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The international legal protection of environmental refugees: a human rights-based, security and state responsibility approach

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2 | The concept of the environmental refugee

‘Environmental strains that transcend national borders are already beginning to break down the sacred boundaries of national sovereignty [...] Dealing with global change will be more difficult. No one nation or even group of nations can meet these challenges, and no nation can protect itself from the actions – or inaction – of others.’

Mathews, former vice president of the World Resources Institute.¹

Science is telling us that environmental degradation is on the rise.² The pressure on land and other resources is rising in all regions of the world due to macro-level changes such as rapid growth of populations, urbanization, climate change, water scarcity and food and energy insecurity and local causes such as the carelessness, mismanagement of resources, increasing industrial accidents/pollution, poor planning, poor infrastructure, poor governance and monitoring. These pressures will, along with other factors, contribute to migration and displacement. In decades to come, environmental degradation will motivate or force millions of people to leave their homes in search of viable livelihoods and safety.³ More people are already displaced annually by natural disasters than by conflict, and the long term effects of climate change are expected to trigger large-scale population movements within and across borders.⁴

The forced migration is often referred to as ‘environmentally forced migration’ and those displaced as ‘environmental refugees’ or ‘environmentally forced migrants’. However, what displacement should be qualified as environmentally forced migration, and who qualifies as an environmental refugee is still up for debate.

1 Mathews 1989.

2 Kolmannskog, Skretteberg 2009, p. 6. Natural disasters – floods, earthquakes, hurricanes, mudslides – and other types of environmental degradation are both increasing in frequency and intensity. Over the last two decades the number of recorded natural disasters has doubled from some 200 to over 400 per year. Nine out of every ten natural disasters today are climate-related.

3 Warner et al. 2009, p. 1.

4 UNHCR 2012.

2.1 FRAMING THE CONCEPT OF ENVIRONMENTAL REFUGEES

As there is no global institution that can legally and authoritatively define environmentally forced migration, this paragraph relies on academic research (§ 2.1.1) and declarations of stakeholders (§ 2.1.2) to determine the scope of the concept and the *ratione personae* and *materiae* (§2.1.3). This paragraph also provides a clarification on the working definition and the terms used in this research (§ 2.1.4) as terms may vary between the different stakeholders and disciplines.

2.1.1 Early academic research

This paragraph looks into some of the definitions proposed by key players in the field. The goal is not to give an extensive overview of the literature on this subject, but to get an insight in the variety of definitions by key players and to determine where the major differences lie, in order to further research the complexities (§ 2.1.3) and to establish a working definition.

The most-quoted definition of ‘environmental refugee’ was provided by El-Hinnawi in 1985, then working for the UN Environment Programme. In the aftermath of the displacements caused by the gas leak in Bhopal in India and the nuclear catastrophe in Chernobyl, he defined environmental refugees as: ‘[...] those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life.’⁵ El-Hinnawi defined environmental refugees in a manner consistent with the humanitarian mission of UNEP rather than using more analytic criteria.⁶

Another frequently quoted definition is that by the British environmentalist Myers. He defined environmental refugees as:

‘Environmental refugees are persons who can no longer gain a secure livelihood in their traditional homelands because of what are primarily environmental factors of unusual scope. The factors include drought, desertification, deforestation, soil erosion and other forms of land degradation; resource deficits such as water shortages; decline of urban habitats through massive over-loading of city systems; emergent problems such as climate change, especially global warming; and natural disasters such as cyclones, storm surges and floods, also earthquakes, with impacts aggravated by human mismanagement. There can be additional factors that exacerbate environmental problems and that often derive in part from environmental problems: population growth, widespread poverty, famine and pandemic disease. Still further factors include deficient development policies and government systems

5 Hinnawi 1985, p. 4.

6 Bates 2002, p. 466.

that “marginalize” people in senses economic, political, social and legal. In certain circumstances, a number of factors can serve as “immediate triggers” of migration, e.g. major industrial accidents and construction of outsize dams. Of these manifold factors, several can operate in combination, often with compounded impacts. In face of environmental problems, people concerned feel they have no alternative but to seek sustenance elsewhere, either within their countries or in other countries, and whether on a semi-permanent or permanent basis.⁷

This working definition mixes environmental reasons with other reasons such as population growth, widespread poverty, famine and pandemic disease. From a legal perspective, this definition is too broad to be of use, as it creates a category that is so broad that it may become meaningless. Another broad definition is by Bates (who proposed a classification of refugees): ‘people who migrate from their usual residence due to changes in their ambient non-human environment.’⁸ This definition is ‘necessarily vague in order to incorporate the two most important features of environmental refugees: the transformation of the environment to one less suitable for human occupation and the acknowledgment that this causes migration.’⁹

Suhrke adopts a more legal approach and links forced migration to the concept of traditional refugees:

‘If it is to have a meaning at all, the concept of environmental refugee must refer to especially vulnerable people who are displaced due to extreme environmental degradation [...]. In extreme situations, environmental change can remove the economic foundation of the community altogether (as when indigenous people lose their forests or fishing grounds). To survive at all, they must move. Responding primarily to push-factors, they become refugees in much the sense that current sociological and legal terms define the condition’.¹⁰

So far, no definition has been widely supported.

The alarmists vs sceptics

Due to the complexity of the problem and the lack of generally accepted definitions, estimates on the number of people in need for protection vary widely. At the extreme end, the alarmist Meyers suggested that as many as 200 million people will be forced to migrate as a result of climate change by 2050.¹¹ Most apocalyptically, in 2007 a report by Christian Aid suggested that nearly a billion people could be permanently displaced by 2050: 250 million

7 Myers, Kent 1995, p. 18.

8 Bates 2002, p. 468.

9 *Ibid.*, p. 468 and 469.

10 Suhrke 1993, p. 9.

11 Myers, Kent 1995, p. 1. Brown argues that ‘Professor Myers himself admits that his estimate, although calculated from the best available and limited data, required some “heroic extrapolations”’ in Brown, Hammill & McLeman 2007, p. 8.

by climate change-related phenomena such as droughts, floods and hurricanes, and 645 million by dams and other development projects.¹² These alarmists predictions emphasise a causal relationship between environmental degradation and displacement. The alarmist's main goal is the development of new policy instruments to protect those displaced.

On the other hand, the sceptics criticise the concept of environmental degradation as a (single) cause of forced migration. They stress that migration and displacement is triggered by complex and multiple causes among which environmental degradation is just one, and predicts that the number of cases where displacement can be directly linked to the effects of environmental degradation will be few.¹³ They point out that 'whilst there is a general presumption that both migration and displacement can be linked to deteriorating environmental conditions and slow-onset climate change, detailed empirical evidence on these links is both limited and often highly contentious.'¹⁴

Also the fact that migration is not considered an adaptation strategy, is criticized.¹⁵ With Pottier, Black agrees that migration is not an 'end result' which can be labelled simply as a 'problem', but often forms part of the solution. As Black puts it 'migration is again perhaps better seen as a customary coping strategy. In this sense, movement of people is a response to spatio-temporal variations in climatic and other conditions, rather than a new phenomenon resulting from a physical limit having been reached.'¹⁶ Tacoli's field research shows that 'migration is better defined as an adaptive response to socioeconomic, cultural, political and environmental transformations, in most instances closely linked to the need to diversify income sources and reduce dependence on natural resources [...] Non-environmental factors largely determine the duration, destination and composition of migrant flows.'¹⁷ This concept of migration as adaptation is now broadly accepted.¹⁸

Where alarmists focus on the big picture of environmental degradation (and possibly other reasons) and the necessity to migrate at a certain moment, the sceptics focus on the people moving solely for reasons that have a clear relationship with the environmental degradation. As a result the alarmists take into account a potentially much larger group of persons that are forced to migrate. So, while projections of the extent of displacement differ widely, it is generally accepted that the effects of climate change and other forms of environmental degradation will result in large-scale movements of people.

12 Baird et al. 2007, p. 7.

13 See also § 2.1.3.

14 Zetter 2011, p. 11.

15 Morton, Boncour & Laczko 2008, p. 6.

16 Black 2001, p. 6.

17 Tacoli 2011, p. v.

18 See for example UNHCR 2011, p. 2 or Zetter 2008, p. 62.

Also the growing knowledgebase on links between environmental degradation and migration takes the debate towards a middle ground.¹⁹

2.1.2 Acceptance of the concept by stakeholders

For political reasons, a relevant question is: why protect environmental refugees and not forced migration for other reasons? It is therefore relevant to see if norm entrepreneurs²⁰ accept environmental refugees as a group worthy of protection

In the last decade, the acceptance of the nexus between either climate change, environmental degradation or disasters and migration has grown exponentially. The 2016 UN Declaration for Refugees and Migrants,²¹ in its introduction, acknowledged migration in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors. It also considered: 'We commit to addressing the drivers that create or exacerbate large movements. [...] We will take measures, inter alia, to [...] combating environmental degradation and ensuring effective responses to natural disasters and the adverse impacts of climate change.'²² In 2018, following on from the 2016 UN Declaration for Refugees and Migrants, many States have adopted two UN General Assembly Compacts, one on migrants and the other on refugees. The Global Compact on Safe and Orderly Migration²³ includes commitments to addressing the impact of climate change on forced movement.²⁴ It devotes a section to 'Natural disasters, the adverse effects of climate change, and environmental degradation'.²⁵ The Global Compact on Refugees²⁶ also recognizes the interaction of climate, environmental degradation and natural disasters with the drivers of refugee movements and states that people displaced across borders in this context will be assisted by relevant stakeholders.

19 See for example in the context a case study in four countries by Zetter 2011, p. 37.

20 According to the broadly accepted theory of the development of international and regional norms by Finnemore, Sikkink 1998, the first stage of norm development is norm emergence where 'norm entrepreneurs' persuade society to identify with an emerging norm.

21 UNGA Doc A/RES/71/1, Resolution adopted by the General Assembly on 19 September 2016. 71/1. New York Declaration for Refugees and Migrants, 3 October 2016.

22 New York Declaration for Refugees and Migrants, para 43.

23 UNGA UN Doc A/RES/73/195, Resolution adopted by the General Assembly on 19 December 2018. 73/195. Global Compact for Safe, Orderly and Regular Migration, 11 January 2019.

24 See also § 11.3.1.

25 Global Compact for Migration, OBJECTIVE 2: Minimize the adverse drivers and structural factors that compel people to leave their country of origin, Article 18 h up to and including l.

26 UNGA UN Doc A/73/12, Report of the United Nations High Commissioner for Refugees. Part II Global compact on refugees, 13 September 2018.

The issue has also been taken up in the United Nations Framework Convention for Climate Change negotiations. It has been accepted that the extent to which people will move because of the effects of climate change will depend on the extent to which global temperatures rise, which in turn will depend on the success of measures to mitigate the production of green-house gasses spearheaded by the UNFCCC. Since the Cancún Adaptation Agreement human mobility has played an increasing role in the UNFCCC negotiations.²⁷ Lastly, in 2018, the UNFCCC Task Force on Displacement reported its findings to the 24th Conference of the Parties at Katowice.²⁸

The Human Rights Council adopted a resolution on Human Rights and Climate Change, which recognizes migrants and persons displaced across international borders in the context of climate change.²⁹ The Resolution recognizes the links between migration, displacement, climate change and human rights. It also recognizes that migrants, are disproportionately affected by climate change. It requests OHCHR to research and identify human rights protection gaps linked to human mobility in the context of climate change. Finally it calls upon States to continue and enhance international cooperation and assistance for adaptation measures to help developing countries, especially those that are particularly vulnerable to the adverse effects of climate change as well as persons in vulnerable situations, including migrants and persons displaced across international borders in the context of the adverse impact of climate change.³⁰ More recently, the Human Rights Council released a report by the United Nations High Commissioner for Human Rights on 'Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps.'³¹ In September 2019, five UN human rights treaty bodies issue a joint statement on human rights and climate change. It considered that:

27 See § 7.3.1 on human mobility in UNFCCC negotiations.

28 The Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, Task Force on Displacement Activity II.2. Analysis Report. Mapping Human Mobility Migration, Displacement and Planned Relocation and Climate Change in International Processes, Policies and Legal Frameworks. International Organization for Migration IOM, August 2018. See also § 7.3.1.

