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CLIMATE CHANGE AND MIGRATION:  
A CHALLENGE FOR THE 21<sup>ST</sup> CENTURY

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## INTRODUCTION

From 2008 to 2016 the number of internally displaced people due to disasters has reached 227.6 million<sup>1</sup>. Throughout the year 2017 the average has touched 18.8 million; here, the main cause of displacement has been climate change: it triggered sudden natural disasters, such as floods and storms, provoking respectively 8.6 million and 7.5 million of internally displaced people, mostly in Asia and America<sup>2</sup>. Whereas, slower environmental changes, such as drought, have jeopardized the life of 686 million of people in Africa and Asia since 2008<sup>3</sup>.

Climate change manifests itself through heavy precipitations, melting ice, floods and droughts, rise of the sea level etc.; those risks threat the natural and human system, affecting the livelihood and wellbeing of people, especially those who are already experiencing different vulnerabilities. The effects of climate change may vary from reduction of water supplies and foods, land degradation to spread of diseases and damages to buildings. Forecasting how much and when climate change consequences will affect the human environment is difficult. What is to be indisputable is that one of the main impact of climate change in the future will be on human security, intensifying the number of displaced people throughout the 21<sup>st</sup> century. The lack of preparedness to natural disasters and the absence of sufficient resources in developing countries makes climate-induced risks increasing, affecting also human movement<sup>4</sup>.

Even though migration due to environmental changes has been part of the traditional human mobility patterns for centuries, the climate change-migration nexus is only a recent awareness. In 1990 the Intergovernmental Panel on Climate Change, one of the main protagonist of the international climate change regime, forecasted that human mobility will be the most affected scenario by such phenomenon. Nevertheless, the attention on the issue lasted briefly, and only

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<sup>1</sup> Migration Data Portal, “Environmental Migration”. See Migration Data Portal online.

<sup>2</sup> Norwegian Refugee Council and Internal Displacement Monitoring Centre, “Grid 2018: Global Report on Internal Displacement – 2018” (2018) at V.

<sup>3</sup> Ibid. at 80.

<sup>4</sup> Christopher B. Field et al., *Summary for policymakers* in Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change at 3-20.

recently international actors and political institutions started to promote a better knowledge of the climate change impact<sup>5</sup>.

Environment is considered a driver of migration, together with economic, social, political and demographic factors<sup>6</sup>. A debate rises whether the environment is merely one of the multiple factors that affects migration patterns, or it can be considered as a direct cause of human mobility. As result, collecting data in order to assess clearly the numbers of human displacement due to environmental changes becomes challenging<sup>7</sup>, together with an unclear conceptualization of climate migration at international level<sup>8</sup>. In addition, further discussions emerge on the right use of the terms “migrants” or “refugees” in the context of environmental changes<sup>9</sup>; a great part of climate migration is composed by internally displaced people, who decide to move voluntarily most of the time<sup>10</sup>. Whether they cross international borders will face a limited international legal protection<sup>11</sup>; it is evident that there is a “[...] lack of appropriate normative frameworks for such persons, but also to institutional gaps in responding to their protection and assistance needs”<sup>12</sup>.

The international community should accept a certain level of responsibility towards climate migrants, in particular in the organization of efficient response strategies<sup>13</sup>. People are more vulnerable to climate change effects whether the resources are limited and a planning of climate actions are absent, but

[e]xpanding opportunities for mobility can reduce vulnerability for such populations. Changes in migration patterns can be responses to both extreme

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<sup>5</sup> Frank Laczko and Christine Aghazarm, “Migration, Environment and Climate Change: assessing the evidence” (2015) at 13-14.

<sup>6</sup> Foresight, “Migration and Global Environmental Change: Final Project Report” (2011) at 43-53.

<sup>7</sup>Walter Kälin and Nina Schrepfer, « Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches » (2012) at 77.

<sup>8</sup> Ibid. at 28.

<sup>9</sup> Jane Mcadam, “Climate Change Displacement and International Law: Complementary Protection Standards” (2011) at 6.

<sup>10</sup> Walter Kälin, and Sanjula Weerasinghe, *Environmental Migrants and Global Governance: Facts, Policies and Practices* in McAuliffe, M. and M. Klein Solomon, *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration* (2017) at 2.

<sup>11</sup> See the outline of lecture given by Walter Kalin on “Climate Change and Population Movements”.

<sup>12</sup> Kalin and Schrepfer, at 43.

<sup>13</sup> Benoit, Mayer, “The international legal challenges of climate induced migration: proposal for an international legal framework” (2011) *Colorado Journal of International Environmental Law and Policy* vol. 22, (3) at 375.

weather events and longer-term climate variability and change, and migration can also be an effective adaptation strategy<sup>14</sup>.

This thesis will attempt to assess a great challenge for the 21<sup>st</sup> century, the climate-induced migration, which presents additional important issues: the lack of a clear conceptualization of the term, the consequently absence of an efficient legal and protection framework for the affected subjects, and the unwillingness of the international community to accept a sense of responsibility towards them. In addition, considerations on migration as a potential adaptation strategy, and other alternative response strategies will be provided.

In the first chapter, a general overview on the International Environmental Law will be useful to introduce the ongoing debate on the scope of the right to a decent environment, and the relationship between human rights and the environment. After assessing the legal and political framework of environmental rights, an historical excursus on the most important environmental Conferences will be presented. Therefore, further paragraphs will focus on the international climate change regime and its main actors: the Intergovernmental Panel on Climate Change and the United Nations Framework Conference on Climate Change, together with their important achievements in reducing climate change. Finally, adaptation and mitigation measures will be discussed as the most efficient strategies in tackling the climate change impact, mentioning the growing consideration of migration as adaptation in the international climate change agenda.

The second chapter will be devoted mainly to assess the climate change – migration nexus; after a brief presentation of important official documents on the climate change impact on human rights, its negative effect on human population will be provided. Since environmental degradation has been identified as one of the multiple factors of human mobility, the resultant migration patterns influenced by climate change are assessed. Specifically, the complex scenario which entails climate change, migration and conflicts will be deepened. The central part of the chapter will be devoted to analyse the difficult conceptualization of climate migration and the consequently legal and protection lacks. Also alternative response

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<sup>14</sup> Field et al., at 20

strategies are taken in consideration, together with a brief reflection on the most vulnerable subjects to climate change.

The initial part of the third chapter will assess the migration issue in the international climate governance; the Loss and Damage approach on migration, together with the Adaptation Framework on human mobility will be discussed. In addition, unexpected consequences derived from response strategies against climate change will be briefly presented. Therefore, a detailed study on state responsibility in environmental law and in the context of climate change will be provided, together with legal considerations on the issue of reparation to climate migrants and hosting states. The final part of the chapter is dedicated to proposals of solution from the climate migration literature, including new legal instruments and international agendas; and to the most recent achievements on the climate change-migration issue, such as the Paris Agreement and the twenty-third Conference of the Parties.

The fourth chapter will be focused on two important actors in the international governance on migration: the United Nations High Commissioner for Refugees and the International Organization for Migration; their legal and technical contributions to states in addressing climate migration, through operational responses, organization of Conferences and Forums, together with promotion of partnerships, will be assessed. The last part will be devoted to describe briefly one important achievement in the international migration governance, the New York Declaration for Refugees and Migrants. Therefore, alternative response measures to climate migration will be deepen, also through the assessment of the MECLEP project; Sustainable Development, the Adaptation Framework and the Disaster Risk Reduction will be all taken in consideration.

## **Chapter I. GLOBAL FRAMEWORK ON THE ENVIRONMENTAL ISSUE**

Before introducing an assessment of the climate change – migration nexus and analysing the copious challenges that climate migrants are confronting at national and international level, essential information on the relationship between human rights and environment will be provided. Thus, this first chapter will begin giving background information on the global evolution of environmental law and a brief introduction to the evolution of climate change and migration in international negotiations.

### **1.1 The rise of Environmentalism**

In 1972 the Report “The Limits to Growth” publicized the results of an analysis made by a prestigious institute of technology<sup>1</sup>, which pictured an apocalyptic future of the world. The analysis was based on a simulation model which, taking in account economic, social and environmental processes, sustained that a collapse of the earth was highly probable in the near future<sup>2</sup>. The main cause was identified as the human trend of development, which would have ended the natural resources, correlated with other negative human conducts<sup>3</sup>.

Many people believe that the future course of human society, [...] depends on the speed and effectiveness with which the world responds to these issues. And yet only a small fraction of the world's population is actively concerned with understanding these problems or seeking their solutions<sup>4</sup>.

Even if the Report was highly criticized because of the unsuitable methodology and the unlikely results, it strengthened a wave of opinion, which emerged mainly in the 60s: the environmentalism<sup>5</sup>. This movement followed few environmental catastrophes which got the attention of the public opinion on limits of the capacity of earth in maintaining our development<sup>6</sup>. As result, a public awareness about

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<sup>1</sup> Massachusetts Institute of Technology.

<sup>2</sup> Giovanni Bottazzi, *Sociologia dello Sviluppo* (Sociology of Development), (Editori Laterza, 2009) at 172-173.

<sup>3</sup> Ibid.

<sup>4</sup> Donella H. Meadows et al., *Limits to Growth*, (Universe books, 1972) at 17.

<sup>5</sup> Bottazzi, at 175.

<sup>6</sup> Ibid. at 172 – 173.



environmental protection arose<sup>7</sup> and “environmentalism became an important political and intellectual movement [especially] in the West<sup>8</sup>”. To give a brief example, powers such as U.S. started to approve a range of national laws aimed to protect the environment and its natural species<sup>9</sup>, the European Community became more active in adopting similar measures, especially after the United Nations Conference on the Human Environment in Stockholm<sup>10</sup>. Here, the United Nations Environment Programme<sup>11</sup> was established and for the first time it was enhanced “a common outlook [...] to inspire and guide the peoples of the world in the preservation [...] of environment [...]”<sup>12</sup>

The next paragraph will provide essential elements on the development of environmentalism in the legal context.

## **1.2 Brief introduction to Environmental Law**

The rise of globalization brought positive and negative elements: it made the world more interdependent and interconnected, boundaries became wide open permitting an easier movement of persons, services and goods and the technologies made great progress<sup>13</sup>. As a result, threats such as environmental degradation spread globally and started to have implications beyond national borders<sup>14</sup>. Political entities understood that also the solutions to environmental problems needed to follow the same path and local environmental problems needed to be faced from a more holistic view<sup>15</sup>. Consequently, the scope of environmental law expanded,

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<sup>7</sup> Dinah L. Shelton and Donald K. Anton, *Law and Environment* in Dinah L. Shelton and Donald K. Anton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011) at 1. See Social Science Research Network’s eLibrary.

<sup>8</sup> Celia I. Campbell-Mohn and Federico Cheever, “Environmental law” Britannica Encyclopedia online version.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> UNEP

<sup>12</sup> R. M. Kamble , “Human rights and environment” (2017) *International Education and Research Journal*, 3(3) at 16.

<sup>13</sup> See the definition of Globalization on World Health Organization online.

<sup>14</sup> Adil Najam et al., *Environment and globalization: five propositions* (2010) in Peter Newell and J Timmons Roberts, *the Globalization and the Environment reader* (John Wiley and Sons, 2017) at 94-95.

<sup>15</sup> Shelton and Anton, at 1

developing a new field, the international environmental law, which has found its milestone in the Trail Smelter case.<sup>16</sup>

Environmental law is constituted by regulations, acts, principles and directives, applied by different actors, which develop on different levels: international, national and local<sup>17</sup>. To give an example, environmental law is encompassed in national constitutions that provides acts and norms to ensure the protection of environment, and at international level in treaties, declarations and conventions<sup>18</sup>.

The enactment and enforcement of environmental law is not simple: precise data about the human impact on environment are not always available and therefore it is more difficult to regulate its degradation. Similarly, natural elements are not separated, they are interconnected, and interdependent, thus environmental policies must take in account that one human action on a natural element may have consequences on the entire biosphere. Finally, scientific certainty is rare, it is difficult to foreseen precisely consequences of human activities on earth<sup>19</sup>.

Nevertheless, scientists can identify at least two main impacts on environment that can be found at different levels on earth: unsustainable use of natural resources and contamination of the biosphere and its inhabitants<sup>20</sup>. The negative impact of environmental degradation is threatening all parts of the world, nowadays people are dealing with water shortage, natural disaster, pollution, waste and deforestation daily. These elements are influencing human wellbeing and human health impeding a good quality of life and a full enjoyment of human rights<sup>21</sup>.

The interrelation between environment and human rights will be assessed in the next session, together with an overview on environmental rights, specifically the

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<sup>16</sup> Benoit Mayer and Francois Crépeau, *Research handbook on climate change (Introduction)*, (Edwarg Elgar publishing, 2017) at 6. In the Trail Smelter Arbitration the United States suited Canada because the smelter, a Canadian corporation placed in British Columbia, provoked environmental damages to the State of Washington between 1925 and 1937. Here, the Canadian state lost the case inasmuch the arbitration sustained that a state is responsible for wrongful actions under its jurisdiction that harm the environment of other states (ECOLEX).

<sup>17</sup> Campbell-Mohn and Cheever, at 1.

<sup>18</sup> Ibid. at 4-5.

<sup>19</sup> Shelton and Alton at 2- 3.

<sup>20</sup> Ibid.

<sup>21</sup>United Nations Environment Programme, “Human rights and Environment”

right to a healthy environment, and to what extent they are guaranteed at national and international level.

### **1.3 Human rights and the Environment**

Few environmental rights have been supported by some non-legally binding declarations in the past<sup>22</sup>. In 1982 the World Charter for Nature recognized for the first time the right to participation in decision making processes and a mechanism of redress in case of violation of rights caused by degradation of environment; later, other international institutions such as the Council of Europe and the UN economic commission for Europe made references to environmental rights, furthermore, international human rights actors such as the Commission on Human Rights<sup>23</sup>, have been confirmed the relationship between environment and human rights in various declarations and reports<sup>24</sup>.

In 2011 the United Nations High Commissioner on Human Rights published a Report that presented the results of an analytic study on the relationship between human rights and environment. The Report discloses different key components which characterize this relation that was growing attention since the Stockholm conference: firstly, it stresses the contribution of Sustainable Development and protection of environment to the enjoyment of human rights, then it bears that the environmental damage has a great influence on population and their wellbeing, especially when its threat cross over national boundaries. Additionally, a cooperation among states is also necessary to protect human rights, which may reinforce environmental policies<sup>25</sup>.

Furthermore, the Report develops three main approaches to clarify the relationship between human rights and environment: (1) environment is considered a precondition for the enjoyment of human rights; (2) human rights are important instruments to enhance the protection of environment; and (3) the concept of

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<sup>22</sup> Philippe Sands, *Principles of International Environmental Law* (2003) in Dinah L. Shelton and Donald K. Anton, *Environmental Protection and Human Rights*, (Cambridge University Press, 2011) at 148.

<sup>23</sup> Human Rights Council since 2006.

<sup>24</sup> Sands, at 149.

<sup>25</sup> Office of the High Commissioner for Human Rights, *Analytical study on the relationship between human rights and the environment: A/HRC/19/34* (2011) at 3.

sustainable development may entail also the issue of human rights and environment. Some academics agreed with the theory of three approaches, even if they developed it in a different manner. In order to better understanding, few authors will be mentioned thereafter<sup>26</sup>.

Boyle sustains that the environmental degradation has a great impact on many aspects of everyday life and for that reason governments should establish environmental standards to secure human wellbeing. This circumstance may compel states to take concrete actions in favour of a decent environment, even promote the creation of a right to a clean environment and finally it may facilitate access to courts and tribunals<sup>27</sup>.

Lewis agrees with the opinion that a clean environment has an important effect on human rights, considering that indispensable for their enjoyment; he sustains that humans are entitled to have a healthy environment and political entities have the duty to apply it broadly. Conversely, a degrading environment may influence negatively human rights undermining the capacity of people to fulfil them or indirectly impede political authorities to implement proficiently policies aimed to protect human rights<sup>28</sup>.

Additionally, Shelton sustains that humans cannot survive without living and non – living resources<sup>29</sup>; the protection of environment should become a core issue for human rights institutions and states, who “[...] [should] ensure the level of environmental protection necessary to allow the full exercise of protected rights [...]”<sup>30</sup>.

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<sup>26</sup> Ibid. at 4.

<sup>27</sup> Alan Boyle, “Human Rights and the Environment: Where Next?” (2012) the European Journal of International Law, vol.23 (3) at 613.

<sup>28</sup> Bridget Lewis, “Environmental Rights or right to Environment?: exploring the nexus between human rights and environmental protection” (2012) Macquarie Journal of International and Comparative Environmental Law 8(1) at 37 and 39.

<sup>29</sup> Dinah L. Shelton., *Environmental Rights* in Dinah L. Shelton. and Donald K. Anton, Environmental protection and human rights (Cambridge University Press, 2011) at 131.

<sup>30</sup> United Nations Environment Programme, n.21 (Chapter 1).

## The right to a Decent Environment<sup>31</sup>

Nowadays, at national and regional level a right to a clean environment is recognized together with other types of environmental rights<sup>32</sup>.

More than 100 national constitutions provide for environmental rights<sup>33</sup>, including the right to information, the right to participate in decision – making and the right to a healthy environment<sup>34</sup>. Each state provides for different environmental provisions, giving that, positive and negative aspects arise<sup>35</sup>. On one hand, few environmental provisions are emerging as customary law and national constitutions may act as a springboard; on the other hand, the language of national environmental provisions may be wide and vague, leading to possible misunderstandings. Moreover, in case constitutions provide for a right to a healthy environment, it is often linked to the satisfaction of other existing rights and never independent. Finally, the presence of such right at national level is not sufficient in order that states recognize it as legally binding<sup>36</sup>.

A right to a healthy environment is included also in regional instruments today<sup>37</sup>, in particular in the Africa Charter of Human and Peoples’ Rights, which declares “[a]ll peoples shall have the right to a general satisfactory environment favourable to their development [...]”<sup>38</sup>, and the Additional Protocol to the American Convention on Human Rights which instead states that “[e]veryone shall have the right to live in a health environment [...]”<sup>39</sup>.

A notable example of international instrument is the Nagoya Protocol, which provides with other documents, a special protection for indigenous people, in particular regarding the right to property and right to control over natural resources<sup>40</sup>. Here, environmental law and human rights law deal with collective

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<sup>31</sup> This paper will use right to a healthy environment and right to a clean environment as synonymous.

<sup>32</sup> Division of Environmental Law & Conventions, UNEP, “Factsheet on human rights and environment” (2015).

<sup>33</sup> UNenvironment, “What are environmental rights?”. See UNenvironment online.

<sup>34</sup> Division of Environmental Law & Conventions, n. 32 (Chapter 1).

<sup>35</sup> Sands, at 149.

<sup>36</sup> Lewis, at 43.

<sup>37</sup> Division of Environmental Law & Conventions, n. 32 (Chapter 1).

<sup>38</sup> African Charter on Human and Peoples’ Rights, art.24.

<sup>39</sup> Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights, art.11.

<sup>40</sup> Division of Environmental Law & Conventions, n. 32 (Chapter 1).

rights of indigenous people, the Protocol is an important international result, which adds obligations to state aimed to respect the genetic resources of this group.

Lewis makes some considerations on the existence of a right to a healthy environment in international human rights law<sup>41</sup>. The author sustains that such right is becoming a general practice performed by most of states at international level; since the scope of environmental protection may increase only through a multilateral treaty, appropriate international instruments are required<sup>42</sup>.

Whereas, some academics<sup>43</sup> sustain that human rights law is further from recognizing entirely the relationship between human rights and environment, even less a right to a clean environment. Important international legal actors such as the ECHR does not still recognize it, borrowing other existing rights in case laws that involve environmental issues.

The recognition of a right to a healthy environment in international human rights law may present advantages and disadvantages: on one hand it would enhance the global environmental protection policies<sup>44</sup> and make the right achieve an equal level to other human rights<sup>45</sup>; conversely, the establishment of universal standards of a healthy environment would be difficult in tribunals or courts, especially if states need to find a common ground on violation of environmental rights<sup>46</sup>.

Another great challenge to the inclusion of such right in international human rights law regards the process of recognition of human rights<sup>47</sup>, “[...] [a right to environment] suffers comparable problems of subjectivity, definition, and relativity

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<sup>41</sup> Lewis, at 39 – 46.

<sup>42</sup> Ibid. at 40.

<sup>43</sup> Pluricourts, “Editorial: the legitimacy of human rights courts in environmental disputes” (2015) *Journal of Human rights and environment*, vol.6 (2) at 133. The PluriCourts is the Centre of Excellence at the Faculty of Law of the University of Oslo, the article is based on papers presented at the PluriCourts Conference which called experts for discussing on environmental cases in human rights courts. See Elgaronline.

<sup>44</sup> Lewis, at 40.

<sup>45</sup> Ibid. at 41.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid. at 44.

[...]”<sup>48</sup>. It needs clarification on scope and content and, also it presents some transboundary elements, which makes more problematic the matter of liability<sup>49</sup>.

Shelton identifies few political issues in incorporating a right to a clean environment in the human rights agenda. Firstly, such a right shall influence national and local policies and it may require high costs and sacrifice by governments. Secondly, international environmental law has been flourishing recently, interfering in a field that was traditionally under state sovereignty, as result a right to a clean environment may cause resistance to compliance by governments. Finally, because of the intrinsic nature of environmental law that is merely dynamic, a right to a healthy environment should present variable standards, based on technical elements that can be renegotiated or change rapidly<sup>50</sup>. Anderson adds that subjects to environmental provisions are mutable over time, environmental standards cannot be fixed, otherwise, static environmental measures may prevent environmental protection to become a human right<sup>51</sup>.

#### New Environmental Human Rights?

As it has already been briefly anticipated, it seems that environmental rights are rising attention in the human rights regime, “[a] significant number of courts cases, national constitutions and legislation, and international instruments have acknowledged the close linkages between the two fields [human rights and environment] [...]”<sup>52</sup>.

According to Boyle, there is not a development of new environmental rights, instead a process of greening of existing human rights is ongoing<sup>53</sup>.

Anderson suggests different theories that would enhance the environmental protection by human rights that are already inserted in international treaties; the first theory proposes to reinforce the existing international instruments to foster the protection of environment. Civil and political rights may trigger claims and

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<sup>48</sup> Michael R. Anderson, *Human rights approaches to environmental protection: an overview* (1996) in Dinah L. Shelton and Donald K. Anton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011) at 134.

<sup>49</sup> Lewis, at 44.

<sup>50</sup> Shelton, at 133.

<sup>51</sup> Anderson, at 132 – 133.

<sup>52</sup> Division of Environmental Law & Conventions, n.32 (Chapter 1).

<sup>53</sup> Boyle, at 614.

mobilization for a better environment, also social, cultural and economic ones may have environmental goals, providing standards of wellbeing, enhancing the possibility of participation to decision – making process and inciting governments towards better practices. Secondly, the reinterpretation of such rights in a better environmental manner may be another solution: a violation of the right to life can be deemed if the government has been unable to protect people from environmental degradation. Thus, implicitly the right to life entails the right to a clean environment, as result the implementation of environmental criteria is present in both processes of monitoring and enforcement of the right to life<sup>54</sup>.

Shelton proposes similar approaches that illustrate the interconnection between human rights law and environmental protection. The first approach seeks to obtain benefits from procedural human rights guarantees to ensure an effective protection of environment. Since environmental degradation may lead to violation of human rights, the second approach foresees a re-interpretation of existing human rights in an environmental manner. The implementation of a right to a healthy environment represents the third approach and finally the draft of a treaty focused on environmental protection as human responsibility is an alternative solution. On the other hand, Shelton identifies a risk in incorporating environmental provisions in the human rights agenda: environmental rights and specifically a right to a clean environment may result excessively anthropocentric. Environmental provisions may protect environment as long as it produces advantages for humans, without thinking to all other species on earth. Nevertheless, “[t]he view that mankind is part of a global ecosystem may reconcile the aims of human rights and environmental protection [...]”; both human rights agenda and environmental protection have a common goal: preserving natural resources and environment for the future generations. Even if human rights agenda favours primary human beings, environment law and human rights law may find a shared interest and from this ground they may smooth the differences and work together<sup>55</sup>.

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<sup>54</sup> Anderson, at 134 and 136.

<sup>55</sup> Shelton, at 130-131.



## Environmental Rights in the legal context

More recent analysis<sup>56</sup> suggest that the relationship between human rights and environmental protection is emerging mostly in the legal context. Since an international environmental tribunal does not exist today, human rights courts seem to replace this role, offering “[...] a value-added approach complementing national legislation and providing for a unified forum when addressing global problems<sup>57</sup>”.

In other words, since there is not a general framework that treats environment at international level<sup>58</sup>, the lack is fulfilled by substantive and procedural human rights that may provide for a level of environmental protection from degradation<sup>59</sup>.

Substantive environmental rights guarantee a clean and healthy environment directly through national constitutions and regional treaties or indirectly through the effort of Courts in dealing with violation of human rights caused by degradation of environment<sup>60</sup>. When Courts come across environmental issues in the legal context, they resort to an interpretative strategy: they refer to environmental rights included in other treaties or they borrow existing human rights<sup>61</sup>. “[...] [T]hese human rights courts and bodies have begun to develop an important body of environment – related human rights jurisprudence in relation to procedural rights as well as to substantive rights<sup>62</sup>”.

Procedural rights instead aim to guarantee fair processes of decision – making and mechanism of complaint and redress for the subjects affected by these processes<sup>63</sup>; they represent a core interest in the relationship between human rights and environment<sup>64</sup>. Rights to information, participation and access to justice are fundamental to protect human rights from environmental degradation and promote respect for our environment; a prime example is the Aarhus Convention which has

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<sup>56</sup> Boyle, at 614.

<sup>57</sup> Pluricourts, at 132.

<sup>58</sup> Council of Europe, *Manual on human rights and environment* (Council of Europe, 2012) at 7..

<sup>59</sup> United Nations Environment Programme, above n.21 (Chapter 1).

<sup>60</sup> Dinah L. Shelton, *Human Rights and the Environment: Substantive Rights* (2011) at 265 in Malgosia Fitzmaurice et al., *Research Handbook on International Environmental Law* (Edward Elgar, 2011).

<sup>61</sup> Boyle, at 621.

<sup>62</sup> Pluricourts, at 133.

<sup>63</sup> Shelton, n.60 (Chapter 1), at 265.

<sup>64</sup> United Nations Environment Programme, n.21 (Chapter 1).

contributed to widen environmental rights, providing for complaint mechanisms and influencing the jurisprudence of different Courts<sup>65</sup>.

An important procedural mechanism that is worthy to nominate is the Environmental Impact Assessment that the African Commission on Human and People Rights<sup>66</sup>; it is an instrument aimed to evaluate the economic, social and cultural impact on environment of a project before definitive decision is taken; it is useful to minimize the negative repercussions on the environment and develop economic and environmental benefits<sup>67</sup>.

Considering the above, the human rights framework deals with the environmental field increasingly and it shows interest in assessing the impact of environment and development policies on human rights<sup>68</sup>. For that reason, UNEP sustains that it would be useful to adopt a human right – based approach when human rights courts or other international human rights actors face issues of environmental protection and Sustainable Development. Such approach may enhance the interdependency between human rights and environment, it may lead to a better governance of natural resources and a major accountability of states; also, it can empower people and ensure access to justice and to policy-making processes in environmental policies, finally it might guarantee a minimum level of environmental rights<sup>69</sup>.

The following paragraph will provide an historical excursus of the main environmental conferences until today to better illustrate the relation between human rights and environment. Specifically, this session will try to assess how the topic of environment and all the issues correlated, have emerged over time in negotiations.

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<sup>65</sup> Adam Boyle, “Human rights and international environmental law: some current problems” (2011) at 5.

<sup>66</sup> United Nations Environment Programme, n.21 (Chapter 1).

<sup>67</sup> Convention on Biological Diversity, “What is Impact Assessment?”. See Convention on Biological Diversity online.

<sup>68</sup> United Nations Environment Programme, n.21 (Chapter 1).

<sup>69</sup> Ibid.

#### 1.4 Conferences on Human Environment: an Overview

Since the environmental movement of 70s has brought global concern on environmental issues, this interest culminated in a range of environmental conferences and declarations<sup>70</sup>, which represent the starting point of the evolution of international environmental law. The Stockholm Conference also known as United Nations Conference on the Human Environment has constituted the first attempt to develop a global vision on the protection and preservation of human environment<sup>71</sup>. It showed the interdependency among human rights, dignity and environment in dealing with environmental problems, an approach that has influenced the first part of United Nations environmental activism<sup>72</sup>. The first purpose of the conference was to create a non-legally binding document, a Declaration of Principles, whose draft process was long and difficult because of high disagreements among parties<sup>73</sup>. On 16 June 1972 the Conference finally adopted a Declaration of 26 Principles of Environment and Development, following a series of reservations that did not change the core of the document<sup>74</sup>. Furthermore, it established the UNEP, who today it is considered as “[...] the leading global environmental authority that sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development [...] and serves as an authoritative advocate for the global environment”<sup>75</sup>. Even if the Stockholm Conference referred indirectly to the concept of Sustainable Development<sup>76</sup>, this term was protagonist of the “Our Common Future” or Brundtland Report published in 1987 by the World Commission on Environment and Development<sup>77</sup>. The Report represents the milestone of the Sustainable Development “[which] is development that meets the needs of the present without compromising the ability of future generations to meet

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<sup>70</sup> Bottazzi, at 177.

<sup>71</sup> Gunther Handl, “Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992” (2012) at 1

<sup>72</sup> United Nations Environment Programme, n.21 (Chapter 1).

<sup>73</sup> Handl, at 2.

<sup>74</sup> Ibid.

<sup>75</sup> UNenvironment, “Why does UN Environment matter?”. See UNenvironment online.

<sup>76</sup> Handl, at 4.

<sup>77</sup> WCED; Bottazzi, at 178.

their own needs<sup>78</sup>”. In other words, it stresses the interdependency between the environment and economic development and it sustains the necessity of a better management of natural resources for the common future<sup>79</sup>.

The United Nations Conference on Environment and Development held in Rio de Janeiro in 1992 represented merely a reaffirmation of the Stockholm principles, even if the initial purpose was to create an Earth Charter, which would have been stated a list of legal rights and obligations on Environment and Development<sup>80</sup>. The Conference presented a range of important documents aimed to insert provisions on Sustainable Development in national policies and it ended with a Declaration on Environment and Development of 27 principles<sup>81</sup>. Another important output was Agenda 21, a series of international, national and local actions aimed to assess the human impact on environment<sup>82</sup>. Also, a Commission on Sustainable Development was established for monitoring the progress of the implementation of measures at national and international level<sup>83</sup>. And finally, the Conference led to other important agreements: the legally binding convention on Biological Diversity, the convention to combat desertification and the Framework Convention on Climate Change<sup>84</sup>.

Handl<sup>85</sup> observes that the Stockholm and Rio declarations present some common elements: they both are non-legally binding documents, they are human-centred, and indirectly recognize the necessity of a right to a healthy environment. Specifically, the Rio Declaration requested the fulfilment of the Right to Development and restated the responsibility of states on environmental protection<sup>86</sup>. The precautionary approach was also inserted in the document together with the common but differentiated responsibilities principle<sup>87</sup>: the former

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<sup>78</sup> See International Institute for Sustainable Development online for the official definition of Sustainable Development.

<sup>79</sup> Bottazzi, at 178.

<sup>80</sup> Handl, at 1.

<sup>81</sup> Bottazzi, at 178 – 179.

<sup>82</sup> United Nations, “Agenda 21”. See the Sustainable Development Knowledge Platform online.

<sup>83</sup> Ibid.

<sup>84</sup> Peter Doran, “World Summit on Sustainable Development (Johannesburg) – An assessment for IISD”. (2002) at 4.

<sup>85</sup> Handl, at 3.

<sup>86</sup> Ibid. at 3 – 8.

<sup>87</sup> Ibid.

states that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>88</sup>”; the latter instead sustains that “[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities<sup>89</sup>”. This principle has been one of the main discussed, in particular regarding the weight of responsibility in environmental degradation of developing countries<sup>90</sup>. Additionally, according to Rio Declaration, states have the duty to inform other states in case of harmful effects on environment in their territory and in case of transboundary effects of their activities<sup>91</sup>.

During the Rio Conference the Parties agreed to establish a review of the progress made in five years conducted by the UN General Assembly in a Special Session<sup>92</sup>. Thus, in 1997 a UN meeting was held in New York with the purpose to review the implementation of Agenda 21, but the results were disappointing<sup>93</sup>. The conference failed to produce a new political Declaration on Environment and the governments demonstrated unwillingness to new commitments<sup>94</sup>.

Since the breakthrough of the past Earth Summits was not evident and the commitment to respect and preserve the environment was not carried on by any international actors, the UN General Assembly decided to call a new Conference aimed to review the progress made ten years after the first Earth Summit<sup>95</sup>. The Johannesburg Summit or the World Summit on Sustainable Development took place in 2002 with the participation of governments, national delegates, NGOs and business groups<sup>96</sup>. The Conference restated the importance of the Sustainable

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<sup>88</sup> The Rio Declaration on Environment and Development, Principle 15.

<sup>89</sup> *Ibid.*, Principle 7.

<sup>90</sup> Handl, at 5.

<sup>91</sup> *Ibid.* at 6.

<sup>92</sup> *Ibid.* at 3.

<sup>93</sup> Earth Negotiations Bulletin, “Summary of the nineteenth United Nations General Assembly Special Session to review implementation of Agenda 21: 23-27 June 1997”. See the Earth Negotiations Bulletin online.

<sup>94</sup> *Ibid.*

<sup>95</sup> Doran, at 4.

<sup>96</sup> United Nations, “World Summit on Sustainable Development (WSSD), Johannesburg Summit”. See the Sustainable Development Knowledge Platform online.

Development in protecting the environment and fighting the poverty<sup>97</sup>. Three important outcomes were presented after the meeting: the Johannesburg Declaration on Sustainable Development, the Johannesburg Plan of Implementation and other key initiatives<sup>98</sup>.

20 years after the first Earth Summit another Conference was held in Rio de Janeiro namely UN Conference on Sustainable Development aimed to assess the situation on the commitment of international actors to the implementation of Sustainable Development<sup>99</sup>. Numerous decisions were taken during the meeting, three of them were highly relevant: the final political outcome named “The Future We Want”, which included a range of measures and actions to implement a better Sustainable Development<sup>100</sup>; since it was restated the importance of UNEP, the Parties approved a strengthening of its action and finally, the topic of Green Economic Policies became one of the core issues<sup>101</sup>.

Other important commitments were established on various fields, to give an example the issue of poverty was described as one of the main threat currently, which required urgent and immediate actions<sup>102</sup>. Here, the leaders decided to launch a new program aimed to develop New Sustainable Development Goals with a more global reach demanding cooperation between developed and developing countries. The poverty eradication is the first of the 17 Global Goals<sup>103</sup>, which took over the past Millennium Development Goals. The latter emerged in 2000 when the world leaders met in New York and accepted together to adopt the United Nations

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<sup>97</sup> Id. “Johannesburg Summit 2002: Key Outcomes of the Summit” (2002). See the Sustainable Development Knowledge Platform online.

<sup>98</sup> Ibid.

<sup>99</sup> Regional and Mesoscale Meteorology Branch, “UNCED (UN Conference on Environment and Development)”. Retrieved from <http://rammb.cira.colostate.edu/dev/hillger/climate-conferences.htm#1992-06-03>. Regional and Mesoscale Meteorology Branch “conducts research on the use of satellite data to improve analysis, forecasts and warnings for regional and mesoscale meteorological events”(Regional and Mesoscale Meteorology Branch). Last visited April, 30 2018.

<sup>100</sup> United Nations, “United Nations Conference on Sustainable Development, Rio+20”. See the Sustainable Development Knowledge Platform online.

<sup>101</sup> Ibid.

<sup>102</sup> Id., “Future We Want - Outcome document”. See the Sustainable Development Knowledge Platform online.

