būti kvalifikuotas kaip pabėgėlis. 1993 m. JT vyriausias pabėgėlių reikalų komisaras pranešė, kad gyvenamosios aplinkos sunaikinimas gali būti laikomas persekiojimo forma, jei valstybės institucijos yra atsakingos už tokius tyčinius veiksmus arba dėl tyčinio valstybės nerūpestingumo nėra padedama nukentėjusiems asmenims (pvz., ciklono „Nargis“ atveju Mianmare).

Tada, kai pabėgėlio statusas dėl aplinkosauginių problemų perkeltiesiems žmonėms nebus suteiktas, atsižvelgiant į aplinkybes, gali būti suteiktas kitas apsaugą teikiantis statusas, pavyzdžiui, humanitarinis, valstybės viduje perkeltųjų asmenų statusas (pvz., Carteret salų atvejis), net asmens be pilietybės statusas arba statusas pagal papildomą tarptautinę teisę reglamentuotą apsaugą. Papildomos arba laikinos apsaugos gali būti suteiktos tais atvejais, kai asmuo nėra kvalifikuojamas, kaip pabėgėlis, bet jam reikia tarptautinės apsaugos.

Iškelta hipotezė, kad nėra konkretaus teisinio statuso ir suteikiamos apsaugos asmenims, kurie bėga nuo ekologinio pobūdžio nelaimių, iš dalies yra patvirtinta. Tarptautinės teisės sistemoje nėra konkretaus teisinio statuso dėl aplinkosauginių problemų perkeltiesiems žmonėms, tačiau kartais gali būti suteikiama apsauga remiantis 1951 m. Pabėgėlių konvencija, kitais atvejais – papildoma apsauga, humanitarinis prieglobstis. Tačiau tarptautinę sistemą vistiek reikia tobulinti.

## ANNEX

### A map of migration induced by environmental stressors



Source: German Advisory Council on Global Change WBGU (2007): Climate Change as a Security Risk.

Map indicates areas where drought, desertification, and other forms affect as much as one-third of the world's human population and contribute to people migration from home areas to secure livelihoods.