29 UNGA UN Doc A/HRC/RES/35/20, Resolution adopted by the Human Rights Council on 22 June 2017. 35/20. Human rights and climate change, 7 July 2017.

30 Mapping Human Mobility Migration, Displacement and Planned Relocation and Climate Change in International Processes, Policies and Legal Frameworks, p. 63, 64, and 65.

31 UNGA UN Doc A/HRC/38/21, Report of the United Nations High Commissioner for Human Rights. Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps, 23 April 2018.

‘5. Migrant workers and members of their families are forced to migrate because their States of origin cannot ensure the enjoyment of adequate living conditions, due to the increase in hydrometeorological disasters, evacuations of areas at high risk of disasters, environmental degradation and slow-moving disasters, the disappearance of small island states due to rising sea levels, and even the occurrence of conflicts over access to resources. Migration is a normal human adaptation strategy in the face of the effects of climate change and natural disasters, as well as the only option for entire communities and has to be addressed by the United Nations and the States as a new cause of emerging migration and internal displacement.

6. In that regard, States must address the effects of climate change, environmental degradation and natural disasters as drivers of migration and ensure that such factors do not hinder the enjoyment of the human rights of migrants and their families. In addition, States should offer complementary protection mechanisms and temporary protection or stay arrangements for migrant workers displaced across international borders in the context of climate change or disasters and who cannot return to their countries.³²

The link between climate change and migration has now been broadly accepted within the UN. The legal consequences of this link are however much less clear and will be further discussed in this study.

At its 3335th meeting, held on 4 August 2016, the International Law Commission decided, in accordance with Article 23 of its statute, to recommend to the General Assembly the elaboration of a convention on the basis of the Draft Articles on the Protection of Persons in the Event of Disasters.³³ The General Assembly took note of the Draft Articles on the Protection of Persons in the Event of Disasters, presented by the Commission, and invited Governments to submit comments concerning the recommendation by the Commission to elaborate a convention on the basis of these Articles.³⁴

The United Nations Environment Assembly (hereafter: UNEA), during the second edition of the UNEA, held in Nairobi in May 2016, dedicated specific thematic sessions to questions of environmental migration and displacement,

32 Joint Statement on “Human Rights and Climate Change” by the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities, 16 September 2019, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>.

33 ILC, Draft Articles on the Protection of Persons in the Event of Disasters, with commentaries 2016 ILC sixty-eighth session, in 2016, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session A/71/10, para 48. The report will appear in Yearbook of the International Law Commission, 2016, vol. II, Part Two.

34 UNGA UN Doc A/RES/71/141, Resolution adopted by the General Assembly on 13 December 2016. 71/141. Protection of persons in the event of disasters, 19 December 2016.

notably through the High-Level Symposium on 'Environment and Displacement: Root causes and implications'.³⁵

The UNHCR has explicitly accepted (at least elements of) the concept on several occasions.³⁶ Although there is no legal acknowledgement of the concept of environmental refugees, the UNHCR has weighed in on the issue of terminology to compel the acceptance of a common definition (at least for policy purposes). Avoiding the term 'refugee',³⁷ UNHCR has cautiously moved towards a definition of environmentally displaced persons as 'person whose migration movement is of a forced nature and decisively induced by an environmental factor.' In 2005, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution on 'The legal implications of the disappearance of States and other territories for environmental reasons, including the implications for the human rights of their residents, with particular reference to the rights of indigenous peoples'.³⁸ The UNHCR has also been actively engaged (through networks) in commissioning research on climate change-related movement and raising it as a normative protection gap.³⁹ The IOM is one of the biggest norm entrepreneurs. The IOM hosts the Environmental Migration Portal a knowledge platform on people on the move in a changing climate. This portal promotes new research, information exchange and dialogue, intended to fill the existing data, research and knowledge gaps on the migration-environment nexus. The IOM developed a working definition in 2007 which defines 'environmental migrants' as follows:

35 Mapping Human Mobility Migration, Displacement and Planned Relocation and Climate Change in International Processes, Policies and Legal Frameworks, p. 42.

36 In 2005, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution on the legal implications of the disappearance of States and other territories for environmental reasons: OHCHR, UNGA UN Doc E/CN.4/DEC/2005/112, The legal implications of the disappearance of States and other territories for environmental reasons, including the implications for the human rights of their residents, with particular reference to the rights of indigenous peoples, 20 April 2005. In 2009, the Office of the UN High Commissioner for Human Rights examined the links between human rights and climate change, including a whole section on displacement UNGA UN Doc A/64/350, Report of the Secretary-General on Climate change and its possible security implications, 11 September 2009. Also, the 2018 Global Compact for Migration mentions climate migration several times.

37 Meyer 2008, p. 10, UNESCO advocates for the term 'environmentally displaced person' as the term 'environmental refugee' 'usually implies the crossing of state borders, whereas movements concerned here may be occurring within the borders of a state. In addition, it poses a significant risk of diluting the concept of "refugee" as legally defined in the 1951 UN Refugee Convention even though it may rightly point to the forced character of the movement.'

38 OHCHR, UNGA UN Doc E/CN.4/DEC/2005/112, The legal implications of the disappearance of States and other territories for environmental reasons, including the implications for the human rights of their residents, with particular reference to the rights of indigenous peoples, 20 April 2005.

39 See for example UNHCR 2014.

‘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.’⁴⁰

The purpose of this definition is to try to encompass population movement or displacement, whether it be temporary or permanent, internal or cross-border, and regardless of whether it is voluntary or forced, or due to sudden or gradual environmental change.⁴¹

On the regional level, the European Union Parliamentary Assembly

‘notes that environmental factors, including climate change, continue to have a dramatic impact on those at risk of being deprived of their livelihoods because of natural or man-made environmental disasters which force people to migrate.’⁴²

Furthermore,

‘The Assembly considers that the absence of a legally binding definition of “climate refugees” does not preclude the possibility of developing specific policies to protect people who are forced to move as a consequence of climate change. Human mobility and displacement due to climate degradation require a better response. Council of Europe member States should therefore take a more proactive approach to the protection of victims of natural and man-made disasters and improve disaster preparedness mechanisms, both in Europe and in other regions.’⁴³

The concept has also been accepted in less obvious fora. On 11 September 2009 a report prepared by the UN Secretary General on ‘Climate Change and Its Possible Security Implications’ has been released.⁴⁴ Since then,

‘climate change implications for threats to international peace and security have come to the fore of the work of the Security Council in the field of natural resources and the environment, frequently with the support of elected members of the Council.’⁴⁵

40 IOM 2019.

41 Aghazarm, Laczko 2009, p. 19.

42 European Union Parliamentary Assembly, Resolution 2307 (2019) A legal status for “climate refugees”, Text adopted by the Assembly on 3 October 2019 (34th Sitting), para 1.

43 *Ibid.*, para 3.

44 UNGA UN Doc A/64/350, Report of the Secretary-General on Climate change and its possible security implications, 11 September 2009.

45 Kron 2020, p. 248. See for example UNSC UN Doc S/RES/2349, Adopted by the Security Council at its 7911th meeting, on 31 March 2017, at para 26.

Also other authoritative organisations such as the World Bank,⁴⁶ the Asian Development Bank,⁴⁷ and many more have taken up on the topic. It is therefore safe to conclude that a political momentum has built in support of a specific protection for the benefit of those forcedly displaced by environmental degradation (and more in particular for climate refugees). Mayer aptly describes the current status of acceptance of the concept in the following words:

‘Despite its logical inconsistencies, the case for a governance of environmental migration appears as a magical recipe for norm entrepreneurs. There is no essential reason why migrants should be protected rather than other vulnerable people, but migrants attract more attention, if only because of the fear that they may be approaching “us.” Nor is there any reason to focus on environmental migrants or climate migrants specifically but anything related to climate change attracts a rare degree of public attention, and, possibly, of engagement. By joining the deep-rooted fears of migration with the existential uncertainties raised by climate change, the concepts of environmental migration or, even more, of climate migration have an immense “marketing” potential.’⁴⁸

In summary, we can conclude that there is an acceptance of the concept of environmental refugee by important stakeholders, even though the protection of environmental refugees is arbitrary. However, the fact that the protection is arbitrary doesn’t imply that environmental refugees should not benefit from a possible willingness by decision makers to protect them. Many (if not all) migration instruments are to some extent arbitrary. All the existing instruments were adopted because there was a political will to protect these specific groups. And even the most prominent instrument in the west, the Refugee Convention has been repeatedly denounced as arbitrary. For this reason, I strongly disagree with authors who suggest that the protection of the group of environmental refugees should be abandoned altogether. Based on the assumption that protection of this group should be pursued, in order to establish a legally suitable protection framework (as opposed to a political one), it needs to be determined which people are entitled to (international) protection.

2.1.3 The scope of *ratione personae* and *materiae*

This paragraph explores which people should be entitled to international protection. As McAdam points out, the need for protection and the type of

46 The World Bank has devoted a webpage to the topic: <http://www.worldbank.org/en/topic/climatechange>.

47 The Asian Development Bank has also devoted a webpage to the topic: <https://www.adb.org/themes/climate-change-disaster-risk-management/main>.

48 Mayer 2016, p. 196 and 197. For an overview of important research and policy developments, see Gemenne, Zickgraf & Ionesco 2015, p. 5-10.

movement (temporary or permanent and internal or cross-border) depends greatly upon unknown variables, including the extent to which movement is already an adaptation strategy employed by the community (e.g. cyclical movement in flood-prone areas) and can continue to be used as an adaptive strategy, the level of assistance available within the country, pre-existing migration options for that community, and whether movement is initial flight in response to a sudden disaster, or pre-emptive and/or secondary movement where climate impacts are more slow onset in nature.⁴⁹ All these elements require further analyses. Therefore, this paragraph will discuss the main complexities: causality, voluntary versus forced migration, temporary versus permanent migration and internal versus cross-border migration. After this, a working definition is adopted.

Causality

Whilst there is a general presumption that both migration and displacement can be linked to deteriorating environmental conditions, migration and displacement are complex processes conditioned by social, economic and political factors.⁵⁰ As Mence and others point out:

‘There is consensus among many analysts that identifying cases where there are direct and exclusive linkages between environmental factors and cross-border migration is difficult and likely to be rare. Those critical of attempts to draw direct correlations have long argued that the causes of migration are highly complex, involving a range of political, economic and social factors that may influence responses to environmental stress. The strength of family, social, cultural and ethnic networks, the effectiveness of state responses to disasters and the level of poverty and wealth all appeared to influence coping strategies and migration decisions. Further, all of these variables are likely to vary over time and space.’⁵¹

It is very likely that environmental degradation impacts will contribute to an increase in forced migration. However, the term environmental refugee implies a mono-causality that one rarely finds in human reality.⁵² For Black (one the most prominent sceptics of environmental refugees) this is multi-causality disqualifies the legitimacy of focusing on environmental refugees as a significant group of migrants, deserving of the world’s attention. Black argues that ‘although environmental degradation and catastrophe may be important factors in the decision to migrate, and issues of concern in their own right, their

49 McAdam 2011, p. 10.

50 See for example McLeman, Hunter 2010.

51 Mence 2013, p. 8.

52 Only in some cases the environmental degradation will be so dramatic and so all-encompassing of livelihoods that, regardless of livelihood strategy or socially constructed differences in wealth, most or all inhabitants of an impacted area will be forced to migrate, for example in the context of powerful tsunamis and wildfires.

conceptualisation as a primary cause of forced displacement is unhelpful and unsound intellectually, and unnecessary in practical terms.⁵³

Currently, the law recognizes either economic migrants or political refugees. However, as a result of the multiple factors influencing the decision to migrate, the distinctions between refugees and migrants and voluntary and involuntary movements are becoming increasingly blurred. At this point, the law fails to reflect reality. As Koser notes, trying to categorise migrants within traditional dichotomies is simplistic and ignores the mismatch between traditional migrant categories and the reality of 'mixed motivations' and 'mixed flows'.⁵⁴ As such, environmental degradation itself might not trigger the movement of persons, but it has the potential to do so combined with other factors. To identify the 'primary cause' of those movements might be impossible as several causes reinforce each other.⁵⁵ Elliot nicely sums it up in the context of climate migrants: 'The long-standing debate on the definition of "climate migrants" reflects more than a difference of perspectives between more or less ambitious proposals: rather, it is symptomatic of the impossibility of determining the often indirect influence that environmental factors may have in actual displacement.'⁵⁶ However, a precondition for using the qualification environmental refugee is that environmental change can indeed be identified as a root cause for migration movements. If environmental factors cannot be significantly separated from social, economic or other factors, migrants should not be considered as environmental migrants.

