

The Need for A New Instrument to Deal With 'Environmental Refugees'

Perspectives

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1 Introduction

‘Environmental refugee’ is a term that is gaining in popularity. This new sustainable development fashionable term seems quite self-explanatory. From the outset, it gives some idea of its meaning: refugees that flee due to environmental causes. But from an international law point of view, the combination of the words ‘environmental’ and ‘refugee’, with their respective implications, add up to a complex concept which cannot be so simply defined.

The most cited definition of ‘environmental refugee’ is found in Essam El-Hinnawi’s report *Environmental Refugees* published by the UNEP in 1985, where the author defines this category of migrant as follows:

Those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life [sic]. By ‘environmental disruption’ in this definition is meant any physical, chemical, and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life.¹

Ten years after the publication of El-Hinnawi’s report, Norman Myers, a well-known author in the field of environmentally triggered migration, defined environmental refugees as:

people who can no longer gain a secure livelihood on their homelands because of drought, soil erosion, desertification, deforestation and other environmental problems. In their desperation, they have no alternative but to seek sanctuary elsewhere (...). Not all of them have fled their countries; many are ‘internally displaced’. But all have abandoned their homeland on a semi-permanent if not permanent basis, having little hope of foreseeable return.²

¹ El-Hinnawi, *Environmental Refugees*, UNEP, 1985, at p.4.

² Myers, Norman; Kent, Jennifer, *Environmental Exodus: An Emergent Crisis in the Global Arena*, Climate Institute, Washington, DC, U.S.A., 1995 at p. 14.

Reading those definitions, one naturally thinks about cyclones and hurricanes, tsunami and earthquakes, hailstorms or heavy rains, which are usually the first causes that come to mind since they are the most impressive. However, more complex environmental problems leading to migration, which are not directly attributable to sudden natural disasters, illustrate the full content of those definitions and help better understand what is referred to by 'environmental refugee'.

To give but one example, in Mozambique, the Tropical cyclone Favio, in February 2007, has worsened the situation of flooding created by persistent and heavy rainfalls causing the overflowing of rivers in the region in addition to Mozambique's geographical position of water receptacle for the neighbouring countries. Therefore, the reception of water not absorbed by the neighbouring lands due to causes such as dryness of land and deforestation led to heavy rainfalls, and increase in the monsoon poses a serious threat. On 23rd of February, the Central Emergency Response Fund³ (CERF) had already authorized funding of 7,6 M \$ to aid 142 000 displaced persons⁴. The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) now estimates that 85,000 people could be directly affected⁵.

The environmental causes of migration are usually divided between 'slow onset environmentally induced movement' and 'acute onset environmentally induced movement', both leading to temporary or permanent displacement. These categories can be paraphrased as long-term degradation of the environment versus sudden environmental disruption including the subcategory of accidents, also sometime added as yet another category⁶.

³ Formerly the Central Emergency Revolving Fund modified by General Assembly resolution A/RES/60/124.

⁴ [http://www.reliefweb.int/rw/dbc.nsf/doc104?\)penForm&rc=1&cc=moz](http://www.reliefweb.int/rw/dbc.nsf/doc104?)penForm&rc=1&cc=moz)

⁵ *idem*.

⁶ McCue, Gregory. *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*. 6 Geo. Int'l Envtl. L. Rev. 151 1993-1994.

Because the international legal refugee regime does not recognize environmentally displaced persons, opinions are divided as to which legal status should be accorded to those migrants as well as to the possible and best solutions to address this growing problem. In the next pages, a brief presentation of the legal issues triggered by the *de facto* environmentally displaced persons will precede a review of the main positions fuelling the debate regarding the legal status of these displaced people. While the adoption of a new instrument rallies the majority as being the solution that best answers these legal loopholes, there is no general agreement as to the form and content nor as to the approach to this new convention. Whether to it is the perspective from which to tackle the problem, that is through refugee or environmental point of view, or the rights and obligations incumbent upon the States and migrants, the idea of a new international instrument raises many issues. This paper will focus on the former of these points and will discuss more specifically two approaches to decision-making as to the qualification of a migrant for help granted by this hypothetical convention, by sketching some of the legal issues arising from both an individual and from a group assessment basis.

2 Facing Consequences of Environmental Degradation: Addressing Global Situations on an Individual Basis?

At the end of 2006, the number of people 'of concern' to United Nations High Commissioner for Refugees (UNHCR) had risen to 32.9 million, and of those, 9.9 million were refugees⁷. Norman Myers calculated in 1995 the number of 'environmental refugees' to be at 25 million, comprising Internally Displaced Persons⁸. Most studies show that this figure is on the rise and will continue to rise due mainly to population growth and environmental degradation. Scientific knowledge and available data from affected countries reveal that the pressure is strengthening⁹ on the main causes of environmental disruption¹⁰. The further degradation of the environment, coupled with *de facto* migration attributable to environmental factors and a lack of *de jure* recognition of 'environmental migrants', raise several interesting but difficult issues that will need to be tackled by the international community in the near future.

The existence of a duty to mitigate environmental causes leading to or triggering migration and the ensuing liability of States is one related issue. Principles, treaties and guidelines for emergency response and preparedness have been established by the United Nations General Assembly resolutions¹¹ (leading to the creation of the International

⁷ UNHCR 2006 *Global Refugee Trends*, <http://www.unhcr.org/statistics/STATISTICS/4676a71d4.pdf>, as revised the 16 July 2007.

⁸ Internationally Displaced Persons (IDPs) are described in the *Guiding Principles on Internal Displacement* as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border"; OCHA/IDP/2004/01, United Nations Publication E/CN.4/1998/53/Add.2

⁹ Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis – Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, February 2007.