<sup>103</sup> Id. “Sustainable Development Goal 1”. See the Sustainable Development Knowledge Platform online.

Millennium Declaration, a global commitment to fight poverty and other relevant issues contained in 8 purposes to be implemented in 15 years<sup>104</sup>.

Today, the last important achievement is the 2030 Agenda for Sustainable Development adopted during the United Nations Summit on Sustainable Development 2015<sup>105</sup>. The conference was highly participated, the political outcome was welcomed by all the Parties.<sup>106</sup> Currently, 193 UN member states adopted the document accepting “[...] a plan of action for people, planet and prosperity<sup>107</sup>”: the poverty must be eliminated definitively, peace needs to be defended and the environment protected<sup>108</sup>. The commitment to the 17 Global Goals represents the practical implementation of the Agenda, purposes that want to continue the progress started with the Millennium Goals with a cooperation among all the international actors and national actors<sup>109</sup>. The content of the Agenda is modern and comprehensive, it states that the environment should be protected therefore people can enjoy a healthy environment, where they can continue their process of development with a sustainable use of natural resources<sup>110</sup>.

So that purpose becomes real, a discussed and controversial threat needs to be defeated, an issue that may impede the success of the Sustainable Development Goals<sup>111</sup> and it may hinder the process of human development: the climate change<sup>112</sup>. The relation human rights - climate change has emerged recently during the 21 COP in 2015, some references were made in the Paris Agreement, even though it is not considered enough<sup>113</sup>.

The next paragraph will be focused primarily on the climate change regime and the evolution of the concept of migration in this context.

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<sup>104</sup> United Nations Development Programme, “Millennium Development Goals”. See the United Nations Development Programme online..

<sup>105</sup> See General Assembly, *The United Nations Summit on Sustainable Development 2015: informal summary* (2015).

<sup>106</sup> *ibid.*

<sup>107</sup> General Assembly, *Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development: A/RES/70/ (2015)* at 1.

<sup>108</sup> United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*. See the Sustainable Development Knowledge Platform online.

<sup>109</sup> *Ibid.*

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

<sup>111</sup> SDGs.

<sup>112</sup> United Nations, n.108 (Chapter 1).

<sup>113</sup> Elisabeth Ferris and Jonas Bergmann, “Soft law, migration and climate change governance”, (2017) *Journal of Human Rights and the Environment*, vol. 8 (1) at 22.

## 1.5 The international Climate Change Regime

The climate is the usual weather of a specific place in the world<sup>114</sup>. There are different climates on Earth which have been transforming for years, a change of a climate has important consequences: it may rise the temperature of Earth or it may change the places where rain and snow usually fall<sup>115</sup>.

Nowadays the climate change is ongoing, studies demonstrate that consequences are increasing in force: the rise of the temperature on Earth and of oceans, the melting of ices sheets, the glacial retreat, the rise of level of sea and its acidification, the disappearance of snow and the appearance of extreme events<sup>116</sup>. Generally, climate change presents two main typologies of effects<sup>117</sup>:

[sudden onset disasters which] can be linked to meteorological hazards including tropical cyclones, typhoons, hurricanes, tornadoes, blizzards; hydrological hazards including coastal floods, mudflows; or geophysical hazards including earthquakes, tsunamis, volcanic eruptions [...]<sup>118</sup>.

The second typology is:

[slow onset events which] include sea level rise, increasing temperatures, ocean acidification, glacial retreat and related impacts, salinization, land and forest degradation, loss of biodiversity and desertification [...]<sup>119</sup>.

One of the main causes of climate change are human activities<sup>120</sup>, according to scientists, human activities product gases that block the heat of the Sun on Earth provoking the rise of temperature and all the correlated issues<sup>121</sup>.

A dated protagonist of the climate change regime is the IPCC, an international organization created in 1988 by the World Meteorological Organization<sup>122</sup> and the UNEP. It is aimed to assess information about climate change and its impact on humans and environment in Assessment reports publicized

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<sup>114</sup> National Aeronautics and Space Administration, "What Is Climate Change?". See NASA online.

<sup>115</sup> Ibid.

<sup>116</sup> Id., "Climate change: How do we know?". See NASA online.

<sup>117</sup> United Nations Climate Change, "Climate-related risks and extreme events". See UNFCCC online.

<sup>118</sup> United Nations High Commissioner for Refugees, "Key concepts on climate change and disaster displacement". See UNHCR online.

<sup>119</sup> Ibid.

<sup>120</sup> NASA, n.116 (Chapter 1).

<sup>121</sup> National Aeronautics and Space Administration, "A blanket around the Earth". See NASA online.

<sup>122</sup> WMO



regularly. The scientific data presented in the Reports are taken in account by international and national actors, who may use them in developing policies on climate change<sup>123</sup>.

Even though the first global conference on Climate occurred in 1979, one great achievement on climate change issue was made in 1992 during the first Earth Summit in Rio<sup>124</sup>. Here, the United Nations Framework Convention on Climate Change<sup>125</sup> was opened to signature, a political document aimed to create a global cooperation to fight climate change and its effects<sup>126</sup>. The IPCC was one of the main supporter of its creation<sup>127</sup>.

“Preventing “dangerous” human interference with the climate system is the ultimate aim of the UNFCCC<sup>128</sup>”; in 1994 the Convention entered into force, the Parties agreed on promoting actions to protect humans from the impact of climate change, asking States to regularize the greenhouse gas emissions and support financially developing countries in actions to reduce climate change consequences. Since that, both developed and developing countries must report about their climate change activities and measures<sup>129</sup>.

Today 197 countries have ratified the Convention, each of them is represented at the Conference of the Parties<sup>130</sup>, the annual conference where the Parties assess the review on national climate change measures and discuss on legal issue for a better implementation of the Convention<sup>131</sup>. The first Convention took place in Berlin in 1995, until today 23 COPs were already called in different part of the world<sup>132</sup>.

Important to remind, in 1997 the COP3 ended with the adoption of an international agreement namely the Kyoto Protocol, which contained a series of

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<sup>123</sup> Intergovernmental Panel on Climate Change, “History”. See IPCC online..

<sup>124</sup> United Nations Climate Change, “History of the Convention”. See UNFCCC online.

<sup>125</sup> UNFCCC.

<sup>126</sup> United Nations Climate Change n.124 (Chapter 1).

<sup>127</sup> Intergovernmental Panel on Climate Change, n.123 (Chapter 1).

<sup>128</sup> European Union, “United Nations Framework Convention on Climate Change (Rio - 1992)”. See European Union online.

<sup>129</sup> Ibid.

<sup>130</sup> COP

<sup>131</sup> United Nations Climate Change, “Conference of the Parties (COP)”. See UNFCCC online.

<sup>132</sup> United Nations Framework Convention on Climate Change, “Documents of the conference of the parties at its first session (COP 1)”. See UNFCCC online.

legally binding reduction targets of industrial emissions aimed to fight the global warming<sup>133</sup>.

According to article 25<sup>134</sup> of the Protocol the document would have been entered into force ninety days after its ratification by at least 55 parties to the convention which represented the 55% of the total carbon dioxide emissions.

In 2004 Russia ratified the Protocol, which entered into force in 2005, later during the COP7 in Marrakesh, some details about its implementation at national level has been discussed. The Protocol divided the Parties in different groups based on their economic development, the industrialized states were considered more responsible for the emission of gases, according to the principle “common but differentiated responsibilities” included in Article 10<sup>135</sup> of the Protocol. The first period of commitment to the Protocol lasted from 2008 to 2012, during this time the Parties started to take actions to cut their greenhouse emissions<sup>136</sup>. Moreover, they adopted national measures to implement the targets, helped by mechanisms such as the International Emissions Trading, the Clean Development Mechanism and the Joint Implementation. Throughout the various commitment periods the conduct made by Parties was monitored and they had to report their actions and improvements<sup>137</sup>. Today, 192 states are Parties to the Protocol, but still important developed states such as US has not signed it yet<sup>138</sup>.

In 2012 the Kyoto Protocol was subject to an amendment namely the Doha Amendment, which provided additional obligations for the group of industrialized Parties: new typologies of greenhouse bases needed to be reported and several articles of the Protocol were amended. A new period of commitment was announced from 2013 to 2020, but not all the developed countries have renewed it a second time<sup>139</sup>.

Other important agreements in the framework of climate change were the Copenhagen Accord and the Cancun Agreements. Since it was clear that the Kyoto

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<sup>133</sup> United Nations Climate Change, “KP Introduction”. See UNFCCC online.

<sup>134</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, art.25.

<sup>135</sup> *Id.*, art.10.

<sup>136</sup> United Nations Climate Change, n.133 (Chapter 1).

<sup>137</sup> *Ibid.*

<sup>138</sup> United Nations Climate Change, “The Kyoto Protocol - Status of Ratification”. See UNFCCC online.

<sup>139</sup> *Id.*, n.133 (Chapter 1).

Protocol needed to be updated, the fifteenth Conference of the Parties in 2009 adopted the Copenhagen Accord, which brought new goals and actions<sup>140</sup>. The Parties approved to take measures to limit the global temperature increase to 2 degrees Celsius and specifically developed countries agreed to finance actions to reduce gas emissions in territories where governments have not enough resources to tackle climate change, finally new terms of reporting were taken<sup>141</sup>. The Copenhagen Accord remained merely a political agreement, thus a new legally binding treaty was needed; the successor of the Kyoto Protocol was called<sup>142</sup>. Throughout the COP 16, the Cancun Agreements were adopted by the Parties, which contained a range of issues on which States agreed to take actions. Few points were restated: the conservation of a limited temperature rise, cut emissions measures, the approval of Environment-friendly Technologies, a Green Fund aimed to help developing countries in their environmental activities and the implementation of better adaptation measures through the Cancun Adaptation Framework<sup>143</sup>.

The Paris Agreement was adopted in 2015 during the COP 21 and it may be considered a compromise between the Kyoto Protocol, the Copenhagen Accord and the Cancun Agreements<sup>144</sup>. Its main goal is the reinforcement of a global action against the negative impact of climate change, through new technologies and measures of financial support for more vulnerable countries<sup>145</sup>. Also, it calls for an enhancement of the transparency framework and ask states to “[...] put forward their best efforts through nationally determined contributions and to strengthen these efforts in the years ahead”<sup>146</sup>. In other words, each Party must present national purposes that it wants to achieve and provide national measures to fulfil these contributions<sup>147</sup>. The Paris Agreement entered into force in on 4 November 2016 and it obtained the ratification of the main producer of greenhouse gases, US and

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<sup>140</sup> Center for Climate and Energy Solutions, “History of UN Climate Talks”. See Center for Climate Change and Solutions online.

<sup>141</sup> United Nations Climate Change, “Copenhagen Climate Change Conference – December 2009 – meeting page”. See UNFCCC online.

<sup>142</sup> Center for Climate and Energy Solutions, n.140 (Chapter 1)

<sup>143</sup> United Nations Climate Change, “Cancun Climate Change Conference”. See UNFCCC online.

<sup>144</sup> Center for Climate and Energy Solutions, n.140 (Chapter 1)

<sup>145</sup> United Nations Climate Change, “The Paris Agreement”. See UNFCCC online.

<sup>146</sup> Ibid.

<sup>147</sup> Id., “NDC Registry”. See UNFCCC online.

China, even of in June 2017 the new president of United States announced the withdraw of United States from the accord<sup>148</sup>, this argument will be assessed in the following chapters.

### Mitigation and adaptation

The UNFCCC and correlated actors present two methods to limit impacts of climate change: mitigation and adaptation.

Most of international climate change conferences have been concentrated on the mitigation approach at the beginning<sup>149</sup>. Firstly, the UNFCCC has recognized that the price for an economic development requires high greenhouse emissions, thus it inserted in the Convention as primary goal “[...] [the] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system<sup>150</sup>”. The Convention committed the Parties to take actions aimed to mitigate the negative consequences of climate change on Earth, and programmes, measures that discourage a high emission of gases<sup>151</sup>. As result, other agreements were taken to reinforce the mitigation approach, to give an example the Kyoto Protocol presented advancing reduction measures for both developed and developing countries<sup>152</sup>.

After Copenhagen and Cancun, some developing countries accepted to take nationally appropriate mitigation actions, instead developed countries approved new gas emissions targets within 2020 and finally the Nationally Determined Contributions<sup>153</sup> were presented by the Paris Agreement as another element of the mitigation actions framework<sup>154</sup>.

A change of perspective on strategies against climate change is offered by the fifth Assessment Report of IPCC which presented an advanced and current analysis of mitigation and adaptation:

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<sup>148</sup> Center for Climate and Energy Solutions, n.140 (Chapter 1)

<sup>149</sup> Mayer and Crépeau, at 7.

<sup>150</sup> United Nations Framework Convention on Climate Change, art.2.

<sup>151</sup> United Nations Framework Convention on Climate Change, “Understanding mitigation”. See UNFCCC online.

<sup>152</sup> Ibid.

<sup>153</sup> NDCs

<sup>154</sup> United Nations Framework Convention on Climate Change, n.151 (Chapter 1).

Adaptation and mitigation are complementary strategies for reducing and managing the risks of climate change. Substantial emissions reductions over the next few decades can reduce climate risks in the 21st century and beyond, increase prospects for effective adaptation, reduce the costs and challenges of mitigation in the longer term and contribute to climate-resilient pathways for sustainable development<sup>155</sup>.

The adaptation approach is a set of actions aimed to react to the negative consequences of climate change<sup>156</sup>. Since 2007 adaptation has been a leading role together with mitigation in UNFCCC negotiation<sup>157</sup>. The Bali Action Plan sustained that adoption measures need to be improved, again the Cancun Agreements stated that: “[a]daptation must be addressed with the same priority as mitigation and requires appropriate institutional arrangements to enhance adaptation action and support<sup>158</sup>”. Finally, the Paris Agreements defined adoption as a necessary purpose that requires the cooperation of all the Parties<sup>159</sup>.

Again, the Paris Agreement<sup>160</sup> recognizes the necessity of an adaptation approach as a fundamental contribution to the global action against climate change and as a strategy that can limit climate change consequences that have been threatening the Earth for decades<sup>161</sup>. The adaptation solutions are multiple, they may focus on different fields: technological, social, political, ecological<sup>162</sup>.

Both mitigation and adaptation necessitate financial support to implement the proposed measures, the UNFCCC sustains that “[c]limate finance refers to local, national or transnational financing—drawn from public, private and alternative sources of financing—that seeks to support mitigation and adaptation actions that will address climate change<sup>163</sup>”. Recalling the Convention<sup>164</sup> countries with high

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<sup>155</sup> R.K. Pachauri and L.A. Meyer, *Climate Change 2014 Synthesis Report Summary for Policymakers* in Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2014) at 17.

<sup>156</sup> United Nations Framework Convention on Climate Change, “Understanding climate resilience”.

<sup>157</sup> Mayer and Crépeau, at 8.

<sup>158</sup> *Decision 1/CP.16* in Conference of the Parties, “Report of the Conference of the Parties on its sixteenth Session held in Cancun from 29 November to 10 December 2010: FCCC/CP/2010/7/Add.1” (2011) part I para. 1 (b).

<sup>159</sup> Mayer and Crépeau, at 8.

<sup>160</sup> Paris Agreement, art.7.

<sup>161</sup> United Nations Framework Convention on Climate Change, n.156 (Chapter 1).

<sup>162</sup> *Ibid.*

<sup>163</sup> United Nations Framework Convention on Climate Change, “Understanding climate finance”. See UNFCCC online.

<sup>164</sup> United Nations Framework Convention on Climate Change, art. 10.

available resources should support countries in difficulty in limiting gas emissions or climate change impacts and moreover, they “[...] should also continue to take the lead in mobilizing climate finance from a wide variety of sources [...]”<sup>165</sup>.

### Adaptation and migration

Before the adoption of the Cancun Agreements, discussion on climate change and migration issue has been attendant in the UNFCCC negotiation, mostly as advocacy work<sup>166</sup>. During COP 13 the Parties agreed that the Kyoto Protocol needed to be substituted with a more advanced text and Ad Hoc Working Group on long term cooperative action started the process of formation<sup>167</sup>. The AWG-LCA was a secondary body whose purpose was a better implementation of the principles of the Convention<sup>168</sup>. The Report of AWG-LCA after its first session stated that the Working Group has been able “[...] to translate the Bali Action Plan into a coherent and comprehensive work programme that would enable Parties to complete their work and arrive at a successful outcome within an ambitious time frame”. The agreement should have been complete within the fifteenth Conference of the Parties and actions aimed to promote mitigation and adaptation were included<sup>169</sup>.

Until COP14 the Parties and Observers had the possibility to submit their opinions to the Working Group, after 30 September 2008 the UNFCCC decided to accept only suggestions made by Parties, thus Observers needed to find other channels to influence the process of draft<sup>170</sup>. Thus, from 2008 and 2009 human rights actors found indirectly channels to insert the migration issue in climate change negotiations; in December 2008 the terms migration and displacement were included in an anticipatory document of the agreement draft, which has collected all the suggestions made by Observers and Parties<sup>171</sup>.

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<sup>165</sup> Id., n.163 (Chapter 1).

<sup>166</sup> Ferris and Bergmann, at 22.

<sup>167</sup> Koko Warner, “Climate change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations” (2011) Legal and Protection Policy Research Series at 5.

<sup>168</sup> United Nations Climate Change, “AWG-LCA bodies page”. See UNFCCC online..

<sup>169</sup> United Nations Framework Convention on Climate Change, *Report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention on its first session, held in Bangkok from 31 March to 4 April 2008: FCCC/AWGLCA/2008/3* (2008) at 3.

<sup>170</sup> Warner, at 5.

<sup>171</sup> Ibid. at 8.

After the COP 14 the concept of migration continued to influence the process of negotiation, which was object of discussion until the COP15<sup>172</sup> ; the meeting was a failure: after a long process of negotiation only a non-legally binding document was achieved, which put limitations on greenhouse emissions<sup>173</sup>.

Nevertheless, the UNFCCC asked to the Working Group to continue the process of drafting that would have created a wider adaptation framework<sup>174</sup> . The Parties expressed their concerns about the inclusion of a section entirely dedicated to migration and displacement, but finally they accepted the integration of the topic in the future document<sup>175</sup>.

The draft decisions presented by AWG-LCA during the COP 15 were subjects to modification after the end of the meeting. The result was an outcome document which contained a paragraph entirely dedicated to the issue of migration and human displacement, which asked the Parties to take “[m]easures to enhance understanding, coordination and cooperation related to national, regional and international climate change induced displacement, migration and planned relocation, where appropriate [...]”<sup>176</sup> . The COP 15 called for a better implementation of the adaptation approach and recognizes that migration and displacement as climate change challenges, suggesting the Parties to deepen the topic<sup>177</sup>.

As result, the process of negotiation headed by AWG-LCA led to the adoption of the Cancun Adaptation Framework, which is part of the general Cancun Agreements<sup>178</sup>. The document put at the same level adaptation and mitigation actions<sup>179</sup>, and it included a new paragraph on climate change – induced migration and displacement, asking States to improve actions for a better understanding of the

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<sup>172</sup> Ibid. at 9.

<sup>173</sup> Regional and Mesoscale Meteorology Branch, “UN Conference on the Human Environment (Stockholm Conference) (including the creation of UNEP - the UN Environmental Program - by the Conference)”. See Regional and Mesoscale Meteorology Branch online.

<sup>174</sup> Warner, at 9.

<sup>175</sup> Ibid. at 10.

<sup>176</sup> Conference of the Parties, *Work undertaken by the Conference of the Parties at its fifteenth session on the basis of the report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention: FCCC/CP/2010/2* (2010) Annex II par.4(f).

<sup>177</sup> Ibid., art. 4.

<sup>178</sup> United Nations System Chief Executive Board for Coordination, “UNFCCC: Cancun Adaptation Framework”. See UN system online.

<sup>179</sup> Mayer, at 381.

topics<sup>180</sup>. In fact, during the last session before the COP 16, the Working Group agreed to slightly change the brief paragraph on migration and displacement<sup>181</sup>. The new wording suggested that a cooperation among actors was fundamental at different levels to develop efficient policies on climate change displacement and migration<sup>182</sup>.

Specifically, the document asked to the Parties to take “[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels [...]”<sup>183</sup>.

Finally, the Doha Conference<sup>184</sup> recognized that climate change may influence human mobility, in particular it wants to deepen “[h]ow impacts of climate change are affecting patterns of migration, displacement and human mobility [...]”<sup>185</sup>. The effect of the Paris Agreement was breakthrough: it inserted the term migrants in the preamble of the document, recognizing their rights when dealing with climate change impact<sup>186</sup>.

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<sup>180</sup> Conference of the Parties, n.158 (Chapter 1), Part. II para.14 (f).

<sup>181</sup> Warner, at 11.

<sup>182</sup> Ibid. at 12.

<sup>183</sup> Conference of the Parties, n.158 (Chapter 1), Part. II para.14 (f).

<sup>184</sup> Or COP 17.

<sup>185</sup> *Decision 3/CP.18* in Conference of the Parties, “Report of the Conference of the Parties on its eighteenth session, held in Doha from 26 November to 8 December 2012: FCCC/CP/2012/8/Add.I” (2013) para. 7 (vi).

<sup>186</sup> See Preamble of the Paris agreement.





## **Chapter II. CLIMATE CHANGE IMPACT ON HUMAN RIGHTS: A DRIVER OF MIGRATION?**

The climate change has been widely recognized as a global threat; its negative implications affect heavily human rights of vulnerable people, who possess limited resources to deal with this phenomenon, driving them to migration<sup>1</sup>. In the second chapter after a brief overview on the climate change impact on human rights, the migration – climate change nexus will be assessed, in particular the causes of movement and the resultant climate migration scenarios. Then, the theoretical context of the potential international legal protection of climate migrants will be discussed, together with its normative gaps. Finally, the peculiar conditions of people particularly exposed to the climate change effect will be described.

### **2.1 The Climate Change impact on Human Rights**

Since 2007 climate change has been gaining attention of international human rights bodies and UNFCCC, especially regarding its influence on human rights. The Male' Declaration on the Human Dimension of Global Climate Change recognized clearly the negative climate change impact on human rights, as result a series of official documents and reports on the topic have been presenting thereafter<sup>2</sup>.

The assumption that climate change is a spreading threat on human population has been also recognized by the Human Rights Council in Resolution 7/23. The document sustained that the solution has to be found at international level and moreover it requested to the Office of the High Commissioner for Human Rights<sup>3</sup> to conduct “[...] a detailed analytical study on the relationship between climate change and human rights<sup>4</sup>”.

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<sup>1</sup> See generally United Nations Human Rights Council, *Human rights and climate change: A/HRC/35/L.32* (2017). See UNFCCC online.

<sup>2</sup> Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: A/HRC/31/52* (2016) at 2-3.

<sup>3</sup> OHCHR.

<sup>4</sup> United Nations Human Rights Council, *Human rights and climate change: Resolution 7/23*. (2008) at 3.

The submissions offered by human rights international actors during the preparation of the analytic study have been collected by the OHCHR in its 2009 Report, which assessed the implications of the climate change – human rights nexus<sup>5</sup>.

The first part of the document provides a general picture of climate change, its causes and effects: referring to the IPCC scientific information, the document lists the main impact on nature and gives an overview on adaptation and mitigation approaches<sup>6</sup>.

The second part instead is focused mainly on the relationship between climate change and human rights<sup>7</sup>; “[...] the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing”<sup>8</sup>. As result, the document assesses in detail the climate change impact on the enjoyment of human rights and on categories of persons particularly vulnerable to its effects<sup>9</sup>.

The document continues, recalling the 1990 IPCC Assessment Report, sustaining that “[...] the greatest single impact of climate change might be on human migration<sup>10</sup>”; specifically, it identifies four possible scenarios where environmental changes may trigger migration flows, and it assesses the potential implication of international legal instruments in the contexts<sup>11</sup>. Further, the Report recognizes that climate change may affect also conflicts, exacerbating existing disputes or triggering news<sup>12</sup>. Finally, it refers to the risks on human rights due to the implementation of climate measures, which may undermine natural resources of populations<sup>13</sup>. A detailed study on the topics mentioned above will be provided in the next paragraphs.

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<sup>5</sup> Id., *Report of the Office of the High Commissioner for Human Rights on the relationship between climate change and human rights: A/HRC/10/61* (2009).

<sup>6</sup> Ibid. at 4 -7.

<sup>7</sup> Ibid. at 2.

<sup>8</sup> Ibid. at 7.

<sup>9</sup> Ibid. at 8-16.

<sup>10</sup> Ibid. at 18. See also Intergovernmental Panel on Climate Change, “Policymakers' summary of the potential impacts of climate change. Report from Working Group II to IPCC, Intergovernmental Panel on Climate Change” (1990).

<sup>11</sup> Ibid. at 16-18.

<sup>12</sup> Ibid. at 18.

<sup>13</sup> Ibid. at 19.

The OHCHR ended the Report assessing the complex relation between climate change effects and human rights violation; specifically, it sustains that climate change impact varies overtime, its consequences are not immediate, and they are difficult to forecast. Its influence on human rights is not simple to detach and separate from other possible causes of violation. In other words, concrete evidences of the impact of climate change on human rights are tangible, on the contrary evidences which indicate climate change as the primary cause of violation are difficult to obtain. Various factors may affect the enjoyment of human rights, thus “[q]ualifying the effects of climate change as human rights violations poses a series of difficulties<sup>14</sup>.”

Nevertheless, states have obligations in protecting human rights from climate change impact: human rights law entails States to take limitation measures and, as it was mentioned in the first chapter, courts are dealing frequently with cases that involves environmental threats on human rights; moreover, states have the duty to inform citizens of noted environmental harm, implementing adequate protection measures, otherwise it would be considered a violation of human rights. The path need to be followed even though there are not scientific proofs of an eventual natural disaster, states have to prevent and mitigate the effects nonetheless<sup>15</sup>. Thus, “[...] states remain under an obligation to ensure the widest possible enjoyment of economic, social and cultural rights under any given circumstances [...]”<sup>16</sup>, together with the right to information and participation to political decisions. Governments need to cooperate and take a global action against climate change<sup>17</sup>.

The UNFCCC referred directly to the impact of climate change on human rights in 2011; the Report of the sixteenth Conference of the Parties, recalling the Resolution 10/4 of the Human Rights Council<sup>18</sup>, stated that

“[...] the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the

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<sup>14</sup> Ibid. at 23.

<sup>15</sup> Ibid. at 20-25.

<sup>16</sup> Ibid. at 25.

<sup>17</sup> Ibid. at 23-24.

<sup>18</sup> United Nations Human Rights Council, *Human rights and climate change: Resolution 10/4* (2009).

population that are already vulnerable owing to geography, gender, age, indigenous or minority status, or disability”<sup>19</sup>.

Following the UNFCCC decision which sustains that “[...] Parties should, in all climate change related actions, fully respect human rights”, the HRC adopted a range of resolutions on the topic and encouraged other human rights bodies to deepen the issue through publication of reports. The Paris Agreement represents the maximum output on the relation between climate change and human rights, its Preamble reminds states the negative implication of climate change on human rights and encourage them to consider the latter when climate measures are implemented. Specifically, the Agreement entails states to respect the rights of categories of persons particularly vulnerable to the climate change impact, migrants included<sup>20</sup>.

The vulnerable position of migrants in the context of climate change had been recognized since 2012, when the Special Rapporteur on human rights of migrants stated that “[...] global environmental variation as a result of climate change is now a certainty, and the impact of climate change on migration is becoming increasingly apparent<sup>21</sup>”.

In 2016 the “Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment” presents a general and updated overview on the relation between climate change and human rights. Specifically, the Report sustained that “[c]limate change will contribute to forced migration, but the ability to migrate often depends on mobility and resources<sup>22</sup>”.

Global warming, river floods, drought are all effects of climate change, which lead to displacement of people, who are not protected under international law today<sup>23</sup>.

### The climate negative implications on human population

Before Industrial Revolution, climate change was merely a process of the earth system that had been occurring naturally; but with the rise of the

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<sup>19</sup> *Decision I/CP.16* in Conference of the Parties in n.158 (Chapter 1) at 2.

<sup>20</sup> Human Rights Council, n.2 (Chapter 2) at 6-7.

<sup>21</sup> Special Rapporteur on the human rights of migrants, *Report of the Special Rapporteur on the human rights of migrants: A/67/299* (2012) Part. III para 19.

<sup>22</sup> Human Rights Council, n. 2 (Chapter 2), part. III para.28.

<sup>23</sup> Mayer, n. 13 (Introduction) at 361-362.

Industrialization Era it became a threat to the natural world and human activity is considered the main cause of its transformation<sup>24</sup>.

The technological and economic development is based on the production processes, which release greenhouse gases<sup>25</sup>, causes of global warming. The most recent significant growth of GHG emissions happened between 2000 and 2010, mostly carbon dioxide, deriving from fossil fuel combustion, which attempt to satisfy the needs of a global growing population<sup>26</sup>.

Surface temperature is projected to rise over the 21st century under all assessed emission scenarios. It is very likely that heat waves will occur more often and last longer, and that extreme precipitation events will become more intense and frequent in many regions. The ocean will continue to warm and acidify, and global mean sea level to rise<sup>27</sup>.

Generally, South and East Asia are areas frequently subjects to climate change impact, as result they trigger large scale climate – induced migration, together with Africa and small islands<sup>28</sup>. In these contexts

[...] people are highly vulnerable to climate change because of high exposure to environmental risks, porous borders between countries, high population density, particularly at the coasts, and the high vulnerability of particular social or economic groups<sup>29</sup>.

Climate change may have influence on the right to life which is recognized by the Universal Declaration of Human Rights<sup>30</sup> and the International Covenant on Civil and Political Rights<sup>31</sup>. Abrupt and violent natural disasters do not permit a full enjoyment of such right, as result drought, rise of temperature, spread of diseases

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<sup>24</sup> Hildegard Bedarff and Cord Jakobeit, “Climate change, migration and displacement: the underestimated disaster” (2017) at 7-8.

<sup>25</sup> GHG.

<sup>26</sup> Pachauri and Meyer, n.155 (Chapter 1), at 5.

<sup>27</sup> Ibid., at 10.

<sup>28</sup> Oli Brown, “Migration and Climate Change” (2008) at 31.

<sup>29</sup> Architesh Panda, *Climate-Induced Migration and Interdependent Vulnerabilities Between Bangladesh and India* in Environment, Migration and Adaptation Evidence and Politics of Climate Change in Bangladesh (2015) at 198.

<sup>30</sup> UDHR.

<sup>31</sup> ICCPR.

threat human existence and increasing mortality especially in developing countries<sup>32</sup>.

Food and water shortage also affect human population today<sup>33</sup>, the right to adequate food is highly recognized at international level<sup>34</sup>; drought, extreme natural events, floods, salinization of water for irrigation and low availability of freshwater impede an enjoyment of such right<sup>35</sup>. Hunger, malnutrition, reduction of agriculture are the main consequences, which undermine the livelihood of population especially for those who are highly dependent on natural resources<sup>36</sup>. Many families in developing countries are dependent on agriculture as the only form of substance. Since it may represent the unique family income, climate change effect also triggers social consequences, such as unemployment<sup>37</sup>.

Water scarcity is another climate change consequence; the enjoyment of the right to clean water is threatened by reduction of glaciers and snowfall, which undermine water supplies; inundations and drought may impede access to freshwater<sup>38</sup>, vital for agriculture and sanitation<sup>39</sup>, spreading diseases; provoking also competition on natural resources and inequalities<sup>40</sup>. In addition, climate change may affect the right to health, exacerbating existing elements of health stress, also increasing malnutrition and injuries especially due to extreme events<sup>41</sup>. Natural disasters may also threaten the right to self-determination especially in circumstances where the habitability of a territory is compromised, forcing populations to leave<sup>42</sup>.

Finally, “[T]he right to live somewhere in security, peace and dignity<sup>43</sup>” or commonly the right to adequate housing is at risk due to climate change specifically

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<sup>32</sup> Office of the High Commissioner for Human Rights, “Understanding human rights and climate change” (2015) at 14. The paper represents the OHCHR submission to the UNFCCC 21<sup>st</sup> Conference of the Parties.

<sup>33</sup> United Nations Environment Programme, “Climate Change and Human Rights” (2015) at 3 and 5.

<sup>34</sup> Office of the High Commissioner for Human Rights, n.32 (Chapter 2), at 16.

<sup>35</sup> *Id.*, n.32 (Chapter 2), at 17.

<sup>36</sup> Human Rights Council, n.5, at 10.

<sup>37</sup> Mostafa, Naser “Climate Change, Environmental Degradation, and Migration: A Complex Nexus” (2015) William & Mary Environmental Law and Policy Review, vol.36 at 726-727.

<sup>38</sup> Human Rights Council, n.5 (Chapter 2), at 11.

<sup>39</sup> Office of the High Commissioner for Human Rights, n.32 (Chapter 2), at 17.

<sup>40</sup> Human Rights Council, n.5 (Chapter 2), at 11.

<sup>41</sup> *Ibid.* at 12.

<sup>42</sup> *Ibid.* at 14.

<sup>43</sup> Human Rights Council, n.5 (Chapter 2), at 13 para.35.

in coastal-zones, islands, low-lying mega deltas where extreme events constrain people to migrate, since the habitancy of these territories is extremely difficult<sup>44</sup>. “Hundreds of millions of people, especially in the global South, are highly vulnerable to global environmental change and will become more so in the future [.]” and “[t]hose effects of climate change and their adverse consequences for livelihoods, public health, food security and water availability will have a major impact on human mobility, as one natural response will be to migrate”<sup>45</sup>.

The next session will describe the gradual recognition of environment as cause of displacement, the resultant debate and the difficulties of conceptualization. Five potential climate migration patterns will be presented, together with a detailed study on the relation of climate change, migration and conflicts.

## **2.2. Environmental change as a driver of migration**

Multiple factors have been contributed to migration historically; persecution, economic crisis, religious or cultural oppression represent element that constrain populations to leave. Otherwise, job opportunities and individual considerations may also attract people towards new destinations<sup>46</sup>. In other words, the main drivers of migration at macro level consist in: (1) economic factors, the family income or the labour market; (2) social and cultural factors, educational opportunities or discrimination; (3) political factors, violence and conflicts or political incentives; (4) demographic factors, population growth or availability of lands; (5) environmental factors, such as environmental degradation<sup>47</sup>.

The causes of environmental degradation may be natural extreme events such as hurricanes or earthquakes, all phenomena that may lead to migration; or human-induced activities performed in social and economic processes, which provoke variations in the environment affecting population movement. A clear example is climate change<sup>48</sup>.

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<sup>44</sup> Ibid. at 13

<sup>45</sup> Special Rapporteur on the human rights of migrants, n. 21 (Chapter 2), part III para. 18 and 20.

<sup>46</sup> Benoit, Mayer, “*The Concept of Climate Migration: Advocacy and its Prospects*” (Edwarg Elgar publishing, 2016) at 8.

<sup>47</sup> Bedarff and Jakobeit, at 11.

<sup>48</sup> Koko Warner, “Global environmental change and migration: Governance challenges” (2009) *Global Environmental Change*, vol.20 (3) at 2.



Environmental elements as causes of migration have emerged for the first time during the 80s, further on, the famous environmentalist Norman Myers predicted alarming numbers regarding people displaced due to environmental degradation. Specifically, he has been forecasted the presence of 250 million of people escaped due to climate change in 2007<sup>49</sup>.

In a short while, scholars started to recognize effectively that environmental changes may affect migration but contrasting opinions have dominated the debate on the topic: on one hand, alarmists sustained that environment drives migration individually; on the contrary, sceptics argue that other factors, beyond environment, may induce displacement, for instance through economic dynamics<sup>50</sup>. Sceptics started to gain consent from other scholars; since they sustained that migration was not triggered merely by environment, but other factors could contribute, the distinction between environmental migrants and other typologies of migrants became superficial. However, the sceptical theories remained simply at analytical level<sup>51</sup>. In the meantime, the climate change issue started to emerge in international debates, literature and media, as result the attention shifted to climate migration<sup>52</sup>. Mayers argues that the identification of climate migrants as a specific phenomenon is incorrect; climate migration cannot be identified as an isolate and new issue, “[...] but only as an abstract causal relation – a nexus between two different fields of global governance [...]”<sup>53</sup>.