A solution to this problem of multi-causality might be found in a parallel to the Refugee Convention. Even with 'traditional' (political) refugees the decision to migrate is often multi-causal and is not solely caused by the persecution.⁵⁷ The Refugee Convention, does not require that persecution be the sole, or even the main, reason for the displacement of political refugees; it only requires that there is persecution. In order to be entitled to receive protection under the traditional refugee regime, it is sufficient to establish that the threat of persecution was enough to justify prompt flight. A similar objective criterion that a good reason exists, could be adopted concerning environmental refugees by analogy.⁵⁸ Whenever the environmental degradation jeopardises the existence and/or seriously affects the quality of life, one can assume that the environmental degradation was the reason to migrate. Another possibility would be to adopt a sine qua non approach.⁵⁹ Whenever a migration would not have taken place without the environmental degradation, the movement will be considered as the cause of the migration. Finally, if no agreement on

53 Black 2001, p. 1.

54 Mence 2013, p. 8.

55 Kraler, Noack & Cernei 2011, p. 17.

56 Elliott et al. 2012, p. 32.

57 See also § 5.1.1.

58 Wyman 2013, p. 172 and 173.

59 Ammer et al. 2010, p. 27.

any qualification can be found, it would be possible to adopt an 'I know it when I see it'⁶⁰ line of reasoning that allows for decisions on a case-by-case basis.

Voluntary vs forced migration

In law, policy and practice, forcibly displaced persons are treated differently, often as a category of persons more in need, and therefore with stronger rights, than migrants.⁶¹ For cross-border migration, the difference is obvious. Where voluntary migrants are only allowed access to third countries under very strict conditions and are not entitled to special protection, (certain types of) forced migrants (refugees) are offered protection. As a result, (political) refugees are often contrasted with 'voluntary' economic migrants. However, as has been noted above, this rigid distinction between 'voluntary' economic migrants and 'forced' refugees is somewhat misleading. The distinction can best be characterized as a spectrum, rather than a single moment in time. On one side of the spectrum there is migration as a (near-normal or) normal adaptation strategy that should not invoke protection. As Black pointed out 'People have historically left places with harsh or deteriorating conditions, whether this is in terms of poor rainfall, high unemployment, or political upheaval, or some combination of these or other adverse factors.'⁶² It can provide a means of escaping danger and increasing resilience, especially when it is planned.⁶³ On the other hand of the spectrum, – due to the extent of environmental degradation and the limit of the adaptive and mitigating capacities of individuals, local communities or States, – the migration changes from a (near normal) adaptation strategy to what is called by Warner et al. a 'survival mechanism of last resort'.⁶⁴ Under this type of survival migration, movement only happens as a last measure and survival migrants are therefore in need for protection. Some authors like Bates have therefore suggested to adopt a continuum. 'People who have absolutely no control over their relocation represent the environmental refugee end of the continuum, designated as "forced". Moving to the left across the continuum are people with more control over the decision to migrate. At the far left of the continuum, voluntary environmental migrants include only those who maintain control over every decision in the migration process.'⁶⁵ The continuum is characterised by growing pressures and fewer choices. In this continuum, voluntary migration is characterised by a voluntary decision, i.e. a situation where at least some alternative quality options are available. 'Voluntary' does not necessarily imply complete freedom of choice,

60 Justice Potter Stewart's concurring opinion on *Jacobellis v. Ohio*, 378 U.S. 184 1964.

61 Kolmannskog 2012, p. 6.

62 Black 2001, p. 14.

63 McAdam 2011, p. 4.

64 Warner, Dun & Stal 2008, p. 13.

65 Bates 2002, p. 468.

but merely that “voluntariness exists where space to choose between realistic options still exists.”⁶⁶

The distinction between normal adaptation strategies and survival migration is complex. For one, the number of people forced into survival migration depends on the level of mitigation and adaptive measures. The better people, communities or States are capable to prevent negative effects from environmental degradation or adapt to negative effects from environmental degradation, the least they are forced into survival migration.⁶⁷ Research shows that the people most at risk for survival migration are not those who are most frequently exposed, but the ones least able to adapt or mitigate.⁶⁸ As a result, poor people with limited resources to adapt or mitigate are at the highest risk for survival migration. This situation is aggravated when countries face severe capacity constraints and have weak or dysfunctional governments, or when costs dwarf a country’s resources. Also, decisions on the individual level can affect whether there are still alternative quality options available.⁶⁹ In short, there is a level of uncertainty about the effects of environmental change in general, which also affects the need for protection and therefore the distinction between voluntary and forced migration. As Zetter points out, only in some cases environmental change will be so dramatic and so all-encompassing of livelihoods that, regardless of livelihood strategy or socially constructed differences in wealth, most or all inhabitants of an impacted area will be forced to migrate. For example, designating prohibited areas for settlement because of hazard/disaster risk, or preventing return to highly vulnerable locations after an extreme hazard event, or resettling people from hazard prone areas. These types of migration constitute perhaps the clearest examples of forced displacement.⁷⁰

In order to determine the scope of *ratione personae*, criteria have to be developed to determine when a movement is no longer voluntary, but happens under compulsion. The Secretary General on Human Rights of Internally

66 Ginnetti, Franck 2014, p. 13.

67 For example, building resilience by setting up early warning systems for natural disasters such as cyclones affects the number of casualties and the level of damage and might prevent people from being forced into survival migration. Kälin en Schrepfer’s analysis is illustrative. They have identified three elements that determine the potential of climate related disasters to trigger population movements. 1 the climate-related hazard – its intensity, scope and frequency, 2 the vulnerability of affected people to such an event and 3 the capacities of those affected to cope with it. Kälin, Schrepfer 2012.

68 Kolmannskog 2008, p. 4.

69 For example, harvest all the forest may lead to soil erosion and further environmental degradation that might cause someone to migrate. Or building one’s house next to a river while doing nothing to prevent it for flooding. This leads us to the question if one should be considered an environmental refugee when one contributes to the situation that forces one to migrate. Or legally framed: could one appeal to protection irrespective of one’s own contribution to the environmental degradation?

70 Zetter 2011, p. 14.

Displaced Persons suggested that: 'One option would be based on a vulnerability analysis to assess when vulnerabilities have reached a degree that a person was forced to leave his or her home. It is obviously extremely complex to develop generic criteria on this basis and to apply them individually, in particular in situations of slow onset disasters.'⁷¹ Further research on the links between environmental degradation and migration and a development on a case by case basis will have to inform more detailed definitions in future.

Developing a more detailed definition will however not automatically support the most desired outcome. In practice, many people will migrate in anticipation, because they recognize that their local situation will eventually deteriorate and want to have the ability to relocate before they are forced to do so.⁷² As these people have some alternative quality options available, this type of migration is generally considered voluntary. However, pre-emptive movement in such circumstances may be a rational human response, that allows other people to stay. Therefore, anticipatory movement may be a good way to prevent emergency situations and unnecessary casualties. As it stands, environmental refugees are conceptually sandwiched between the non-fitting legal concepts of voluntary migrants and refugees.

Temporary vs permanent migration

The distinction between forced or voluntary displacement becomes more significant depending on whether the displacement is temporary or permanent. For example, extreme hazard events such as flooding undoubtedly 'force' displacement; but the significance of the displacement and the scope of the rights to be protected will differ fundamentally if the displacement then becomes permanent.⁷³ Both scenarios – temporary and permanent migration – require different protection mechanisms and have different implications for defining the legal status of displaced populations. The complicating factor is that there is no common understanding of what constitutes 'temporary' or 'permanent' migration. The IOM mapped the various definitions on permanent migration in 2009:

'Definitions range from six months away from the place of origin with no plans to return for "permanent" migration (Findley, 1994 citing Hugo, 1980; Standing, 1985; Prothero & Chapman, 1985), to movement from the usual place of residence to another country for a period of at least three months but less than a year for "short-term migration" (IOM, 2004: 60). [...] The Inter Agency Standing Committee Framework for Durable Solutions argues that the ending of displacement is a process through which the need for specialized assistance and protection diminishes (Ferris, 2008). In fact, knowing whether movements are permanent or temporary

71 Kálin 2008.

72 Kunz 1973.

73 Zetter 2011, p. 14.

following natural disasters would require accurate demographical measurements spanning several years (Smith & McCarty, 1996: 265, 294).⁷⁴

As any timeframe will be arbitrarily, the most practical solution may be found in aligning with migration policies on permanent residence permits.

On top of this conceptual vagueness, in practice the duration of the stay is influenced by decisions on the individual, State and international level. Even if return is possible, some people might not return for various reasons, such as the populations capacity and resources to rebuild livelihoods in the affected areas or the opportunity for income diversification. The more rapid and effective the State is able to recover the social, economic and physical aspects of the affected areas, the likelier it is that people will return to their homes and thus are temporarily displaced.⁷⁵

Internal vs cross border migration

The overwhelming majority of the people moving for environmental reasons is, and will be, migrating within their own countries.⁷⁶ If we simply look at the numbers, realistically the focus should be on internal migration and cross-border movements in the same region, as only a very small group of environmental refugees will end up in western countries. Interestingly, the protection of internally displaced persons (hereafter: IDPs) has gained less attraction in the public debate than cross-border migration. Several reasons have been given in the literature for this phenomena: (1) migration is viewed as posing more challenges on the international community than internal migrants, (2) the majority of internal displacements take place within developing countries and the persons moving to the developed world cause more concerns, and (3) it is assumed that a stronger legal and normative framework is already in place for those displaced internally by the effects of environmental change.⁷⁷ As the aim for this research is to provide a broad overview of protection possibilities, it analyses all types of migration, regardless of the number of people involved in this type of migration. However, it needs to be acknowledged that from a policy perspective these numbers are highly relevant in determining which action should be undertaken.

2.1.4 Working definition

The most frequently quoted definition in the context of environmentally forced migration by El-Hinnawi is very broad: ‘those people who have been forced

74 Aghazarm, Laczko 2009 p. 270.

75 See also § 2.1.3.

76 See for example Escap 2015.

77 Kraler, Noack & Cernei 2011, p. 41.

to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.⁷⁸ Although this definition initiated the debate, it does not suffice from a legal perspective for a lack of distinction. However, the alternative – creating a very narrow definition that applies only to a limited type of environmental degradation – is falling short in protecting those in need for protection: all those forcibly displaced by environmental degradation.

The element of force in this research is understood as a continuum. The tipping point from voluntary to forced migration in the continuum can best be developed on a case by case basis. This working definition obviously differs from other definitions (such as from the IOM) that do not distinguish between voluntary and forced migration. This can be explained from the goal of the research to map legal protection regimes.

The element of moving away from one's traditional habitat includes all movements, irrespective of whether these movements cross international borders or remain inside the country. This working definition does not distinguish between international or cross-border migration. However, the legal protection possibilities do make this distinction and will therefore be discussed within the relevant legal frameworks.

The research covers both temporary and permanent displacement. Again, the aim of providing a framework requires the analyses of both types of migration. The research presupposes that the main goal is to return people to their place of origin as soon as possible. The temporary or permanent character will be explicitly discussed within the relevant legal frameworks. This research aligns the distinction between temporary and permanent migration with migration policies on permanent residence permits.

This research understands 'a marked environmental disruption' as a certain degree of damage. If societies are capable to bear the burden of environmental degradation themselves, no international protection is required. This research uses the same standard as United Nations International Strategy for Disaster Reduction (hereafter: UNISDR) (currently operating under the name United Nations Office for Disaster Risk Reduction (UNDRR)) and the Nansen Initiative. Disasters are understood as 'serious disruption of the functioning of a community or society causing widespread human, material, economic or environmental losses which exceed the ability of the affected community or society to cope using its own resources.'⁷⁹

78 Hinnawi 1985, p. 4.

79 See The Nansen Initiative Definitions, available at <https://www.nanseninitiative.org/secretariat>. This is similar to the definition adopted by the ILC in the Draft Articles on the Protection of Persons in the Event of Disasters 2016. Article 3 defines disasters as "disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society'.

The element of ‘a jeopardised existence and/or seriously affected quality of life’ is closely related to the element of force. There can only be an element of force when the movement is caused by a situation that is serious enough to justify the movement. Circular migration or income diversification strategies (although they might prevent forced migration and may be a very reasonable adaptation strategy) are not considered to jeopardise the existence and/or seriously affected quality of life, and are therefore excluded from the scope of *ratione personae*.⁸⁰ Just as with the element of force, this element should be decided on a case by case basis.

Similar to the approach taken by Ammer et al.,⁸¹ this analyses includes (1) the prevention phase that covers the prevention of situations of environmental change, adaptation and mitigation measures and (2) the phase of coping with environmentally forced migration which Ammer refers to as ‘environmental flight’. As Ammer points out, the prevention of obligations to prevent situations of environmental change is relevant, as ‘firstly, it serves the immediate avoidance of environmental change; secondly, the violations of those obligations can result in State obligations in accordance with the rules of State responsibility (e.g. compensation).’⁸² Even though in the prevention stage it will be hard to determine whether forced displacement will happen, this phase is included in the research as different legal regimes focus on the prevention of harm. It is also the best possible outcome when forced migration can be avoided altogether.

Figure 1: Schematic overview of situations covered⁸³

Prevention of ‘environmental flight’				Coping with ‘environmental flight’	
Prevention of situations of environmental change as such (environmental/climate protection)	Adaptation measures (Reduction of vulnerabilities)	Preventive mitigation measures (Preventive minimisation of the consequences of ‘environmental flight situations’)	Mitigation measures (Mitigation of the impact of occurring ‘environmental flight situations’)	Protection of ‘internal environmental refugees’	Reception of ‘international environmental refugees’

80 Of course it is difficult to establish exactly when an existence is jeopardised or when the quality of life is seriously affected. Especially when you take into consideration that field research shows that in many cases of gradual environmental degradation, the people most poor and in need for protection are unable to leave, while others relatively well of anticipate worse to come and leave at an early stage.

81 Ammer et al. 2010, p. 2.

82 *Ibid.*, p. 2.

83 *Ibid.*, p. 2.

Terminology in this research

This research adopts the term ‘environmental or climate refugee’ for those forcedly displaced by environmental degradation or climate change more in particular. If we consider the acceptance of the topic by norm entrepreneurs, we see a strong focus on climate (change)-induced migration, and within that topic a strong focus on man-made climate change. Despite the strong argument of political support for this particular concept, this research opts to use the more neutral term ‘environment’. It allows for a broader analysis of different legal regimes for their capacity to respond to forced migration. This fits in with the daily practice of most of the stakeholders, who deal with migration per se and do not take into consideration if the migration is caused by climate change. On top of that, the term environment may face less resistance, as it does not become entangled in discussions about the validity of climate change. It also ensures that causality does not have to be drawn between individual events and climate change.⁸⁴

Science does not allow us to determine whether a specific disaster is caused by natural circumstances or is the effect of climate change.⁸⁵ It is also difficult (and in many cases impossible) to draw a direct causal link between the pollution of a certain actor that has led to a specific disaster in another country that has led to the forced migration.⁸⁶ However, whenever a climate narrative provides for better protection, this research uses this narrative. Especially in the context of the responsibility approach⁸⁷ and the justice narrative,⁸⁸ the climate change argument provides for legal or moral obligations for protection.

This research also adopts the term ‘(environmental) refugee’. Although accepted as part of popular vocabulary,⁸⁹ the use of the term in the legal context is controversial.⁹⁰ The general debate on terminology is structured along two lines of reasoning. The first line focuses on the legal meaning of the term refugee and thus denounces the use of the term. This group prefers the term ‘migrant’. The second line of reasoning focuses on the ordinary meaning of the word ‘refugee’.⁹¹ In this line of reasoning, the term refugee implies a forced nature of the movement and calls for protection. The group that focusses on the legal meaning rightfully points out that the term refugee has a precise, well-defined legal meaning and that this definition does not

84 See for example Nash 2012, p. 3.

85 Elliott et al. 2012, p. 32.

86 See also § 7.4.3.

87 See § 2.3.3.

88 See § 13.2.1.

89 Findlay, Geddes 2011, p. 140 use bibliometric data to chart an increase in the use of the term ‘environmental refugee’ in academic journals since the 1980s, despite its frequent criticism.

90 For example it is suggested that “The terms of “climate refugee” and “environmental refugee” should be avoided as they are inaccurate and misleading”, UNHCR 2011, p. 561.

91 Oxford dictionary: A person who has been forced to leave their country in order to escape war, persecution, or natural disaster.

include environmental factors.⁹² So, unless the legal landscape changes, the legal term refugee does not apply. Also, important stakeholders such as the UNHCR and the IOM emphasize that, although people displaced by environmental degradation are often forcibly displaced and in need of assistance, their protection need differs from that of those 'traditional' refugees. 'Traditional' 'refugees could not turn to their own governments for protection because states were often the source of persecution and they therefore needed international assistance, [...] whereas environmental migrants continued to enjoy national protection whatever the state of the landscape.'⁹³ Some argue, that by using the term refugee for environmentally forced migration, the protection of 'traditional' refugees under the Refugee Convention may be harmed.⁹⁴ These are strong arguments for not using the term refugee. However, the alternative use of the term migrant also embodies a lot of disadvantages. The term migrant implies a voluntary choice to migrate and can instigate a stronger protection of national borders. In that sense, the connotation of the term refugee can be very beneficial for the support.⁹⁵ Campaigners argue that any other term than refugee would downplay the seriousness of the situation of affected people and that a higher proportion of the general public can sympathise with the implied sense of duress. On the contrary, the term 'refugee' is colourful and descriptive and calls for attention for one of the major problems of our times. I agree with Stavropoulou that 'Even though the term 'environmental refugee' is legally inaccurate, it is more compelling than the term 'environmental migrant' because it evokes a sense of global responsibility and accountability, as well as a sense of urgency for impending disasters.'⁹⁶ The element of flight and the element of needing assistance, make the term 'refugee' a compelling word to describe the phenomena addressed here. As Renaud and others pointed out, 'people who have been forced to move because of environmental disasters must often flee with expediency. Such individuals need protection and assistance, often in a way that is very similar to Convention refugees. They may require a safe place to stay, food and water, health and legal assistance, and possibly resettlement.'⁹⁷ Therefore, this research adopts the term 'refugee', as it stresses the forced character of the movement and stimulates questions of protection and responsibility.

92 See § 5.1.1.

93 Wilkinson 2002, p. 13.

94 The Office of the United Nations High Commissioner for Refugees, the International Organization for Migration, and other humanitarian organizations have advised that these terms have no legal basis in international refugee law and should be avoided in order not to undermine the international legal regime for the protection of refugees. For an overview, see for example Boano, Zetter & Morris 2008, p. 8.

95 Lehman 2009.

96 Stavropoulou 2008, p. 12.

97 Renaud et al. 2011, p. e12.

2.2 Types of environmental refugees in this research

Current migration patterns due to environmental degradation are very complex. As McAdam rightfully pointed out: ‘a number of very different scenarios are captured within the rubric, it is obvious that it is only through examining them separately, with attention to their distinctive and common features, that any meaningful normative frameworks can be developed’⁹⁸ This research therefore (in parts II and III) applies the general legal frameworks to different types of refugees. This paragraph first describes relevant typologies as developed in the academic literature, and then clarifies the types of environmental refugees that are used in this research. A word of caution is needed, as these scenarios are a typology. In reality, they may coincide and overlap.

El Hinnawi identified three broad categories of environmental migrants: (1) persons who are displaced temporarily but who can return to their original home when the environmental damage has been repaired, (2) persons who are permanently displaced and have resettled elsewhere, and (3) persons who migrate from their original home in search for a better quality of life when their original habitat has been degraded to such an extent that it does not meet their basic needs.⁹⁹ Bates reclassified existing literature in three qualitatively different situations.

Figure 2: Classification of environmental refugees by Bates¹⁰⁰

	Disaster An unintended catastrophic event triggers human migration		Expropriation The wilful destruction of environment renders it unfit for human habitation		Deterioration An incremental deterioration of the environment compels migration as constraints to human survival increase	
Sub-Category	Natural	Technological	Development	Ecocide	Pollution	Depletion
Origin	Natural	Anthropogenic	Anthropogenic	Anthropogenic	Anthropogenic	Anthropogenic
Intention of Migration	Unintentional	Unintentional	Intentional	Intentional	Unintentional	Unintentional
Duration	Acute	Acute	Acute	Acute	Gradual	Gradual
General Example	Volcano	Meltdown	Dam Building	Defoliation	Global	Deforestation
Real-World Example	Montserrat	US-TMI	China 3G	Vietnam	Warming	Ecuador-Amazon
Est. Number Displaced	7,000	144,000	144,000	7 million	Bangladesh 15 million	115,000

Kolmannskog has published extensively on the various types of environmental disruptions. He proposes the following typology: (1) natural disasters, (2) gradual environmental degradation, (3) environmental conflicts, (4) environ-

98 McAdam 2010, p. 2 and 3.

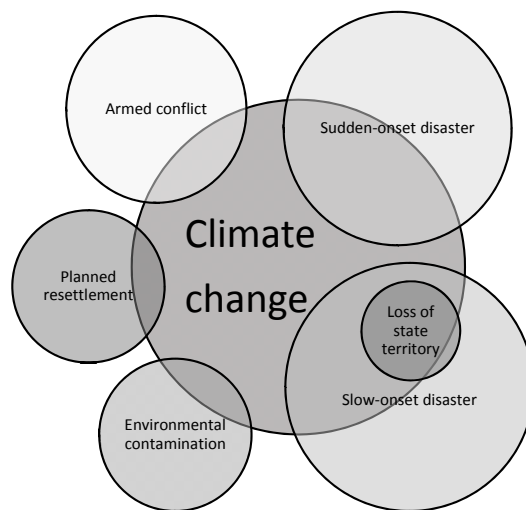
99 Kolmannskog 2008, p. 8.