Generally, two main obstacles are impeding the conceptualization of climate migrants: (1) the difficulty to identify climate change as primary cause of an event, especially of abrupt natural disasters; similarly, scientists rarely succeed in assess climate change as cause of slow environmental mutations. Climate change may also exacerbate existing elements of environmental degradation, without directly trigger the event, since other diverse factors may affect it. (2) As result, the difficulty in correlating climate change and migration, especially in monitoring activities and development of predictions. “[E]nvironmental degradation is often a driver of displacement, but rarely it is the unique cause [...]”, people decide to move because

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<sup>49</sup> Mayer, n.46 (Chapter 2), at 9-10.

<sup>50</sup> For example when climate change events undermine the agriculture activities (Mayer, 2016).

<sup>51</sup> Mayer, n.46 (Chapter 2) at 9-12.

<sup>52</sup> Ibid.

<sup>53</sup> Mayer, n.46 (Chapter 2), at 17.

of new opportunities, persecution, or insecurity in addition to environmental change<sup>54</sup>. It is difficult to estimate the numbers of climate-induced migrants, the Internal Displacement Monitoring Centre sustains that “since 2008, an average of 24.6 million people per year have been displaced from their homes by disasters brought on by natural hazards<sup>55</sup>”. However, the statistics are not completed, because they do not consider the number of persons who flee following gradual environmental changes<sup>56</sup>.

Walter Kalin, Representative of the Secretary-General on the human rights of internally displaced persons in 2004<sup>57</sup>, has suggested five potential pictures of displacement caused by climate change impact. The scenarios will be enriched with other considerations elaborated in the literature of climate migration:

1. “Sudden-onset disasters, such as flooding, windstorms (hurricanes/typhoons/cyclones) or mudslides caused by heavy rainfalls [...]”<sup>58</sup>. “[...] [They] are differentiated into geophysical disasters [...], and climate and weather-related disasters”. Developing countries are the main exposed to climate displacement<sup>59</sup>, to give an example in 2015 “India, China and Nepal accounted for the highest numbers [of displaced people], with 3.7 million, 3.6 million and 2.6 million respectively<sup>60</sup>”. Thus, these types of disasters provoke high rates of migration flows with important economic costs<sup>61</sup>; in this context migrants are usually forced to leave<sup>62</sup> and stay within national borders temporally, while government should proceed with

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<sup>54</sup> Mayer, n.13 (Introduction), at 366.

<sup>55</sup> Internal Displacement Monitoring Centre, “Global Estimates 2015: People displaced by disasters”. See IDMC online.

<sup>56</sup> Mayer, n.46 (Chapter 2), at 21.

<sup>57</sup> See OHCHR online to find more information on Walter Kalin.

<sup>58</sup> Walter Kalin, *Conceptualising Climate-Induced Displacement* (2010) in Jane McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, (Hart publishing, 2010) at 85.

<sup>59</sup> Bedarff and Jakobeit, at 14.

<sup>60</sup> Alexandra Bilak, “Grid 2016: Global Report on Internal Displacement” (2016) at 5. This Report assesses disasters intended as sudden natural events and conflicts; it does not consider slow environmental changes since it cannot count on Global Figures yet (Bilak, 2016, at 74).

<sup>61</sup> Walter Kalin “The Climate Change – Displacement Nexus” (2008). See Brookings Institution online.

<sup>62</sup> Informal group on Migration/ Displacement and Climate Change of the InterAgency Standing Committee (IASC), “Climate Change, Migration and Displacement: Who will be affected?” (2008).

relocation on the territory. Whether migrants decide to cross an international border, they will find limited international protection<sup>63</sup>.

2. “Slow-onset environmental degradation”, such as desertification, droughts, rising sea levels or degradation of soil, which generally affect populations economically<sup>64</sup>. At the beginning the resultant migration will be voluntary, which will turn in forced and permanent when the degradation becomes unbearable<sup>65</sup>. The monitoring of migration flows is not easier in this context, because migrants abandon their habitual residence in small and separated groups<sup>66</sup>. Monitoring portals such as IDMC is still working on the development of an approach to estimate displaced people due to gradual environmental changes<sup>67</sup>; the limited information and the methodological difficulties impede a clear quantification of them<sup>68</sup>.
3. “Sinking small islands states<sup>69</sup>”, where the rise of the sea level is a great threat to small islands<sup>70</sup>; they are subjects to storms, inundation and erosion<sup>71</sup>, natural events that make the territory inhabitable. The initial migration will be internal<sup>72</sup>, but a problem of statelessness will rise when population is forcing to migrate permanently whether the island disappears completely. Here, political questions emerge, especially if the government will continue to perform its legal duty, and if it will be still able to protect and enforce the rights of its citizens<sup>73</sup>.
4. “Governments may designate areas as high-risk zones too dangerous for human habitation on account of environmental dangers<sup>74</sup>”. Here,

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<sup>63</sup> United Nations High Commissioner for Refugees, ‘Climate change, natural disasters and human displacement: a UNHCR perspective’ (2009) at 4-5.

<sup>64</sup> Kalin, n. 58 (Chapter 2), at 85.

<sup>65</sup> Informal group on Migration/ Displacement and Climate Change of the InterAgency Standing Committee (IASC), n.62.

<sup>66</sup> United Nations High Commissioner for Refugees, n.63 (Chapter 2), at 15

<sup>67</sup> Bilak, at 74.

<sup>68</sup> Ibid. at 43.

<sup>69</sup> Kalin, n. 58 (Chapter 2), at 85.

<sup>70</sup> Ibid.

<sup>71</sup> M.L. Parry et al., *Summary for Policymakers* in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) at 15.

<sup>72</sup> Kalin and Schrepfer, at 41.

<sup>73</sup> United Nations High Commissioner for Refugees, n.63 (Chapter 2), at 5.

<sup>74</sup> Kalin, n. 58 (Chapter 2), at 85.

populations are forced to leave without the possibility to return, while the state proceed to the relocation<sup>75</sup>. Generally, an internal displacement is more likely in this context; in case government is not able to provide for effective solutions, people may decide to return risking their life or migrate abroad<sup>76</sup>.

5. Climate-induced competition on natural resources may “unrest seriously disturbing public order, violence or even armed conflict<sup>77</sup>”, and also trigger migration. The topic will be examined more in depth in the next paragraph.

Considering the above, migration is an umbrella terms, it entails the movement of economic migrants, displaced persons, refugees<sup>78</sup>; the type of migration depends on the choice of a person to stay within national borders, along borders or cross international borders<sup>79</sup>. Climate migrants usually prefer to remain within national borders or rather move towards boundaries of neighbour states, as result, international migration is highly less developed than intra-state migration<sup>80</sup>. Again, climate- induce migration can be temporary or permanent, generally after abrupt events population prefer to return as soon as the event ends. Instead, a gradual process of environmental degradation may lead people to move definitively towards other destinations<sup>81</sup>. Finally, movement caused by climate change can be forced or voluntary, mostly depending on the gravity of the natural event<sup>82</sup>. Those elements are influenced by the modalities in which the events occur and by the implementation of responses. Moreover, “[t]he relationship between environmental and climate change and migration is often complicated by the multifaceted associations with other factors, such as population growth, poverty, governance, human security and conflict<sup>83</sup>”.

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<sup>75</sup> Ibid.

<sup>76</sup> Kalin and Schrepfer, at 42.

<sup>77</sup> Ibid.

<sup>78</sup> See the definition of “migration / migrant” UNESCO online.

<sup>79</sup> Julia Toscano, "Climate Change Displacement and Forced Migration: An International Crisis," (2015) Arizona Journal of Environmental Law and Policy, vol. 6 (1) at 467. See Heinonline.

<sup>80</sup> Bedarff and Jakobeit, at 8.

<sup>81</sup> Ibid.

<sup>82</sup> Informal group on Migration/ Displacement and Climate Change of the InterAgency Standing Committee (IASC), n.65 (Chapter 2)

<sup>83</sup> International Organisation for "Migration, Migration, Climate Change and Environment : A Complex Nexus". See IOM online..

People who do not have enough financial resources to leave<sup>84</sup>, “[...] are often more vulnerable than migrants themselves-populations “trapped in place” and unable to adapt through migration<sup>85</sup>”.

### Climate change, migration and conflicts

A growing field of studies on the relation among climate change, migration and conflicts have emerged recently<sup>86</sup>. Generally, the climate change is not considered the direct cause of conflict and migration, the interconnection among them is more complex, they are usually considered as three distinct elements that overlap in different scenarios<sup>87</sup>.

In 2011 the Security Council “[...] expresses its concern that possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security<sup>88</sup>”.

The climate change repercussions on human security may have a strong impact whether the livelihood of population is highly dependent on natural resources; as result, a change of availability of the latter due to climate change exacerbate existing vulnerabilities<sup>89</sup>. Social and economic elements are protagonists together with climate change in influencing human security; for instance, the capacity of adaptation to environmental changes is affected by the level of social protection provided or by the political decisions of governments.<sup>90</sup>

In 2009 the Secretary General presented a report which explains the climate change impact on security. The document sustains that generally climate change may exacerbate the existing vulnerabilities of states and impede their development process. Moreover, climate-induced consequences such as migration or statelessness also affect human rights and security<sup>91</sup>. The Report describes “[...]”

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<sup>84</sup> Foresight, at 14.

<sup>85</sup> Mayer, n.46 (Chapter 2), at 34.

<sup>86</sup> Michael Werz and Laura Conley, “Climate Change, Migration, and Conflict: Addressing complex crisis scenarios in the 21st Century” (2012) at 1.

<sup>87</sup> Ibid.

<sup>88</sup> United Nations Security Council, Statement by the President of the Security Council: S/PRST/2011/15 (2011) at 1.

<sup>89</sup> Jon Barnett and W. Neil Adger, “Climate change, human security and violent conflict” (2007) *Political Geography*, vol.26 (6) at 641.

<sup>90</sup> Ibid. at 641-642

<sup>91</sup> General Assembly, Climate change and its possible security implications: A/64/350 (2009) at 1.

climate change as a threat multiplier, namely as a factor that can work through several channels [...] to exacerbate existing sources of conflict and insecurity<sup>92</sup>". In other words, climate change does not provoke directly national or international conflicts, instead it increases the chances of their development or exacerbate the fragility of a state<sup>93</sup>. Specifically, climate change effects on agriculture, human health, water may lead to social insecurity, poverty, economic disparity<sup>94</sup> triggering a competition for natural resources. The latter may deteriorate an ongoing conflict, forcing populations to leave<sup>95</sup> or create the basis for a new one<sup>96</sup>. The foreseeability of conflicts is rare, the factors that affect the relation between climate change and conflict are numerous<sup>97</sup>, nevertheless a recent study have found that a high density of population leads to conflicts more than other climate change effects on availability of food and lands. The complexity in studying the climate change – conflict nexus is represented by the fact that climate change affects a state through "[...] multiple and indirect pathways, interacting in complex ways with social, political and economic factors [...]"<sup>98</sup>.

The growing literature on the topic includes also the role of migration, even though academics have not come to a clear conclusion yet<sup>99</sup>.

Generally, migration is a reason for dispute at national or international level because of ethnic factors, social and economic implications, also cultural and religious motivations. For example, a conflict might break whether a host state is not able to receive the entire average of migrants, increasing the tension among populations.

Reuveny sustains that the arrival of climate migrants in a host state may create competition regarding natural resources, especially whether the arrival state is equipped inadequately. In addition, disputes are likely to happen particularly because national population and hosted migrants are not willing to trust each other.

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<sup>92</sup> Ibid. part II para. 13.

<sup>93</sup> Robert McLeman, *Migration and Displacement in a Changing Climate* in Caitlin E. Werrell and Francesco Femia (eds), *Epicenters of Climate and Security: the new geostrategic landscape of the anthropocene* (2017). See the Center for Climate and Security.

<sup>94</sup> Ibid.

<sup>95</sup> Mayer, n.46 (Chapter 2), at 22.

<sup>96</sup> McLeman, at 105.

<sup>97</sup> Secretary General, n.91 (Chapter 2), at 18.

<sup>98</sup> Ibid. para. 67.

<sup>99</sup> Kate Burrows and Patrick L. Kinney, "Exploring the Climate Change, Migration and Conflict Nexus" (2016) *International Journal of Environmental Research and Public Health* 13(4):443 at 1..

The tension may emerge also at social and economic level, where migrants seek jobs and lands in order to start a new life, threatening the existing livelihood of original populations<sup>100</sup>. Finally, migrants may maintain contacts with persons who are fighting in their national state, spreading violence across borders<sup>101</sup>.

Currently, studies are still developing on the issue; the debate on climate change – conflicts nexus, including the phenomenon of migration, is still ongoing. As it was mentioned before, researches have demonstrated that migration does not affect conflicts following a linear pattern, in fact it interacts with other multiple potential factors<sup>102</sup>. The ethnic factor is a potential trigger of conflict together with migration and environment: food insecurity or water scarcity due to climate change may push population to move, mostly within the national territory, colliding with different ethnicity<sup>103</sup>. Recent events demonstrated that ethnic disputes are mainly focused on ownership issue caused by the continue movement of persons in areas that traditionally are managed by people of different ethnicity. A concrete example may be represented by the Darfur conflict which started in 2003<sup>104</sup> following a long period of drought<sup>105</sup>.

According to UNEP “[...] there is substantial evidence of a strong link between [...] local conflict and environmental degradation of rangeland and rain-fed agricultural land in the drier parts of Sudan<sup>106</sup>”. In 2007 the secretary general Ban Ki-Moon sustained that the main cause of the conflict in Darfur was merely environmental, recognizing a heavy role to the climate change impact<sup>107</sup>. Since the 80s climate-related effects on the region have been evident, the average of rainfall dropped dramatically<sup>108</sup>, as result scarcity of water hit heavily the livelihood of local populations<sup>109</sup>. The limiting water supplies and the process of desertification

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<sup>100</sup> Rafael Reuveny, “Climate Change-Induced Migration and Violent Conflict” (2007) *Political Geography* 26(6) at 659.

<sup>101</sup> Werz and Conley, n.86 (Chapter 2), at 17.

<sup>102</sup> *Ibid.* at 9.

<sup>103</sup> Brown, at 33.

<sup>104</sup> Ban Ki-moon, “A Climate Culprit In Darfur” (2007). See UN online.

<sup>105</sup> Brown, at 33

<sup>106</sup> United Nations, “Sudan Post-Conflict Environmental Assessment Sudan post conflict environmental assessment” (2007) at 80.

<sup>107</sup> Ban Ki-moon, n.104 (Chapter 2).

<sup>108</sup> Stephan Farris, “The Real Roots of Darfur: The violence in Darfur is usually attributed to ethnic hatred. But global warming may be primarily to blame” (2007) *The Atlantic newspaper online*.

<sup>109</sup> UNenvironment, “Climate for Change in Sudan”. See UNenvironment online. 12 2018.

changed the traditional pattern in Darfur, where nomadic herders and farmers started to compete for natural resources. The Africans<sup>110</sup> stopped to help and share goods with herders, conversely, the Arabs<sup>111</sup> started to extort lands from the farmers; the resultant tension exacerbated in a racial dispute. The latter was aggravated through the armed conflict carried out by the military fighters,<sup>112</sup> which led to a considerable number of displaced people who have been the main victims, subjects to continuous and serious violation of human rights<sup>113</sup>.

Considering the above, the relation between climate change and migration develops in different and complex ways, impeding also a concrete definition of climate migration. An overview of the debate on its conceptualization will be provided. Then, in order to develop a better understanding of the climate change – migration nexus, an assessment of the possible international legal protection of climate migrants will be presented, together with existing normative gaps.

### **2.3 Defining Climate-induced Migration**

The first attempt to define climate-induced migrants was carried out by Essam El-Hinnawi, who inserted the term “environmental refugees” in a UNEP report in 1985<sup>114</sup>.

The document suggests that an environmental refugee is a person who is constrained to leave his habitual residence temporarily or not, due to environmental degradation developed naturally or human-induced<sup>115</sup>.

In 1995 the environmentalism Norman Myers provided a further definition of environmental refugees, he presented them as persons

[...] who can no longer gain a secure livelihood in their traditional homelands because of environmental factors of unusual scope, notably drought,

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<sup>110</sup> Farmers in Darfur are called also Africans.

<sup>111</sup> Herders in Darfur are called also Arabs.

<sup>112</sup> Farris, n.108 (Chapter 2).

<sup>113</sup> United Nations Office of the High Commissioner for Human Rights and African Union, “The Human Rights Situation of the Human Rights in Sudan 2014-2016” part IV para.17.

<sup>114</sup> Marta Picchi, “Climate Change and the Protection of Human Rights: The Issue of Climate Refugees climate change and the protection of human rights” (2016) *US-China Law Review*, vol.13 (7) at 578.

<sup>115</sup> Franklin Cardy, “Environment and Forced Migration: a Review” (1994) at 2. This paper has been developed for the Fourth International Research and Advisory Panel Conference..



desertification, deforestation, soil erosion, water shortages and climate change, also natural disasters such as cyclones, storm surges and floods<sup>116</sup>.

The term “climate refugee” was considered a component of “environmental refugee”, even though there was not a clear definition of the former.<sup>117</sup> As result the phenomenon started to become a common concern<sup>118</sup>, increasing discussions and debates<sup>119</sup>.

Today, the United Nations High Commissioner for Refugees<sup>120</sup> sustains that the terms “climate refugee” and “environmental refugee” have been started to be used wrongly by media, politicians, international actors as common words to define persons forced to move due to climate change. Specifically, only the term “refugee” has a legal framework at international level, thus other association with it, such as “economic refugee” does not find a legal correspondence in international law. “[...] [T]he use of such terminology could potentially undermine the international legal regime for the protection of refugees whose rights and obligations are quite clearly defined and understood<sup>121</sup>”. In addition, the UNHCR states that the possibility to amend the Refugee Convention in order to insert environmental elements in the official definition of refugee, would undermine the Convention and provoke a potential renegotiation of the document<sup>122</sup>.

Thus, in 2007 the International Organisation for Migration<sup>123</sup> have tried to present a different conceptualization

“Environmental migrants are persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad<sup>124</sup>”.

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<sup>116</sup> Norman Myers and Jennifer Kent and Climate Institute, *Environmental Exodus : an Emergent Crisis in the Global Arena* (Climate Institute, 1995) at 19.

<sup>117</sup> Frank Biermann and Ingrid Boas, “Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees” (2010) in *Global Environmental Politics* 10(1) at 63.

<sup>118</sup> Picchi, at 578.

<sup>119</sup> Fatima Rabab et al., “Human rights, climate change, environmental degradation and migration: a new paradigm” (2014) at 2.

<sup>120</sup> UNHCR.

<sup>121</sup> United Nations High Commissioner for Refugees, n.63 (Chapter 2), at 9.

<sup>122</sup> *Ibid.* at 9.

<sup>123</sup> IOM.

<sup>124</sup> International Organization of Migration, *Discussion note: Migration and the Environment: MC/INF/288* (2007) at 1-2.

The definition is comprehensive and broad, it includes few forms of migration, as internal or cross border movement, and temporal or permanent one; even though the concept of climate change has not been directly inserted, it may provide a basis for further developments of the phenomenon and for identifying the current normative gaps<sup>125</sup>. On the contrary, the definition does not make references to other types of migration<sup>126</sup>, and it does not distinguish between movement caused by environment or movement caused merely by climate change. This difference is fundamental, because it may affect the role of the international community and the issue of responsibility. In fact, historically it is evident that climate change has been produced by the global economic development, instead the cause of environmental degradation is less clear, and the international community may take advantages on it and reject responsibility over environmental migration<sup>127</sup>.

Other efforts have been made to identify climate migrants in literature, to give an example Renaud and additional famous scholars, proposed a classification of three different categories: firstly, they identify “environmentally motivated migrants”, who decide to leave their home in order to avoid a worse scenario, in this context the displacement may be permanent or temporary. Secondly, “environmentally forced migrants” are those who are constrained to move often permanently, hoping to avoid a natural disaster. Finally, the authors define “environmental refugees” as persons who flee from disasters, with the possibility to return afterwards<sup>128</sup>.

These three categories make a distinction between voluntary and forced movement, even though they do not identify international legal instruments that provide normative protection for the distinct categories. Moreover, the definitions do not distinguish internal displacement from cross border one<sup>129</sup>.

Thus, various terms “[...] such as environmental migration, climate change-induced migration, ecological or environmental refugees, climate change migrants

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<sup>125</sup> Rabab et al., at 3.

<sup>126</sup> Warner, n.48 (Chapter 2), at 2.

<sup>127</sup> Mayer, n.13 (Introduction), at 368.

<sup>128</sup> Fabrice G. Renaud et al., « Adapt or Flee: How to face Environmental Migration? » (2007) at 29-30. This paper is part of a Publication Series developed by United Nations University Institute for Environment and Human Security.

<sup>129</sup> Kälin and Schrepfer, at 28-29.

and environmentally-induced forced migrants [...]”<sup>130</sup>” have been using confusedly until today<sup>131</sup>. As it was mentioned above, it is difficult to isolate environmental factors from others causes of migration, and as result linking migration with climate change impact<sup>132</sup>. A common ground on an official definition is still complex to achieve<sup>133</sup>, but such accomplishment may help to clarify the status of climate migrants and the legal protection, their rights and needs, and governments may develop adequate responses to the phenomenon<sup>134</sup>.

### Internally Displaced Peoples in the climate change context

International migration law “[...] is an umbrella term covering a variety of principles and rules that together regulate the international obligations of States with regard to migrants<sup>135</sup>”. It has grown gradually developing international instruments and picking essential elements from branches of international law<sup>136</sup>. As result, the sources are diverse, which helped to develop an international migration law mostly composed by soft law instruments such as bilateral or multilateral agreements, but also by legally binding treaties<sup>137</sup>.

The Guidance Principles of Internal Displacement represents a clear example of soft law in international migration field<sup>138</sup>. In 1993 the Commission on Human Rights entrusted the Representative of the Secretary-General an important task, it was asked to develop a document aimed to fulfil the lacks and gaps in the existing law of protection of internally displaced people. In 1998 the Guidance Principles were presented with the hope that states, international organisations, non-governmental organisations and other international actors would have incorporated the Guidance as international standards<sup>139</sup>.

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<sup>130</sup> Olivia V. Dun and Francois Gemenne, “Defining 'environmental migration'” (2008) *Forced Migration Review*, 31 at 10.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*, at 10.

<sup>133</sup> Picchi, at 578.

<sup>134</sup> Dun and Gemenne, at 10.

<sup>135</sup> See the definition of “International Migration”, retrieved from <https://www.iom.int/migration-law>. Last visited May, 14 2018

<sup>136</sup> See IOM definition of “International Migration Law”, retrieved from <https://www.iom.int/migration-law>. Last visited May, 14 2018.

<sup>137</sup> Ferris and Bergmann, at 13.

<sup>138</sup> *Ibid.* at 14.

<sup>139</sup> See “Background to Guiding Principles on Internally Displacement” retrieved from <http://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx>. Last visited May, 09 2018

During the 2005 World Summit the General Assembly identified the document “[...] as an important international framework for the protection of internally displaced persons and resolve to take effective measures to increase the protection of internally displaced persons<sup>140</sup>”.

Internally Displaced Persons<sup>141</sup> are persons forced to abandon the place where they live, because of armed conflicts, severe violation of human rights and natural or human – induced disasters. In contrast to refugees, IDPs do not cross international borders, they stay within national boundaries, often subjects to military attacks, food and water scarcity and violation of rights<sup>142</sup>.

Disasters displaced around 19.2 million people across 113 countries in 2015, more than twice the number who fled conflict and violence. Over the past eight years, a total of 203.4 million, or an average of 25.4 million displacements have been recorded every year<sup>143</sup>.

Further,

“[...] [I]ndividuals displaced under life-threatening conditions resulting either directly from natural disasters, or indirectly from conflicts or generalized violence exacerbated by increased environmental stress, should readily be considered as internally displaced persons<sup>144</sup>”.

The official definition included in the Guidance is broad and open, it can cover displaced people who are forced to leave because of natural hazards, without the necessity to determine the link between climate change and disaster<sup>145</sup>.

The Guiding Principles provides a series of rights entitled to IDPs deriving from humanitarian law and international human rights instruments, the document was a result of a negotiation among governments, experts and UN agencies<sup>146</sup>. According to the document, the Principles must be respected by all types of actors<sup>147</sup>, the duty to protect and assist such persons within national borders is upon states and displaced people cannot be punished whether they request protection and

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<sup>140</sup> General Assembly, *Resolution adopted by the General Assembly: A/RES/60/1* (2005) part. IV para. 132.

<sup>141</sup> IDPs.

<sup>142</sup> See “Questions and Answers about IDPs” retrieved from <https://www.ohchr.org/EN/Issues/IDPersons/Pages/Issues.aspx#1>. Last visited May, 15 2018.

<sup>143</sup> Bilak, at 5.

<sup>144</sup> Mayer, n.46 (Chapter 2), at 126.

<sup>145</sup> Kalin, n.58 (Chapter 2), at 87.

<sup>146</sup> Ferris, at 14-16.

<sup>147</sup> Guiding Principles on Internal Displacement, Principle 2.

assistance<sup>148</sup>. Furthermore, authorities have the responsibility to favour the reintegration or resettlement of displaced people<sup>149</sup>.

Even though the thirty Principles do not represent a legally binding Guidance, they have contributed to the development of other instruments and policies to enhance the protection of IDPs. To give an example, in 2009 the African Union adopted the African Union Convention on Protection and Assistance of Internally Displaced People<sup>150</sup>, which constitutes a legally binding document that commits African states to respect and fulfil the rights of such persons, in a continent with a high number of displaced people<sup>151</sup>.

The Convention entered into force in 2012, five years later 27 states have ratified it<sup>152</sup>; according to the document, the parties must assist internally displaced people also in context of climate change, providing effective solutions or preventing dangerous natural events; moreover, such people have the right to reparation in case of state carelessness<sup>153</sup>.

After the numerous natural disasters that affected Asia and America between 2004 and 2005, it was evident that sudden events such as hurricanes, severe storms and earthquakes undermine heavily the livelihood and the rights of persons, forcing them to move. Thus, in 2006 the Inter-Agency Standing Committee<sup>154</sup> adopted the Operational Guidelines on Human Rights and Natural Disasters, document that sustains the adoption of a human rights approach in protecting the displacement of people after a natural disaster, which may improve the humanitarian assistance<sup>155</sup>. The Guidelines advice humanitarian organisations in assisting and protecting displaced persons during the phases before the occurrence of the natural disaster and afterwards<sup>156</sup>. Despite these attempts to enhance the

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<sup>148</sup> Ibid. Principle 3.

<sup>149</sup> Ibid. Principle 28.

<sup>150</sup> Ferris, at 15.

<sup>151</sup> Internal Displacement Monitoring Centre and Norwegian Refugee Council, «The Kampala Convention two years on: time to turn theory into practice » (2014). See IDMC online.

<sup>152</sup> See the list of Parties to the Kampala Convention retrieved from [https://au.int/sites/default/files/treaties/7796-sl-african\\_union\\_convention\\_for\\_the\\_protection\\_and\\_assistance\\_of\\_internally.pdf](https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf). Last Visited May, 15 2018.

<sup>153</sup> Ferris, at 15-16.

<sup>154</sup> IASC.

<sup>155</sup> Brookings et al., “IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters” (2011) at 2-3.

<sup>156</sup> Ferris, at 16.

protection of internally displaced persons following natural disasters, the Guiding Principles still present few issues and legal gaps, that need to be urgently solved.

The ongoing debate on the normative gaps in the context of Internally Displaced Persons follows three questions: (1) the Guiding Principles remains a source of soft law, a non-binding instrument, thus, states shall ensure an implementation of them through national policies, recognizing climate-induced events as a font of displacement<sup>157</sup>; (2) as it was mentioned before the definition of internally displaced people is flexible, but it is focused mainly on forced displacement, letting uncovered people who move within national boundaries because of slow environmental changes. Those who decide to move voluntary for the effect of climate change that is gradually destroying the environment, may be recognized as internal migrants; the human rights law provides some level of protection, but still they are not covered by the Guiding Principles protection<sup>158</sup>. (3) The last issue is represented by a low willingness of states in the effective implementation of the Principles, especially in case of natural disasters caused by climate change, due to the difficult forecasting of sudden events<sup>159</sup>. Even though twenty governments have translated the Principles into domestic law, none have implemented them entirely. In fact, most of governments have focused on incorporation of norms that regulate merely internal displaced people by conflicts<sup>160</sup>.

#### Alternative forms of legal protection on climate migrants

A normative protection to internal climate migration is partly provided by the legal framework described above. On the contrary, cross border climate migration still does not find existing legal covering.

Beyond soft law instruments aimed to protect persons forced to move because of climate change, there are other important tools which may favour a hard law approach to the issue, namely the international human rights law and international refugee law.

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<sup>157</sup> Kalin and Schrepfer, at 30.

<sup>158</sup> Ibid. at 24.

<sup>159</sup> Khalid Koser, "Gaps in IDP protection" (2008). See Forced Migration Review.

<sup>160</sup> Ferris, at 15.

In 2017 during an Intersessional Panel Discussion on the relation among human rights, climate change, migration and IDPs at the Human Rights Council, numerous recommendations were carried out. Particularly the participants such as governments, international organizations, stakeholders “[...] called for a rights-based approach to climate change and migration, founded on the principles of equality, non-discrimination and common but differentiated responsibility [...]”<sup>161</sup> International Human Rights Law represents a possible form of protection for cross border climate displaced people. It presents a proliferation of international treaties and other important related instruments also at national and regional level. This branch of law places a series of obligations upon states that have ratified the treaties and incorporate them into domestic law; states must respect and protect people from violation of human rights since it covers everyone on grounds of humanity, furthermore states shall take positive measures to permit a full enjoyment<sup>162</sup>.

At the 2011 Nansen Conference, the importance of human rights principles, and in particular the prohibition of non-refoulement, was highlighted as a possible protection framework for those displaced across borders not falling under the refugee protection regime<sup>163</sup>.

Nevertheless, the violation of human rights due to climate change impact is still spread: more efforts in a better protection are needed<sup>164</sup> and in a stronger implementation of the Human Rights Law in developing countries. A coordination and cooperation at international level aimed to help migrants in the climate change context is far from being effective<sup>165</sup>. Since, the protection of HRL is limited, it does not cover the admission of persons in new states and does not clarify their status abroad, an alternative is represented by the International Convention on the Protection of the Rights of All Migrants Workers and their Families. But, it applies only whether the cross border displaced people due to climate change fall within

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<sup>161</sup>United Nations Human Rights Council, *Advance edited version, Summary of the panel discussion on human rights, climate change, migrants and persons displaced across international borders: A/HRC/37/35* (2017) part. IV para. 54.

<sup>162</sup> See background on International Human Rights Law on OHCHR online.

<sup>163</sup> Kalin and Schrepfer, at 25.

<sup>164</sup> Ferris, at 20.

<sup>165</sup> Mayer and Crépeau, at 10.

the criteria of migrant worker, but still the number of states that have ratified it is low<sup>166</sup>.

A brief consideration on the issue of statelessness of climate migrants will be provided, focusing primarily on the context of sinking small islands, which makes the normative protection of this category of persons more complex.

Small island states are constantly threatened by the rise of sea level; the resultant migration flow will be internal initially, then it will change in forced whether the island ceases to exist. Here, climate migrants become permanent cross border displaced people, uncovered by international law.

In this context displaced population may be considered as stateless persons under the 1954 Convention relating to the Status of Stateless Persons, when the inundation of the island results in the end of statehood and loss of nationality. However, the protection presented by the Convention remains mostly limited, it provides few rights to stateless persons, and it does not regulate the admission to a third state, also the number of ratification is still low. Moreover, since the Convention considers stateless persons those who have lost the nationality, it is unlikely that an inundation of a small island results in the loss of the entire legal apparatus of a state. Probably the government will try to maintain symbolically a basic level of control, providing assistance to their displaced citizens, even though it will find difficulty in the protection and fulfilment of their rights.

#### Refugees in the climate change context

The 1951 Convention and its 1967 Protocol relating the Status of Refugees includes a narrow definition of refugee<sup>167</sup>. Currently a refugee is a person who: (1) fears “[...] persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group or political opinion<sup>168</sup>”, which forced him to flee; (2) cross international borders and (3) cannot benefit from the protection of his national government<sup>169</sup>.

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<sup>166</sup> Kalin Schrepfer at 25.

<sup>167</sup> Ferris, at 21.

<sup>168</sup> United Nations High Commissioner for Refugees, ‘Summary Conclusions on the interpretation of the extended refugee definition in the 1984 Cartagena Declaration’ (2014) at 2 para.4. See UNHCR online.

<sup>169</sup> See the Convention and the Protocol relating to the Status of Refugees, at 14, art.1 para.A(2).



Clearly, this definition has not been developed for climate migrants, as result most of them remain without a legal covering at international level. Even though the Convention protect people who cross international borders, the Status of Refugee can be released exclusively in case of persecution<sup>170</sup>. “Persecution means that the country of origin of the refugee is unwilling, or in the case of persecution by non-state actors unable, to fulfill its basic duty of guaranteeing peace and security to its citizens [...]”<sup>171</sup>.

Only in few cases a cross border climate displaced person may obtain the Status of Refugee:

- a) The government should have been refused to assist populations during or after a natural disaster (scenario 1-2) because they are affiliated to a particular religion, race, nationality, social or political association; similarly, a climate impact may be considered a persecution, whether it is a result of a policy, sustained by a government, aimed to persecute a specific category of persons on the basis mentioned above. Or, whether a governmental policy favours an environmental deterioration aimed to persecute people on the same basis<sup>172</sup>.
- b) In case a provision which forbids human habitation (scenario 4) is released with the aim to persecute a category of people because of the elements above; whether a government forced people to leave the inhabitable zone with violence, and this violence is aimed to persecution linked to religious, racial, national, social and political elements. Or, whether the displaced people remain without assistance of the government<sup>173</sup>.
- c) In case of violent conflict animated by a competition on limited natural resources due to climate change (scenario 5), the Status of Refugee may be released whether a category of persons is subject to persecution because of the elements reported above<sup>174</sup>.

The international refugee law has developed mostly at regional level through the adoption of regional instruments namely the Organization of African Union

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<sup>170</sup> Kalin and Schrepfer at 31.

<sup>171</sup> Ibid. at 32.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid. at 33.

<sup>174</sup> Ibid.

Convention on the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration<sup>175</sup>.

According to the above Convention a refugee is

[...] [a] person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality<sup>176</sup>.

Similarly, the Cartagena Declaration provides protection of people who are forced to move because of armed conflicts, violence and events threatening public order<sup>177</sup>. Both the documents have provided a broader definition of refugee<sup>178</sup>. A more current achievement has been reached during the 30<sup>th</sup> anniversary of the Cartagena Declaration in December 2014. Here, representatives of governments and UNHCR met in Brasilia to discuss about migration, displacement and statelessness; after consultations and discussions, they adopted the Brazil Declaration and Plan of Action which broadened even more the definition of refugee. Firstly, the Declaration aspired to promote new forms of protection for those categories of people and advanced solutions with the cooperation at regional and international level<sup>179</sup>.

Furthermore it

Recognize[s] the challenges posed by climate change and natural disasters, as well as by the displacement of persons across borders that these phenomena may cause in the region, and recognize the need to conduct studies and give more attention to this matter, including by UNHCR [...] <sup>180</sup>.

A further important development, which may fulfil such normative gaps, is represented by the complementary protection<sup>181</sup>. From a legal point of view, it expands the protection of people who are not covered by the Refugee Convention;

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<sup>175</sup> Ferris, at 21.

<sup>176</sup> See the Organisation of African Unity (OAU) Convention art. 1 para.2.

<sup>177</sup> See the Cartagena Declaration on Refugees, part III para.3.

<sup>178</sup> Ferris, at 21.

<sup>179</sup> See Brazil Declaration and Plan of Action: "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean" (2014) at 1-3.

<sup>180</sup> Ibid. at 3.

<sup>181</sup> Ferris, at 21.

specifically, states provide for protection following a human rights treaty or humanitarian law in case a person has forced to leave, because subject to violence. The complementary protection which expands the concept of non-refoulement<sup>182</sup>, presents correlated forms namely temporary protection and subsidiary protection which have mainly developed in European Union<sup>183</sup>. The former was established through the 2001 Directive on Temporary Protection, “[...] an exceptional measure to provide displaced persons from non-EU countries and unable to return to their country of origin with immediate and temporary protection<sup>184</sup>”, especially in case of high flows of migration; instead, the Article 15 EU Qualification Directive provides a subsidiary protection for whom face an important threat in returning to their national state in context of national or international conflict<sup>185</sup>.

An advanced development of those recent instruments may be useful to fulfil the normative lacks in displacement caused by climate change, or it may trigger the expansion of new regional instruments<sup>186</sup>. Even though, Mayer sustains that unlikely these forms of protection will affect the international protection, states still prefer applying strategies aimed to impede migrants to request a status of asylum or through a strict control on borders<sup>187</sup>.

In order to provide potential solutions for enhancing the protection of climate-induced forms of migration, some academics present few proposals on the matter; first of all, an amendment of the Refugee Convention was proposed, even though it seems less probable<sup>188</sup>, secondly legal assessments and negotiations are needed to develop new norms that directly assist climate-induced migrants<sup>189</sup>. In 2007 the German Advisory Council on Global Change proposed to “[adopt] an additional protocol to the existing United Nations Convention Relating to the Status

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<sup>182</sup> Jane Mcadam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) at 20-22; the principle of non-refoulement “[...] prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened (IOM, 2011, at 68).

<sup>183</sup> Ferris, at 21.

<sup>184</sup> See definition of “Temporary Protection” on European Commission (Migration and Home Affairs) online. Retrieved from [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en). Last visited May, 16 2018.

<sup>185</sup> Kalin and Schrepfer at 33.

<sup>186</sup> Ferris, at 21 22.

<sup>187</sup> Mayer and Crepéau, at 9.

<sup>188</sup> Ferris, at 21.

<sup>189</sup> Andrew I. Schoenholtz, “The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century” (2015) *Chicago Journal of International Law*, vol. 16 (1) at 126.

of Refugees, [and declares that] vigorous efforts [need to] be made at this stage to establish a cross-sectoral multilateral Convention aiming at the issue of environmental migrants<sup>190</sup>”.

Nevertheless, Biermann sustains that a new and independent treaty on climate migrants would require a long negotiation on key issues, enlarging the separation with the climate change regime. Thus, a better solution would be represented by inserting “[...] the protection of climate migrants within an institutional mechanism under the climate convention<sup>191</sup>”.

Thus, normative gaps are still existing in the context of cross border climate migration; recently the Nansen Conference faced the issue sustaining that “[a] more coherent and consistent approach at the international level is needed to meet the protection needs of people displaced externally owing to sudden-onset disasters<sup>192</sup>”.

#### Further protection tools for climate migrants

The Nansen Conference on Climate Change and Displacement took place in Norway in 2011; the main goal of the meeting was finding a better way to face cross-border displacement caused by abrupt or slow climate-induced events. A first achievement is represented by the Nansen Principles, a series of guidelines which states shall refer to deal with climate-induced displacement<sup>193</sup>. In order to provide effective response to climate displacement, the Principles recognizes the need for a detailed understanding of the phenomenon and they place the responsibility upon states together with civil society and stakeholders; further, they promote preventive actions and call for an enhancement of the capacity of states in facing climate displacement. Finally, the Principles do not deny the importance of international law and international human rights law but request the identification of normative gaps for developing new efficient instruments<sup>194</sup>.

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<sup>190</sup> Schubert R. et al, *Climate change as a security risk* (2008) at 11.

<sup>191</sup> Frank Biermann, *Earth System Governance: World Politics in the Anthropocene* (The MIT Press, 2014) at 195.

<sup>192</sup> See Margareta Wahlström (Chairperson for the Nansen Conference in 2011) “Summary of the Nansen Conference on Climate Change and Displacement in the 21st Century” (2011) at 5, Principle IX. See Pakistan National Committee of IUNC Members.

<sup>193</sup> United Nations High Commissioner for Refugees, “Quick Guide: Climate Change and Disaster, Displacement” (2017) at 2.

<sup>194</sup> Walter Kalin, “From the Nansen Principles to the Nansen Initiative” at 1. See Forced Migration online.

The Conference was highly participated, 230 actors were contributing to the development of the outcomes, namely academics and experts, humanitarian organizations, delegates from governments and the civil society<sup>195</sup> Following the Conference, Norway and Switzerland launched the Nansen Initiative one year later

[...] a state-led, bottom-up consultative process intended to build consensus on the development of a protection agenda addressing the needs of people displaced across international borders in the context of disasters and the effects of climate change<sup>196</sup>.

The process started with a series of meetings among regional and sub-regional entities, together with experts, academics and international organizations, aimed to a better understanding of the topic, trying to find a common ground and identifying the normative gaps<sup>197</sup>. The main result of the long process was the Agenda for the Protection of Cross Border Displaced Persons in the Context of Disaster and Climate Change, which has collected the whole consultative outcomes. The document: (1) expands the concept of disaster displacement developing counteractions; (2) promotes better performances of states in protecting displaced persons who cross international borders; (3) endures cooperation at international level, harmonisation of policies and the prevention of displacement; (4) improves measure taken by states in specific areas, filling the normative gaps<sup>198</sup>. Currently the Nansen Protection Agenda, promoted by 109 states, is advanced by the Platform on Disaster Displacement, which “[...] aims to ensure implementation of the recommendations of the [...] Agenda<sup>199</sup>”.

Another important achievement in the protection framework of migrants is represented by the ILC Draft Articles on the Protection of Persons in the Event of Disasters. In the past the International Law Commission<sup>200</sup> attempted to promote a

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<sup>195</sup> Elisabeth Rasmusson et al., “the 2011 Nansen Conference: Climate Change and Displacement in the 21st Century” (2011) at 3.

<sup>196</sup> Environmental Migration Portal, “The Nansen Initiative”. See Environmental Migration Portal online. 16 2018.

<sup>197</sup> Kalin, n.194 (Chapter 2), at 2.

<sup>198</sup> See The Nansen Initiative Global Consultation, “Conference Report” (2015) at 16,

<sup>199</sup> United Nations High Commissioner for Refugees, n.193 (Chapter 2), at 3.

<sup>200</sup> The International Law Commission “[...] shall have for its object the promotion of the progressive development of international law and its codification”. See the Statute of the International Law Commission, especially art. 1 para.1.

binding instrument for the humanitarian assistance in case of disasters which at the beginning failed; in the 90s the issue rose again and the Draft Articles have been elaborated. Such document encourages a comprehensive approach to disasters, including state responsibility and human rights-based assistance. The definition of disasters presented by the Draft Articles is broad and detailed, specifically it entails both the displacement issue and the disasters due to environmental degradation. On the other hand, such document does not seem referring to slow environmental changes, and to the multiple vulnerabilities of migrants, together with different typologies of human movement<sup>201</sup>.

In the last session the fragilities of people particularly sensitive towards the climate change impact will be exposed, dwelling upon the conditions of women, children and indigenous people. Their particular position in the context of climate change have been recognized at international level, both the negative implications and their positive and valuable contribute in adaptation and mitigation measures.

#### **2.4 Vulnerable people and the struggle against Climate Change**

In October 2017 during the Panel discussion on Human Rights climate change migrants and persons displaced across international borders, the Deputy High Commissioner has sustained that “[c]limate change disproportionately harmed the poor, children, women, persons with disabilities, indigenous peoples and minorities – the people who had contributed the least to global warming<sup>202</sup>”. These human categories present limited resources to tackle climate change, they have social, cultural and economic disadvantages that make their experience of environmental degradation more severe<sup>203</sup>.

Gender represents an element that influence the migration patterns, decisions taken by men or women may shape the experience of migration differently and throughout the process traditional gender roles may change. The field of research on such issue has been growing recently, even though public

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<sup>201</sup> Ferris, at 25.

<sup>202</sup>United Nations Human Rights Council, *Summary of the panel discussion on human rights, climate change, migrants and persons displaced across international borders: A/HRC/37/35* (2017) part.2 para.6.

<sup>203</sup>Flavell Alex et al., *Brief 13: A Gender Approach to Environmental Migration* in IOM Outlook on Migration, Environment and Climate Change (2014) at 105.

discussion on the relationship between gender, migration and climate change in the political and academic fields is still not sufficiently faced. Generally, women are more vulnerable to the climate change impact due to their lower status in the social tissue. Specifically, climate change exacerbates their existing weaknesses: (1) women represent the poorest and less educated segment of global population<sup>204</sup>; (2) they are highly dependent on natural resources and (3) are subjects to inequalities in the decision-making process<sup>205</sup>.

These vulnerabilities highly affect the capacity of women to adapt to climate change, for example they have limited access to information, traditional and cultural norms often impede them to move when an environmental disaster occurs, the duty to look after family members constrain them to stay also after the natural hazard<sup>206</sup>. On the other hand, women have an important role in in mitigation and adaptation measures<sup>207</sup>, their knowledge and capacity of mobilization<sup>208</sup>, together with their experience in management of resources contribute to strategies aimed to tackle climate change<sup>209</sup>.

The use of migration as a gendered measure of adaptation depends on different economic, social and cultural elements. In Africa for example migrants are mostly men, in Nigeria floods, drought induce them to migrate instead of women due to the reduction of jobs and the cost of brides. As result family members prefer to keep women in the territory. Instead, in other regions equally vulnerable to climate change such as South Asia, women are the social segment that mostly migrate following a climate event<sup>210</sup>.

In few contexts migration of men represents an additional burden for women who stay behind; they have to carry new additional duties, without a better access to equal resources, assistance, and facing more economic risks. On the contrary, the departure of men due to climate change may represent also an opportunity of

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<sup>204</sup> Ibid.

<sup>205</sup> Women Watch, "Women, Gender Equality and Climate Change". See UN online.

<sup>206</sup> Flavell et al., at 105

<sup>207</sup> Ibid.

<sup>208</sup> Senay Habtezion, "Overview of linkages between gender and climate change" (2013) at 4.

<sup>209</sup> Ibid.

<sup>210</sup> Sam Sellers, "Gender and climate change: a closer look at existing evidences" (2016) at 22.

empowerment for women. They may perform activities that traditionally have been managed by men, such as taking decisions on agriculture practices<sup>211</sup>.

The integration of a gender perspective in the climate change – migration nexus presents several advantages: gender considerations may help academics to understand better the context and the correlated influencing factors, reduce vulnerabilities, find effective strategies to respond and develop tailored assistance<sup>212</sup>.

In November 2017 the twenty-third Conference of the Parties adopted a Gender Action Plan, developed during the Lima work programme on gender which

[...] seeks to advance women’s full, equal and meaningful participation and promote gender-responsive climate policy and the mainstreaming of a gender perspective in the implementation of the Convention and the work of Parties, the secretariat, United Nations entities and all stakeholders at all levels<sup>213</sup>.

The Plan is focused on five core points: (1) enhancing gender understandings and knowledge of stakeholders; (2) ensuring an equal participation of women in processes of decision-making on climate change; (3) promoting gender considerations in UNFCCC negotiations; (4) considering gender and women empowerment in the implementation of the Convention and Paris Agreement, finally (5) guaranteeing of reporting and monitoring. The whole actions needed to be implemented within 2019 and require the cooperation of both states and organizations<sup>214</sup>.

Finally,

The GAP recognizes the need for women to be represented in all aspects of the UNFCCC process and the need for gender mainstreaming through all relevant targets and goals in activities under the Convention as an important contribution to increasing their effectiveness<sup>215</sup>.

Another category of subjects vulnerable to climate change is represented by children. In 2017 the Human Rights Council declared that

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<sup>211</sup> Ibid.

<sup>212</sup> Flavell, at 104.

<sup>213</sup> United Nations Framework Convention on Climate Change, *Draft decision -/CP.23 Gender Action Plan: FCCC/SBI/2017/L.29* (2017) at 3 para.2.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid. at 3 para.3.



“[...] climate change affects some children more than other children, including children with disabilities, children on the move, children living in poverty, children separated from their families and indigenous children<sup>216</sup>”.

The resolution 32/33 presented by the Human Rights Council requested an analytical study aimed to assess the impact of climate change on human rights of the children to be submitted during the following thirty-five session. The outcomes resulted from the study provided an additional understanding on the issue<sup>217</sup>, “[c]hildren are disproportionately impacted by climate change due to their unique metabolism, physiology and developmental needs<sup>218</sup>”; the climate change impact threatens the whole enjoyment of children human rights, exacerbating their existing inequalities and impeding their natural progress. Abrupt natural disasters limit the availability of natural resources leading children to live in conditions of water and food scarcity, together with risks of exploitation and mortal dangers. In addition, air pollution threatens the children health and the spread of important diseases. The manifestation of climate change impact is not only physical, but it may affect children with mental issues, inspiring anxiety or depression<sup>219</sup>.

The recommendations of the analytical studies have been summarized in five points: (1) the climate policies, together with measures of risk reduction and development shall considerate the rights of children; (2) climate policies should ensure empowerment of children through education and consultative methods; (3) remedy mechanism need to be guaranteed; (4) ensuring monitoring and reporting on climate change impact on rights of children also through collecting data and (5) guaranteeing resources for the implementation of protection of children from climate change effect<sup>220</sup>.

Furthermore, the Human Rights Council

[...] [Recognizes] that children, particularly migrant children and children displaced across international borders in the context of the adverse impacts of

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<sup>216</sup> United Nations Human Rights Council, *Human Rights and Climate Change: A/HRC/RES/35/20* (2017) at 4.

<sup>217</sup> See generally United Nations Human Rights Council, *Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child A/HRC/35/13* (2017).

<sup>218</sup> *Ibid.* part.II para.4.

<sup>219</sup> *Ibid.* para.18.

<sup>220</sup> *Ibid.* part V.

climate change, are among the groups most vulnerable to the adverse impacts of climate change [...] <sup>221</sup>.

Children, together with women are subjected to migration due to climate change impact.

“In 2016, over 12 million children around the world were living as refugees or asylum seekers, while an estimated 23 million children were living in internal displacement – 16 million as a result of conflict and 7 million due to natural disasters <sup>222</sup>”;

But, data are still imprecise, and it seems the numbers are much higher <sup>223</sup>.

Children may migrate alone or with family members because of an environmental degradation that compromise their livelihood. Firstly, they aim to find a job and provide economic support at home, also to develop a business or find access to education <sup>224</sup>. Usually children face important perils throughout the migration path such as smuggling, trafficking especially whether they are unaccompanied; moreover, they are no longer under the state protection and prefer not to be engaged with humanitarian organizations along the route to avoid any control by authorities. Children may face perils also at their arrival in a new state, where the economic conditions are worse and social, legal services are not adequate <sup>225</sup>.

General speaking, studies on the impact of climate migration on children remain insufficient <sup>226</sup>, “[...] children remain virtually invisible in emerging research and policies around climate-related displacement and migration <sup>227</sup>”. The United Nations Children's Fund <sup>228</sup> sustains that since international law does not provide an effective normative protection for them, states should act first and

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<sup>221</sup> Human Rights Council, n.216 (Chapter 2), at 2.

<sup>222</sup> International Organization for Migration, “Massive Data Gaps Leave Refugee, Migrant and Displaced Children in Danger and Without Access to Basic Services” (2018). Retrieved from <https://www.iom.int/news/massive-data-gaps-leave-refugee-migrant-and-displaced-children-danger-and-without-access-basic>. Last visited May, 19 2018.

<sup>223</sup> Ibid.

<sup>224</sup> Regional Office for West and Central Africa, “In Search of Opportunities Voices of children on the move in West and Central Africa” (2017) at 2.

<sup>225</sup> Ibid at 15-18.

<sup>226</sup> Robert Oakes, “Climate Change, Migration, and the Rights of Children” (2016) Huffington Post newspaper.

<sup>227</sup> Joni Pegram and Robert Oakes, “No place to call home: protecting children’s rights when the changing climate forces them to flee (Executive Summary)” at 2.

<sup>228</sup> UNICEF.

include rights of children in migration policies, taking in account their vulnerabilities that may be exacerbated by climate impact and migration. These policies should reduce the displacement of children and increasing their protection during the migration path; UNICEF presents three action that need urgently to be implemented in order to tackle threats that children migrants are facing today: (1) reduction of the climate change impact that is considered one of the main driver of migration; (2) involvement of children in the process of decision-making in order to develop tailored policies and give a better access to information on opportunities and threats; (3) adaptation and mitigation strategies should respect human rights, and relocation measures should take in account the opinion of participants<sup>229</sup>.

According to the “Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child”:

The negative impacts of climate change on children trigger obligations among all duty bearers to take action to protect all children from its actual and foreseeable adverse effects. The importance of children’s rights in the context of climate change is explicitly recognized in the Paris Agreement under the United Nations Framework Convention on Climate Change, in which States are called on to respect, promote and consider their respective obligations on, among other things, the rights of the child and intergenerational equity when taking action to address climate change<sup>230</sup>.

The last category of people particularly vulnerable to the impact of climate change is embodied by indigenous people. The United Nations system does not provide for an official definition of indigenous people, since the groups scattered around the world present various and different characteristics. The term indigenous is commonly used to indicate the general group of persons; but the UN bodies sustain that an identification of them is possible through specific elements such as the self-identification as belonging to indigenous people, the dependence on natural resources and the respect of environment, finally their affinity to a culture, religion and tradition<sup>231</sup>.

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<sup>229</sup> Pegram and Oakes, at 4.

<sup>230</sup> Office of the High Commissioner for Human Rights, n.217, part. III para.30.

<sup>231</sup> United Nations Permanent Forum on Indigenous Issues, “Factsheet: who are indigenous people?”.

According to article 29 of the Declaration on the Rights of Indigenous People, they “[...] have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources<sup>232</sup>”. Most of indigenous people live in geographical areas extremely exposed to climate change effects, natural disasters may force them to migrate, aggravating their existing vulnerabilities. In fact, indigenous people represent a category with limited economic resources<sup>233</sup>. They are subjects to social and political marginalization, underrepresentation, lack of social services and protection of rights. However, they have a profound respect of environment culturally and practically, and they promote an environmental-friendly development<sup>234</sup>.

“Indigenous peoples are affected by climate change in multiple ways with the effects varying according to the different locations and ecosystems in which they live<sup>235</sup>”; natural disasters have been damaging the ecosystem where they live, influencing their existence, traditions and identity, increasing vulnerabilities. On the contrary, indigenous people are a fundamental resource to tackle climate change, their dated knowledge of the surrounding environment may help to enhance the mitigation and adaptation approaches<sup>236</sup>.

[...] [They] have always adapted to a changing environment and have developed sophisticated and sustainable strategies to cope with environmental changes. Indigenous peoples interpret and respond to climate change in creative ways, drawing on their traditional knowledge of the natural resource base and other technologies to find solutions<sup>237</sup>.

During the twenty-first Conference of the Parties the Paris Agreement has been adopted, the Preamble makes important references to vulnerable people, recognizing that the climate change impact is a threat and the Parties “[...] should, when taking action to address climate change, respect, promote and consider their

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<sup>232</sup> See United Nations Declaration on the Rights of Indigenous Peoples, art.29 para. 1.

<sup>233</sup> Rishabh Kumar Dhir et al., “Indigenous peoples and climate change: From victims to change agents through decent work” (2017) at 7.

<sup>234</sup> United Nations Permanent Forum on Indigenous Issues, n.231 (Chapter 2)

<sup>235</sup> International Work Group for Indigenous Affairs, *Conference on Indigenous Peoples and Climate Change: Meeting Report: E/C.19/2008/CRP. 3* (2008) part.2 para. (a)10.

<sup>236</sup> Dhir, at 1-2.

<sup>237</sup> International Work Group for Indigenous Affairs, part.II para. (b)13.

respective obligations on human rights [...] <sup>238</sup>. Moreover, in order to enhance the action taken by the Paris Agreement, the Conference

[r]ecognizes the need to strengthen knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change, and establishes a platform for the exchange of experiences and sharing of best practices on mitigation and adaptation in a holistic and integrated manner <sup>239</sup>.

The Local Communities and Indigenous People's Platform has been formalized during the twenty-third session of the Conference of the Parties, aimed to create an opportunity of interaction among indigenous groups and local communities. The Platform enhances the position of vulnerable people in the UNFCCC negotiations, recognizes their contribution to tackle climate change and it represents an important occasion for them to be involved in the development of climate action policies <sup>240</sup>.

In 2017 the Report of the Special Rapporteur on the Rights of Indigenous People recognized publicly that climate change impact is threatening their environment, damaging their natural resources; similarly, mitigation measures seem to undermine their livelihood, forcing them to leave.

In addition, the Report stated that

“[h]uman rights treaty bodies have expressed concerns over the forcible displacement of indigenous peoples, noting the special relationship that indigenous peoples have with their land and the profound impact forced displacement has on their survival [...] <sup>241</sup>”.

A result, displacement does not threat indigenous peoples only on the sense of security or availability of resources, but it tackles the profound and cultural relationship that they have developed with the environment <sup>242</sup>.

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<sup>238</sup> See the Paris Agreement Preamble, at 2.

<sup>239</sup> Conference of the Parties, *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015: FCCC/CP/2015/10/Add.1* (2016) part.V para.135.

<sup>240</sup> See the announcement of the Local Communities and Indigenous People's (LCIP) Platform realization on COP23 online.

<sup>241</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples: A/HRC/36/46* (2017) part V para. F (67).

<sup>242</sup> Julie-Anne Richards and Simon Bradshaw, “Uprooted by climate change: Responding to the growing risk of displacement” (2017) at 27.

### **Chapter III. WHO BEARS RESPONSIBILITY FOR THE CLIMATE CHANGE EFFECTS?**

The issue of responsibility for climate change is well-known at international level; it has been identified mainly upon developed states, which have produced high quantity of GHG in history, provoking changes in the environment and unintended consequences such as migration<sup>1</sup>.

The third chapter assesses the role of migration in the international climate governance: firstly, it will discuss the loss and damage approach with the correlated areas of activities; secondly, it will analyse the concept of migration as a form of adaptation, followed by an assessment on the unexpected consequences of climate solutions. Therefore, the issue of state responsibility will be deepened in light of the climate change impact and the consequent displacement. Finally, the challenges to the international governance on migration will be discussed, and a brief analysis on the Paris Agreement, the most recent and famous climate treaty, will be provided.

#### **3.1 Tackling Climate Change through Loss and Damage**

In 1992 the ratification of the UNFCCC committed a group of states to limit the consequences of human influence on the climate change system. An idea of international cooperation was established, even though controversial issues emerged, which persist also today. In the first place, states which have been the main producer of GHG historically, and thus provoked climate change, gain the main economic profits. Instead states that have been highly affected by the negative impact of climate change, do not receive great benefits from gas emissions. Furthermore, the productive level of GHG remains high in developed countries, and it is growing fast in developing ones<sup>2</sup>.

Thus, actions aimed to limit the increasing emissions in both developed and developing states are indispensable, together with the implementation of responsibility on the historical producers of GHG. The principle of common but differentiated responsibility, together with other important legal instruments, may

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<sup>1</sup> Mayer, n.46 (Chapter 2), at 252.

<sup>2</sup> Ibid., at 186 – 188.

lead to forms of redress for the most affected countries. Furthermore, in light of the growing number of climate migrants, the international governance on migration may need a refresher, especially in defining the responsibilities and obligations of states towards such vulnerable subjects<sup>3</sup>.

In the first chapter the two main approaches aimed to tackle climate change, mitigation and adaptation, have been introduced briefly. The first approach is considered as “[...] a human intervention to reduce the sources or enhance the sinks of greenhouse gases [...]”<sup>4</sup>, the second is “[t]he process of adjustment to actual or expected climate and its effects”<sup>5</sup>. Both measures, which seek to satisfy the UNFCCC ultimate objective<sup>6</sup>, followed different paths throughout the negotiations in the climate change regime: at the beginning the UNFCCC has been mainly focused on mitigation measures, which did not achieve the development of ambitious commitments. As result, alternative response actions were needed, and the adaptation approach started to gain attention in the climate change negotiations<sup>7</sup>. Moreover, discussions regarding the responsibility issue for climate change damages and correlated measures of potential compensation emerged in the UNFCCC negotiations; specifically, such discourse developed focusing on states which have been highly affected by climate change impact without any historical responsibility and subjects to high level of loss and damage<sup>8</sup>.

The Loss and damage issue has not been defined yet, generally it is considered as unresolved questions that adaptation and mitigation have not been able to deal with. Small Island Developing States have tried to insert the concept in the UNFCCC negotiations since the beginning<sup>9</sup>. In 1991 they proposed the creation of an international mechanism of loss and damage to deal with the climate change

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<sup>3</sup> Ibid.

<sup>4</sup> Ottmar Edenhofer et al., *Summary for Policymakers* in Climate Change 2014: Mitigation Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change at 4.

<sup>5</sup> Katharine J. Mach et al., Annex II: Glossary in R.K. Pachauri and L.A. Meyer, Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2014) at 118. Available at [https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5\\_SYR\\_FINAL\\_Glossary.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_Glossary.pdf)

<sup>6</sup> See United Nations Framework Convention on Climate Change, art.2.

<sup>7</sup> Mayer, n. 46 (Chapter 2), at 190-198.

<sup>8</sup> Mayer, n.46 (Chapter 2), at 190.

<sup>9</sup> Julia Kreienkamp and Lisa Vanhala, “Climate Change Loss and Damage” (2017) at 2.

impact<sup>10</sup>. The request remained mostly unheard and the opposition of developed countries was significant<sup>11</sup>, as result the UNFCCC negotiations focused on mitigation actions instead<sup>12</sup>. Shortly, it was evident that such actions were not enough to tackle climate change, thus, the adaptation approach entered in international discussions; its scope expanded with the introduction of the loss and damage issue in the Bali Action Plan<sup>13</sup> aimed to “[...] address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change [...]”<sup>14</sup>. The change of course happened in 2010 during COP 16, where it was

[...] establish[ed] a work programme in order to consider, including through workshops and expert meetings, as appropriate, approaches to address loss and damage associated with climate change impacts [...]”<sup>15</sup>.

Doha 2012 prepared the ground for the creation of an international mechanism of loss and damage which becomes concrete during COP 19 in Warsaw<sup>16</sup>.

The Warsaw International Mechanism for Loss and Damage (WIM) is the main vehicle in the UNFCCC process to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change, in a comprehensive, integrated and coherent manner<sup>17</sup>.

In other words, it is considered an important tool to deal with loss and damage caused by climate change, it may act favouring international cooperation on the topic and a greater financial support, driving the Parties to a better knowledge of climate change consequences<sup>18</sup>. It has been subject to review in COP 22 aimed to

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<sup>10</sup> Ibid. at 5.

<sup>11</sup> Mayer, n.46 (Chapter 2), at 202-203.

<sup>12</sup> Koko Warner et al., “Loss and Damage: when adaptation is not enough” (2014) Environmental Development, vol. 11 at 220.

<sup>13</sup> Ibid.

<sup>14</sup> *Decision 1/CP.13, Bali Action Plan* in Conference of the Parties, Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007: FCCC/CP/2007/6/Add.1 (2008) para. 1 c(3).

<sup>15</sup> Conference of the Parties, n.158 (Chapter 1), part II para.26.

<sup>16</sup> Kreienkamp and Vanhala, at 5.

<sup>17</sup> See Loss and Damage Online Guide retrieved from [https://unfccc.int/sites/default/files/online\\_guide\\_ld\\_nov\\_2016.pdf](https://unfccc.int/sites/default/files/online_guide_ld_nov_2016.pdf). Last visited June, 02 2018.

<sup>18</sup> United Nations Climate Change, “Approaches to address loss and damage associated with climate change impacts in developing countries”. See UNFCCC online.



reinforce the mechanism<sup>19</sup>. The twenty-third Conference of the Parties hosted in Marrakesh requested a further review of the WIM in 2019, asking to stakeholders and organizations to participate with suggestions<sup>20</sup>. Through COP 19 another important role was established, the Executive Committee of the WIM as guidance for a better implementation of the mechanism through task force, expert committee, technical reports<sup>21</sup>. The Paris Agreement also recognized the issue of Loss and Damage and accepted to address it<sup>22</sup>. In particular, the concept have been mentioned in national commitments such as INDCs by a consistent number of developing countries, as a negative effect that has already been occurring<sup>23</sup>.

Finally, a two-year workplan proposed by Ecom has been established during COP 20, which has been recently substituted by a five-year workplan with COP 22<sup>24</sup>.

#### The Loss and Damage approach on migration

The Loss and Damage issue is currently under discussion at international level; a common agreement on an official definition is absent, even though different proposals have been presented<sup>25</sup>: loss and damage as “the actual and/or potential manifestation of impacts associated with climate change...that negatively affect human and natural systems<sup>26</sup>” or as “[...] the negative effects of climate variability and climate change that people have not been able to cope with or adapt to<sup>27</sup>”. The conceptualization of loss and damage presents few obstacles: the identification of

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<sup>19</sup> See Loss and Damage Online Guide, n.17 (Chapter 3)

<sup>20</sup> *Decision 5/CP.23, Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts* in Conference of the Parties, Report of the Conference of the Parties on its twenty-third session, held in Bonn from 6 to 18 November 2017: FCCC/CP/2017/11/Add.1 (2018) para. 12.

<sup>21</sup> See Loss and Damage Online Guide, n.17 (Chapter 3).

<sup>22</sup> Ibid.

<sup>23</sup> Kreienkamp and Vanhala, at 2.

<sup>24</sup> See Loss and Damage Online Guide, n.17 (Chapter 3).

<sup>25</sup> Warner et al., n.12 (Chapter 3), at 220.

<sup>26</sup> United Nations Framework Convention on Climate Change, *A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change: FCCC/SBI/2012/INF.14* (2012) para. 2 quoted in Benoit Mayer, “Migration in the UNFCCC Workstream on ‘Loss and Damage’: An Assessment of Alternative Framings and Conceivable Responses” (2006) *Transnational Environmental Law* at 2.

<sup>27</sup> Koko Warner et al., “Evidence from the Frontlines of Climate Change: Loss and Damage to Communities Despite Coping and Adaptation Loss and Damage in Vulnerable Countries Initiative” (2012) *Policy Report* quoted in Warner et al., n.12 (Chapter 3), at 220.

climate change as the principal cause of natural events and the recognition of the multiple resultant consequences, especially social ones<sup>28</sup>.

Generally speaking, Loss and Damage derived from the climate change impact, which may result in abrupt natural hazards or gradual environmental changes<sup>29</sup>.

It has become common to split these impacts into non-economic losses and economic losses. Economic losses can be understood as the loss of resources, goods and services that are commonly traded in markets. [...] Non-economic losses can be understood as the remainder of items that are not economic items [...]<sup>30</sup>

Displacement has been identified as a non-economic loss<sup>31</sup>; on one hand, loss and damage may derived from human mobility, on the other hand the latter may represent a form of loss and damage itself. Generally, the second assumption is the main accepted, displacement in turn may result in non-economic losses such as “[...] loss of security (including legal rights) and agency (the ability to control one’s location and livelihood), among other things [,]” and economic losses “[...] such as the loss of possessions [...]”<sup>32</sup>.

Displacement is described as the clearest case of mobility-related loss and damage for two main reasons. First, because it is clear that it directly harms security and agency, among other things. Second, displacement is also a clear example of the potential limits of adaptation [...]<sup>33</sup>.

On the contrary, unforced human movement and human relocation are considered as examples of adaptation actions rather than limitations, even though further considerations on the issue are needed; together with the development of strategies aimed to evaluate the non-economic losses derived from forced migration<sup>34</sup>.

Before COP 18 event and the correlating discussion of a work programme on loss and damage, the role of migration in such framework had not been defined

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<sup>28</sup> Mayer, n.26 (Chapter 3), at 3.

<sup>29</sup> Ibid.

<sup>30</sup> See *Non-economic losses in the context of the work programme on loss and damage, Technical Paper: FCCC/TP/2013/2* (2013) part I para.3 and 4. This Technical Paper has been developed as requested by the Conference of the Parties for enhancing the actions under the work programme on Loss and Damage.

<sup>31</sup> Ibid. part I para.8.

<sup>32</sup> Ibid. part IV para.83.

<sup>33</sup> Ibid. para.84.

<sup>34</sup> Ibid.

yet<sup>35</sup>. Mayer presents three potential pictures of the loss and damage framework in which the role of migration develops in varied manners:

1. “Migration as a Way of Reducing Loss and Damage<sup>36</sup>”, since historically migration has been considered a strategy of adaptation to difficult living conditions, in such context migration may occur before the natural hazards or after the disaster. The Cancun Agreements have already brought discussions on the issue<sup>37</sup>, but an excessive attention on migration as a tool for reducing losses due to climate change risks to increase the adaptation strategies, ignoring the issue of compensation<sup>38</sup>.
2. “Migration as a Source of Loss and Damage for the Migrants<sup>39</sup>”; forced migration, included displacement due to climate change impact, may provoke loss and damage. Violation of human rights together with absence of an adequate international protection and assistance are challenges that migrants need to face<sup>40</sup>. Negative implications may emerge also for host states, which may not be equipped sufficiently to manage the arrival of migration flows<sup>41</sup>.

Before the implementation of the work programme on loss and damage, few UNFCCC documents reported migration as harmful element for migrants especially in the context of climate-induced migration and resettlement. Specifically, loss and damage for migrants are likely to occur in case a lack of a concrete legal protection<sup>42</sup>.

3. “Migration as a Source of Loss and Damage for other Concerned Communities<sup>43</sup>”; even though the arrival of migrants in host states may favour social, cultural and economic incentives on one hand, it may bring also negative implications on the other. Hosting migrants can represent a burden for governments, which may not have enough resources to respond;

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<sup>35</sup> Mayer, n.46 (Chapter 2), at 204.

<sup>36</sup> Id., n.26 (Chapter 3), at 11.

<sup>37</sup> Ibid. at 13 .

<sup>38</sup> Mayer, n.46 (Chapter 2), at 204.

<sup>39</sup> Id., n.26 (Chapter 3), at 13.

<sup>40</sup> Ibid.

<sup>41</sup> Mayer, n.46 (Chapter 2), at 205.

<sup>42</sup> Id., n.26 (Chapter 3), at 14.

<sup>43</sup> Ibid. at 15.

as result competition and tension arise, together with pressure on social services and political institutions. Such context provokes loss and damage to host states, stakeholders and communities; the issue has been discussed throughout the UNFCCC workstream, stressing the necessity to reinforce mitigation and adaptation measures and avoiding to insist on negative conceptions of migration<sup>44</sup>.

Since COP 18 the migration issue has been considered an urgent issue in the workstream on loss and damage, especially in light of the recent growing flows of migration which were affecting developed states at that time<sup>45</sup>. The initial two-year workplan, requested by Decision 2/CP.19, has been implemented through a plan of actions on different topics. Among them, the Excom aims to

[...] [e]nhance the understanding of and expertise on how the impacts of climate change are affecting patterns of migration, displacement and human mobility; and the application of such understanding and expertise<sup>46</sup>[.]

Such aim has been followed by a series of analysis on correlating issues, such as economic and non-economic losses, presented by experts in the field<sup>47</sup>.

Later, the Paris Agreement made two important requests to the Excom: (1) the facilitation of exchange of information on risk transfer among states and (2) the development of a task force on a comprehensive approach to address climate-induced displacement<sup>48</sup>.

As it was mentioned above, COP 22 approved a new five - year rolling workplan which in turn presented strategic workstreams; again the climate-induced migration issue appeared as an aim to “[...] [enhance] cooperation and facilitation in relation to human mobility including migration, displacement and planned relocation<sup>49</sup>”.

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<sup>44</sup> Mayer, n.26 (Chapter 3), at 16-18.