100 Bates 2002, p. 470.

mental destruction as a consequence of or as a weapon in conflicts, (5) environment conservation, (6) development projects, and (7) industrial accidents. His proposal also contained further sub-categories based on distinctions such as: (a) human-made or natural change, (b) climate change-induced or all environmental change, (c) temporary or permanent environmental change, (d) temporary or permanent migration, and (e) internal or international/cross-border migration.¹⁰¹ This typology is also generally adopted in the framework developed by Kälin, that was subsequently adopted by the UN's Inter-Agency Standing Committee Working Group on Migration/Displacement and Climate Change¹⁰² and by the European Parliament.¹⁰³

This research adopts a similar approach, but it excludes 'environmental destruction as a consequence of or as a weapon in conflicts' as this is a very specific type of environmental damage that should be dealt with from a very different legal angle.¹⁰⁴ Also environmental conservation and development projects are discussed under the umbrella term 'planned resettlement', for their similarities in protection needs. Finally, the category of 'industrial accidents' has been broadened to environmental contamination as to clearly include intentional pollution. In some parts of the research, the term climate refugee is used. This term overlaps with the various types of environmental refugees, as is demonstrated in the next diagram.

Figure 3: The relation between climate change and the types of environmental refugees



101 Kolmannskog 2008.

102 IASC Working Group 2008.

103 Kraler, Noack & Cernei 2011, p. 35.

104 For an in depth analysis see for example Dam-de Jong 2013.

2.2.1 Sudden-onset disasters

In line with the UNISDR and the definition of the Nansen Initiative, in this research a disaster is understood as ‘serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources’.¹⁰⁵ In other words, widespread loss of life alone is not enough – there must be an additional social impact to invoke protection obligations. This definition includes series of events resulting in widespread suffering and distress, as environmentally induced migration is often driven by smaller, frequent or repetitive events. The common denominator is that other factors, such as socio-economic factors only have secondary influence on the decision to migrate. This research does not opt for a limitation to natural disasters as this refers to a difference in origin (only those that occur naturally) that is not reflected in the need for protection. Those affected by man-made disasters are in a similar need for protection (e.g. climate change increases the likeliness of floods) as those that are struck by the same events that occur naturally. On top of this, even natural disasters are affected by human actions. For example, their trigger (or increased magnitude and frequency) can be caused by social or economic factors such as land use change and the severity of their impacts is often linked to increased exposure of affected populations because of natural population growth in critical areas.¹⁰⁶ However, the different nature of the disaster natural or man-made may have an effect on the legal protection possibilities (e.g. for man-made disasters the obligation to cause no harm may provide extra protection.¹⁰⁷ Therefore, in this research whenever the nature of the disaster is relevant for the legal protection regimes, this differentiation will be made within the relevant legal framework.

Sudden-onset disaster induced displacement is often a form of acute displacement, as sudden-onset disasters often result in the destruction of housing that, in turn, invariably results in the large-scale displacement. In many settings, those displaced choose to return home once conditions so permit.¹⁰⁸ The causality and the element of force are relatively easy to establish for migration due to big natural disasters. The swiftness of the disaster may lead to evacuations before or after the event. Depending on the magnitude of damage to physical infrastructure, they may result in a pulse of distress migration out of the affected region. However, for (a series of) small disasters causing displacement, the causality and the element of force are much harder

105 See The Nansen Initiative Definitions, available at <https://www.nanseninitiative.org/secretariat>.

106 Renaud et al. 2011, p. e18.

107 See § 7.4.1.

108 Scott 2009, p. 27.

to proof. Case studies show that the actual impact of a disaster – and therefore its potential to trigger population movements – will depend on a combination of three elements: (1) the disaster hazard – its intensity, scope and frequency, (2) the vulnerability of affected people to such an event and (3) the capacities of those affected to cope with it.¹⁰⁹ This non-linear causality makes it harder to determine in which situations migration must be considered forced and caused by the disaster. Especially for migration caused by a series of events, it will be hard to differentiate between voluntary (or economic) migration and forced migration, as a series of events will lead to a tipping point that is dependent on many factors and many people leave before their existence is jeopardized and/or their quality of life is seriously affected.

There is growing evidence that at least the number of people displaced by climate-related sudden-onset disasters is very substantial.¹¹⁰ Much of the sudden-onset disaster displacement is temporary and short distance. This type of displacement is often a form of acute displacement as sudden-onset disasters often result in the destruction of housing that, in turn, invariably results in the large-scale displacement. In many settings, those displaced choose to return home once conditions so permit.¹¹¹ Whether this is possible depends on both States as well as on affected populations capacity and resources to rebuild livelihoods in the affected areas. The effectiveness and success of response, recovery and rehabilitation efforts largely determine how long people are displaced. If disaster response after sudden-onset disasters is slow and ineffective, this limits the range of choices about people's mobility and people cannot return to the affected area. These people can become permanently displaced.¹¹² In this research, those displaced by sudden-onset disasters are considered forcibly displaced if they are displaced inside or outside their country and they cannot return to their place of origin for factual or legal reasons or cannot reasonably be expected to do so because of a lack of security or sustainable livelihoods there.

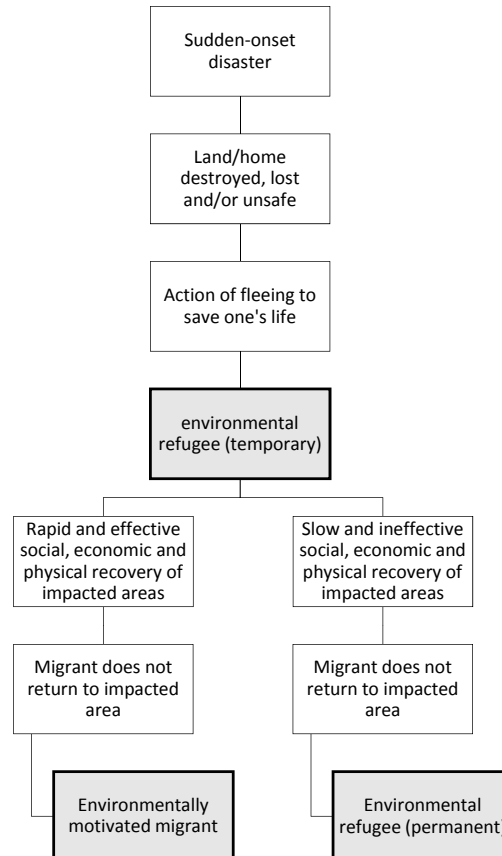
109 See in the context of climate-related hazards: Ginnetti 2015.

110 See for example Gemenne, Zickgraf & Ionesco 2015.

111 Scott 2009, p. 27.

112 Kolmannskog, Skretteberg 2009, p. 7.

Figure 4: Schematic overview of other impacts on the status of those displaced by sudden-onset disasters¹¹³



2.2.2 Slow-onset disaster

Slow onset disasters, such as drought and desertification, land and soil degradation, water resources degradation, pest infestations, and sea level rise will lead to a tipping point at which people's lives and livelihoods come under such serious threat that they have no choice but to leave their homes. The nature of the migration is linked to the degree of severity of the environmental degradation and can only be established on a case-by-case basis. It is virtually impossible to determine exactly at which point people's lives and livelihoods come under such serious threat that the migration should be considered

¹¹³ Based on: Renaud et al. 2011, p. e16.

forced.¹¹⁴ The causes may unfold over months or years and may affect vast regions. The common response to slow-onset degradation is to adapt and possibly to supplement family income by (temporal) labour migration. In this situation, identifying the root cause for migration will be difficult and can only be achieved through a process of interviews with the migrants and cross checking with people living in or knowledgeable about the place of origin of the migrants.¹¹⁵ Renaud et al. rightfully pointed out that: 'Environmental factors can be the dominant push factor, in which case migrants should be considered environmental migrants. However, in many cases, the environmental factors might not be significantly separated from other factors (e.g., social, economic, cultural or political), in which case migrants should not be considered environmental migrants.'¹¹⁶ Therefore, one of the main problems for the protection of those displaced by slow-onset disasters is that it is extremely difficult to establish to what extent environmental degradation was the dominant decision to migrate. For example, how do you draw the line between someone moving because his plot of land, and thus his harvest, is too small, and someone moving because a drought reduced his revenue due to crop failure?¹¹⁷ As such, the causality between the environmental degradation and the migration is often hard to establish.

Also the element of force is hard to construct. As Kälin sums it up: 'If areas start to become uninhabitable [...] during a first phase, leave voluntarily to find better (economic) opportunities elsewhere within or outside their country, but later movements may amount to forced displacement and become permanent as inhabitants of such regions no longer have a choice but to leave permanently.'¹¹⁸ Slow-onset events allow people from degrading environments some room to negotiate when, where, and how they migrate. As a result of this 'freedom of decision', this type of migration is often considered a voluntary migration.¹¹⁹ Only in the latest stage of degradation, the freedom of decision no longer exists. It is very difficult to decide when migration can be considered forced. The extent to which this type of migration is forced can only be decided

114 See for example Ferris 2012a 'It is likely that most of those who migrate will be individuals or families who decide that conditions are such that it is time to leave their homes and communities. They will make decisions on the basis of the perceived risk of staying where they are, analysis of possibilities for settlement elsewhere, and available resources for making the move. However, other families in more or less the same situation may decide that they do not have enough resources to move on their own and need to wait, despite hardship, until government assistance for moving becomes available. People taking the initiative to move are usually more skilled, stronger, younger and healthier than those who stay behind. They have assets and opportunities while those who remain are often more vulnerable, making resettlement efforts more difficult.'

115 Renaud et al. 2011, p. e21.

116 Renaud et al. 2011, p. e21.

117 Kolmannskog, Skretteberg 2009, p. 25 and 26.

118 Kälin 2008, p. 4.

119 Kolmannskog 2008, executive summary.

on a case by case basis. As Ferris pointed out, this will in general be extremely difficult, as it requires detailed knowledge of the place of origin of the migrants. Ferris raises the conceptual questions: How do you tell and who decides when land is uninhabitable? And is this permanent? She pointed out that slow-onset degradation is often not just a one-way end process, but for example drought may be very severe in some years and not in others. She also pointed out that sometimes an area of land may be uninhabitable for the current population, but maybe if there were few people it would be okay.¹²⁰

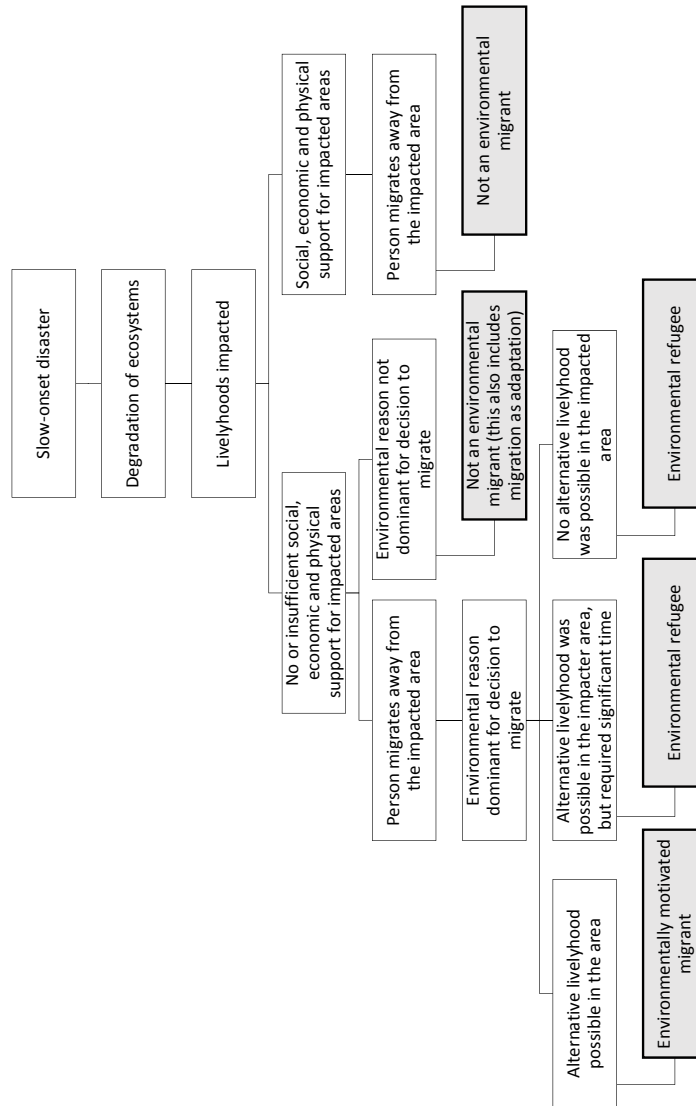
Despite these legal difficulties, the slow onset nature of the environmental degradation does provide an opportunity which does not usually exist in other instances of mass displacement: to plan for responses, instead of having to rely on remedial instruments as in the case of flight. As is pointed out by Farquhar 'there will be significant benefits for both origin and destination communities if the migration of increasing numbers of people can be "managed progressively through a co-ordinated approach." [...] Schemes which work on the model of pre-emptive, voluntary migration have a much higher chance of success than delaying action until the mass resettlement of communities becomes the only option.'¹²¹ The gradual character also allows for adaptation including State measures, such as flood defence infrastructures.¹²² New legal opportunities should be sought to benefit from this possibility of future planning.