<sup>45</sup> Ibid. at 8-9.

<sup>46</sup>United Nations Framework Convention on Climate Change, *Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts: FCCC/SB/2014/4* (2014) at 11.

<sup>47</sup> Mayer, n.26 (Chapter 3), at 9.

<sup>48</sup> See Loss and Damage Online Guide, n.17 (Chapter 3).

<sup>49</sup> United Nations Climate Change, “Workplan - Executive Committee of the Warsaw International Mechanism for Loss and Damage”. See UNFCCC online.

Finally, following the COP 21 request, the Excom established a Task Force on Displacement; a first meeting took place in Bonn on 18 and 19 May 2017<sup>50</sup>, the Task consists in a group of technical experts, representatives of developed and developing states, representatives of international organizations and NGOs, aimed to “develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change<sup>51</sup>”.

#### Climate migration as a form of adaptation?

The academic field has produced empirical evidences that migration may be considered as an adaptation strategy to environmental and economic changes. On the other hand, the social and political spheres continue to have an incomplete vision on migration as adaptation, probably due to confusion on conceptualization and definition of the migration issue<sup>52</sup>. Specifically, at political level the migration is depicted as an urgent issue that needs to be contained; thus, instead focusing on the positive aspects of migration as an adaptive action, national policies prefer to take preventive and control measures on borders<sup>53</sup>.

Generally speaking, there are different considerations on migration as an adaptative strategy: migrant remittances for example may provide benefits for affected populations<sup>54</sup>; precisely, remittances towards home states permit (1) access to basic resources, (2) capitals and (3) they encourage the production of local goods, decreasing the pression on resources demand at national level. As result, the availability of incomes increases, together with expansion of social networks and spreading of information<sup>55</sup>.

Moreover, migrants who live in host states may decide to make some investments in school or hospitals of the origin country, or make the choice to return, bringing

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<sup>50</sup> See *Annex II, Summary of the Proceedings* in United Nations Framework Convention on Climate Change, Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts: FCCC/SB/2017/1 (2017) at 11.

<sup>51</sup> See “Terms of reference task force on displacement” part I para.3.

<sup>52</sup> François Gemenne and Julia Blocher, “How can migration support adaptation? Different options to test the migration–adaptation nexus” (2016) Migration, Environment and Climate Change: Working Paper Series No.1 at 4.

<sup>53</sup> *Ibid.* at 8-9.

<sup>54</sup> Jon Barnett and Michael Webber, “Accommodating Migration to Promote Adaptation to Climate Change” (2010) Policy Research working paper at 22.

<sup>55</sup> *Ibid.* at 26.

new understandings and knowledge on climate change impact. Also, they may carry new working skills, triggering positive changes in the economic field<sup>56</sup>.

Empirical evidences demonstrated that non-farm earnings and remittances have favoured an increase of farm activities in Africa and Asia:

[o]n the one hand, income diversification provides the capital needed to invest in agricultural production – inputs, infrastructure and sometimes waged labour. On the other hand, income diversification also provides the safety net that enables farmers to take the risks inherent in changing long-held practices<sup>57</sup>.

Thus, mobility together with income diversification constitute important measure to tackle vulnerabilities<sup>58</sup>. In the context of slow-onset events, an increasing of circular migration is evident; households tend to continue farming activities in other areas due to environmental degradation or accept temporary non-farm jobs. They may also move definitively to urban areas<sup>59</sup>, following the rural-urban movement scheme which is triggering a threatening increase of urban populations<sup>60</sup>. Migration patterns are thus highly influenced by different elements of the context and the protagonists<sup>61</sup>, but such strategies of adaptation do not represent a logical reduction of migration due to climate change<sup>62</sup>.

However, empirical studies also demonstrate that small town in territories where the agriculture is the main activity, have a fundamental role in favouring an adaptation process to climate change; such towns offer non-farm job places which do not require high-skills and provide social services. Supporting the process requires access to market, technologies and capitals, which may help farmers in their activities, enabling them to respond to climate change impact<sup>63</sup>.

Migration may also create benefits to host states, enhancing their capacity to adjust to environmental changes. Firstly, migrants are usually hard workers, especially because they need to help economically other householders or because

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<sup>56</sup> Ibid. at 23.

<sup>57</sup> Cecilia Tacoli, “Crisis or adaptation? Migration and climate change in a context of high mobility” (2009) *Environment and Urbanization*, vol.21 (2) at 520.

<sup>58</sup> Ibid. at 514.

<sup>59</sup> Ibid. at 520.

<sup>60</sup> Ibid. at 514.

<sup>61</sup> Ibid. at 517.

<sup>62</sup> Ibid. at 521.

<sup>63</sup> Ibid. at 522.

their finances are limited; as result, they constitute an important economic resource. They also bring incomes and new technical and agriculture knowledges that can help the conditions of host communities. The willingness of governments in assist migrants and protect their rights is indispensable in “[...] maximizing the benefits they can bring to host and destination areas, as well as minimizing the costs the migrants themselves experience<sup>64</sup>”.

Currently, academics are trying to enrich the knowledge on the relation between migration and adaptation<sup>65</sup>, considering the numerous factors that may influence it, such as the local or seasonal context<sup>66</sup>.

On the contrary, migration may bring further risks for people on the move, persons who are already facing difficulties<sup>67</sup>. In the framework of environmental changes, populations have been facing climate change impact with migration historically. Migration does not represent the first choice, before undertaking the decision to leave, populations make an evaluation on the situation, advantages or disadvantages, and when all the alternative options to tackle climate change are finished, they choose migration. Generally, migrants are aware of the potential climate change consequences, as result they also have the capacity to develop migration as a successful adaptation strategy<sup>68</sup>; such strategies may vary from short-term actions, to long-term or radical transformation<sup>69</sup>. Generally, the adaptation capacity to face environmental changes depends on several elements: (1) social and financial resources, (2) the availability of information on potential climate change risks and the level of ability in managing the adaptation process, (3) willingness of population to undertake an adaptation process, and (4) presence of technologies and adequate infrastructures<sup>70</sup>.

Migration may reinforce the capacity of populations to face changes in the future, or it may undermine their willingness to resist, turning in maladaptation. Whether population undertake an adaptation strategy that influence negatively the

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<sup>64</sup> Barnett and Webber, at 24.

<sup>65</sup> Gemenne and Blocher, 4-5.

<sup>66</sup> Ibid. at 6.

<sup>67</sup> Warner, n.48 (Chapter 2), at 2.

<sup>68</sup> Ibid. at 5.

<sup>69</sup> Ibid.

<sup>70</sup> Barnett and Webber, at 26.

parties, it means that such actions has transformed in maladaptation. Phenomenon which can be influenced also by economic elements, such as the family income. Furthermore, a migrant who does not have enough resources to move, becomes an immobile person, who may decide to stay in the territory voluntarily or forcefully<sup>71</sup>, increasing the perils and vulnerabilities<sup>72</sup>.

The choice of migration presents also social implications: in determined contexts, social and cultural elements may decide who can leave or not; for some communities, migration is part of the tradition, it is considered a demonstration of success. Moving towards a new state may enhance the social status, but on the other hand it may disappoint the expectations, increasing the level of poverty<sup>73</sup>.

To sum, further empirical studies on the relationship between migration and adaptation in the climate change context are needed; since the legal identification of climate migrants and the climate change as unique cause of disasters, impede to develop adequate information on the topic.

#### Unexpected consequences of measures tackling climate change

Migration may be considered part of the “Unintended Consequences of Response Measures<sup>74</sup>”; adaptation and mitigation actions develop projects, programmes, initiatives that may result in high social, human and economic costs, mainly unrecognised<sup>75</sup>.

Throughout the UNFCCC negotiations the issue of the unwanted consequences of measures to tackle climate change impact, has already been discussed. Art 4 of the Convention required more understandings on the elimination of “[...] the economic and social consequences of various response strategies [,]<sup>76</sup>” and

[i]n the implementation of the commitments [...] the Parties shall [...] meet the specific needs and concerns of developing country Parties arising from

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<sup>71</sup> They are defined also “trapped” people as those who cannot move towards safer areas because of lack of resources or external pressure (Gemenne and Blocher, 2016, at 3).

<sup>72</sup> Gemenne and Blocher, at 2-3 and 5-6.

<sup>73</sup> Gemenne and Blocher, at 4-5

<sup>74</sup> Mayer, n.46 (Chapter 2), at 207.

<sup>75</sup> Ibid.

<sup>76</sup> See the United Nations Framework Convention on Climate Change, art. 4.1 (g).



the adverse effects of climate change and/or the impact of the implementation of response measures [...]”<sup>77</sup>.

Hereafter, the Kyoto Protocol reiterated that states shall

[...] consider what actions are necessary to minimize the adverse effects of climate change and/or the impacts of response measures on Parties [...]. Among the issues to be considered shall be the establishment of funding, insurance and transfer of technology<sup>78</sup>.

Again, in decision 5/CP.7 the Conference of the Parties stressed “[...] the specific needs and special situations of the least developed countries [...]”<sup>79</sup>,

[r]ecognizing the special difficulties of those countries, especially developing countries, whose economies are particularly dependent on fossil fuel production, use and exportation, as a consequence of action taken to limit greenhouse gas emissions [...]”<sup>80</sup>

Finally, it suggested the use of the climate change fund, namely Global Environment Facility, to better deal with the unexpected effects of response measures<sup>81</sup>.

An important further improvement is represented by the development of a workstream on the impact of response measures in the UNFCCC context<sup>82</sup>; it has culminated at COP 17 in a work programme “[...] with the objective of improving the understanding of the impact of the implementation of response measures in eight distinct areas [...]”<sup>83</sup>, among them it was included the “[a]ssessment and analysis of impacts [area]”<sup>84</sup>.

Furthermore, during the same Conference of the Parties, the “Forum on the impact of the implementation of response measures” has been realized, whose engagement started right after the meeting. The participants were the Parties and other

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<sup>77</sup> Ibid., art 4.8 .

<sup>78</sup> See the Kyoto Protocol, art 3 (14).

<sup>79</sup> See Conference of the Parties, *Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 October to 10 November 2001: FCCC/CP/2001/13/Add.1 (2002)*, in particular Decision 5/CP.7, “Implementation of Article 4, paragraphs 8 and 9, of the Convention (decision 3/CP.3 and Article 2, paragraph 3, and Article 3, paragraph 14, of the Kyoto Protocol)” at 32.

<sup>80</sup> Ibid.

<sup>81</sup> Mayer, n.46 (Chapter 2), at 208.

<sup>82</sup> Ibid.

<sup>83</sup> United Nations Climate Change, “Forum on the impact of the implementation of response measures”. See UNFCCC online.

<sup>84</sup> Ibid.

organizations which could submitted opinions on the matter. After COP 18 the implementation process of the work programme decisions started, aimed to develop recommendations to COP 19, together with a process of review on the utility and continuation of the forum<sup>85</sup>.

Additional discussions continued until COP 21 where the Paris Agreement with decision 11/CP.21 stated “[...] that the forum on the impact of the implementation of response measures, under the subsidiary bodies, shall continue, and shall serve the Agreement<sup>86</sup>”.

Considering the above, migration may be considered as a phenomenon that derived from adaptation and mitigation measures. Strategy actions such as limitation of GHG emissions, or a reconversion towards new forms of clean energy may have a great impact on international migration. Specifically, the latter may result from the implementation of adaptation strategies, such as the construction of infrastructures aimed to contain climate hazards; here, response measures could also provoke a decrease in the respect of human rights, where projects are financed by distant donors or implemented by organizations, which do not have any political responsibility in the territory. Receiving states prefer to collect the economic benefits, ostracising a more attentive discussion on the topic; furthermore, the resultant profits are usually channelled towards the wealthier part of the population<sup>87</sup>.

An explicit example is the Clean Development Mechanism developed with the Kyoto Protocol, which

[...] allows emission-reduction projects in developing countries to earn certified emission reduction (CER) credits, each equivalent to one tonne of CO<sub>2</sub>. These CERs can be traded and sold, and used by industrialized countries to a meet a part of their emission reduction targets under the Kyoto Protocol<sup>88</sup>.

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<sup>85</sup> Ibid.

<sup>86</sup> See *Decision 1/CP.21* in Conference of the Parties, Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015 (2016) Part.III para.33. See UNFCCC online.

<sup>87</sup> Mayer, n.46 (Chapter 2), at 208-210.

<sup>88</sup> United Nations Climate Change, “What is the CDM?”. See UNFCCC online for further information on the Clean Development Mechanism. Retrieved from <https://cdm.unfccc.int/about/index.html>. Last visited May, 28 2018.

Such instrument does not present high level of social safeguards; it requests only a general consultation with the national stakeholders, for the construction of infrastructures, which may provoke human displacement. Similarly, the Reducing Emissions from Deforestation in Developing countries<sup>89</sup> presents the same limited social protection; it requires that the cultural knowledge and the rights of national populations shall be respected, even though the protection measures do not provide effective actions that tackle the impact on them<sup>90</sup>.

In order to understand deeply the issue of state responsibility in the context of climate change, a brief introduction to the main legal principles in environmental law will be provided in the next session.

### **3.2 Legal Principles in International Environmental Law**

International environmental law presents two main basic elements on which it has been historically developing: (1) the sovereign control of states on their natural resources and (2) the prohibition to bring damages to the environment. The first principle is highly recognized at international level and it is considered as part of customary law; but the sovereignty of a state is not unlimited, for example it must not harm the environment in other states or other territories beyond its national jurisdiction<sup>91</sup>.

Further important principles have contributed to the development of the current international environmental law:

1. “The precautionary principle” declares that a state has the duty to control a suspicious activity and stop its potential harm to environment, even though there are no concrete scientific evidences.
2. “The prevention principle” was at the basis of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which requested the limitation of waste in order to prevent an

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<sup>89</sup> Reducing Emissions from Deforestation and Forest Degradation and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries (REDD+) is an important global mechanism aimed to protect forests, which are fundamental since they absorb Carbon Dioxide (Martijn Wilder AM et al., 2014, at 10).

<sup>90</sup> Mayer, n. 46 (Chapter 2), at 210-212.

<sup>91</sup> Max Valverde Soto, "General Principles Of International Environmental Law," (1996) ILSA Journal of International & Comparative Law, vol.3 (1) , Article 10 at 194.

environmental harm. Thus, the principle sustains the necessity to take environmental measures to avoid potential natural disasters in the future.

3. “The “polluters pays” principle” which has been promoted in environmental law since the 70s. It is based on the idea that emitters of pollution should pay for the resultant consequences in the environment, even though it is difficult to estimate the real costs; for example the calculation of the cost of gas emitted by automobiles is challenging, because the material is highly dispersive. But, states incorporated such principle in their environmental policies, and polluters started to pay the external costs of their activities.
4. “The integration principle” which foresees the integration of environmental provisions in the process of political decision-making.
5. “The public participation principle” sets forth the right to participation in environmental decisions of states and the possibility of public consultation on environmental governmental information. The principles is inserted in the Rio Declaration and in the Aarhus Convention.
6. “Sustainable development” approach which seeks to combine economic development and the protection of environment for the future generations<sup>92</sup>.

The Trail Smelter case, which set forth the basis of “the principle of good neighbourliness” in international environmental law<sup>93</sup>, declares that

[...] under the principles of international law [...] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence<sup>94</sup>.

In other words, such principle puts upon states the responsibility to avoid harms in the environment of other states and it contributed to the development of new international rules on transboundary effects of anthropogenic environmental

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<sup>92</sup> *The Principles of Environmental Law* in Campbell-Mohn and Cheever, Britannica Encyclopedia online version.

<sup>93</sup> Richard S. J. Tol and Roda Verheyen, “State responsibility and compensation for climate change damages: A legal and economic assessment” (2004) *Energy Policy*, vol.32 (9) at 1110.

<sup>94</sup> See Trail Smelter (United States v. Canada), Decision of 11 March 1941, (1941) III Reports of International Arbitral Awards at 1965.

disasters; it is better known as the no-harm principle which will be assessed in the next paragraphs<sup>95</sup>.

#### The common but differentiated responsibilities principle

Environmental justice is based on the assertion that life on earth can be maintained and protected only by a healthy environment. As result, positive actions such as conservation of the environment and a sustainable treatment of its elements are essential, together with a fair allocation of natural resources<sup>96</sup>.

At the end of the twenty-century the differentiation between developed and developing countries emerged in international environmental law together with the idea that global environmental issues such as climate change had been influencing them in a differentiated manner. From that time developing countries claimed that historical responsibilities needed to be taken in account, especially towards climate change impact, which have been bringing benefits to industrialized countries on the expenses of the most vulnerable.

Such efforts led to “the common but differentiated responsibilities principle” inserted in the Stockholm and Rio Conference outcomes<sup>97</sup>. The principle entails all affected states in tackling climate change and applies different commitments taking in account the historical principle, the level of development and capacities<sup>98</sup>.

The concept of differential treatment is based on 2 important pillars: (1) corrective justice, which entails states, who have contributed to accumulation of GHG overtime and thus led to environmental changes, to take the responsibility and provide compensation. (2) Distributive justice, which foresees an equal distribution of resources among states, is subject to debates especially whether to consider it an international law provision; it usually meets the opposition of developed countries, especially whether it may entail legal obligations<sup>99</sup>.

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<sup>95</sup> Tol and Verheyen, at 1110.

<sup>96</sup> Philippe Cullet, *Common but Differentiated Responsibilities* in Malgosia Fitzmaurice et al., *Research handbook on international environmental law* (Edward Elgar Publishing, 2010) at 162.

<sup>97</sup> Thomas Deleuil, “The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties” (2012) *Review of European Community & International Environmental Law*, 21 (3) at 271.

<sup>98</sup> Tuula Honkonen, “The Principle of Common But Differentiated Responsibility in Post-2012 Climate Negotiations” (2009) *Review of European Community & International Environmental Law*, 18 (3) at 257.

<sup>99</sup> Cullet, at 166-168.

Another element that can be considered in framework of the differential treatment is the sense of solidarity. It is a concept broader accepted at international level and it is based on the idea that from common concerns may arise a sense of cooperation among states aimed to fulfil the same interests. Considering all the elements above, an awareness that developed states have the duty to act against environmental change and support vulnerable countries in their process of development has emerged<sup>100</sup>.

The principle of common but differentiated responsibilities, inserted as principle 7 in the Rio Declaration<sup>101</sup>, has been adopted also by the UNFCCC which declared that

[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities<sup>102</sup>.

The historical responsibility assertion was less evident in the UNFCCC provision, the opposition of developed countries was strong such as to insert responsibilities and capacities at the same level<sup>103</sup>. Nevertheless, the Kyoto Protocol applied the differentiation concept in the implementation of commitments and distribution of resources, specifically it appointed binding commitments only to industrialized countries<sup>104</sup>.

The differential treatment is not a recent achievement, it has been inserted also in other important environmental treaties such as the Montreal Protocol<sup>105</sup>, which for example permitted to developing countries a degree of delays in implementation of commitment<sup>106</sup>. However, the principle of common but differentiated responsibilities is still considered without a precise legal status, since it does not represent a rule of customary international law yet<sup>107</sup>. Moreover, discussions on the reconceptualization of the traditional categories of developed

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<sup>100</sup> Cullet, at 168-170.

<sup>101</sup> Deleuil, at 272.

<sup>102</sup> See United Nations Framework Convention on Climate Change, art. 3.1.

<sup>103</sup> Deleuil, at 272.

<sup>104</sup> Honkonen, at 258.

<sup>105</sup> Ibid.

<sup>106</sup> Cullet, at 175.

<sup>107</sup> Honkonen, at 259.

and developing countries have emerged<sup>108</sup>: India and China are considered developing countries and thus they have low commitments according to environmental treaties, but on the other hand, they represent economic powers and great emitters of GHG. Thus, the differentiation process needs new criteria in establishing the level of state commitment, such as the individual protection level of environment<sup>109</sup>.

Furthermore, the principle of common but differentiated responsibilities leads to different interpretation among countries given its vague wording. On one hand, economic powers such as US prefer focus on the responsibilities in “common”, others such as small islands declare that responsibilities are mainly different and developed countries have the primary duty to fight against climate change<sup>110</sup>.

Discussions on the implementation of such principle have been characterizing climate negotiations; during COP 15 an agreement has not been reached due to the unwillingness of developed states to find a common ground on the differential treatment. The Durban Platform seemed an occasion to rise again the issue, but any references to the principle has been made in decision 1/CP.17; instead, the launch of a process aimed to create a new universal instrument to enhance the climate regime has been declared<sup>111</sup>.

The Paris Agreement presents a different approach to the idea on differentiation in state responsibility: even though it entails the principle of common but differentiated responsibilities, it considers it “[...] in the light of different national circumstances [...]”. It expands the approach of differentiation in the climate change context, bringing new elements for responsibilities such as “[...] technical capabilities, human capacity, population size [...], opportunity costs [...]”<sup>112</sup>. The Paris Agreement, which presents differentiation especially in mitigation provisions,

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<sup>108</sup> Cullet, at 175-177.

<sup>109</sup> Ibid, at 169 and 175-177.

<sup>110</sup> Deleuil, at 272.

<sup>111</sup> Ibid. at 273.

<sup>112</sup> Christina Voigt and Felipe Ferreira, Differentiation in the Paris Agreement (2016) *Climate Law*, vol.6 (1-2) at 65-66. See Social Science Research Network’s eLibrary. Available at SSRN: <https://ssrn.com/abstract=2827633>

seems to permit further discussions on the state responsibility of climate change, triggering an enhancement in tackling climate change<sup>113</sup>.

The next paragraph is devoted to provide a general scenario on the current debate on the responsibilities of states, mainly developed countries, for the historical emission of gases, and on the outstanding question of compensation for developing states.

### **3.3 State responsibility in the context of Climate Change**

In 2001 the International Law Commission, a UN body aimed to codify international law, drafted a series of articles on the law of state responsibility; such document is based on the assertion that states are responsible for breaches of international law and for that reason they must provide for compensation towards harmed states<sup>114</sup>.

Article 1 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts declares that “[e]very internationally wrongful act of a State entails the international responsibility of that State [,]” thus, such wrongful act represents “[...] a breach of an international obligation of the State”<sup>115</sup>. Even though the document promoted by the Commission represents international law once states ratify it, the articles embody an important international instrument in order to develop better understandings on the responsibility of states in the context of climate change<sup>116</sup>.

Since the 90s developing states have called for responsibility of developed countries for the historical production of GHG on which they have based their economic development; the former requested them to find solutions and act in limiting the emissions, but since the beginning such invitation found the opposition of industrialized states<sup>117</sup>.

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<sup>113</sup> Ibid. at 67

<sup>114</sup> Tol and Verheyen, at 1111

<sup>115</sup> See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art 1 and art 2 para.b.

<sup>116</sup> Tol and Verheyen, at 1111.

<sup>117</sup> Benoit Mayer, “State Responsibility and Climate Change Governance: A Light Through the Storm” (2014) Chinese Journal of International Law, vol.13 (3) at 7.



Before establishing the state responsibility, it is necessary to assess four elements: (1) to identify the negative behaviour performed by states or the negative actions carried out by private subjects, but attributable to states, (2) the causal relationship between such activity and the harm, (3) the identification of the breach and (4) the state obligation<sup>118</sup>.

The attribution of the negative conduct to states or private actors is the first step (1); generally, the state is considered as the main responsible, such issue is also promoted also by the Rio Declaration, which attributes to states the duty to ensure the protection of other states environments, not distinguishing between public or private actions. Moreover, the Draft Articles suggests that even though a state does not directly provoke the damage, whether the activity has been licensed by a state, it is attributable to the latter. Thus, in case a state is unable to halt, limit or regulate excessive and dangerous emissions of gases, it is considered potentially responsible<sup>119</sup>.

Secondly, it is central to distinguish between general causation and specific causation (2); the former requests only a general connection between the wrongful act and the injury, the latter instead requires clear proofs that a wrongful act was determinant in causing a specific injury<sup>120</sup>. In the first case the identification of a general causal link between the emissions of GHG and the resultant consequences on environment has been universally recognized by mostly international actors, together with the acceptance that climate change impact has also an influence on humans<sup>121</sup>. The second affirmation results less probable to realize due to the difficulty in identifying the specific emitter of GHG and the dispersive character of the material. Moreover, the presentation of proofs regarding emissions of gases is complex, because of the difficulty to collect evidences on climate change as cause; also there is uncertainty on the amount of proofs needed in tribunals and on which circumstances a Court would accept them in order to establish the causal link<sup>122</sup>.

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<sup>118</sup> Tol and Verheyen, at 1111.

<sup>119</sup> Ibid.

<sup>120</sup> Christina Voigt, "State Responsibility for Climate Change Damages" (2008) *Nordic Journal of International Law*, vol. 77, (1-2), at 15-16.

<sup>121</sup> Tol and Verheyen, at 1112.

<sup>122</sup> Voigt, at 15-16.

Thirdly, before declaring that a wrongful act constitutes a breach of international law, lawyers prefer to assess whether the act may be defined as such with the “due diligence test” (3). The due diligence is interpreted as the right conduct of a state, “[t]hat means that state responsibility can only occur if the respective state has not acted with the appropriate care<sup>123</sup>”. Generally, due diligence is based on the assertion that a state must act when it has the opportunity to do that, and it must use all the means in its possession to limit an environmental harm, implementing preventive and limiting measures, such as the gradual reduction of GHG<sup>124</sup>. Moreover the due diligence standard includes also the circumstance in which a state “[...] is able to envision the general consequences of an act or omission [,]” even though it does not have scientific evidence on the environmental damage<sup>125</sup>. Finally, the state needs to ensure responding measures that are proportionated to its national condition and to the natural harm; in order to assess the issue of proportionality, the state capacity needs to be compared with “[...] the interests of the potentially harmed State to be protected against injury”<sup>126</sup>. The due diligence standard is not equal for each actor, it may change from state to state, on the basis of their capacity in limiting and preventing emission of GHG for example, influenced by their level of economic and technologic development. Still, states need to do anything and everything to prevent climate change consequences.<sup>127</sup>

The fourth element, which can establish a state responsibility, is the identification of obligations towards other states (4), which are contained in treaties and International Customary Law<sup>128</sup>. International environmental law presents treaty law that may be invoked by singular states, or by more than one state, which entail also a range of obligations such as “[...] implementation control and enforcement [...]”<sup>129</sup>. Most of the historical environmental treaties, the UNFCCC Convention and the Kyoto Protocol, do not directly recognize state responsibility for GHG emissions; instead, they include an obligation to implement effectively

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<sup>123</sup> Tol and Verheyen, at 1113.

<sup>124</sup> Voigt, at 11.

<sup>125</sup> Ibid. at 12 .

<sup>126</sup> Ibid. at 12.

<sup>127</sup> Ibid. at 15.

<sup>128</sup> Tol and Verheyen, at 1113.

<sup>129</sup> Ibid., at 1114.

mitigation and adaptation measures, even though they do not specify additional information on how to deal with the obligation<sup>130</sup>.

Recently the attention of international actors on the concept of state responsibility in the context of climate change impact has been growing, especially concerning the relationship between developed and developing countries. The latter have started to demand justice for their vulnerable position towards climate change impact, and for their limited contribution to the emissions of GHG. In addition, they complain to receive less benefits than industrialized states from the polluting economic process, in which the latter continue to grow with less repercussions<sup>131</sup>.

In 1989 developing countries sustained that industrialized states have been the main producer of emissions in history, as result they have the responsibility to develop remedy measures to protect environment and reduce the dependence on such productions. The declaration met the opposition of developed states, which refused to accept any forms of responsibility<sup>132</sup>.

However in 1992 the UNFCCC stated

[...] that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs [.]<sup>133</sup>

The issue of responsibility on industrialized states has been declared, but specifications regarding the following obligations remained obscure<sup>134</sup>. Therefore, in the Rio Declaration the parties have been willing to accept their “common but differentiated responsibilities<sup>135</sup>”, which added further ambiguities concerning the form of responsibility that the Declaration was referring and its distribution. Furthermore, the numerous attempts arise by developing countries in order to demonstrate the weight of responsibility of industrialized states have been overcome by statements of U.S at that time; specifically, they praised about their

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<sup>130</sup> Ibid.

<sup>131</sup> Benoit Mayer, “Climate Change Reparations and the Law and Practice of State Responsibility” (2016), *Asian Journal of International Law*, vol.7 (1) at 185-186.

<sup>132</sup> Ibid. at 223.

<sup>133</sup> See United Nations Framework Convention on Climate Change Preamble.

<sup>134</sup> Mayer, n.46 (Chapter 2), at 224.

<sup>135</sup> See Chapter 1, para.1.4.

economic and technological superiority in environmental protection<sup>136</sup>. At the end of the negotiations the UNFCCC, recognizing that developing countries are subjects particularly vulnerable to climate change impact, requested developed states to help and assist them, also financially, still without a clear acceptance of responsibility<sup>137</sup>.

The unsolved discussion between developed and developing countries has continued to characterize also the following international environmental instruments. As result the issue of historical and present responsibility of emissions production was not take in consideration also in developing limitation measures under the Kyoto Protocol<sup>138</sup>. A slight and brief reference to an historical responsibility was inserted in the Cancun Agreements which declared

[...] that the largest share of historical global emissions of greenhouse gases originated in developed countries and that, owing to this historical responsibility, developed country Parties must take the lead in combating climate change and the adverse effects thereof [.]<sup>139</sup>

Therefore, developing countries attempted to promote the work programme on loss and damage as a potential form of compensation in light of the historical responsibility, but it met the opposition of developed countries. But, the latter were able to insert such position in the Paris Agreement<sup>140</sup>.

#### The principle of no-harm

Considering the above, the responsibility issue emerges whether a state does not respect a climate treaty obligation, such as respecting a limitation in gas emissions; a viable way for calling state accountability is the no-harm principle<sup>141</sup>. In the context of environmental law, the 1941 Trail Smelter case established the principle of no-harm<sup>142</sup>, according to which a state shall impede environmental damages which may cross national borders and prevent other subjects under its

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<sup>136</sup> Mayer, n.46 (Chapter 2), at 224 da citazione diretta A/conf.151/26/rev.1.

<sup>137</sup> Ibid. at 224 225.

<sup>138</sup> Ibid. at 226.

<sup>139</sup> *Decision I/CP.16* in Conference of the Parties in n.158 (Chapter 1).

<sup>140</sup> Mayer, n.46, at 226; Decision 1.CP.21, the Adoption of the Paris Agreement, sustains that art.8 of the Agreement, which promotes better understandings on Loss and Damage provoked by climate change and actions to limit them, cannot be considered as a form of compensation (see n.239 (Chapter 2), part.III para.51).

<sup>141</sup> Mayer, n.46 (Chapter 2), at 215.

<sup>142</sup> See Trail Smelter, n.94 (Chapter 3).

jurisdiction from committing such actions<sup>143</sup>. In addition, they may compensate states victim of the wrongful act<sup>144</sup>.

The principle is recognized also by important international instruments such as the Stockholm Conference and the Rio Declaration:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and 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.<sup>145</sup>

The no-harm principle has a broad scope, since it not only acts among states, but also beyond the national territory<sup>146</sup>.

Therefore, the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons has recognized the principle of non-harm as a rule of customary law, which however rises some opening questions<sup>147</sup>.

A first issue on the matter is whether the no-harm rule prohibits only the specific injury, or it refers to the actions that may provoke the injury; in the second case will be necessary to specify how to address with such activities<sup>148</sup>. The clearness on the no-harm principle in international customary law prevents to define its scope: whether states are accused because of negligence, they will be considered responsible only from the historical moment in which the climate change started to be studied scientifically; on the contrary, a stricter vision will take in account their entire historical production of gas emissions<sup>149</sup>.

Furthermore, since climate change cannot be forecasted easily and it is influenced by multiple factors, the identification of a specific harm is difficult to achieve. On the other hand, the no-harm principle seems referring mainly to a general obligation of the international community, since the environment represents a common global territory<sup>150</sup>.

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<sup>143</sup> Mayer, n.46 (Chapter 2), at 217.

<sup>144</sup> Voigt, at 9.

<sup>145</sup> See Rio Declaration on Environment and Development, Principle 2.

<sup>146</sup> Ibid. at 8.

<sup>147</sup> Mayer, n.46 (Chapter 2), at 216-217.

<sup>148</sup> Voigt, at 8.

<sup>149</sup> Mayer, n.46 (Chapter 2), at 219.

<sup>150</sup> Ibid. at 217-218.

Although the no-harm principle remains an important instrument to raise responsibility of states for their greenhouse gas production<sup>151</sup>, its application in the litigation context seems to fail. Mayer suggests three main obstacles: (1) the potential absence of an agreement among states for an international process, (2) the limited diplomatic power of developing countries and the resultant pressure by developed states at international level and (3) the difficulty on distribution of responsibility, since the production of emission is an action which has been performing by many states<sup>152</sup>.

However developing countries have been attempting to arise the issue of responsibility throughout climate negotiations since the 90s. They hope to “[...] promote a comprehensive and equitable framework that would implement the responsibility of excessive greenhouse gas emitters for the negative impacts of climate change<sup>153</sup>”.

#### The issue of reparation

According to the Draft Articles on Responsibility of States for internationally wrongful acts, states have two main obligations in case of an international law breach: (1) to abandon the wrongful act and (2) to present “[...] guarantees of non-repetition [...]”<sup>154</sup>.

Article 34 states that “[the] [f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction [...]”<sup>155</sup>; the injury, any damages provoked by the wrongful act of a state, may be both moral and material<sup>156</sup>.

Emissions of greenhouse gases have been provoking damages in the environment, including the costs for implementing adaptation measures and the economic/non - economic losses that adaptation fail to avoid<sup>157</sup>. As it was mentioned above, he identification of the causal link between the wrongful action and the harm is

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<sup>151</sup> Ibid. 219-220.

<sup>152</sup> Ibid. 220-222.

<sup>153</sup> Ibid. 223.

<sup>154</sup> See Draft Articles on Responsibility of States for internationally wrongful acts, art.30.

<sup>155</sup> Ibid. art 34.

<sup>156</sup> Ibid. art 31 .

<sup>157</sup> Mayer, n.46 (Chapter 2) at 227.

complex to find; but the ILC seems to consider the causal relationship when “[...] it is generally accepted [...] [as] proximate or foreseeable, although not necessarily direct”<sup>158</sup>. Still, the difficulty to determine climate change as the unique cause of a natural event together with the complicated determination of specific impacts, impedes a clear picture of the causal relation between the wrongful act and the damage<sup>159</sup>.

The restitution act foresees the re-establishment of the previous conditions, given that the lack is materially repayable and it does not turn in an exceeded burden for the state; the compensation instead “[...] cover[s] any financially assessable damage including loss of profits [...]”, the satisfaction instead is a non-monetary redress, according to which the state needs to demonstrate public regret<sup>160</sup>. In the context of environmental harm, the compensation and satisfaction acts are likely to be used, since the restitution is rarely a viable way. Furthermore, compensation provides for the “[...] apportionment of responsibilities [...]”<sup>161</sup>: whether more than one state have contributed to the wrongful act, the individual responsibility may be taken in account<sup>162</sup>. Compensation includes also contributions in case a state has been careless<sup>163</sup>.

Nevertheless, such mechanisms have not been used to sustain countries more vulnerable to the impact of gas emissions; several attempts have been carried by developing countries, especially regarding the enhancement of compensation through the development of a financial mechanism<sup>164</sup>. Through the WMI a slightly form of compensation has been established, even though developed countries still are opposed to forms of redress; the concept of loss and damage have been carried out by developing countries “[...] in order to raise awareness of the adverse consequences of climate change in developing countries and to call for some form of reparation”<sup>165</sup>. However, today such proposal has met the opposition of

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<sup>158</sup> Ibid. at 228 – 229.

<sup>159</sup> Ibid.

<sup>160</sup> See Draft Articles on Responsibility of States for internationally wrongful acts, art. 35 and 37.

<sup>161</sup> Mayer, n.46 (Chapter 2), at 233.

<sup>162</sup> See Draft Articles on Responsibility of States for internationally wrongful acts, art 47.

<sup>163</sup> Mayer, n. 46 (Chapter 2), at 233.

<sup>164</sup> Ibid. at 234.

<sup>165</sup> Id. n.131 (Chapter 3), at 194.

industrialized countries, which present adaptation efforts as a possible justification<sup>166</sup>.

Mayer sustains that adaptation cannot be considered as a form of reparation in case of wrongful act; firstly, the adaptation measures provoke an internal interference with the injured state, instead reparation seeks to re-establish the previous situation in the territory or provide for monetary and symbolic redress. In addition, adaptation measures may change overtime, and they are influenced by different policies; also, they may result in an unexpected burden for injured states, which find difficulty in managing the strategies and do not accept to being controlled by international actors in such situation<sup>167</sup>.

Reparation acting in the context of climate change may enhance the implementation of mitigation strategies: (1) they would reduce the production of gas emissions in developed countries, (2) they would contribute to the development of a new environmental consciousness at political level and (3) and major awareness on breaches of international law<sup>168</sup>.

The development of a responsibility narrative has been highly felt by developing countries, actors who would be the favoured subjects to reparation acts, calling for a new global economic order; on the contrary, industrialized states still avoid any discussions on the issue. The portion of population which deny the existence of climate change is quite broad in the western country societies, due to the complexity in precise scientific findings and the pressure of national lobbies. In addition, the difficult of representations of the climate change impact impedes a concrete communication of the issue in developed countries, together with a clear perception of its gravity, since most of natural disasters happen geographically far. Information regarding the vulnerability of developing states are channelled mostly by developed ones, preventing the possibility for the former to influence their political agenda. The perception that most of the climate change consequences will affect generations in the future, as opposed to the economic and political costs that are more current, contributes to prevent the acceptance of a responsibility narrative in the industrialized states. More, the spreading of new moral visions on state

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<sup>166</sup> Id., n. 46 (Chapter 2), at 234.

<sup>167</sup> Ibid. at 235.

<sup>168</sup> Id., n.131 (Chapter 3), at 195.



responsibility depict developed states as the generous saviours, presenting them as promoters of international solidarity. Industrialized states also tend to advance their national economic interests in the context of the global governance. Finally, in order to face the climate change impact, global actors need to support a radical change in the traditional way of development, but it seems that the world is not ready yet<sup>169</sup>.

The next paragraph will argue that a claim of state responsibility can include also the burden of climate migration. Whether the latter is considered a harm to vulnerable countries, developed states should act finding effective solutions to the issue. A negative vision of migration is still spread, especially as threat to national security, but new considerations in light of the historical principle may turn it. Finally, in the state responsibility issue should be included also form of reparation towards climate migration costs. The next session will provide an assessment of climate migration through the historical principle on state responsibility, followed by few proposals of compensation and remedies for the costs derived from migration.

### **3.4 The responsibility narrative of Climate Migration**

Empirical evidences demonstrate that historically developed states have been constructed their wellbeing on exploitation of pollutant materials, which assured benefits for their economic development, but also generated negative externalities for developing states<sup>170</sup>.

The idea of a consequential responsibility is partly rejected by industrialized countries, even though recently with the support on adaptation financial measures and the work programme on loss and damage, they seem to do some concessions. Even though developing countries request more clear and efficient forms of reparation<sup>171</sup>.

Considering climate migration as an injury is an assertion on which the alarmist discourse is based, depicting climate migration as a potential threat to security. The alarmist discourse provokes different reactions among states: countries more

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<sup>169</sup> Mayer, n. 46 (Chapter 2), at 242-247.

<sup>170</sup> Raphael Nawrotzki, "Climate Migration and Moral Responsibility" (2014) *Ethics, policy & environment* vol.17 (1) at 6.

<sup>171</sup> Mayer, n. 46 (Chapter 2), at 250.

vulnerable to climate change impact take advantage of the situation for raising the issue of responsibility and making justice claims; on the contrary, developed countries will not accept the idea of responsibility, instead they may adopt closing responses<sup>172</sup>.

The alarmist discourse is opposed to a more positive vision of climate migration, which considers it as a way to tackle climate change effects. It suggests that migration may enhance the adaptation capacity of vulnerable populations, and even brings positive outcomes for states of arrival<sup>173</sup>.

Applying the historical principle, which takes in account the wrongful state actions of the past and the resultant current unfair distribution of profits, leads to the assumption that the production of GHG has provoked the current environmental changes<sup>174</sup>. Such discourse opens a little possibility towards an agreement between developed and developing countries also on the migration issue; the position of the latter in international negotiations is weaker, due to their special vulnerabilities and economic conditions. In fact, the international governance of climate migration is dominated by industrialized countries, which impose their political interests rather than address the protection of migrants, sustaining policies of containment. Here, developing countries are often forced to accept any form of finances due to their low position in negotiations<sup>175</sup>. Anyway, the historical principle represents firstly an occasion to rise justice claims in order to demonstrate the historical responsibility of developed states in productions of pollutant gases; it thus contributes as incentive for limiting GHG in industrialized countries, which feeling responsible may decide to invest more in clean energies. Such decision would reduce at the beginning the level of emissions and consequently the number of climate migrants. Secondly, the acceptance of historical responsibility may encourage developed countries to see migrants as needy subjects: consequently, they would enhance their condition, for example allowing them to enter in their territory, where they can increase their wellbeing and send remittances to their families, triggering a fair redistribution of economic richness. Finally, such

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<sup>172</sup> Ibid.

<sup>173</sup> Mayer, n. 46 (Chapter 2), at 252.

<sup>174</sup> Nawrotzki, at 6.

<sup>175</sup> Mayer, n. 46 (Chapter 2), at 252-253.

principle may also inspire migrants for a social change, which would spread a better understanding on climate change impact<sup>176</sup>.

The idea that migration is a phenomenon that brings negative externalities towards host states may be overcome again by the claim of the historical responsibility. Even though states use the issue of sovereignty as a justification for excluding the admission of determined persons on behalf of national security, the transboundary effects of their past actions discredit such assumption. Since the negative externalities of GHG cross national borders, states have the responsibility on all the affected victims. They may be considered responsible not only for the present emissions, but also for the entire pollutant activities in the past, and an empirical recognition of the causal link between climate migration and GHG would trigger a concrete response by developed states, such as the promotion of open borders<sup>177</sup>.

The idea that migration leads to economic repercussions, such as reduction of job places, in developed states has been demonstrated false. Industrialized states have been living in wellbeing at the expense of vulnerable countries, which have sustained most of the externalities costs of gas emissions. Thus, a logic remedy is a fair redistribution of economic costs, advanced on behalf of a sense of moral responsibility. On one hand, the most industrialized may finance economic aid to vulnerable territories, enhancing their livelihood; on the other hand, developed states should allow migrants to enter in their territories, educate them to clean energies and to environmental-friendly behaviours, promoting a share of responsibility<sup>178</sup>.

Still, the issue on the effective capacity of developed countries to sustain all the costs of climate migration is under discussion. Scholars sustain a potential utilitarian approach which allows policies of containment, for example, in case of excessive arrival of migration flows a state may be morally justified to close borders in order to preserve the national wellbeing. But further considerations are needed on the topic, also about other possible moral justifications for excluding climate migrants such as the national security<sup>179</sup>.

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<sup>176</sup> Nawrotzki, at 8.

<sup>177</sup> Ibid. at 9.

<sup>178</sup> Ibid. at 11-13.

<sup>179</sup> Ibid. at 15.

The security problem in the context of climate migration is argued also by Mayer, who suggests that sustainability may represent a potential tool to ensure more protection on climate migrants. Firstly, since environmental changes undermine development, in order to ensure a living environment in the future, mitigation and adaptation measures are requested. Furthermore, development may help to enhance the capacity of adaptation of vulnerable populations, for example permitting migrants to find a job, which enhances the process of development and increase its adaptation to climate change effects. The sustainable adaptation approach<sup>180</sup> is aimed to ensure the capacity of adaptation for future generations through long-term schemes. Thus, preventive actions are needed, for example as promoting relocation before the occurrence of a disruptive change in the environment. Sustainable development is also fundamental in the security context, given that development limits the possibility of conflicts; as it has been already discussed, environmental migration may be considered as a consequence of conflicts or a driver to conflicts, linkages that have triggered international debates. As result the security issue has promoted the advancement of climate migration in international agenda and has favoured international cooperation on its management. On the other hand, the security issue on climate migration may lead the international global governance of migration towards national interests: states may focus on specific vulnerable states that represent strategic rewards, leaving uncovered other climate migrants who do not fulfil their needs<sup>181</sup>.

Considering the above, two visions of climate migration – security nexus may come out: (1) climate change as a security threat, such consideration may lead to a negative vision of migration, which has to be stopped in order to protect the nation; or (2) it may lead to a more flexible vision, where the security is extended to individuals, and development is inserted in the international agenda, recognizing the fundamental role of development in assuring human security<sup>182</sup>.

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<sup>180</sup> It combines both Sustainable Development and Adaptation approach;

<sup>181</sup> Benoit Mayer, *The International Legal Protection of Climate (or Environmental) Migrants at the Crossroads: Fraternity, Responsibility and Sustainability* (2011) in Michel Morin et al., *Responsibility, Fraternity and Sustainability in Law: In Memory of the Honourable Charles Doherty Gonthier* (Markham, ON: LexisNexis Canada, 2012) at 754-757.

<sup>182</sup> Ibid. at 758-759.

### Potential forms of compensation for climate migrants

As it was mentioned above, from a legal point of view a state is considered responsible whether it has committed a wrongful act at international level; generally, such act is represented by a state that has failed to prevent an injury to another state, as result consequences on the territory, including migration, should become its responsibility. In this case the state has breached the no-harm principle<sup>183</sup>, whose application represents a way to claim states responsibility for provoking environmental migration, even though it rises some issues<sup>184</sup>.

The no-harm principle requires that (1) the consequences of the wrongful act are serious and (2) it entails concrete evidences of the harm<sup>185</sup>; the first condition should ponder the sovereign interests of the polluting state and the interests of the affecting states in order to establish a limit of gravity. Whether the limit of seriousness have not been passed, it is likely that the state has been considered responsible for damages in its own territory and not for the entire global warming. Furthermore, the claim of responsibility requires evidences that are difficult to obtain especially because the link between environmental change caused by the pollutant state and migration is not simple to demonstrate<sup>186</sup>.

Moreover, polluted states may require some forms of reparation in the context of climate migration. Here, compensation seems the only viable way, which should cover, financially and morally, the costs for loss of lands, resettlement<sup>187</sup> and adaptation<sup>188</sup>. The best option for developing states is to obtain finances that can use to manage on their own the acquisition of new territories, without any interferences of polluting states; the latter in case they decide to manage directly the resettlement, would have interfered at domestic level following their interests<sup>189</sup>.

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<sup>183</sup> Ibid. at 737.

<sup>184</sup> Ibid. at 740.

<sup>185</sup> See Trail Smelter, n. 94 (Chapter 3), at 1965.

<sup>186</sup> Mayer, n.181 (Chapter 3), at 740-741.

<sup>187</sup> According to UNHCR resettlement “[...] involves the selection and transfer of refugees from a State in which they have sought protection to a third State that has agreed to admit them – as refugees – with permanent residence status” (UNHCR, 2016)

<sup>188</sup> Mayer, n.181 (Chapter 3), at 742-743.

<sup>189</sup> Id., n. 46 (Chapter 2), at 236.

The implementation of a financial mechanism aimed to assist the transfer of climate migrants to the polluting state is another possible action that the global governance may put in practice towards the climate migration issue; the instrument is different from compensation since it foresees few obligations on the affected state, which anyway often sustain mostly of the costs. Finally, the last proposal foresees visas aimed to restore partly the conditions in states of origin, especially in context of conflict. Overall, even though the recognition of the status of climate migrant would create some obligations also towards developing states, such vulnerable people should be protected and their rights respected. The “[...] international governance should constitute the response of the international community to the injury caused by excessive greenhouse gas emissions”<sup>190</sup>.

A general overview on the different academic proposals to enhance the global governance of climate migration will be reported therefore; solutions that vary from the inclusion of provisions on climate migrants in international agendas and the creation of new correlated instruments, to the amendment of existing treaties.

### **3.5 Proposals of solutions to the Climate Change – Migration nexus**

A reform of the international governance of migration is still object of discussion today; critics suggest that the attention should shift from the climate change effects to the rights and protection of migrants, seeking solutions for their condition of vulnerability. The climate-migration nexus may represent an important tool to enhance the migration governance at international level, triggering new discussions on dated and noted political lacks<sup>191</sup>.

First of all, proposals of new legal frameworks on the climate change – migration issue have been numerous; among them there are suggestions on the development of international agendas and new legal instruments. A potential first typology of agenda is focused on the protection of human rights of migrants; since the latter have been subjects to lacks of protection and climate change seems to exacerbate more such vulnerability, the new agenda aims to an enhancement of the international protection mechanisms, which may bring more political attention on

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<sup>190</sup> Ibid. at 239.

<sup>191</sup> Mayer, n. 46 (Chapter 2), at 167.

the issue. The second proposal is animated by alarmist discourses which give a negative connotation to migration, depicting frightening future scenarios where high numbers of climate migrants will undermine the international security. Thus, the second potential typology of agenda relies on mitigation strategies, which limit the emissions of gases which indirectly trigger climate migration. Finally, the last typology of agenda is mainly westerner, again climate migration is considered a growing threat and policies of containment are advanced. The protection of migrants is ignored, the focus is on the development of militaristic and political instruments to protect western populations from such subjects<sup>192</sup>.

Beyond political proposals on international agendas, scholars have been presented more practical suggestions, including the formation of new international instruments of protection, together with the enhancement of the existing ones. Still, difficulties on the implementation of such ideas are several. To give an example the scientific uncertainty on climate change as unique cause of a natural hazard, or the lack of empirical evidences on the causal link between climate change and migration impede to new protection tools to emerge; together with the interference of a range of other factors in the context. Moreover, new instruments of protection need to take in consideration that climate change influences migration triggering disparate situations, each one presents different challenges. Thus, they have to find a solution for a better management of resources, useful to protect persons on the move, but also for those people who do not have enough resources to leave and remain within their own country<sup>193</sup>.

The alternative proposal is also focused on existing protection tools, such as the Refugee Convention which may require an updating; here, the challenges are more numerous, given that the Convention still requires a full implementation in several countries and meets the strong opposition of economic powers for a reform<sup>194</sup>.

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<sup>192</sup> Mayer and Crépeau, at 13-14.

<sup>193</sup> Ibid. at 16-17.

<sup>194</sup> Ibid.

### A climate refugee regime

Biermann and Boas support the creation of a new international instrument to deal with climate change impact on migrants; firstly, they suggest that the new climate refugee regime is based on a series of fundamental principles: (1) “The Principle of Planned Re-location and Resettlement<sup>195</sup>”, which provides for a preventive organization of the move from the affected territory to a safer area, since the climate change consequences on humans will increase in the future. (2) “The Principle of Resettlement Instead of Temporary Asylum” that may accommodate the needs of climate migrants who cannot return home, (3) “The Principle of Collective Rights for Local Populations” since the new regime on climate migrants should recognize entitlements to social groups, avoiding to focus on the individual condition of the migrant as it is provided by the Refugee Convention. (4) “The Principle of International Assistance for Domestic Measures”, which enhances the domestic protection of climate migrants, who mostly move within the national borders and towards specific areas of the state. Finally, (5) “The Principle of International Burden-sharing”, that stresses the developed state responsibility in causing climate change and the resultant human effects, thus additional legal elements, such as the principle of common but differentiated responsibility needs to be taken in consideration<sup>196</sup>.

The preference of an international instrument on climate migration focuses on a collective groups, instead of an individual case is supported also by Docherty and Giannini. Specifically, they sustain that such instrument “[...] should allow for the determination of whether a person is a climate change refugee to be made on either an individual or group basis, but include a strong preference for the latter”<sup>197</sup>. According to them, since climate change may provoke high flows of migrants, it is easier to recognize each individual of a group as a climate refugee. Such solution

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<sup>195</sup> Planned Relocation is “[...] process in which persons or groups of persons move or are assisted to move away from their homes or places of temporary residence, are settled in a new location, and provided with the conditions for rebuilding their lives.” (Brookings, 2015, at 5).

<sup>196</sup> Biermann and Boas, at 75-76.

<sup>197</sup> Bonnie Docherty and Tyler Giannini, “Confronting a rising tide: A proposal for a convention on Climate change refugees” (2009) *The Harvard Environmental Law Review*, vol 33(2) at 374.



may request less costs, promote equality and preserve the characteristic of the group<sup>198</sup>.

The mentioned academics propose also the development of a new Protocol or Convention to deal with the issue of climate migration. Biermann and Boas suggest a “Protocol on Recognition, Protection and Resettlement of Climate Refugees” to be linked to the UNFCCC. Such treaty will have the same Parties of the latter Convention, providing protection for the climate migrants and collaborating with the existing climate change regime. Furthermore, it foresees the establishment of an executive body, which an equal membership between vulnerable and developed countries, with a “[...] double-weighted majority rule”. The body will be supported by a group of experts, which will provide for scientific assessment on climate change human impact. Moreover, the executive committee may present a series of concerning areas, where implementing “[...] specific rights and support mechanisms, including financial support, voluntary resettlement programs over several years, together with the purchase of new land, and, especially in the case of small island states, organized international migration<sup>199</sup>”.

The authors allow supporting bodies to the new regime, giving that a sole executive committee would not be able to deal efficiently with millions of climate refugees in the future; thus, the proposal includes the recruitment of several correlated agencies, each of one will be focus on its area of interest<sup>200</sup>.

Millions of climate refugees will demand just as much money to sustain their protection, relocation and resettlement; Biermann and Boas identify three potential funds for sustaining the regime: (1) funds provided by international agencies such as UNHCR or the World Bank group which need to develop new programs on the climate change issue; (2) an “environment-related fund” which presents more negative implications, for example it may impede to developing countries claims of state responsibility and correlating actions of redress. Finally, (3) the authors suggest a better solution, the creation of a “[...] Climate Refugee Protection and Resettlement Fund”. Here, “[...] the principle of reimbursement of full incremental costs to the protection and resettlement of climate refugees [...]”

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<sup>198</sup> Ibid. at 374 – 375.

<sup>199</sup> Biermann and Boas, at 76-78.

<sup>200</sup> Ibid. at 79.

will be applied, especially in cases where the causal link between migration and climate change is clearer. In the other cases, where the link is less visible, “[...] the principle of additional funding [...]” is preferable<sup>201</sup>.

Similarly, Docherty and Giannini suggest the creation of a “Global Fund” which shall

[...] determine the size of obligatory contributions, collect payments, and distribute grants to states in need and organizations that provide aid to refugees themselves. The instrument should allow states to substitute in-kind assistance for financial assistance, but distribution of the former should be funneled through the instrument’s coordinating agency.

The assistance provided by such fund should be distributed following the idea of common but differentiated responsibilities. Since existing funds are usually based on a voluntary contribution, such instrument requires a binding involvement of the Parties; moreover, these financing will provide aid to vulnerable countries and arrival states, limiting the aggravation of the climate situation due to abrupt or slow natural hazards<sup>202</sup>.

The authors continue proposing the creation of a specific agency of coordination aimed to implement the instrument. It should assist host and arrival states in dealing with flows of migrants, assuring protection of human rights and supporting refugees on the move and on the way home. The agency needs to collaborate with other international actors and acts as mediator among them, also it has to manage the distribution of aid. A group of scientific experts should support the agency work, for example they may be committed in researches on climate change, develop new technologies or assess the distribution of funds. Both the bodies mentioned above are requested to be independent<sup>203</sup>.

Docherty and Giannini add further elements to the new international instrument on climate refugee protection: (1) the full protection of a range of human rights provided by the international human rights regime following a non-discriminatory way; (2) the implementation of an effective humanitarian aid, (3) “Shared Responsibility” and (4) “International Cooperation and Assistance”. The

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<sup>201</sup> Ibid. at 79-81.

<sup>202</sup> Docherty and Giannini, at 385-387.

<sup>203</sup> Ibid. at 388-390.

last two points need a further assessment. Generally, host states should have the primary responsibility towards climate refugees, because firstly the latter are literally on their national ground, as result governments may better implement the protection provisions, assuring respect of human rights and humanitarian aid. On the other hand, since home states have the sovereign duty to protect their own citizens, they must put efforts on preventing migration, and therefore, provide all the necessary for permitting the return. Moreover, they need to implement assistance also during the relocation and resettlement processes. Thus, even though home states usually present difficult situation due to climate change, they need to support arrival states in every possible way, since populations flee not because government does not want to assist them, but because it does not have the possibilities. The whole actions mentioned above would be more effective with the support of the international community, which is the main historical responsible for climate change and thus also for the correlating consequences<sup>204</sup>.

Again, Docherty and Giannini recognize that a clear conceptualization of climate refugee is urgent today. They stress 6 main elements that needed to be included in its definition: the climate refugee is a victim of a forced migration (1), which obliges him to relocate temporarily or permanently (2) towards a new area crossing national borders (3). The cause of migration shall be climate change induced (4) through slow or abrupt natural hazards (5); in addition the recognition of a “more likely than not” anthropogenic contribution to climate change (6) is required<sup>205</sup>.

Beyond the implementation of an international instrument, the consent on a new Climate Change Refugee Convention is crucial; such treaty would gain global attention on the issue, stressing the importance of the inclusion of other legal norms and provisions for developing effective solutions. Finally, the participation of the civil society and victims would be broader<sup>206</sup>.

The last paragraph will be focused on the most famous climate treaty, the Paris Agreement, providing general information on its content and provisions, regarding

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<sup>204</sup> Ibid. at 376-382

<sup>205</sup> Ibid. at 368 -371

<sup>206</sup> Ibid. at 392

also climate migration. Furthermore, the most recent decisions taken during the last Conferences of the Parties will be reported.

### 3.6 The Paris Agreement

In 2015 the achievement of the Paris Agreement has been defined as “[...] the world's greatest diplomatic success<sup>207</sup>”. The long path towards the Agreement began in 2007, when, together with the establishment of a second period of commitment included in the Kyoto Protocol, a further process started aimed to achieve a common ground on actions against climate change. Such decision has not been reached during COP 15 as states had hoped, especially because global powers such as China and US opposed to the proposal of a binding treaty. A second attempt has been done with COP 17 where the Durban Platform for Enhanced Action has been established, with the goal to create an international instrument which would present a high participation of states. Finally, during the COP 21 the Agreement has been achieved, representing the “ultimate objective” declared by the UNFCCC in 1992<sup>208</sup>.

The main novelty of the document regards the binding nature of some provisions of the treaty as opposed to the precedent political accords; today 176<sup>209</sup> countries have ratified it, enhancing its global membership, including developed and developing countries. The Paris Agreement foresees a long-term action, with regular meetings every 5 years during which the Parties make the point on the achieved progress with transparency and finally, it takes in consideration that states present different characteristics in the implementation of provisions, thus its approach may vary on such considerations<sup>210</sup>.

The treaty includes 29 articles focused on different matters: the entry-into force regulation, INDCs, mitigation and adaptation efforts, together with the contributions of non-state actors<sup>211</sup>. “[...] [P]ursuing efforts to limit the temperature

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<sup>207</sup> Fiona Harvey, “Paris climate change agreement: the world's greatest diplomatic success” (2015) *The Guardian* newspaper. See *The Guardian* online.

<sup>208</sup> Mayer, n. 46 (Chapter 2), at 193.

<sup>209</sup> 30 of May 2018.

<sup>210</sup> Daniel Bodansky, “The Paris Climate Change Agreement: A New Hope?” (2016). *American Journal of International Law*, vol. 110 at 4-5.

<sup>211</sup> *Ibid.* at 20.

increase to 1.5°C above pre-industrial levels [...]”<sup>212</sup> which is a goal of the Paris Agreement, have been representing a key priority for developing countries which are facing most the impact the global warming<sup>213</sup>; it takes part to the more general groups of mitigation efforts promoted by the Agreement, such as “[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels [...]”<sup>214</sup>, and applying immediate reduction actions on gas emissions, without any specifications on time limits<sup>215</sup>.

“Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve [...]”<sup>216</sup> is a binding provision fostered by the Agreement; on the other hand, the Parties are not obliged to achieve the NDCs since the inclusion of a legal obligation has met the opposition of global powers, they only need to promise to implement them<sup>217</sup>. The treaty also demands to industrialized countries to support developing ones in achieving the economic targets<sup>218</sup>.

Therefore, the Agreement establishes the development of a new mechanism aimed to enhance the mitigation actions, also promoting correlating policies and programs<sup>219</sup>.

A further goal is related to “[i]ncreasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development [...]”<sup>220</sup>; here, the Agreement fosters to help populations in tackling climate change impact and promote an international support to the adaptation capacities in developing countries. Still, the adaptation provisions are included with a general language, which do not permit to understand their effective result<sup>221</sup>.

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<sup>212</sup> See the Paris Agreement, art.2 para.1(a).

<sup>213</sup> Bodansky, at 21.

<sup>214</sup> See the Paris agreement, art.2 para.1 (a).

<sup>215</sup> Bodansky, at 22.

<sup>216</sup> See the Paris agreement, art.4 para.2.

<sup>217</sup> Bodansky, at 24; the Paris Agreement presents only few legally binding articles: 4.2, 4.3, 4.8, 4.9, 4.13, 7.1, 13.7 (Voigt and Ferreira, 2016, at 67).

<sup>218</sup> Ibid. at 25; see the Paris Agreement, art. 4.

<sup>219</sup> Bodansky, at 27.

<sup>220</sup> See the Paris Agreement, art.2 para.1 (b).

<sup>221</sup> European Commission, “the Paris Agreement”. Retrieved from [https://ec.europa.eu/clima/policies/international/negotiations/paris\\_en](https://ec.europa.eu/clima/policies/international/negotiations/paris_en) . Last visited June, 10 2018.

The Paris Agreement “[...] recognize[s] the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change [...]”<sup>222</sup>, such article is important not only because it inserts the loss and damage issue in the treaty, but also it separates it from the adaptation approach. Still, industrialized countries stress the fact that such wording does not represent an occasion for demanding state responsibility<sup>223</sup>. The third explicit goal consists in “[m]aking finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development”<sup>224</sup>. The finance commitments have not been subjects to substantive changes than before, thus the financial assistance of developed countries has been remarked, even though in a voluntary manner<sup>225</sup>. Finally the treaty recognizes the contributions of non-state stakeholders, which help reinforcing reduction actions and promoting cooperation<sup>226</sup>. As result, the Talanoa Dialogue have been proposed, an open and transparent dialogue aimed to make a primary evaluation on the commitments requested by the Agreement, before the official review meeting. The process has started during COP 23, the process is open to non-Parties actors and it will end with COP 24 when the results will be assessed<sup>227</sup>.

Generally speaking, the Paris Agreement represents a great global compromise, even though its success will depend on the willingness of the Parties in implementing the actions effectively at national and regional level, with the support and cooperation of non-Parties actors<sup>228</sup>.

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<sup>222</sup> See the Paris Agreement, art. 8 para.1.

<sup>223</sup> Bodansky, at 30.

<sup>224</sup> See the Paris agreement, art.2 para.1 (c).

<sup>225</sup> Bodansky, at 31.

<sup>226</sup> European Commission, n.221.

<sup>227</sup> Centro Euro-Mediterraneo per i Cambiamenti Climatici (Euro-Mediterranean Center for Climate Changes), “Talanoa dialogue: i negoziati sul clima non sono più un’esclusiva dei diplomatici (Talanoa dialogue: negotiations on climate are no longer an exclusive of diplomats). Retrieved from <https://www.cmcc.it/politica-climatica/talanoa-dialogue-climate-change-negotiations-are-not-a-diplomat-only-affaire-anymore-2>. Last visited May, 25 2018.

<sup>228</sup> Meinhard Doelle, *The Paris Climate Agreement – Assessment of Strengths and Weaknesses* (2016) in in Klein et al, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, 2017) at 14.

## The human soul of the Paris Agreement

Efforts aimed to promote human rights issue in an international climate treaty have been rewarded with the adoption of the Paris Agreement. Since the Cancun Agreements a process of advocacy on human rights have been sustained by non-state actors and civil society<sup>229</sup>. The “Lima call for climate action” requested the development of an international instrument to enhance the adaptation action<sup>230</sup>

[s]tressing that all actions to address climate change and all the processes established under this agreement should ensure a gender-responsive approach, take into account environmental integrity / the protection of the integrity of Mother Earth, and respect human rights, the right to development and the rights of indigenous peoples[.]<sup>231</sup>

References to human rights and the right to development have been sustained primarily by developing countries, others instead preferred to shift the attention towards vulnerable people conditions. As result, the Preamble of the Paris Agreement recognizes the role of human rights in the global action against climate change<sup>232</sup>.

Despite the fact that the Preamble does not provide any obligations for the Parties in referring to human rights, the relevance of such topics is so highly recognized at international level, that the Parties are likely to respect them like clauses of customary international law. Furthermore, the human rights issue is reinforced with references on other important arguments such as sustainable development, gender equality and poverty issue<sup>233</sup>.

Considering the above, the integration of human rights and correlating topics represents a great achievement in the climate change legal framework, even though it needs further work in the negotiations for a concrete implementation of such clauses<sup>234</sup>.

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<sup>229</sup> Benoit Mayer, “Human Rights in the Paris Agreement” (2016) *Climate Law*, vol.6 (1-2) at 113. See Social Science Research Network’s eLibrary.

<sup>230</sup> *Decision 1/CP.20, “Lima call for climate action”* in Conference of the Parties, Report of the Conference of the Parties on its twentieth session, held in Lima from 1 to 14 December 2014: FCCC/CP/2014/10/Add.1 (2015) at 1.

<sup>231</sup> *Ibid.* at 7.

<sup>232</sup> Mayer, n.229 (Chapter 3), at 110-113

<sup>233</sup> *Ibid.* at 113-115.

<sup>234</sup> *Ibid.* at 117.

The Paris Agreement embodies a great opportunity to foster also the human mobility issue; specifically, 3 important points have been advanced in the text: (1) the Preamble requests Parties to considerate their obligations towards migrants and the respect of their rights when implementing climate actions<sup>235</sup>; (2) the treaty suggests “[...] to protect people, livelihoods and ecosystems [...]” and “[...] strengthening resilience and reducing vulnerability to climate change [...]”<sup>236</sup>; such provisions represent a starting point to tackle the primary causes of displacement. And finally (3) the establishment of a task force on displacement<sup>237</sup>.

### The Twenty-Third Conference of the Parties

The main discussed argument during the twenty-third Conference of the Parties has been the recent US decision to withdraw from the Paris Agreement. As result, developing countries such as African ones requested to put under discussion the financing issue, given the heavy financial support of the US to the climate action. Other Parties instead insisted on reinforcing the tackling towards losses and damages due to climate change impact, maintaining the Adaptation Fund<sup>238</sup>.

Since the Parties agreed to develop “the Paris rulebook” within COP 24, the Bonn Conference focused mainly on the technical aspect of the potential rules and decisions.

Specifically, during COP 23 several decisions have been taken: (1) the Conference of the Parties requests the conclusion of the work programme, advanced by the Paris Agreement, during the next meeting of the Parties scheduled in 2018; (2) it pushes the local communities and indigenous peoples platform to “[...] strengthen the knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change [...]”<sup>239</sup>; (3) it asks to Parties and stakeholders “[...] to participate and engage in implementing the

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<sup>235</sup> United Nations High Commissioner for Refugees, “Displacement related to Climate Change” (2016) Policy Brief: Displacement at COP 22.

<sup>236</sup> See the Paris Agreement, art.7 para. 1 and 2.

<sup>237</sup> United Nations High Commissioner for Refugees, n.235 (Chapter 3).

<sup>238</sup> The Center for Climate and Energy Solutions, “Outcomes of the U.N. Climate Change Conference in Bonn: 23rd Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 23)” (2017) at 1.

<sup>239</sup> *Decision 2/CP.23: Local communities and indigenous peoples platform* in n.20 (Chapter 3) at 11.



gender action plan with a view to advancing towards the goal of mainstreaming a gender perspective in all elements of climate action [...]”<sup>240</sup>; (4) it “[e]ncourages Parties to actively engage in the work and to disseminate, promote and make use of the products of the Warsaw International Mechanism and its Executive Committee [...]”<sup>241</sup>, and “[i]ncorporating [...] climate change impacts on human mobility, including migration, displacement and planned relocation [...]”<sup>242</sup>(5). Also, it “[u]rges developed [...] Parties to continue their efforts to channel a [...] share of public climate funds to adaptation activities and [...] to achieve a greater balance between finance for mitigation and finance for adaptation [...]”<sup>243</sup>.

The next chapter will provide an overview on the main actors dealing with environmental migration in the context of the global governance on migration. Furthermore, a broad assessment on the issue of migration as an adaptation strategy, together with Disaster Risk Reduction measures will be provided in order to explore alternative solutions to climate migration.

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<sup>240</sup> *Decision 3/CP.23: Establishment of a gender action plan*, in n.20 (Chapter 3), at 13 para 2.

<sup>241</sup> *Decision 5/CP.23: Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts*, n.20(Chapter 3), at 21 para. 13.

<sup>242</sup> *Ibid.* at 21 para. 13 (c).

<sup>243</sup> *Decision 6/CP.23: Long-term climate finance*, n.20 (Chapter 3), at 23 para.3.

## **Chapter IV. ALTERNATIVE APPROACHES TO CLIMATE MIGRATION**

The first part of the chapter will be devoted to provide an overview on the main protagonists in the global governance of migration. Firstly, the UNHCR will be assessed, an UN organization that deals particularly with refugees, which is attempting to provide technical and legal support for states in the context of environmental migration; it offers efficient operational responses to the issue and promotes the fulfilment of the existing normative gaps. Therefore, the IOM will be presented, as an organization that has been dealing with the phenomenon of migration for years, and as an international actor which helps states in dealing with climate change and migration. It proposes itself as a guide and a source of information on the matter, promoting dialogue and instauration of partnerships, together with response strategies such as prevention, assistance and adaptation.

Moreover, the New York Declaration will be discussed, and after a brief introduction on its content, its approach on environmental migration will be reported, together with the main outcomes: the Refugee Framework and the two Global Compacts.

The second part instead will focus on the MECLEP project which has assessed the relationship between migration and adaptation in six countries between 2014 and 2017; the outcomes and recommendations of such project will be presented, together with an overview on the Disaster Risk Reduction Strategies. Therefore, the position of the Sendai Framework towards environmental migration will be discussed, and finally the efforts of the Kenyan government to promote migration as adaptation at national level will be reported.

### **4.1 The Environmental Governance of Migration**

Climate migration represents a growing and challenging issue; finding an efficient way to deal with such phenomenon is debated at international level, especially who is the best subject for addressing the climate change impact and how it should implement concrete actions to deal with it<sup>1</sup>.

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<sup>1</sup> Jane McAdam, “Environmental Migration Governance” (2009) UNSW Law Research Paper No. 2009-1 at 1.

Since climate change effects cannot be predicted and the casual relationship between such phenomenon and migration is still under discussion, together with the absence of a precise legal status for climate migrants, it is difficult to develop the right approach for facing environmental migration. The international governance of migration presents different international, regional and domestic actors which operate with other political entities and institutions. The IPCC and the UNHCR have an important role in such context: the former has been studying human-induced climate change since the 80s, publicizing a range of reports containing scientific information on the climate change impact and its future implications; it also provides technical support to UNFCCC<sup>2</sup>. The latter has been created in 1950 after the end of the WWII to help millions of refugees who lost home in Europe. It covered an important role also during other difficult historical periods, such as the process of decolonization. Today, the scope of UNHCR action has expanded worldwide, focusing not only on refugees, but also dealing with IDPs and stateless populations<sup>3</sup>. Another important protagonist in the migration governance is the International Organization for Migration which has been founded after the WWII as well to engage with the refugee flows at that time; today it is

[...] the leading international agency working with governments and civil society to advance the understanding of migration issues, encourage social and economic development through migration, and uphold the human dignity and well-being of migrants<sup>4</sup>.