120 Anderson 2012.

121 Farquhar 2015, p. 42.

122 Kolmannskog 2008.

Figure 5: Schematic overview of other impacts on the status of those displaced by slow-onset disasters¹²³



Loss of State territory

The most frequently quoted example in the literature of climate induced migration, is that of the small island development States (hereafter: SIDS) in particular the small Pacific island States of Kiribati and Tuvalu as they are considered the showcase and will be affected in an early stage by sea-level

123 Based on: Renaud et al. 2011, p. e16.

rise. It is widely acknowledged that the people on these SIDS are affected by climate change. In 2009, the Secretary-General acknowledged that

‘in the case of small island developing States, the adverse impacts of climate change are already increasing the rate of domestic migration and relocation, with people from rural areas and outlying islands moving to urban centres as they lose their livelihoods and lands owing to natural disasters and sea-level rise. This migration is placing enormous strains on food, housing, education, health, and water supplies, as recipient communities struggle to accommodate the number of people migrating.’¹²⁴

Also several declarations on the impacts have been made by the inhabitants of these islands themselves.¹²⁵

States can be affected in several ways: (a) States can totally disappear, mostly island-States, (b) States can lose a significant proportion of their territory, leaving only such territory as will be unable to support the existing population, and (c) States can lose a significant proportion of their territory, with serious implications for the existing population.¹²⁶ Obviously, sea level rise is a slow process. In the initial phases, people will migrate to other islands belonging to the same country or abroad in search of better opportunities. Later, such movements can turn into forced displacement because areas of origin could become uninhabitable and in extreme cases the remaining territory of affected States could no longer accommodate the whole population or would disappear entirely, rendering return impossible. Obviously, such persons will be in need of some form of international protection.¹²⁷ As Mc Adam pointed out, the move is likely to take place a long time before the islands are submerged.¹²⁸ This leads to the conceptual problem to determine when is the point at which people are considered to leave forcedly.

Due to the slow-onset character, there is a timeframe in which the (international) community can respond. Mobility issues associated with the impacts of sea-level rise require both timely and proactive interventions, and pertinent reactive responses. Legal and other measures are needed to help people: (a) remain *in situ*, where this is possible and desirable, (b) move elsewhere, in anticipation of harm (including immigration access for early migrants), and (c) be protected and assisted if they are displaced. In some extreme cases, such

124 UNGA UN Doc A/64/350, Report of the Secretary-General on Climate change and its possible security implications, 11 September 2009.

125 See for example, Loughry, McAdam 2008, p. 51.

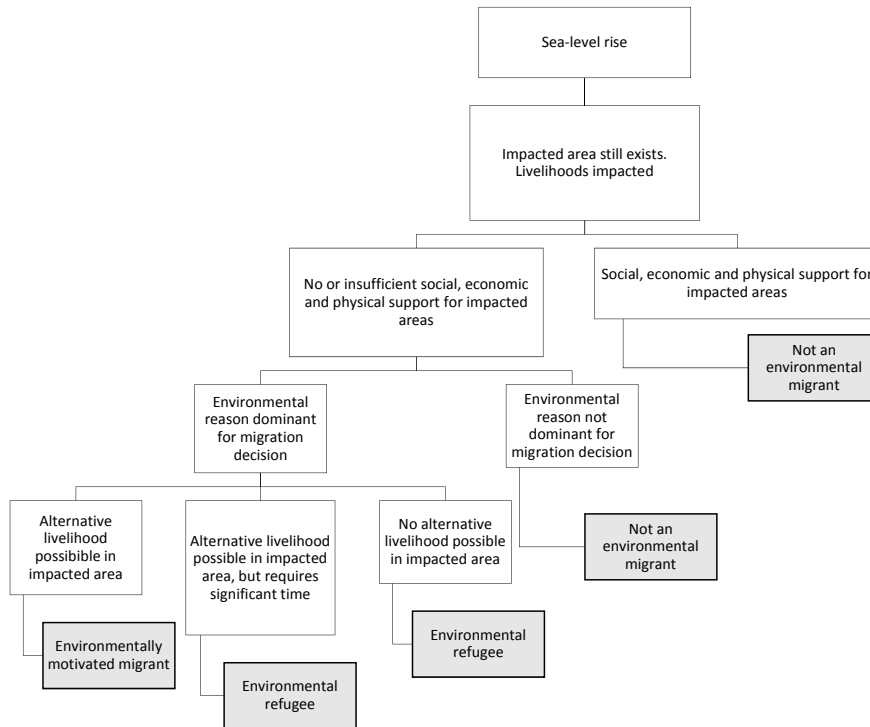
126 UN Commission on Human Rights, E/CN.4/Sub.2/AC.4/2004/CRP.1, Other Matters. The Human Rights Situation of Indigenous Peoples in States and Territories Threatened with Extinction for Environmental Reasons, 13 July 2004.

127 Kälin 2008, p. 4 and 5.

128 McAdam 2010, p. 4.

as in the case of the low-lying SIDS and potential statelessness, there may be a need for a cross-border relocation.¹²⁹

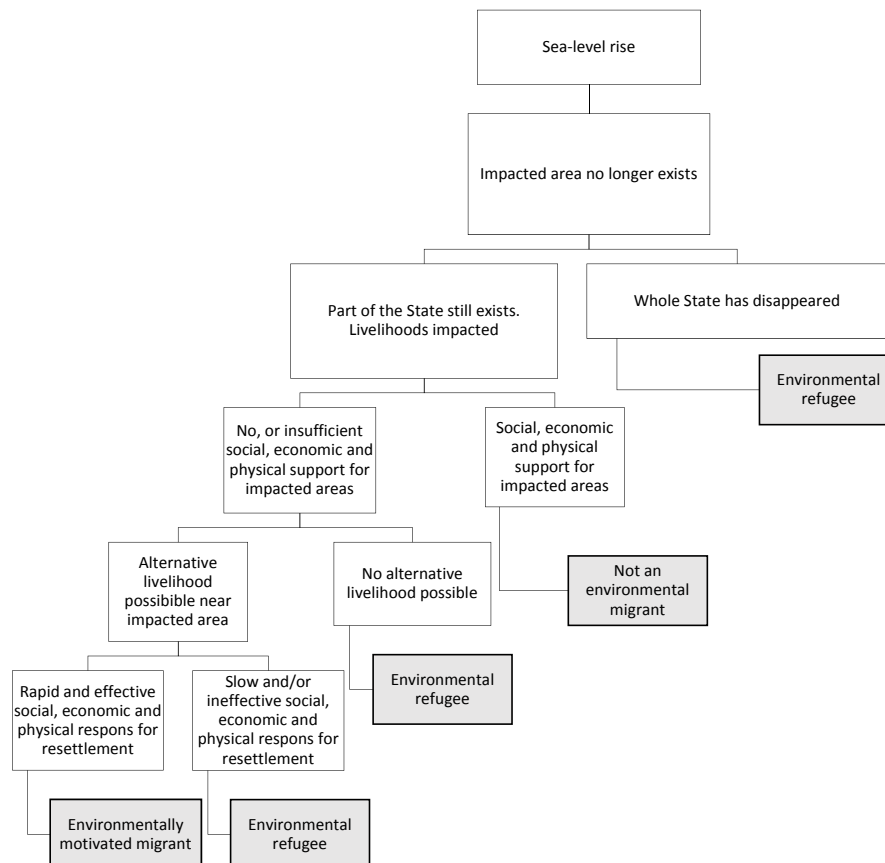
Figure 6a: Sea-level rise – Impacted area still exists¹³⁰



129 Kolmannskog, Skretteberg 2009, p. 15.

130 Inspired by the overview of Renaud on disaster related displacement Renaud et al. 2011, p. e16.

Figure 6b: Sea-level rise – impacted area no longer exists



2.2.3 Armed conflict

Environmental degradation such as drought may have consequences for conflict, for example by making resources scarcer and increasing competition.¹³¹ Conflict may also arise over resource abundance.¹³² These conflicts (where environmental degradation is a root cause) trigger forced migration in an indirect way. Initially the environmental change results in violent conflict, and only in a second phase are the affected forced to flee due to the violence.

¹³¹ See for example Rakhi et al. 2014, p. 19 and Rüttinger et al. 2015.

¹³² For example disputes over maritime boundaries, competition in the polar regions High Representative and the European Commission to the European Council 2008, p. 4.

Early literature on this topic, suggested that climate change was a growing cause of conflict over diminishing resources that led to population displacement that would become more pronounced as the effects of climate change worsened.¹³³ However, the critics of this type of environmentally forced migration, suggested there is little evidence of direct causality between environmental factors and armed conflict.¹³⁴ A lack of hard evidence led some of these authors to conclude that the pervasiveness of security concerns in relation to environmentally-related migration is heavily influenced by political considerations.¹³⁵ This image became more nuanced in time. In 2007 the Secretary-General, warned about the destabilising effect of environmental change: 'Environmental degradation has the potential to destabilize already conflict-prone regions, especially when compounded by inequitable access or politicization of access to scarce resources'.¹³⁶ Kolmannskog also argued that 'The environment is only one of several inter-connected causes of conflict and is rarely considered to be the most decisive factor'.¹³⁷ As Kron pointed out, the topic has gained interest in the Security Council. 'In recent years, there has been a trend towards addressing conflict prevention and root causes of conflict, including environmental drivers. [...] several members underlined the way that climate change can serve to aggravate existing security factors and act as a 'threat multiplier'. In addition, the UN Secretary-General has noted that climate change is an integrated part of his conflict prevention agenda.'¹³⁸

Another paradigm is that environmentally forced migration may be a cause for conflict. Several climate and security reports consider migration to be one of the most worrisome aspects of climate change. The IOM concludes that

'Rapid mass population movements have the potential to negatively affect well-being, stability and safety in the receiving communities by modifying existing socioeconomic and cultural balances. Receiving communities often suffer the arrival of newcomers as a burden, as the influx of the foreign population results in competition for scarce resources, services and income opportunities, potentially leading to impoverishment, tension and conflict.'¹³⁹

133 Saul 2009, p. 4

134 For example, Gleditsch 2015 and Black 2001, p. 8-10.

135 Mence 2013, p. 9.

136 Secretary-General's statement at open Security Council debate on energy, security and climate, 17 April 2007, available at: <https://www.un.org/sg/en/content/sg/statement/2007-04-17/secretary-generals-statement-open-security-council-debate-energy>.