Climate migration entails multiple legal aspects: it involves different subjects and different rights, which makes difficult for international actors to respond in an independent way adequately. Even though, the scope of IOM and UNHCR touches multiple areas of interest, it seems that a comprehensive approach to deal with climate migration is still absent at international level. It is under discussion whether a unique actor should be chosen for addressing the issue, or it had be better sustaining a cooperation among two or more. Moreover, the efficiency of such

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<sup>2</sup> Intergovernmental Panel on Climate Change, n.123 (Chapter 1).

<sup>3</sup> United Nations High Commissioner for Refugees, "History of UNHCR". Retrieved from <http://www.unhcr.org/history-of-unhcr.html>.

<sup>4</sup> International Organization for Migration, "IOM History". Retrieved from <https://www.iom.int/iom-history>. Last visited June, 19 2018.

subjects should be guaranteed by binding provisions, which support the implementation of an inclusive approach towards climate migration<sup>5</sup>.

### United Nations High Commissioner for Refugees

The process of establishment of the UNHCR has been led by a group of western countries after the WWII, which influenced its initial actions, in order to fulfil their political and strategic interests; specifically, the United States was particularly focused on the European reconstruction at the beginning, therefore, during the Cold War the fear of a Soviet expansion restricted increasingly the UNHCR work. The mandate, that the western countries decided to entrust it, was aimed to merely provide legal protection to refugees together with efficient solutions, without any reference to financial assistance. In fact the United States hoped to maintain a control on refugees, especially those who came from East, avoiding transferring too much power to the United Nations. Sooner, the organization was able to gain power and started to act autonomously<sup>6</sup>.

Today, UNHCR is a UN Agency that responds to the General Assembly and ECOSOC, the former appoints the High Commissioner, who usually presents the programme of actions and the budget to the Executive Committee<sup>7</sup>.

According to the UNHCR Statute, the Agency

[...] shall assume the function of providing international protection, under the auspices of the United Nations, to refugees [...] [for] seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities<sup>8</sup>.

Article 35 of the Refugee Convention states that

[t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, [...] and shall in particular

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<sup>5</sup> McAdam, n.1 (Chapter 4), at 23 – 28.

<sup>6</sup> Gil Loescher, “UNHCR’s Origins and Early History: Agency, Influence, and Power in Global Refugee Policy” (2017) *Refuge: Canada’s Journal on Refugees*, vol 33, (1) at 78.

<sup>7</sup> United Nations High Commissioner for Refugees, “Governance and Oversight”. Retrieved from <http://www.unhcr.org/governance.html> . Last visited June, 5 2018.

<sup>8</sup> See Statute of the Office of the United Nations High Commissioner for Refugees, Chapter 1 para.1.

facilitate its duty of supervising the application of the provisions of this Convention<sup>9</sup>.

Generally speaking, the organization in its implementation of supervision acts at different levels and fields, providing assistance to vulnerable people and monitoring practical application of legal provisions for the fulfilment of humanitarian aid<sup>10</sup>.

In 2017 Antonio Guterres, UN Secretary General, stated that “[c]limate change is an unprecedented and growing threat [,]” as consequence the protagonists of the environmental governance, namely states, stakeholders and the civil society, must “[...] back the most ambitious action on climate change for the benefit of this generation and generations to come<sup>11</sup>”. The UNHCR declares that today millions of people are at risk of natural disasters due to climate change, vulnerable populations that may face already multiple difficulties, such as conflicts. The process of relocation is challenging and it may provoke competition and tension on exploitation of natural resources. The risk of second time displacement is high, similarly as the chances to return<sup>12</sup>.

UNHCR has been aware on the climate change-migration nexus for many years; even though a concrete global cooperation on the issue is still absent, the Agency has been provided assistance to states in dealing with climate migration, promoting response measures which respect and protect displaced people. Moreover, the Agency is collaborating with governments in order to fill the normative gaps which impede a comprehensive protection of climate refugees. Partly, the problem has been reduced by the 10 Nansen Principles and the approval of the Nansen Initiative’s Agenda, which seeks to promote measures of prevention of migration due to climate change disasters, together with protection of people on the move. Also the Kampala Convention and the Brazil Declaration constitute important tools which recognize the displacement of persons due to human-induced

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<sup>9</sup> See the Convention relating to the Status of Refugees (1951), Chapter VI art.35 para.1.

<sup>10</sup> See generally the Mandate of the High Commissioner for Refugees and his Office Executive Summary. Available at <http://www.unhcr.org/publications/legal/5a1b53607/executive-summary-of-the-mandate-of-the-high-commissioner-for-refugees.html> .

<sup>11</sup> See the Secretary-General speech “Climate Action: mobilizing the world”, New York, 30 May 2017. Retrieved from <https://www.un.org/sustainabledevelopment/blog/2017/05/secretary-generals-climate-remarks-at-nyu-stern/> . Last visited June, 10 2018.

<sup>12</sup> Volker Türk et al., “UNHCR, the Environment & Climate Change” (2015) at 6. See UNHCR online.

challenges such as climate change<sup>13</sup>. Finally, another important effort aimed to reduce the legal gaps in protection of climate migrants is represented by the UNHCR's Guidelines on Temporary Protection or Stay Arrangements<sup>14</sup>; they consist in a multilateral form of protection for persons who flee from humanitarian disasters and that are not covered by the Refugee Status. As result, governments need to implement such provision, which favours states cooperation, share of responsibility and reduction of economic costs<sup>15</sup>.

UNHCR does not promote the achievement of a new Convention to address climate migration, instead it encourages adaptation measures, strategies on reduction of disasters and planned process of relocation. Also programmes of assistance and protection for IDPs are advanced<sup>16</sup>, together with operational actions aimed to reduce vulnerability in states subjects to climate affects; legal protection of climate migrants shall come along with sustainable strategies, due to the necessity to guarantee access to natural resources since most of the migrants rely on the surrounding environment to survey<sup>17</sup>.

In 2008 UNHCR sustained the creation of a task force aimed to develop a better understanding on climate change, together with a “sub group” dedicated to migration that began a process of advocacy to address both the issues. Throughout the same year the Agency publicized its first official paper on the climate change – migration nexus<sup>18</sup>, where UNHCR has developed its “[...] preliminary perspectives on these questions as a contribution to the ongoing debate on climate change<sup>19</sup>”; after an assessment on the possible scenarios on climate displacement and the correlated normative gaps, the document stresses that more analysis on the consequences of climate change impact on humans are needed; and current statistical data are fundamental to advance a better legal protection for such vulnerable people, together with the development of new technology that may

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<sup>13</sup> United Nations High Commissioner for Refugees, n.193 (Chapter 2), at 2-3.

<sup>14</sup> See UNHCR Responses - Questionnaire in relation to United Nations Human Rights Council Resolution A/HRC/35/20 on human rights and climate change.

<sup>15</sup> UN High Commissioner for Refugees, “Guidelines on Temporary Protection or Stay Arrangements” (2014) at 1. See UNHCR online.

<sup>16</sup> Turk, at 7

<sup>17</sup> Ibid. at 13

<sup>18</sup> Guy S Goodwin-Gill and Jane McAdam, “UNHCR & Climate Change, Disasters and Displacement” (2017) at 15. See UNHCR online.

<sup>19</sup> United Nations High Commissioner for Refugees, n.63 (Chapter 2), at 2.

reduce the impact. Moreover, UNHCR advanced two main strategies to tackle climate migration that are reported in the document, adaptation and mitigation, which represent long term processes that needed to be sustained by international financing. Finally, it sustains that also prevention is a solution to migration due to natural disasters, reinforced by measures implemented at international level<sup>20</sup>.

In 2010 the “High Commissioner’s Dialogue on Protection Challenges Background Paper” listed numerous factors and circumstances that may drive migration and climate change was considered among them. Here, the UNHCR sustained the necessity to enhance the implementation of the humanitarian aid, developing a tailored and new approach since the diversity of victims involved. Furthermore, it recognized that the growing urbanization due to climate migration towards urban areas represents a great security threat, given that tension on resources management is a driver of conflicts. In the final part, the Report stated again the strong normative gaps in the protection of climate refugees that need to be addressed. States cooperation and border sharing are proposed as possible solution, in particular statelessness was found as an urgent issue to deal with<sup>21</sup>.

In 2011 UNHCR in order to raise more attention on the normative gaps in climate displacement, proposed the creation of “[...] a global guiding framework on cross-border displacement for situations not covered by the Refugee Convention, including in the context of climate change and disasters<sup>22</sup>”. The issue has been raised again with the Cancun Adaptation Framework and finally it found a practical application with the Nansen Initiative<sup>23</sup>.

Even though UNHCR has been already active on the field in implementing assistance and protection to vulnerable people due to natural disaster, for example when the Philippines has been devastated by typhoons in 2009<sup>24</sup>, states claimed a clarification of the UNHCR role in implementation of responses to climate displacement. They were concerned that Agency action on the field may interfere

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<sup>20</sup> Ibid. at 10 -11

<sup>21</sup> See generally United Nations High Commissioner for Refugees, “Background Paper, 2010 High Commissioner’s Dialogue on Protection Challenges, “Protection Gaps and Challenges”, (2010). See UNHCR online.

<sup>22</sup> Goodwin-Gill and McAdam, at 17

<sup>23</sup> Ibid.

<sup>24</sup> Ibid. at 12

with other actors working in the same context, as result they suggested a deeper analysis on its capacities and its relation with other organizations. Also the implementation of the Global Protection<sup>25</sup> have been put under discussions. Nevertheless, the High Commissioner stated the necessity to find a leading organization aimed to implement a clear coordination of the protection mechanism towards persons vulnerable to climate change and the Agency has been proposed. At the beginning many states have addressed reservations, they did not want UNHCR obtaining more powers and responsibilities, and others suggested that the Agency should have focused on enhancing existing legal tools, instead of fulfilling the normative gaps with new ones. However, states accepted that a leader in implementing human protection from climate change was necessary and UNCHR has been appointed<sup>26</sup>.

### Operational responses

The operational responses to climate displacement sustained by UNHCR are based on four main pillars: (1) prevention, supported by the Disaster Risk Reduction instruments<sup>27</sup>. (2) Preparedness, which foresees “analysis, planning, gap identification, partnership development and coordination, and perhaps resource pre-positioning”; it is inserted in the Preparedness Package for Refugee Emergencies, which aims to enhance the responses to a refugee emergency<sup>28</sup>. (3) Planned Relocation, which can occur before the natural disaster or following it as last option

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<sup>25</sup> GPC represents a group of international agencies, the UNHCR covers the leading role, “[...] with the aim of strengthening system-wide preparedness and technical capacity to respond to humanitarian emergencies”; in particular they seek to enhance the protection of persons vulnerable to natural disaster and conflicts, through a coordination of policies and practical instruments, for a better management of protection on the ground. The GPC have been subjects to review in 2015, creating the Strategic Reform 2016-2019 (Global Protection Cluster, 2018).

<sup>26</sup> Goodwin-Gill and McAdam, at 18-19.

<sup>27</sup> United Nations High Commissioner for Refugees, n.394, at 4; Disaster Risk Reduction is defined as “The concept and practice of reducing disaster risks through systematic efforts to analyse and manage the causal factors of disasters” ([https://www.unisdr.org/files/7817\\_UNISDRTerminologyEnglish.pdf](https://www.unisdr.org/files/7817_UNISDRTerminologyEnglish.pdf))

<sup>28</sup> UN High Commissioner for Refugees, “Preparedness Package for Refugee Emergencies (PPRE)” at 1. The 4th edition of UNHCR’s Handbook for Emergencies has been presented as a digital edition in form of a website available at <https://emergency.unhcr.org/about>; it “[...] covers all aspects of UNHCR-led refugee emergency preparedness and response, UNHCR’s involvement in IDP emergencies, and describes current inter-agency leadership and coordination systems, including the Refugee Coordination Model and UNHCR’s responsibilities within the Inter Agency Standing Committee (IASC) context” (UNHCR, 2015).



on the table and it is usually a government issue since most of the process happens within national boundaries.<sup>29</sup> UNHCR has collaborated with the Brookings Institutions and Georgetown to develop a final guidance on the relocation implementation. (4) Emergency response, since UNHCR offers assistance and protection in case of abrupt natural disasters<sup>30</sup>.

Such operational actions have been addressed also by the Platform on Disaster and Displacement aimed to better implement the Nansen Initiative Protection Agenda, which includes prevention, preparedness and response measures, in particular towards climate displacement across borders. The operational responses can be effective only whether inserted into state domestic practices, collaborating with other international actors. The Platform promotes further studies on the climate change – displacement nexus, and the collecting of statistical data; moreover it helps to enhance existing actions, performed by states, aimed to support people on the move, such as planned relocation. Since the Platform recognizes that climate change is not the unique driver of migration, it promotes interdisciplinary knowledge that can develop comprehensive and coordinated policies on the issue. Finally, it states again the necessity to address the existing normative gaps of protection on vulnerable populations because of climate change, alternatives may be found in the domestic and regional contexts<sup>31</sup>.

In 2015 UNHCR declared that its future commitment to the protection of refugees and displaced people, together with statelessness populations will be based on few pillars; first of all, its approach needs to be human-centred, the livelihood of people becomes the priority, their rights and needs must be respected and protected. Their opinions and knowledge will be taken in considerations, together with their claims and concerns. Secondly, the establishment of multiple partnerships is considered fundamental to address and manage better the displacement of persons, increasing the understandings on the matter and the resources. Moreover, UNHCR declares that states are important allies in tackling people displacement and they

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<sup>29</sup> Sanjula Weerasinghe et al., “Planned relocation, disasters and climate change: consolidating good practices and preparing for the future” (2014) at 6-7. See UNHCR online.

<sup>30</sup> United Nations High Commissioner for Refugees, n.193 (Chapter 2), at 4.

<sup>31</sup> See the Platform on Disaster and Displacement Leaflet, “Addressing the protection needs of people displaced across borders in the context of disasters and climate change”.

represent the main actors that can provide protection. Specifically, UNHCR declares to support and help states in the developing and implementation of response measures. Finally, all categories of actors that may become victims of displacement and the multiple drivers of migration will be taken in account<sup>32</sup>.

Following such declaration, UNHCR presented the 2017-2021 Strategic Directions towards forced displacement, referring also to climate change as potential cause; generally, the Directions focus on five keys core: (1) protect, (2) respond, (3) include, (4) empower and (5) solve; the implementation of such approaches will be comprehensive, based on partnerships and cooperation, leading by UNHCR<sup>33</sup>. Since the Agency stated again that climate change and natural disasters are considered drivers of displacement, the first two key strategies make clear references to the phenomena; specifically, in the protection approach UNHCR declares to

[...] contribute to advancing legal, policy and practical solutions for the protection of people displaced by the effects of climate change and natural disasters, in recognition of the acute humanitarian needs associated with displacement of this kind, and its relationship to conflict and instability<sup>34</sup>.

Again, in the responding approach it sustains to “contribute to any inter-agency response to emergencies resulting from natural disasters [...]”<sup>35</sup>. Finally, it promotes policy coordination, based on assessment and new analysis on the matter<sup>36</sup>.

Through its strategic directions, UNHCR seeks to shape the global response to forced displacement and statelessness by supporting States to address protection challenges, placing people of concern at the centre of its work, and working across the entire spectrum of displacement, including with the internally displaced<sup>37</sup>.

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<sup>32</sup> UN High Commissioner for Refugees, “UNHCR’s Strategic Directions 2017-2021” (2017) at 12 -14. See UNHCR online.

<sup>33</sup> Ibid at 15.

<sup>34</sup> Ibid. at 7 and 18.

<sup>35</sup> Ibid. at 21.

<sup>36</sup> Ellen Hansen et al., “Climate Change and Disaster Displacement : an overview on UNHCR’s role” (2017) at 5. See UNHCR online.

<sup>37</sup> United Nations High Commissioner for Refugees, *Report of the United Nations High Commissioner for Refugees: Covering the period 1 July 2016-30 June 2017: A/72/12* (2017) part II para.B. See UNHCR online. Available at <https://undocs.org/en/A/72/12>.

## International Organization for Migration

In 1951 the Provisional Intergovernmental Committee for the Movements of Migrants from Europe was established with the aim to favour the transition of migrants from Europe to other regions abroad due to the WWII historical event. At the beginning the Committee was created with a temporary mandate, until the issue of migration flows had been reduced. But the Cold War changed the situation and western countries decided to maintain the Committee in order to keep under control migrants, who might lead to social tension or favour the spread of communism. As result, the Committee started to be highly monitored by European countries and the United States, excluding non-European and developing states from the membership. In 1989 it became officially a permanent organization, IOM, which was able to contribute in different emergency situations such as the management of migration flows due to the Iraqi invasion of Kuwait<sup>38</sup>. In 2016 joined affectively the UN system<sup>39</sup>.

Currently IOM has 169 members, it presents two main bodies, the Council and the Administration<sup>40</sup>; its Constitution entails the purposes of the organization: (1) to manage the transfer of migrants; (2) to deal with migrants on the move; (3) to offer states, whether they requested it, services in order to arrange migration flows and (4) to provide occasions to states for exchange of information on the matter and establish partnerships<sup>41</sup>.

Today, IOM distinguishes itself for its practical implementation of measures on the ground rather than its political work; its budget has been growing and since it adopted a broader definition of migrants, it operates in multiple contexts. Its mandate entails assistance to displaced people threatened by conflicts or natural disasters, instauration of partnerships with governments and supporting their work, favouring dialogue on displacement, collecting information and preparing actors to deal with the issue<sup>42</sup>.

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<sup>38</sup> Antoine Pécoud “What do we know about the International Organization for Migration?” (2017) *Journal of Ethnic and Migration Studies* at 3-5.

<sup>39</sup> International Organization for Migration, “IOM Snapshot” (2017). See IOM online.

<sup>40</sup> See “Constitution and Basic Texts of the Governing Bodies” at IOM online.

<sup>41</sup> International Organization for Migration, “Constitution And Basic Texts” (2017) Chapter I art.1.

<sup>42</sup> Pécoud, at 5.

The migration policy has been always a domestic issue that is part of the sovereignty power of a state; for such reason international organizations have difficulty to deal with the phenomenon of migration since there is still no broad political agreement on the matter. Nevertheless, IOM has been able to influence the migration governance at different levels, advancing proposals and projects, becoming an important ally of governments in managing migration. On the other hand, others sustain that IOM is a western-centred organization, and even though it acts in developing countries, it is able to change their politics, favouring the interests of the West<sup>43</sup>.

The climate change – migration nexus has been relevant to IOM since 1990; the relating activities of the Organization ranged from researches, collection of information and statistical data to development of policy, activities on the ground and establishment of collaborations. Given that climate change and migration have been gaining growing attention at international level, Member States requested to IOM a regular update on its actions in such field; such decision has been already discussed during few regular meetings of the IOM governing bodies and the International Dialogues on Migration<sup>44</sup>. In 2015 the Organization established the Migration, Environment and Climate Change Division<sup>45</sup>, decision that was presented during the 105<sup>th</sup> Council Session by the IOM Director General

Given the importance of the link between migration and climate change, as well as the growing attention to this thematic area and related management and governance issues, the Administration has decided that it will establish a Migration, Environment and Climate Change Division within the Department of Migration Management, to support policy development and provide guidance throughout the Organization regarding project development and implementation<sup>46</sup>.

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<sup>43</sup> Ibid. at 6-7.

<sup>44</sup> International Organization for Migration, *Migration Environment and Climate Change: Institutional Developments and Contributions to Policy Processes: S/18/8* (2016) at 1.

<sup>45</sup> See International Organization for Migration, “Focus on Migration, Environment and Climate Change (MECC) at the 105th IOM Council” (2014) at 2.

<sup>46</sup> International Organization for Migration, *Director General’s Report to the 105th session of the Council: C/105/42* (2014) at 10 para.5.

The decision has demonstrated a growing commitment of IOM in the field of environmental migration especially in sustaining Member States activities aimed to reduce the climate change impact and the resultant consequences such as migration.

The Division's institutional responsibility is to oversee, support and coordinate the development of guidance for activities, programmes, projects and partnerships with a migration, environment and climate change dimension within the Organization [;]<sup>47</sup>

The Document also sustained that IOM shall establish cooperation with all the Departments of the Organization to foster future internal aims such as: (1) promoting actions in the field of climate change, migration and environment nexus; (2) expanding the staff expertise on the topic within the Organization; (3) increasing the attention to the environmental impact also in other areas of migration management and (4) developing guidelines aimed to promote sustainable development in projects. Moreover, the IOM Development Fund also sustains several projects on the ground, publicizing also a training manual in order to enhance the ability of policymakers in addressing environmental migration. The Organization establishes cooperation with other international actors which are facing issues in the field of environmental migration, in order to support their activities on the matter<sup>48</sup>. Finally, it has been publicizing a series of info sheets and reports on environment, climate change and migration nexus, together with the creation of webpages to update the stakeholders<sup>49</sup>.

In 2017 the Division expressed its interest in the promotion of sustainability of the environment which may enhance the condition and reduce the vulnerability of migrants; it presented a range of projects whose focus on clean energies, water and management of waste and established partnerships in order to promote such activities in the migration management<sup>50</sup>.

IOM played an important role throughout the Twenty-First Conference of the Parties in supporting the insertion of the migration issue in the Paris Agreement text

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<sup>47</sup>International Organization for Migration, art 1 para.7.

<sup>48</sup> International Organization for Migration, n. 44 (Chapter 4), at 1-3.

<sup>49</sup> Id., *Migration, the Environment and Climate Change at IOM: taking stock of progress: S/21/7* (2017) at 5.

<sup>50</sup> Ibid. at 2.

and in sustaining the necessity to a better understanding on the topic of climate migration. As result, IOM proposed suggestions on technical matter, together with the organization of events aimed to raise acknowledge on migration due to climate change and related consequences. Furthermore, it supported UNFCCC work through the promotion of projects that take in account the entire cycle of migration, proposing its expert knowledge on climate migration. It also asked for joining the Task Force on Displacement and the Green Climate Fund. Finally, IOM has been active in promoting the implementation of the Nansen Protection Agenda<sup>51</sup>.

Throughout COP 22 the Organization sustained the implementation of the Paris Agreement, arranging and participating to events focused to deepen the climate change-migration nexus and working for developing further considerations on the matter during COP 23. It joined officially the Task Force on Displacement and it made available its knowledge and expertise on climate migration to Forum and Human Rights actors such as the HRC; it supported conferences and established collaboration with Platforms in order to raise awareness on climate migration and human rights<sup>52</sup>.

#### IOM and its practical approach on environmental migration

The IOM approach to environmental migration is based on three main actions:

1. “To prevent forced migration resulting from environmental factors to the extent possible;”
2. “To provide assistance and protection to affected populations where forced migration does occur, and to seek durable solutions to their situation;”
3. “To facilitate migration as a climate change adaptation strategy and enhance resilience of affected communities.”

Such actions take in account the entire migration cycle in order to respond and reduce environmental migration<sup>53</sup>.

The first aim foresees the limitation of such issue through the promotion of “infrastructure interventions” to decrease the vulnerability of populations due to

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<sup>51</sup>International Organization for Migration, n.44 (Chapter 4), at 3-5.

<sup>52</sup>Id., n.49 (Chapter 4), at 3-4.

<sup>53</sup>Flavell Alex et al., *Brief 14: IOM Operational Responses to Environmental Migration and Displacement* in IOM Outlook on Migration, Environment and Climate Change (2014) at 111.

abrupt natural events together with national stakeholders. The building of habitations which can resist to the impact of floods represents a clear example. Moreover, “livelihood interventions” are also presented in order to maintain a basic subsistence of migrants, such as the analysis of risks and the promotion of income diversification. Finally, IOM attempts to transform migration in an opportunity to increase resistance to environmental degradation, giving opportunities of circular labour to migrants<sup>54</sup>.

Population displacement cannot be avoided sometimes, thus, it is essential to favour a secure movement of persons towards new areas or host states; here, coordination on activities of risk management among actors on different level may prepare migrants to face adequately natural dangers. Thus, when the prevention strategy is not successful, relocation seems the best alternative; even though it helps reducing vulnerability to natural risks, it requires high economic costs and negative implications for home and host countries. It is fundamental to seek adequate measures to protect the affected area without forced negatively population to leave, consider the capacity of the host country in collecting migrants and its level of resources. The legal status of migrants shall be considered whether cross-borders movement has occurred, and in case the return is not possible, they need to be compensate; finally, such actions can be enhanced with the participation of migrants and host communities to decision-making processes<sup>55</sup>.

The safety of the journey can be guaranteed only whether stakeholders provide for humanitarian aid and protection, together with monitoring of movement and prepare emergency responses before the occurrence of natural disasters. Also the host states play an important role in such context: whether resources are not enough, tension and conflicts will break in the territory, thus stakeholders shall assess the real capacity of arrival states, sustain host communities in the implementation of services to migrants, promoting an equal treatment and reduce the potential cultural tension may raise from the cohabitation among different ethnic groups. Solutions such as promoting a safety return, relocation and local integration constitute a free choice of migrants. But such measures raise different implications:

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<sup>54</sup> Ibid. at 112.

<sup>55</sup> Ibid. at 113-115.

they are conditioned by social, economic and legal concerns and by the intensity of the natural disaster. A safe return is possible whether the basic livelihood is restored through the construction of new and more resistant buildings and promote a major environmental-friendly consciousness<sup>56</sup>.

Generally speaking, the involvement of IOM in the field of environmental migration can be summarized in 4 main points: (1) the Organization proposes itself as a place of dialogue and exchange on the matter, also it supports states actions publicizing training manuals and organizing a range of international events which rise awareness on the topic. (2) IOM finance studies and researches aimed to collect information, deepen knowledge, assess empirical evidences, developing new methodologies for responding adequately to environmental migration and enhance its management. (3) It proposes a range of operational measures for responding to humanitarian crisis and promoting migration as adaptation; and finally (4) IOM collaborates with a series of international actors and stakeholders which may help to develop better response strategies to environmental migration<sup>57</sup>.

The next session will provide an overview on the New York Declaration, its primary outcomes, assessing its contribution to the global management on migration.

## **4.2 The New York Declaration**

The Summit for Refugees and Migrants took place in New York on 19 September 2016, where 193 UN Member States adopted the New York Declaration for Refugees and Migrants<sup>58</sup>. The document pointed to enhance the respond capacity of the international community to high flows of migrants and refugees, a global phenomenon that needs a global solution. The Declaration recognizes that such subjects are vulnerable to risks and obstacles that can threat their lives, thus States must respect their human rights, ensure protection, and acknowledge their responsibility in managing the flows, developing partnerships and tackling the

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<sup>56</sup> Ibid. at 116 -121.

<sup>57</sup> See IOM's perspective on Migration and Climate Change retrieved from <https://www.iom.int/migration-and-climate-change> . Last visited June, 19 2018.

<sup>58</sup> United Nations High Commissioner for Refugees, "The New York Declaration for Refugees and Migrants Answers to Frequently Asked Questions" (2018) at 2. See IOM online.



causes of such phenomenon. Furthermore, the document reaffirms the 2030 Agenda and its global scope, since it shall “[...] facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies”. The Sendai Framework for Disaster Reduction 2015-2030<sup>59</sup> and the Paris Agreement have been recalled as well. In the Declaration Member States recognize:

[...] a set of commitments that apply to both refugees and migrants, as well as separate sets of commitments for refugees and migrants [and] [...] different national realities, capacities and levels of development [...]<sup>60</sup>.

The Declaration aims to enhance the responses to emergencies promoting sustainability requiring more financial aid and the expansion of the criteria of admission to a third country, together with the creation of a “Comprehensive Refugee Response Framework<sup>61</sup>”. Specifically,

[t]hrough a comprehensive refugee response based on the principles of international cooperation and on burden- and responsibility-sharing, [...] [states] are better able to protect and assist refugees and to support the host States and communities involved<sup>62</sup>.

Since human mobility presents different scenarios, such Framework aims to include diverse situations of high flows of refugees, in light of international law and human rights protection<sup>63</sup>; it is an inclusive approach which entails elements of sustainability and development addressed to reintegration in home states, which seeks long-term solutions<sup>64</sup>. Moreover, it involves great cooperation at different levels, which encompasses various actors such as stakeholders, governments, civil society, organizations and refugees. After listing a range of actions addressed to States and host States, including elements of “reception and admission”, Member

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<sup>59</sup> The Sendai Framework is a non-binding agreement which aims to reduce risks for humans and their vulnerability; it deals with the resultant displacement due to environmental or non-environmental harming events. It entails a range of broad goals and actions, including response measures, that can be effective only with strong partnerships and collaborations between states and stakeholders (UNISDR).

<sup>60</sup> *New York Declaration for Refugees and Migrants* in General Assembly, Resolution adopted by the General Assembly on 19 September 2016: A/RES/71/1 (2016) at 2-5, especially para. 16 and 21.

<sup>61</sup> United Nations High Commissioner for Refugees, n.58 (Chapter 4), at 2

<sup>62</sup> *Annex I*, n.60 (Chapter 4), para.1.

<sup>63</sup> *Annex I*, in see n.60 (Chapter 4), at 16 especially para.1 and para.11 (b).

<sup>64</sup> United Nations High Commissioner for Refugees, n.58 (Chapter 4), at 4.

States declare that they “[...] will work towards the adoption in 2018 of a global compact on refugees, based on the comprehensive refugee response framework [...]”<sup>65</sup>. It represents a tool to enhance the capacity of response by the international community towards a durable humanitarian crisis which involves high numbers of refugees, promoting a sense of share responsibility; The Global Compact includes the Refugee Framework, since it is a way to enhance its implementation, and a range of actions, which have been discussed during five thematic discussions, together with the High Commissioner’s Dialogue on Protection Challenges in 2017. Stakeholders and States have been able to present a first draft of the Global Compact at the beginning of 2018 which was the result of a series of consultations among these actors. Such achievement will not represent a binding document and it will not have any legal influence on the Refugee Convention, it will only provide a better and broader ground for its implementation<sup>66</sup>. Further formal consultations will take place until July 2018 in order to present a definitive document of the Global Compact for the future potential adoption by the General Assembly<sup>67</sup>. Finally, the last revised draft entails a series of actions divided in two subparts: the first one “[...] sets out mechanisms for more equitable and predictable burden- and responsibility-sharing;” then, the other one “[...] sets out areas for concrete contributions in support of host countries and, where appropriate, countries of origin, by States and relevant stakeholders [...]”<sup>68</sup>.

UNHCR has played an active role in consultations aimed to develop the Refugee Framework and the correlated Global Compact; in fact the New York Declaration states that

[t]he comprehensive refugee response framework will be developed and initiated by the Office of the United Nations High Commissioner for Refugees, in close coordination with relevant States, including host countries, and involving other relevant United Nations entities, for each situation involving large movements of refugees<sup>69</sup>.

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<sup>65</sup> *Annex I*, in n.60 (Chapter 4), at 17-21, especially para.19.

<sup>66</sup> United Nations High Commissioner for Refugees, n.58 (Chapter 4), at 4-5.

<sup>67</sup> United Nations High Commissioner for Refugees, “Towards a global compact on refugees”. See IOM online.

<sup>68</sup> United Nations High Commissioner for Refugees, *The Global Compact on Refugees DRAFT 3 (as at 4 June 2018)* part III para. 11.

<sup>69</sup> *Annex I*, in n. 60 (Chapter 4), para 2.

Also the Member States

[...] invite the United Nations High Commissioner for Refugees to include such a proposed global compact on refugees in his annual report to the General Assembly in 2018, for consideration by the Assembly at its seventy-third session in conjunction with its annual resolution on the Office of the United Nations High Commissioner for Refugees<sup>70</sup>.

Therefore, they “[...] launch a process of intergovernmental negotiations leading to the adoption of a global compact for safe, orderly and regular migration”. Such instrument sustains the enhancement of the global governance on migration, especially it calls for a harmonization of the migration policies at international level; furthermore, it promotes a comprehensive approach to migration and a large cooperation among international actors<sup>71</sup>. The preparatory process has been divided in three main phases: consultations (April 2017 - November 2017), stocktaking (November 2017 - January 2018) and intergovernmental negotiations (February 2018 - July 2018)<sup>72</sup>; the last revised document draft presents 23 objectives which entails a programme of actions aimed to achieve a safe and regular condition for migrants<sup>73</sup>.

The New York Declaration requested to UNHCR and other stakeholders to support the development of such Global Compact for safe, orderly and regular migration and to work on a range of non-binding principles<sup>74</sup>. The Agency expertise is aimed to achieve consistency between the two Global Compacts, ensuring protection and assistance for both refugees and migrants, decreasing their vulnerability and enhancing their condition.

Since the two documents refer to different legal frameworks, the General Assembly decides to maintain a division between such instruments, the same applies to their preparatory processes; it may happen that their work overlaps in dealing with

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<sup>70</sup> Ibid. para 19.

<sup>71</sup> *Annex II*, in n. 60 (Chapter 4), at 21-22, especially para.1.

<sup>72</sup> General Assembly, *Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration: A/RES/71/280* (2017) para.14.

<sup>73</sup> General Assembly, “Global Compact for safe, orderly and regular migration” (2018) para. 15. The document has been subject to a second revision on 28 May 2018.

<sup>74</sup> United Nations High Commissioner for Refugees, “New York Declaration for Refugees and Migrants”. See UNHCR online.

determine issues, in such cases each framework should address the issue following its goals and processes, maintaining a complementary approach<sup>75</sup>.

Also IOM has played an important role in the preparatory process of the GCM; specifically, in the “Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration” paper, the General Assembly

[r]eaffirms that the Secretariat of the United Nations and the International Organization for Migration would jointly service the negotiations, the former providing capacity and support and the latter extending the technical and policy expertise required, and decides that such joint servicing shall apply to the entire preparatory process to develop the global compact;<sup>76</sup>

In other words, throughout the consultation phase, IOM provided technical and political support and it encouraged national and regional consultations; moreover, it addressed the International Dialogue on Migration to the development of GCM, encouraged the participation of the Civil Society and it has advanced the issue during an IOM Council. It also presented a range of thematic papers aimed to advice on the matter, and requested to global research entities to deepen the issue. Finally, it promoted campaigns, attempting to raise awareness on GCM process and other topics in the migration field. IOM has been requested to support the Secretary General in elaborating a report during the stocktaking phase in light of the UN system recommendations<sup>77</sup>. Here, IOM has been called to provide suggestions on GCM structure, potential commitments and a mechanism of review<sup>78</sup>.

According to IOM the GCM represents an important achievement in the context of migration governance; it promotes a positive consideration on migration, presenting it to states and individuals. The Compact may provide assistance and protection of migrants, respect for their rights and needs, and it may embody a guide for states in order to find a common ground for better managing migration. IOM suggests that the GCM may lighten the weaknesses of exiting migration policies and that the latter should be less rigid and focused on integration processes and

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<sup>75</sup> United Nations High Commissioner for Refugees, n.58 (Chapter 4), at 6-7.

<sup>76</sup> General Assembly, n.72 (Chapter 4), para.11

<sup>77</sup>International Organization for Migration, “Phase I: Consultations”. See IOM online.

<sup>78</sup> See generally International Organization for Migration, “Input to the UN Secretary General’s Report on the Global compact for Safe, Orderly and Regular Migration” (2017). See IOM online.

human rights promotion. Moreover, the GCM could achieve a comprehensive approach to migration policy, given that it touches multiple topics that involve different international actors and stakeholders. As result, a stronger cooperation may emerge, thus GCM should consider all the protagonists and their specific characteristics, in order to build a stronger consensus<sup>79</sup>.

The New York Declaration has been an occasion to enhance the approach to environmental migration; such topic has been absent or little addressed in international governance on migration for a long time, but today following COP 21 and other political processes, such argument has gaining attention. The Declaration does not present a full recognition of the issue, but it makes few references: (1) it sustains that environmental migration does not have only one cause, but it is the result of a combination of different causes, included climate change. (2) It encourages the implementation of the 2030 Sustainable Agenda which aims to tackle climate change and its adverse effects. (3) The Declaration confirms that environmental degradation and the correlated elements are drivers of migration and (4) since the phenomenon of climate migration is growing fast, it encourages the adoption of the Migrants in Countries in Crisis Principles and the Nansen Agenda. (5) Finally, it stresses the necessity to take in account the consequences on the environment provoked by high flows of migrants and (6) it mentions important achievement in dealing with environmental migration such as the Sendai Framework for Disaster Risk Reduction<sup>80</sup>.

According to IOM states have made references to environmental factors several times throughout the consultation phase for developing the GCM<sup>81</sup>; an important achievement is represented by the second thematic session namely “addressing drivers of migration, incl. climate change, natural disasters & human-made crises, through protection and assistance, sustainable development, poverty eradication, conflict prevention and resolution”. Here, the complex combination of migration causes has been discussed, climate change and environmental

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<sup>79</sup> See generally International Organization for Migration, “IOM vision on the global compact on migration” (2017).

<sup>80</sup> Environmental Migration Portal, “UN Summit for Refugees and Migrants”. See Environmental Migration Portal online.

<sup>81</sup> Environmental Migration Portal, “Taking stock of environmental dimensions in the GCM”. See Environmental Migration Portal online..

degradation as well, recognizing that the 2030 Agenda for Sustainable Development is a great instrument to limit the negative implications of certain drivers of migration, in turn the latter may be an element which supports the implementation of Sustainable Development. Nevertheless, the session ended with an awareness that further efforts are needed to solve the legal situation of cross border displaced people who are not covered by the Refugee Convention; updated and new data have been recognized as fundamental to find a way to address the multiple drivers<sup>82</sup>.

Mentions to environmental migration has been inserted also into the first written presentation of GCM, the Zero Draft, whose objective 2, “[m]inimize the adverse drivers and structural factors that compel people to leave their country of origin”, lists several actions aimed to

[...] create conducive political, economic, social and environmental conditions for people to lead peaceful, productive and sustainable lives in their own country and to fulfil their personal aspirations, while ensuring that desperation and deteriorating environments do not compel them to seek a livelihood elsewhere through irregular migration<sup>83</sup>.

The Draft continues sustaining that measures, such as adaptation and mitigation, are important to eliminate the negative drivers of migration, developing “[...] adaptation and resilience strategies to sudden-onset natural disasters and to slow-onset environmental degradation related to the adverse effects of climate change [...]”<sup>84</sup>. Moreover, it aims to

[s]trengthen joint analysis and sharing of information to better map, understand, predict and address migration movements, including those resulting from sudden- and slow-onset natural disasters, environmental degradation, the adverse effects of climate change, as well as other precarious situations, while ensuring the effective respect, protection and fulfilment of the human rights of all migrants [.]

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<sup>82</sup> See generally “Second informal thematic session on addressing drivers of migration, incl. Climate change, natural disasters & human-made crises, through protection and assistance, sustainable development, poverty eradication, conflict prevention and resolution: co-facilitators summary”. See IOM online.

<sup>83</sup> General Assembly, n.73 (Chapter 4), at 7, Objective 2, para.17.

<sup>84</sup> Ibid. at 8, Objective 2, para.17 (j).

Finally, it stresses the necessity to fulfil the normative gaps for people forced to move due to natural disasters, specifically it points to

[h]armonize and develop approaches and mechanisms at subregional and regional levels to address the vulnerabilities of persons affected by sudden- and slow-onset natural disasters, by ensuring they receive appropriate humanitarian protection and assistance wherever they are, and by promoting lasting solutions that increase resilience and self-reliance, taking into account the capacities of all countries involved [.]<sup>85</sup>

After an overview on the relation between SDG13 and adaptation, the next paragraph will focus on a recent project, namely MECLEP, which has contributed to assess the consideration of migration as an adaptation strategy in six countries; further MECLEP works will be considered in order to deepen the topic.

### **4.3 The MECLEP project**

The Preamble of the 2030 Agenda for Sustainable Development declares that all human beings shall live a satisfying life respecting the environment, as result tackling climate change and its impacts becomes one of the Global Goals<sup>86</sup>. Specifically, the SDG13 aims to “[t]ake urgent action to combat climate change and its impacts<sup>87</sup>”, together with additional five targets which focused on adaptation efforts, insertion of the climate change issue in policies, promoting the mobilization of finances to raise awareness on the matter and better knowledge. Even though the SDGs do not mention displacement due to climate change or environmental degradation, such phenomena may bring some challenges to the achievement of the Goals. First of all, target 13.1 promotes adaptation measures to increase resilience, which may be improved by disaster risks assessment and actions; prevention and relocation are fundamental to limit human vulnerability, however clear challenges may slow down the response capacity: difficulty in assessing the risks and understanding the real cause of the disaster<sup>88</sup>. Target 13.2 “[i]ntegrate climate

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<sup>85</sup> Ibid. at 8, Objective 2, para.17 (f) and (l).

<sup>86</sup> United Nations, n.108 (Chapter 1).

<sup>87</sup> United Nations, “Sustainable Development Goal 13”. See Sustainable Development Knowledge Platform.

<sup>88</sup> Emily Wilkinson et al., “Climate change, migration and the 2030 Agenda for Sustainable Development” (2016) at 7-8.

change measures into national policies, strategies and planning<sup>89</sup>” may tackle climate change impact sustaining development plans that take in consideration migration as an adaptation measure; but usually these plans have high costs and they need to understand better migration patterns. Whether governments want to encourage people to stay despite environmental degradation, they should invest in agriculture for example: the enhancement of agriculture methods resistant to climate change needs to come along with adequate protection measures to permit human livelihood on the territory. When vulnerable populations do not find such support, they may leave and transfer in urban areas, where resources are limited. Target 13.3 requests to raise awareness on climate change and its effects, collecting information before the occurrence of natural disasters and information when relocation has been settled, are fundamental to reduce vulnerability and increase adaptation strategies<sup>90</sup>. Finally, target 13B declares to “[p]romote mechanisms for raising capacity for effective climate change-related planning [...] including focusing on women, youth and local and marginalized communities<sup>91</sup>”; here, financing aids are needed, but they have to be used avoiding maladaptation and with a high knowledge on the real needs and conditions of migrants<sup>92</sup>.

The promotion of adaptation strategies is advanced also by a recent and famous project, namely Migration, Environment and Climate Change: Evidence for Policy<sup>93</sup>, funded by the European Union, supervised by IOM and other 6 partners. The subjects of the projects are 6 countries, Dominican Republic, Haiti, Mauritius, Papua New Guinea and Kenya and Viet Nam, which contributed to the achievement of the goals<sup>94</sup>.

The project aimed to contribute to the global knowledge base on the relationship between migration and environmental and change. More specifically, it aimed to formulate policy options on how migration, including

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<sup>89</sup> United Nations, n.87 (Chapter 4)

<sup>90</sup> Wilkinson et al., at 9-10

<sup>91</sup> United Nations, n.87 (Chapter 4)

<sup>92</sup> Wilkinson et al., at 10

<sup>93</sup> MECLEP

<sup>94</sup> United Nations, “Migration, Environment and Climate Change: Evidence for Policy”. See Partnership for SDGs online.



displacement and planned relocation, can benefit adaptation strategies to environmental and climate change<sup>95</sup>.

The concrete outcomes of MECLEP, which lasted from January 2014 to March 2017, can be summarized in three main points:

1. “Research”, the project developed a range of assessments and reports on the 6 countries analysing the relationship between human mobility and adaptation; through surveys and qualitative interviews it presented a document which makes a comparison among these countries and describes how different patterns of human mobility influence adaptation measures<sup>96</sup>.
2. “Capacity-building”, MECLEP publicized manuals aimed to train policymakers and governments for promoting migration in climate policies with a special attention to adaptation strategies; moreover it organizes workshops for training politicians in dealing with climate migration and enhance the knowledge on the matter<sup>97</sup>.
3. “Dialogue and Knowledge sharing”, the project promoted dialogue and information exchange on climate policies, adaptation and migration among stakeholders and governments; it also presented brief reports on specific issues and create an Environmental Migration Portal online<sup>98</sup>.

Since the climate change impact has been predicted to increase displacement in the future, new climate policies that face climate migration, developing durable and efficient solutions, are urgently needed today. The MECLEP project presented

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<sup>95</sup> Environmental Migration Portal, “Migration, Environment and Climate Change: Evidence for Policy (MECLEP)”. See Environmental Migration Portal online.

<sup>96</sup> See generally United Nations, n.94 (Chapter 4); Environmental Migration Portal, n.95 (Chapter 4); and general information on Susanne Melde et al., “Making mobility work for adaptation to environmental changes: Results from the MECLEP global research” retrieved from <https://environmentalmigration.iom.int/making-mobility-work-adaptation-environmental-changes-results-meclep-global-research> . Last visited June, 16 2018.

<sup>97</sup> See generally United Nations, n.94 (Chapter 4); Environmental Migration Portal, n.95 (Chapter 4); general information on “Training Manual Migration, Environment and Climate Change: Training Manual (Facilitators’ Guide)” retrieved from <https://environmentalmigration.iom.int/training-manual> and on “Training Workshops and Capacity-building Activities on Migration, Environment and Climate Change” from “<https://environmentalmigration.iom.int/training-workshops> . Last visited June, 17 2018.

<sup>98</sup> See generally United Nations, n.94 (Chapter 4); Environmental Migration Portal, n.95 (Chapter 4).

a policy brief which reported how the six subjects have inserted climate migration in the UNFCCC adaptation framework. The latter includes the National Adaptation Programmes of Action, the National Communications, National Adaptation Plans and Intended Nationally Determined Contributions<sup>99</sup>.

First of all, the NAPAs which “[...] identify priority activities that respond to their urgent and immediate needs to adapt to climate change [...]”<sup>100</sup>, demonstrated themselves as a great opportunity to recognize climate migration at national level; for example the government of Haiti admitted through its NAPAs that drought is a primary cause of migration and the latter represents an urgent issue to deal with. Also through the NCs, which foresee updates on the effective implementation of the UNFCCC, some countries mentioned the climate-migration nexus<sup>101</sup>. Furthermore, the NAPs which identify “[...] medium- and long-term adaptation needs and developing and implementing strategies and programmes to address those needs [...]”<sup>102</sup>, permit the development of own national adaptation policy. As result, countries such as the Dominican Republic, Vietnam and Kenya mentioned migration in their Adaptation Plans; specifically, the government of Kenya included such topic in its National Climate Change Response Strategy, which will be assessed in the next sessions. Finally, the INDCs submitted by Haiti and Vietnam recognized migration as an adaptation strategy completed by relocation and resettlement<sup>103</sup>.

The MECLEP project sustained that Disaster Risk Reduction strategies are fundamental to limit the impact of natural disasters through prevention and mitigation. Haiti and Vietnam governments developed risk reduction national Plans to reduce the impact of natural disasters on humans, enhancing the response measures. Adaptation strategies have been also included in development policies, such as Papua New Guinea which inserted relocation and resettlement in its

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<sup>99</sup> Lina Kelpsaitė and Eva Mach, “Migration as adaptation? A comparative analysis of policy frameworks on the environment and development in MECLEP countries” (2015) Policy Brief Series issue 5 vol 1 at 2-3. See IOM online.

<sup>100</sup> Climate Change Adaptation, “National Adaptation Programmes of Action (NAPAs)”. See UNDP online. Available at <http://adaptation-undp.org/national-adaptation-programmes-action-napas>. Last visited June, 10 2018.

<sup>101</sup> Kelpsaitė and Mach, at 4.

<sup>102</sup> United Nations Climate Change, “National Adaptation Plans”. See UNFCCC online.

<sup>103</sup> Kelpsaitė and Mach, at 5.

Development Strategic Plan from 2010 to 2030. However, the consideration of migration as an adaptation strategy is more supported at regional level, in fact both the African Community Climate Change Policy and the Caribbean Regional Strategic Programme for Climate Resilience sustain that the climate change impact will increase migration and the latter is a useful way to limit natural hazards<sup>104</sup>.

Nevertheless, the MECLEP declared that migration is still considered negatively in climate change policies, and even though few states mentioned climate displacement in official documents, they lacked in developing efficient and concrete actions. Furthermore, the absence of information and collecting data on the numbers of displaced people impedes governments to tackle adequately the climate change consequences<sup>105</sup>.

#### The MECLEP comparative work

One of the main output presented by the MECLEP project is the Report, namely “Making mobility work for the adaptation to environmental changes”, which takes in consideration the six countries mentioned above and their approach to migrations as an adaptation strategy. First of all, the assessment develops on three different sources: analysis, surveys and qualitative interviews and it differs three types of human mobility: migration, which leads populations to leave because of multiple motivations, such economic or environmental reasons; displacement, intended as a forced human movement caused by disasters and planned relocation, the process which addresses people towards safe areas following natural hazards. In its outcomes, the document reports the positive or negative position of the three types of human mobility towards adaptation to environmental migration. Starting from migration, the Report sustains that the latter may be a potential adaptation strategy; for example the seasonal human movement in Haiti seems to enhance resilience of populations towards climate change; on the contrary, forced displacement seems to increase human vulnerability instead. Relocation is a concrete solution that permits populations to leave a dangerous environment and move towards safe territories, even though population are still subject to future

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<sup>104</sup> Ibid. at 5-7

<sup>105</sup> Ibid.

natural perils. Generally, most of the analysed countries consider migration as way to cope climate. Populations see migration as a way to diversify economic income and decrease the level of poverty: remittances permit to sustain the basic livelihood, increase national resources and climate change impact awareness; migration may be an occasion for develop new skills and knowledge that people can bring to the affected countries, enhancing the possibility to strengthen their resilience. However, migration as adaptation strategy still presents few threats in the origin country where the absence of infrastructures resistant to climate change increase vulnerability of migrants; and in host territories where they face different obstacles, such as the difficult in access to social and protection services<sup>106</sup>.

The MECLEP comparative Report recommendations are mainly three: (1) “Time to act now: Maximizing migration as an adaptation strategy to environmental stress”; in light to the above findings, the document stresses the necessity to include migration in national climate policies. (2) “Fostering policy coherence through data collection, research and capacity-building”; here, governments are called to enhance data collecting on climate migration and share the results among all the political spheres in order to raise a comprehensive awareness on the matter<sup>107</sup>. (3) “Prioritizing vulnerable groups”; it is evident that in the context of climate change effects some people, such as women and children, are more exposed to perils; as result climate policies need to take in account such consideration and find solutions to reduce climate risks. In addition, the project entails Disaster Risk Reduction in response policies as a tool aimed to deal with displacement and prevent it, including origin and arrival communities; such actions shall include a gender perspective and focus particularly on specific persons who cannot leave the dangerous environment because of economic and cultural reasons; furthermore, they have to involve the affected subjects in order to develop tailored actions, which need to be financially supported and shared among stakeholders. Finally, host communities often do not have enough information on the arrivals; consequently, increased and clear information on numbers of migrants may help to equip adequately host territories<sup>108</sup>.

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<sup>106</sup> Melde et al., n.96 (Chapter 4), at 85-87.

<sup>107</sup> Ibid. at xvi – xvii .

<sup>108</sup> Ibid. at xvii.

Disaster Risk Reduction and Adaptation, together with Sustainable Development may represent a tool for enhancing the capacities of adaptation to disasters. The benefits and the obstacles derived from such integrated approach will be presented therefore, together with the approach of the Sendai Framework to environmental migration. Finally, a concrete example of integration between risk reduction strategies and adaptation will be provided.

#### **4.4 Integrating Sustainable Development, Disaster Risk Reduction and Adaptation**

Climate change impact does not provoke merely natural disasters such as tropical storms or floods; in addition, it increases the vulnerability of populations, striking their livelihood and reducing natural resources. The Bali Action Plan sustained that the reduction of risks is necessary to achieve development and adaptation; historically disaster risk reduction and adaptation strategies developed separately in the context of climate change regime. Nevertheless they present few areas in which they overlap. And since they deal with the same subject, climate change, they may use similar instruments to tackle the phenomenon. Finally, both approaches involve different policies in their process of implementation<sup>109</sup>.

The past efforts in enhancing DRR may represent a great opportunity for adaptation, which can learn from such long experience and benefit from risk reduction tools. Recently, governments have started to include disaster risk reduction and adaptation strategy in a unique policy in order to deal with climate change impact, especially in the context of development policies<sup>110</sup>. But, it is necessary to rise few considerations before: countries react to natural hazards differently, states with a high economic resources usually are less vulnerable to climate change impact, whereas for examples small islands which have a weak economy find more difficulty in responding to a natural disasters. Or communities who rely on agriculture as primary national resources are more vulnerable to climate change effects. However, disaster risk reduction strategies are necessary in

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<sup>109</sup> International Strategy for Disaster Reduction, “Adaptation to Climate Change by Reducing Disaster Risks: Country Practices and Lessons” (2009) at 1-2.

<sup>110</sup> Ibid. at 2.

developing adaptation plans by governments, especially because such natural events are happening more frequently<sup>111</sup>.

In 2017 an UNFCCC technical paper presented by the secretariat sustained the possibility to integrate “[...] adaptation with the SDGs and the Sendai Framework [which] can be very beneficial for building resilience comprehensively across societies”<sup>112</sup>. The Sendai Framework is the successor of the Hyogo Framework for Action, which is aimed to reduce the level of risks and losses following a disaster which a human-centred approach. It presents four priorities that states need to implement “[...] taking into consideration respective capacities and capabilities, in line with national laws and regulations”. States have to enhance the knowledge on disaster risks and its management, also they need to increase resilience, promote preparedness and a better process of reconstruction after the disaster<sup>113</sup>. The Sendai Framework recognizes the main responsibility upon states which have “[...] to prevent new and reduce existing disaster risk, and highlight the need for inclusivity, the need to ensure the promotion and protection of all human rights and the need for engagement by all of society”<sup>114</sup>. Among the drivers of disasters, climate change has been inserted<sup>115</sup>.

Integrating adaptation with SDGs and the Sendai Framework presents 3 main benefits: (1) all these approaches may collaborate in recognizing which actions are fundamental to achieve their goals and which are obstacles; (2) the share of data and the reciprocal help may enhance their capacity to action and pursue common aims; and (3) the effective collaboration may be essential to achieve targets and goals. Furthermore, SDGs and the Sendai Framework have also similar areas of actions that can improve their integration: (a) resilience and ecosystem may put them in contact and develop strategies pursuing their goals; (b) since they have to deal with multiple sectors, the coordination of their actions such as the promotion

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<sup>111</sup> Id. “Strengthening climate change adaptation through effective disaster risk reduction” (2010) at 2-3.

<sup>112</sup> United Nations Framework Convention on Climate Change, *Opportunities and options for integrating climate change adaptation with the Sustainable Development Goals and the Sendai Framework for Disaster Risk Reduction 2015–2030: FCCC/TP/2017/3* (2017) part I, B para. 6(a).

<sup>113</sup> General Assembly, *Resolution adopted by the General Assembly on 3 June 2015: A/RES/69/283* (2015) at 6 and 8-9, especially part IV para. 21.

<sup>114</sup> United Nations Framework Convention on Climate Change, part II C para.24

<sup>115</sup> *Annex II* in n.113 (Chapter 4), para. 13

of common spaces in which governmental bodies and stakeholders may share experiences, represents an opportunity of integration. Developing operations from local to international level may enhance the common actions of the three agendas, which can share information, solutions and policies; (c) all three approaches are human-centred, they sustain that communities are essential to develop more effective and tailored actions. However, some obstacles to the process of integration have been identified: the necessity of a high level of coordination and data, together with the request of technical and financial resources. Finally, the Report identifies the NAPs as a great opportunity to promote an integrating approach of the three frameworks, given that it is an adaptable instrument and have great resources at the disposal<sup>116</sup>.

### The Sendai Framework

The Hyogo Framework of Actions has presented only a slight reference to human mobility, sustaining that migrants may be vulnerable towards disasters and thus it is necessary to manage the resultant risks. Today, the Sendai Framework instead makes more references to the human mobility, including also its multiple typologies such as displacement and relocation. First of all, the Sendai document recognizes that migrants present negative and positive elements in the context of disasters: on one hand, they face numerous perils such as lack of information and resources, vulnerability, difficulty in accessing to protection and assistance; on the other hand, they may find strategies to adapt and increase resilience<sup>117</sup>.

Migrants contribute to the resilience of communities and societies, and their knowledge, skills and capacities can be useful in the design and implementation of disaster risk reduction [...]<sup>118</sup>

In other words, the recognition of the role of migrants as stakeholders in disaster risk management is essential to reduce consequences of risks and enhance the post-disaster recovering. Preparedness and tailored solutions are process that migrants may influence and shaped taking in account their knowledge of the local

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<sup>116</sup> Secretariat, at 15 -20 and 29.

<sup>117</sup> Lorenzo Guadagno, “Human Mobility in the Sendai Framework for Disaster Risk Reduction” (2016) *International Journal of Disaster Risk Science*, vol. 7, (1) at 30–40.

<sup>118</sup> General Assembly, n.113 (Chapter 4), part V para.36 (a) (vi).

context, the availability of resources and the most urgent needs. In order to develop such integrated approach, institutions shall improve the channels of communication with migrants, respecting their cultural background, facilitating the access to resources and services. Moreover, favouring the movement of people towards safer areas may reduce the negative implications and the vulnerability, guaranteeing also a return. The engagement of migrants in risk reduction strategies before and after the disaster may appreciate their skills and increase financial resources<sup>119</sup>.

The Sendai document sustains that risk reduction strategies need to take in account the negative implications of human mobility, especially regarding the consequent changes in demographic patterns. In fact, migrants usually flee towards urban areas, where resources and infrastructures are limited and they may face different cultural contexts. Furthermore, relocation has been identified as an important tool to reduce vulnerability, even though legal and physical protection need to be guaranteed, together with sustainable livelihood, access to resources and social services. Thus, a complete assessment and monitoring on the social and economic necessities and conditions of migrants are required. Similar actions are considered in evacuation processes, taking in account the different needs and characteristics that such subjects present<sup>120</sup>.

In addition, the document recognizes that transboundary cooperation and share of resources are considered in

[...] [promoting] regular disaster preparedness, response and recovery exercises, including evacuation drills, training and the establishment of area-based support systems, with a view to ensuring rapid and effective response to disasters and related displacement, including access to safe shelter, essential food and non-food relief supplies, as appropriate to local needs [...]

Finally, it

[...] encourage[s] the adoption of policies and programmes addressing disaster-induced human mobility to strengthen the resilience of affected people and that of host communities, in accordance with national laws and circumstances [...]<sup>121</sup>

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<sup>119</sup> Ibid. at 32-33

<sup>120</sup> Ibid. at 34-36

<sup>121</sup> Ibid., part IV 33 (h) and 30 (l)



### The case of Kenya

Today, Kenya represents a state which has promoted migration as an adaptation strategy. A series of national documents reinforce such vision, even though only one document has recognized the link between environment and migration<sup>122</sup>.

Kenya has been subjects to natural hazards for years, such events are growing in frequency, especially flood and drought, which are threatening the livelihood of farmers and pastoralists; the vulnerability of such population towards climate change impact is high due to the dependency on agriculture and rainfalls<sup>123</sup>.

The National Climate Change Response Strategy recognizes that climate change may contribute to displacement in Kenya and consequently it may undermine the livelihood, especially whether people move towards unequipped urban areas. Thus, the document promotes an enhancement in urban planning. In order to implement it, the National Climate Change Action Plan has been established; similarly it recommends to improve the approach on migration as an adaptation measure, developing strategies to encouraging populations to remain in home territories, limiting human mobility. Moreover, the Climate Change Act No.11 of 2016 promotes resilience, adaptation and risk reduction strategies in the context of climate displacement. Instead, the Community Land Act No.27 of 2016 aims to enhance resilience through the promotion of land rights: new process of land management and adjudication may encourage communities to adapt and avoid the choice of migration, increasing their resources and sense of security<sup>124</sup>.

The National Adaptation Plan 2015-2030 represents a great result for Kenya given that it aims to limit vulnerability to climate change through adaptation, promoting disaster risk reduction strategies<sup>125</sup>. It points in

[...] reduced climate-induced loss and damage, mainstreamed disaster risk reduction approaches in various sectors, reduced costs of humanitarian aid,

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<sup>122</sup> George Odipo et al., “Migration as adaptation to environmental and climate change: the case of Kenya” (2017) at 9-10.

<sup>123</sup> See general information on Kenya at <http://www.environmentalmigration.iom.int/kenya-1> .

<sup>124</sup> Odipo et al., at 10-12.

<sup>125</sup> Ibid. at 12.

and improved knowledge and learning for adaptation and the future protection of the country<sup>126</sup>.

Among its objectives, the Plan points to “[e]nhance resilience of vulnerable populations to climate shocks through adaptation and disaster risk reduction strategies<sup>127</sup>”. Since in Kenya most of migrants move from rural to urban areas, such document takes in account the vulnerable conditions of those who live in poor urban areas; as result, the government encourages the development of actions to enhance their adaptation strategies, such as the building of adequate infrastructures<sup>128</sup>. Furthermore, the Plan aims to “[s]trengthen and expand social protection and insurance mechanisms against main climate hazards [,]” and “[...] support climate resilient sustainable livelihoods<sup>129</sup>”. It encourages public awareness on environmental issues and improve education on climate change adaptation<sup>130</sup>. Finally, the Common Programme Framework for Ending Drought Emergencies 2012-2022 has been inserted, following two main pillars: (1) increasing resilience and (2) applying a better risk management<sup>131</sup>.

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<sup>126</sup> Republic of Kenya, “Kenya National Adaptation Plan 2015-2030: Enhanced climate resilience towards the attainment of Vision 2030 and beyond” (2016) at 3.

<sup>127</sup> Ibid.

<sup>128</sup> Odipo et al., at 12

<sup>129</sup> Republic of Kenya, at 35

<sup>130</sup> Ibid. at 29 et 31

<sup>131</sup> Odipo et al., at 12; Republic of Kenya, at 42

## CONCLUSION

“Climate change is one of the greatest challenges of our time<sup>1</sup>”, and human mobility due to climate-induced disasters is a current reality<sup>2</sup>. In the past climate change has been merely a natural process, today it is increasing, and the main cause is human activity<sup>3</sup>. “Migration and resettlement may be the most threatening short-term effects of climate change on human settlements” according to the IPCC; specifically, climate change provokes losses in housing and reduction of vital resources which force populations to move<sup>4</sup> forcibly or voluntarily, within national territory or crossing international borders<sup>5</sup>. The adverse effects of climate change on earth are multiple: floods, desertification, rise of the sea level and the global temperature, ice melting and sea acidification, sudden on-set or slow on-set natural disasters etc. “Climate change impacts, directly and indirectly, an array of internationally guaranteed human rights”<sup>6</sup>; it may threaten the right to life, food and housing, impeding a full enjoyment of human rights and worsening the already fragile conditions of populations in developing countries<sup>7</sup>.

Both the HRC and OHCHR have recognized the link between climate change and human rights<sup>8</sup>, “[a]ffirming that human rights obligations and commitments have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence [...]”<sup>9</sup>. Referring to HRC Resolution 10/4, the UNFCCC stated that climate change may influence directly or indirectly human rights and the whole UNFCCC Parties shall respect them when implementing climate strategies<sup>10</sup>.

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<sup>1</sup> See the “Declaration of the leaders of the major economies forum on energy and climate” (2009) *The Guardian*.

<sup>2</sup> Kalin and Weerasinghe, at 1

<sup>3</sup> Bedarff and Jakobeit, at 7

<sup>4</sup> W.J. McG. Tegart et al., “Climate Change: The IPCC Impacts Assessment” (1990) at 5-9. It represented the final Report of the of Working Group II of the Intergovernmental Panel on Climate Change, also sponsored by both the World Meteorological Organization and the United Nations Environment Programme.

<sup>5</sup> Kälin and Schrepfer, at 22

<sup>6</sup> See Office of the High Commissioner for Human Rights “Key message on human rights and climate change”.

<sup>7</sup> Office of the High Commissioner for Human Rights, “Human Rights and Climate Change”. See OHCHR online.

<sup>8</sup> Id., “Integrating human rights at the UNFCCC”. See OHCHR online.

<sup>9</sup> Human Rights Council, n.18 (Chapter 2), at 2

<sup>10</sup> Conference of the Parties, n.158 (Chapter 1), at 2 and 4

There is a general consensus on the consideration of environment as a driver of migration, including climate change, and thus on the existence of a climate-migration nexus. On the contrary, the causality link between such elements is not immediate; as a result the difficulty in establishing the cause triggering a natural event, whether it is climate change or not, and identifying its direct contribution to migration impedes also a clear estimation of the amount of climate migrants on the move. However, experts sustain that the phenomenon of climate migration increases, through five potential patterns of human mobility<sup>11</sup>, where most of the populations will remain within national borders<sup>12</sup>. Specifically: slow natural events, sinking of small islands and high risk zone due to irreversible environmental degradation usually trigger permanent displacement (scenario 2, 3 and 4). Instead sudden natural events and potential climate-induced conflicts (scenario 1 and 5) lead to a temporary migration<sup>13</sup>.

The main issues to climate migration in the 21<sup>st</sup> century have been discussed mainly in the second and third chapter. Firstly, there is still a lack of a clear definition of climate-induced human mobility; media and newspapers usually describe confusedly the affected subjects as “migrants”, “displaced people” or “refugees<sup>14</sup>”. Secondly, even though most of the human movement due to climate change remains internal, the Guiding Principles on Internal Displacement are applied timidly at domestic level. General normative lacks still impede an effective protection of those migrants, especially whether they decide to cross international borders: the Refugee Status is applied to cross-border subjects only in specific and few circumstances<sup>15</sup>. Moreover, additional hard law instruments such as international human rights law, whose application on human mobility is the broadest, does not provide enough global guidance<sup>16</sup>. Potential alternative protection tools are present at domestic and regional level: on one hand, governments may apply temporary and subsidiary protection towards migrants who crossed national borders; in addition, the Kampala Convention represents an

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<sup>11</sup> See chapter 2, subs. 2.2

<sup>12</sup> Kälin and Schrepfer, at 77

<sup>13</sup> Ibid. at 16-17

<sup>14</sup> Dun and Gemenne, at 10

<sup>15</sup> Kälin and Schrepfer, at 78; see Chapter 2 (2.3.1 and 2.3.3)

<sup>16</sup> Ferris and Bergmann, at 26

important instrument to deal with climate migration in Africa. The Draft Articles on the Protection of Persons in the Event of Disasters<sup>17</sup> may enhance the protection framework of climate migrants, calling responsibility upon states<sup>18</sup>; however, the long negotiation aimed to develop the Draft represented the unwillingness of states in accepting new legal obligations<sup>19</sup>.

In the context of the international climate change regime a great achievement has been reached by the Cancun Agreements, which encouraged the consideration of migration in the UNFCCC international agenda, reinforced by the Nansen Agenda<sup>20</sup>. Recently few debates have risen aimed to propose new instruments for a better protection of climate refugees<sup>21</sup>: a new Refugee Protocol has been called by Biermann and Boas, together with Docherty and Giannini, who advanced a new Convention and a different legal instrument<sup>22</sup>.

Thirdly, even though the historical process of gas emissions performed by developed states has been considered the main cause of climate change, the issue of a correlated legal state responsibility is still debated. Regarding the specific action of gas emission, its attribution to states is unlikely due to the difficulty in providing clear proofs of the action and separating climate change from other environmental events. Moreover, the fact that gas emissions have been performed by several states makes it hard to raise accountability upon a single state, and also it is less clear whether a mechanism of reparation is taken in consideration. In addition even though a state had be recognized responsible for a wrongful action, collecting evidences on the causality link between the harming action and the climate effect, such as displacement, would be difficult. Thus, the complexity of the relationship between climate change and migration impedes a clear recognition of a legal responsibility for the protection and the assistance of people on the move<sup>23</sup>;

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<sup>17</sup> Draft Articles on the Protection of Persons in the Event of Disasters, adopted by the International Law Commission in 2016.

<sup>18</sup> Kälin and Schrepfer, at 75 et 78-79

<sup>19</sup> Ferris and Bergmann, at 25-26

<sup>20</sup> Kälin and Schrepfer, at 78-79

<sup>21</sup> Mayer and Crépeau, at 15

<sup>22</sup> See Biermann and Boas, n.117 (Chapter 2) and Docherty and Giannini, n.197 (Chapter 3)

<sup>23</sup> Mayer and Crépeau, at 7-10; 77

Generally speaking, there are negative and positive considerations on the migration issue: on one hand, governments usually maintain a negative vision of the phenomenon, since it may increase the perils that migrants have to face on the move and bring problems to host territories. On the other hand, it may enhance the condition of populations, increasing their process of development and enforcing their adaptation capacity; a clear example are remittances<sup>24</sup>. Considering migration as adaptation is a potential strategy for reducing climate change effects and promoting human mobility not as a problem, but a solution. Such vision would call for respect of whole human rights and an enhancement of the legal protection for climate migrants.

The integration of such conceptualization in international agendas especially in the context of climate change is essential<sup>25</sup>. As the MECLEP project has demonstrated, a National Adaptation Plan “[...] provides an opportunity to ensure that migration, displacement and planned relocation are fully addressed, as both potential challenges and potential opportunities”. In other words, the Cancun Adaptation Framework has promoted actions that tackle the negative aspects of migration which worsen human conditions; conversely, it asked states to support migration when it is considered a way for adaptation<sup>26</sup>. Also the Paris Agreement restated the necessity to ensure adaptation for tackling globally climate change, through increasing resilience and reducing vulnerability<sup>27</sup>. The treaty contains another important element to address climate migration: the Executive Committee of the Warsaw International Mechanism on Loss and Damage requested the establishment of a Task Force on Displacement, developing potential strategies for dealing with climate displacement and its negative effects<sup>28</sup>.

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<sup>24</sup> Warner, n.48 (Chapter 2) at 2; Barnett and Webber, n.54 (Chapter 3), at 22 et 45; see Chapter 3 (3.1.2)

<sup>25</sup> Monika Mayrhofer, “Climate change and migration Dimensions, Concepts and Policy Responses from a Human Rights Perspective” (2016), *Panorama: Insights into Asian and European Affairs* (1) at 149-150.

<sup>26</sup> Koko Warner et al., “National Adaptation Plans and Human Mobility” (2015) at 8.

<sup>27</sup> United Nations Climate Change, “New elements and dimensions of adaptation under the Paris Agreement (Article 7)”. See UNFCCC online.

<sup>28</sup> See “Frequently asked questions on climate change and disaster displacement” retrieved from <http://www.unhcr.org/news/latest/2016/11/581f52dc4/frequently-asked-questions-climate-change-disaster-displacement.html> . Last visited June, 20 2018.

“Development interventions to support resilience are therefore essential. Disaster risk reduction and adaptation measures can limit the scale and negative impact of climate change<sup>29</sup>”. In order to promote a comprehensive approach to climate migration, few strategies are needed to be considered: (1) the Disaster Risk Reduction strategies and the Adaptation Framework measures which can reduce vulnerability and promote prevention to disasters; also the Sustainable Development Goals are essential since they have recognized the negative effects of forced displacement. (2) Considering migration as adaptation for example “[...] through the creation and expansion of safe, legal pathways that leverage regional agreements on free movement, labor mobility schemes, and domestic immigration laws [...]”. (3) Enhancing the existing legal protection for Internally Displaced People and promoting temporary protection measures, together with humanitarian permissions for those who cross national borders. (4) Offering relocation and resettlement as preventive measures. The New York Declaration for Refugees and Migrants seems to represent an important opportunity to address climate migration following such comprehensive approach, developing efficient responses which may enhance resilience in this challenging context<sup>30</sup>.

Finally, since the lack of a unified and harmonized global governance on migration impedes to address efficiently climate migration<sup>31</sup>, UNHCR and IOM may fulfil the gap presenting themselves as a potential global guidance for states in dealing with the phenomenon<sup>32</sup>.

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<sup>29</sup> Wahlström, at 2-3

<sup>30</sup> Kälin and Weerasinghe, at 79

<sup>31</sup> Mcadam, n.1 (Chapter 4), at 1

<sup>32</sup> See generally Chapter 4 para.4.1

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