137 Kolmannskog 2008, p. 18.

138 Kron 2020, p. 251 and 252. See also p. 252-258 for a more extensive overview of considerations of the UNSC on the link between climate change international security.

139 Hoffmann, Guadagno & Quesada 2013, p. 89 and see also Saul 2009, p. 5 who argues that 'Mass displacement carries risks of internal and inter-State conflict, including due to political sensitivities about migration control, the inflammation of ethno-centric political agendas, and increasing isolationism. Here there is a two-fold risk of radicalisation: first, within communities faced with receiving large numbers of 'climate refugees' and secondly, within displaced communities frustrated by the unwillingness of the international community

Kolmannskog pointed out with greater accuracy that, 'The conflict potential of migration depends to a significant degree on how the government and people in the place of transit, destination or return respond.'¹⁴⁰ It is too early however to draw general conclusions. For example Christiansen pointed out that:

'Although research on migration pressures and environmental stress as a source of conflict has improved the understanding of specific situations. It has not provided clear general conclusions. In particular, the potential linkages and interplay between climate change and security issues are mediated by a number of contextual factors – including governance, institutions, access to information and external resources and availability of alternatives.'¹⁴¹

A third paradigm is that environmental degradation may simply coincide with conflict. For example, when a natural hazard strikes a community that is affected by conflict, it tends to exacerbate the pre-existing inequalities and tensions, impacting vulnerable parts of the population in a disproportionate manner. As a rule, sudden disasters tend to heighten dissatisfaction with the ruling government. Weak and/or unsatisfactory State structures are exposed during and after disasters, which may eventually lead to conflict.¹⁴²

2.2.4 Environmental contamination

It is generally accepted that industrial or technological contamination can cause environmental degradation to such an extent that people are forced to migrate. Environmental contamination includes: accident release (occurring during the production, transportation or handling of hazardous chemical substances), (chemical, mine or nuclear) explosions, (chemical or atmosphere) pollution (degradation of one or more aspects in the environment by noxious industrial, chemical or biological wastes, from debris or man-made products and from mismanagement of natural and environmental resources), acid rain and sudden collapses of large buildings and constructions such as dams.¹⁴³ Depending on the type and severity of the pollution, it can unintentionally produce migration both temporary or permanent and acute or gradual. Some types

to adequately respond to their plight. Dissatisfaction may be aggravated by concerns that those who bear a disproportionately large burden of the impact of climate change – developing countries – are not the major historical source of carbon emissions. Any failure by developed or relatively developed countries to responsibly respond to climate-induced displacement may generate further tensions.'

140 Kolmannskog 2008, p. 21.

141 Christiansen 2016.

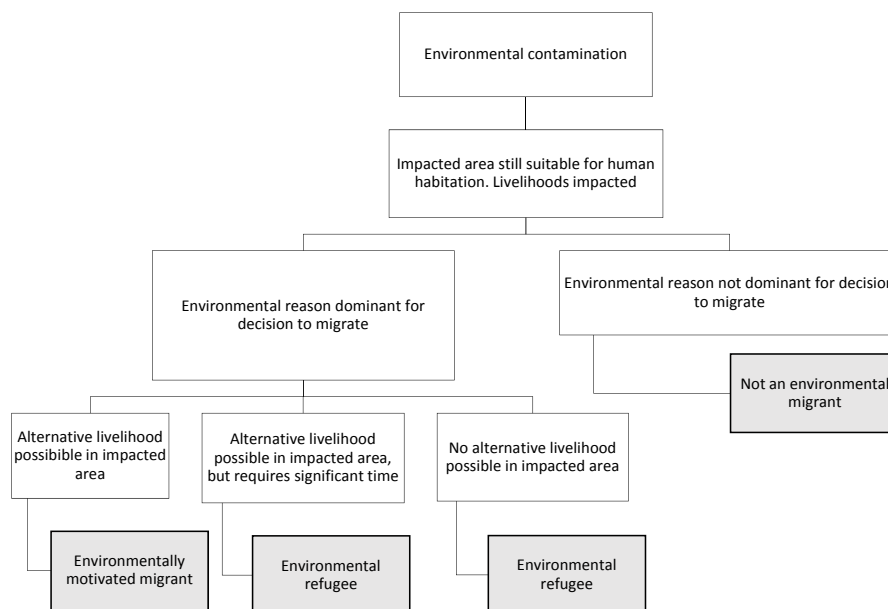
142 Kolmannskog 2008, p. 19.

143 Morel 2014, p. 52.

of sudden-onset contamination cause permanent migration (e.g. nuclear accidents¹⁴⁴) while others cause temporary migration (e.g. an accident with chemical materials during transport). As with other types of sudden-onset disasters,¹⁴⁵ causation and force are relatively easy to establish.

For slow-onset contamination, such as soil, air and water pollution, the pollution builds over a longer period of time and people have the possibility to adapt to the situation or to plan their migration. Therefore, in such situations it is hard to determine if migration is forced and/or caused by environmental degradation.

Figure 7a: Environmental contamination - Impacted area still suitable for human habitation¹⁴⁶

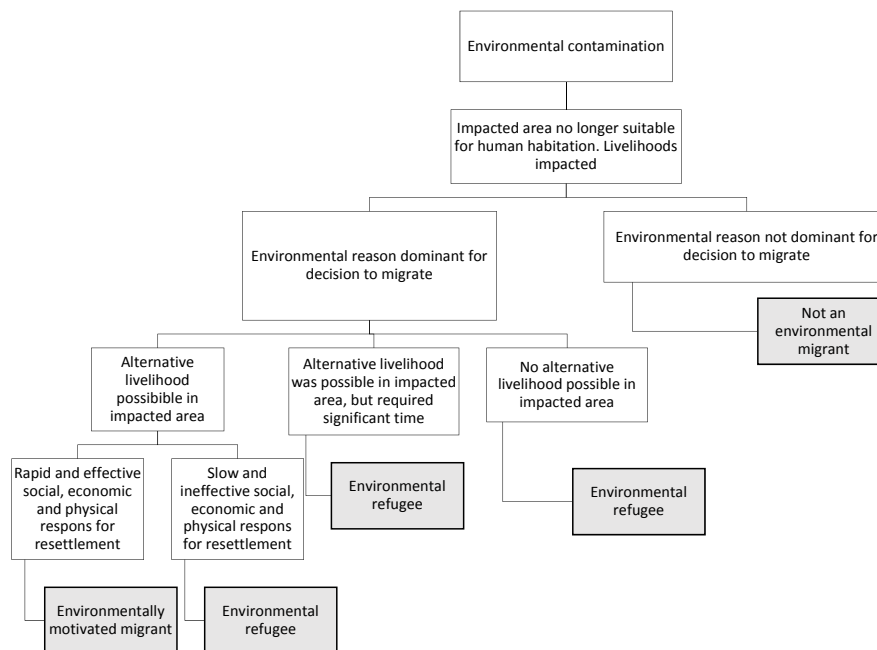


144 Examples are the nuclear accident at Chernobyl, in Ukraine former USSR in 1986, and the Fukushima Daiichi nuclear power plant accident triggered by an earthquake and tsunami in March 2011.

145 See § 2.2.1.

146 Inspired by the overview of Renaud on disaster related displacement Renaud et al. 2011, p. e16.

Figure 7b: Environmental contamination - Impacted area no longer suitable for human habitation



2.2.5 Planned resettlement

Planned resettlement covers different types of planned relocation. It includes people who are displaced by intentional land use changes e.g. development projects¹⁴⁷ such as dam construction,¹⁴⁸ transport infrastructure development, as well as conservation programs, such as wildlife re-introduction schemes and the creation of game parks and bio-diversity zones, also often oust communities. Planned resettlement also includes resettling people from hazard prone areas and designating prohibited areas for settlement because of hazard/disaster risk, or preventing return to highly vulnerable locations after an extreme hazard event.¹⁴⁹ The big difference between planned resettlement and other types of environmentally forced migration is that the timing of displacement is fixed and planned.

147 Defined by EACH-FOR as 'people who are intentionally relocated or resettled due to a planned land use change' EACH-FOR 2008. This type of displacement is also referred to as 'Development Induced Displacement' and DID or 'development-forced displacement and resettlement' and DFDR.

148 See Stanley 2004.

149 Zetter 2011, p. 14, 52 and 53.

Development projects, such as natural resource extraction, urban renewal or development programs, industrial parks, and infrastructure projects (such as highways, bridges, irrigation canals, and dams) often involve the introduction of direct control by a developer over land previously occupied by another group. All development projects require land, often in large quantity. One common consequence of such projects is the upheaval and displacement of communities. Conservation programs, such as wildlife re-introduction schemes and the creation of game parks and bio-diversity zones, also often oust communities. Unlike for refugees and IDPs, there are no institutions or publications dedicated to tracking overall development-induced displacement and resettlement. Therefore, no precise data exists on the numbers of persons affected by development induced displacement throughout the world.¹⁵⁰

As development projects commonly involve environmental change or degradation at a particular locality to an extent that the population in that locality can no longer reside in their usual place of residence, the migration can be qualified as forced migration.¹⁵¹ As the environment is often degraded for the long term, the migration is often permanent. The consequences of development induced displacement depend largely on how resettlement is planned, negotiated, and carried out. There is a legally liable entity for indemnification of the displaced. As such, the issues surrounding assistance, relocation and protection of such displaced persons differs greatly from the issues surrounding displacement of the other types of environmentally forced migration. However, even though there is a legal liable entity for indemnification, many studies show that the planning process is often not consultative and compensations frequently do not compensate actual losses.¹⁵² Development induced displacement often affects the economically, politically, and socially most vulnerable and marginalized groups in a population.¹⁵³ Sometimes the resettlement turns into forced evictions. The Committee on Economic, Social and Cultural Rights (hereafter: CESCR) defines forced evictions as ‘the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.’¹⁵⁴

For planned resettlement from hazard prone areas, it is obvious that the displacement is forced. People may have to be (forcibly) evacuated and displaced from their homes and prohibited from returning there and be relocated to safe areas. As return may not be possible, the displacement may be permanent.¹⁵⁵ Sustainability of the solution chosen is important to avoid permanent

150 Stanley 2004, introduction.

151 EACH-FOR 2008, preliminary findings.

152 Kraler, Noack & Cernei 2011, p. 29.

153 Stanley 2004, 4.2 Varying levels of risk for indigenous peoples, women, and other groups.

154 CESCR, General Comment No. 7: The right to adequate housing Art. 111: Forced evictions, 20 May 1997, at para 3.

155 Kälin 2008, p. 2 and 3 at para iv.

and protracted displacement situations or even return to high risk zones exposing the lives of returnees to a high risk incompatibly with human rights standards.¹⁵⁶

2.3 APPROACHES TO ENVIRONMENTAL REFUGEES

In the legal literature, an element that has broadly been overlooked, is the fact that the topic of environmental refugees is often approached as either a human rights, a security, or a responsibility issue. Each of these approaches is rooted in a different disciplinary background and leads to a different justification for an engagement of the international community. As the current debate is often organised through channels with the same objective and the same approach, consequences of opting for one or the other of those approaches (apart from listing their benefits and disadvantages) are not considered.

This research will demonstrate that the difference in approaches is a highly relevant difference that should be considered by legal practitioners (and policy makers), as the approach determines the expectations that one holds from the law and provides a framework in which complementary norms are bargained. A different approach thus leads to a different logical solution and therefore preselects legal outcomes (see part II). On top of that, neither the rights-based, nor the security, nor the responsibility approach are on themselves sufficient to create a solution for the complex and global character of the phenomenon of environmentally forced migration (see part III). This research argues for a combined approach that is supported by the individual strengths of the approaches (see part IV). This paragraph describes the different approaches.

2.3.1 The rights-based approach

It has been broadly accepted that environmental degradation has implications for the full enjoyment of human rights. On several occasions, the International Court of Justice (hereafter: ICJ) and regional human rights courts have confirmed that environmental degradation can lead to a violation of human rights (see part II). The report A/HRC/10/61¹⁵⁷ by the Office of the United Nations High Commissioner of Human Rights (OHCHR) contained a detailed section focused on the impact of climate change on migration. It states that the effects of climate change will fall hardest on the rights of those people who are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability. On the regional level,

¹⁵⁶ *Ibid.*, p. 5.

¹⁵⁷ UNGA UN Doc A/HRC/10/61, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 January 2009.

the European Parliament conducted a study in 2011 on environmentally induced migration and one of the key findings of this report is that existing policies could be reviewed and additional mechanisms should be considered which should be rooted in a human rights based approach.¹⁵⁸

In the context of this research, the rights-based approach considers environmentally forced migration from an anthropocentric point of view, addressing the adverse effects of environmental degradation on human beings. The Rights-based approach is based on the idea that every human being is both a person and a rights-holder, empowered to claim the rights he or she is entitled to against duty-bearers. The duty-bearers are primarily the home States of the people affected, however as the most impacted States by environmental degradation are generally developing States, this research also explores duties for third States.¹⁵⁹ The strongpoint of the approach is that it directly addresses environmental impacts on the life, health, private life, and property of individual humans, rather than on other states or the environment in general.¹⁶⁰ It also prescribes special responsibility for the protection of vulnerable populations and minorities, including women, children and indigenous groups, as environmentally forced displacement is considered to exacerbate these vulnerabilities. The (oftentimes human) rights-based approach offers legally binding and enforceable entitlements and rights for individuals, even when national laws lack these standards. However, most of the human rights that are affected by environmentally forced migration have notoriously weak protection regimes. Therefore, the rights narrative often relates to a broader humanitarian discourse, conceiving the governance of environmental migration as essentially a question of international solidarity.¹⁶¹

2.3.2 The security approach

In general, the security approach is based on the presumption that population displacement and involuntary migration are considered threats from uncoordinated coping that could increase the risk of domestic conflict as well as have international repercussions.¹⁶² The recent Global Risks Report 2019 from the World Economic Forum identifies extreme weather events and the failure of climate change mitigation and adaptation as the two most likely risks the world is facing, and ranks them second and third after nuclear war in terms of negative impact.¹⁶³ On 17 April 2007, the Security Council held its first-ever

158 Kraler, Noack & Cernei 2011.

159 See § 10.3.

160 Boyle 2012 or Frigo 2011, p. 6.

161 Jodoin, Lofts 2013, p. 6.

162 UNGA UN Doc A/64/350, Report of the Secretary-General on Climate change and its possible security implications, 11 September 2009, para 16.

163 World Economic Forum 2019, p. 5.

debate on the impact of climate change on peace and security. Several recognitions of climate change as a threat to peace have followed. In the reports on climate and security, climate change was frequently described as a 'threat multiplier' for conflict. In 2009, the UN General Assembly adopted a resolution on 'Climate Change and Its Possible Security Implications' (A/64/350). The report summarizes that 'climate change is often viewed as a "threat multiplier", exacerbating threats caused by persistent poverty, weak institutions for resource management and conflict resolution, fault lines and a history of mistrust between communities and nations, and inadequate access to information or resources.'¹⁶⁴ According to the resolution, forced displacement due to climate change can lead to localized conflicts or spill over into the international arena in the form of rising tensions or even resource wars.¹⁶⁵ The report also identifies several 'threat minimizers', of which migration is explicitly mentioned under the chapter on coping and security.¹⁶⁶ Recently, in January 2019, the UN Security Council hosted a debate on the risks relating to climate security.¹⁶⁷ In the run up to this debate, the UNSC has recognized on various occasions, the threats that climate change and related environmental stresses, such as land degradation and desertification, pose to international peace.¹⁶⁸

The traditional security approach is based on the assumption that it is a State's interest to act early in order to prevent future political instability, and to cooperate in order to avoid illegal migration.¹⁶⁹ As Mayer puts it – the strength of the security narrative lies in the idea that – 'states should cooperate, because this is in their own, well-understood interest, defined mostly on utilitarian grounds.'¹⁷⁰ It focusses on the interest of States rather than on the

164 UNGA UN Doc A/64/350, Report of the Secretary-General on Climate change and its possible security implications, 11 September 2009, summary.

165 *Ibid.*, para 16.

166 *Ibid.*, para 13.

167 UNSC UN Doc S/PV.8451, Maintenance of international peace and security. Addressing the impacts of climate-related disasters on international peace and security, 25 January 2019, or before that UNSC UN Doc SC/13417, Addressing Security Council, Pacific Island President Calls Climate Change Defining Issue of Next Century, Calls for Special Representative on Issue, 11 July 2018.

168 The Planetary Security Initiative gave a short overview 'In March 2017, the UNSC recognised climate change for the first time as contributor in a conflict-prone region, Lake Chad Resolution 2349. In January a presidential statement was released in which climate change was recognised as a risk factor in West Africa and the Sahel. Subsequently, in March 2018 the UNSC adopted Resolution 2408 regarding climate change as a factor driving conflict in Somalia. Most recently, in June 2018, climate change was included in the extension of the UN MINUSMA mission mandate that operates in Mali Resolution 2423. The agreed language of these resolutions refers to the adverse effects of climate change as a factor that contributes to destabilization, and the importance of adequate risk assessment and analysis in this regard.' Planetary Security Initiative 2018.

169 Mayer 2016, p. 193.

170 *Ibid.*, p. 193.

ethical duties of States. As such developed States may be convinced that it is in their best interest to act now (by supporting affected States) instead of facing conflict and insecurity or receiving floods of migrants in the future. This creates possibilities for early measures such as mitigation and adaptation and disaster risk reduction. Another important strongpoint of the security approach is that the approach offers an integrated approach that encompasses for example foreign policy, diplomacy, trade and (sustainable) development cooperation. It also involves a new stakeholder: the military. The military has a broad field experience with the effects of climate change on security and with dealing with uncertainties by using scenarios in their planning processes. It also possesses of (non-public) detailed strategic intelligence. This approach can therefore offer various non-legal benefits.

A weakness of the security approach is that a strong focus on mass-migration to developed countries may incite western governments to close their borders for migration. Under the security approach, developed countries often perceive migration as 'voluntary and therefore as not compelling the 'international community' to respond [...]. The assumption here is that States can respond as and when they see fit through domestic immigration policy.¹⁷¹ This approach may therefore be beneficial for the prevention of migration, but may be harmful for those forced to flee. This fear is reflected by many affected developing countries and especially by the SIDS. Affected States argue that it is not their interest that is central in the discussion, but the interest of the polluting States.¹⁷² In a response to this lack of attention for the affected people, some have tried to reframe environmentally forced migration as a 'human security' issue. This approach also regards the interest of those affected and argues that basic human rights support global peace and security. The human security approach focusses on current and emerging threats to the security and well-being of individuals and communities. This approach aims to be people-centred, comprehensive, context-specific and preventive and addresses the root causes behind the threats.¹⁷³

From a legal perspective, the security approach mainly focusses on under what conditions third State nationals will be allowed on a State's territory. The topic of environmental degradation is of growing importance for this field. In 2018, following on from the 2016 UN Declaration for Refugees and Migrants, many States have adopted two UN General Assembly Compacts, one on migrants and the other on refugees. The Global Compact for Safe and Orderly

171 McAdam 2012, p. 212.

172 As is pointed out in Voigt 2009, p. 294, the High Representative and the EU Commission stated in this context that Climate change impacts will fuel the politics of resentment between those most responsible for climate change and those most affected by it. Impacts of climate mitigation policies or policy failures will thus drive political tension nationally and internationally.

173 See for a more detailed explanation for example McAdam, Saul 2008, Elliott et al. 2012 or Commission on Human Security 2003.

Migration¹⁷⁴ dedicates a paragraph to environmentally induced migration.¹⁷⁵ The Global Compact on Refugees¹⁷⁶ excludes environmental refugees from its scope, but still acknowledges environmental degradation as a driver of migration. These and other instruments on migration will be discussed in parts II and III.

2.3.3 The responsibility approach

The link between environmental degradation and migration is complex and the reasons for migration are often multi-causal. However, a growing number of case studies ties ever stronger links between pollution, environmental degradation and migration. Therefore, preventing pollution, can prevent environmentally forced migration as it addresses (one of the) root cause(s) of migration. Moreover, while countries of the global north are primarily responsible for the pollution, the countries that will suffer most from it are situated in the global south. This reflects one of the most fundamental issues related to man-made environmental degradation that has its effects across borders (such as climate change): accountability. It is plain that cross-border pollution such as climate change poses significant challenges to international law as it transcends the classical structure of an international legal order that divides our planet into territorially defined areas over which States are said to have sovereignty. Issues associated with climate change permeate national boundaries: emissions or actions in one State will have adverse consequences in another, and in areas over which States have no jurisdiction or sovereignty.¹⁷⁷

The responsibility approach defines special obligations to prevent trans-boundary harm. The law of State responsibility determines the consequences of a State's failure to comply with its international obligations. In general, it requires a State that breaches an international obligation to cease the violation and provide reparations for any harm caused to another State.¹⁷⁸ The international obligations for combating or preventing pollution of the environment are rooted in international environmental law, with broadly recognised principles such as the "no harm" principle, polluters pay principle and the precautionary principle. The responsibility approach calls for solutions based on better accountability and environmental protection standards. A strongpoint

174 UNGA UN Doc A/RES/73/195, Resolution adopted by the General Assembly on 19 December 2018. 73/195. Global Compact for Safe, Orderly and Regular Migration, 11 January 2019.

175 See § 11.3.1.

176 UNGA UN Doc A/73/12, Report of the United Nations High Commissioner for Refugees. Part II Global compact on refugees, 13 September 2018.

177 Pachauri et al. 2014.

178 Shelton, Kiss 2007, p. 19.

of the responsibility approach is that it shifts the debate from protection of migrants to mitigation and compensatory remedies to prevent migration. It also carries a moral weight, as developed countries are causing pollution, which provides the opportunity to leverage funding and assistance for the affected countries.

Within the UNFCCC and its subsequent Conferences of Parties (hereafter: COPs), the connection between climate change and human mobility is increasingly acknowledged. Even though, currently it is generally considered that the UNFCCC does not contain primary obligations that could lead to State responsibility,¹⁷⁹ it does reflect in its preamble that States 'have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.'¹⁸⁰ In the Conference of Parties of Cancún it was also explicitly acknowledged that 'owing to historical responsibility, developed country Parties must take the lead in combatting climate change and the effects thereof.' A similar responsibility for support can be found in the Sustainable Development Goals¹⁸¹ that also cover environmentally forced migration.¹⁸² Responsibility therefore covers a broader spectrum than legal liability and responsibility. It also covers questions of State support and moral obligation.

2.4 CONCLUSION

The complex character of the phenomenon of environmentally forced displacement requires systematic analyses. Based on the typology and the approaches the next chapters will provide systematic analyses of the legal aspects of environmentally forced migration in order to deduce to what extent the current international frameworks offer adequate protection¹⁸³ (part II), to what extent current regimes can be interpreted to better protect environmental refugees (part III) and how the different approaches can be combined to enhance protection possibilities (part IV).

179 See § 7.3.1 primary obligations under the UNFCCC.

180 Voigt 2008, p. 3 and 4.

181 UNGA UN Doc A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015. Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015

182 See § 7.6.

183 Adequate protection is understood in this study as the situation in which people can have a life in dignity and can enjoy the core of their human rights (such as a right to life, food and housing).

Figure 8: An overview of approaches for environmental refugees