¹⁰ N. Myers identifies 14 pressure points: landlessness; deforestation; desertification; soil erosion; salinization and water logging of irrigated land; water deficit and droughts; agricultural stress; biodiversity depletion; extreme weather event and climate change; population pressure; diseases and malnutrition; poverty; governmental shortcomings; and subsidiary causes of involuntary migration; *supra* footnote 2.

¹¹ Such as A/RES/61/200 of 16 February 2007 on Natural disasters and vulnerability; A/RES/61/198 of 16 February 2007 on International Strategy for Disaster Reduction; A/RES/60/195 of 2 March 2006 on International Strategy for Disaster Reduction; A/RES/60/196 of 2 March 2006 on Natural disasters and vulnerability; A/RES/59/231 of 22 February 2005 on International Strategy for Disaster Reduction and more available at http://www.unisdr.org/eng/about_isdr/bd-ga-resolution-eng.htm

Strategy for Disaster Reduction), the International Federation of the Red Cross and Red Crescent Societies¹² as well as the OCHA; however, when it comes to slow onset environmental disruption such as global warming, the obligation on the international community to mitigate the negative effects of their policies in order to avoid future possible threats to the environment and, by the same token, displacement of population is yet to be defined. For example, if a country carries out a policy of uncontrolled deforestation, which amplifies flooding caused by heavier monsoon attributable to global warming because of the lack of forest to retain the water, and if flooding and landslide then extends to both the State in question and neighbouring countries, one can wonder what liability and what responsibilities towards the affected neighbours fall upon that State. In international environmental law, States have exclusive jurisdiction over their own territory and the way they exploit their resources¹³. But that sovereign right is subject to a duty to ensure that the activities carried out do not cause damages to the environment outside their national jurisdiction¹⁴. In the above example, is the increase in the monsoon due to climate change too remote to engage the liability of the State proceeding to deforestation? If such liability is established, what kind of reparation can be demanded? Could remedies include assistance to persons displaced because of famine and health problems as a result of the liable State's policies?

These questions relating to States' liability lead to the issue of the very existence and, in the affirmative, the scope, of obligation of the neighbouring countries to accept 'environmental migrants' on their respective territory and to offer them protection. A number of studies¹⁵ show the negative impact of refugee camps on the host

¹² See the various policies of emergency responses at <http://www.ifrc.org/who/policy/index.asp>

¹³ The Rio Declaration on Environment and Development of June 13, 1992, principle 2, The United Nations Declaration on the Human Environment (Stockholm Declaration) of June 16, 1972, principle 21, Convention on Biological Diversity (CBD) of June 5, 1992, article 3, the United Nations Convention on the Law of the Sea (UNCLOS) of December 10, 1982, articles 192-193-194(2), the United Nations Framework Convention on Climate Change (FCCC) of May 9, 1992 in preamble at paragraph 9, UN Security Council resolution S/RES/1483 (2003) in its preamble

¹⁴ Stockholm Declaration (*supra* footnote 13) principle 21, Rio Declaration (*supra* footnote 13) principle 2, the International Court of Justice advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Report 1996, paragraph 29.

¹⁵ See in particular UNHCR *Refugee Magazine*, Issue 127 (2002) and Norman Myers, *supra* footnote 2.

environment¹⁶. If the environment of a State facing an environmental problem is so pressured that it cannot provide the basic needs to the population, thus amounting to a threat to life and forcing people to leave their home and seek refuge elsewhere, then in many instances the environment of the neighbouring State might be threatened of a similar degree of degradation since they may be confronted with the same kind of pressure, often being in the same climatic area¹⁷. The neighbouring country may be unable to assist environmentally displaced persons because hosting refugee camps could jeopardize the neighbouring country's own environmental – not to mention financial – situation. Therefore, States are, and will be, reluctant to offer protection to those migrants.

The on-going debate about the legal status of 'environmental migrants' comprises the determination of the kind of legal protection 'environmental migrants' are entitled to. The main question is thus: what rights should 'environmental migrants' be recognized? Should this determination be framed around the refugee status determination? Should 'environmental migrants' have the possibility to acquire permanent status in a host country or should they only be temporarily protected, until they can return? One particular aspect of serious environmental degradation is that a significant improvement in the situation is generally not to be foreseen in a near future, as environmental damages are long to repair, if at all. Would 'environmental migrants' qualify for the *non-refoulement* principle or the 'in need of protection' test? The *non-refoulement* obligation on member States usually does not cover the case of migrants, as in the Convention refugee system, it requires the demonstration of a nexus between threats on life or freedom and one of the recognized grounds¹⁸. The protection against *refoulement* has been explained by the European Court of Human Right as imposing the obligation on contracting States to take due account of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁹ when exercising their right to

¹⁶ For example, in Kagera, Tanzania, UNHCR established that refugees consumed more than 1 200 tons wood daily; UNHCR *Refugee Magazine*, Issue 127 (2002)

¹⁷McGregor, JoAnn. *Refugees and the Environment in Geography and Refugees: Patterns and Processes of Change*. Richard Black & Vaughn Robinson Editions, 1993.

¹⁸ 1951 Convention, *supra* footnote 25, article 33

¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950

control the entry, residence and expulsion of aliens on their territory²⁰. Therefore, the argument of the right to a level of environment adequate to permitting a “life of dignity and well-being”²¹ as a human right raises the issue of an obligation to offer protection to the victims of grave environmental disruption. The lack of a clear definition of the content and scope of such a right however constitutes a problem. Indeed, this protection is viewed as only relating to breach of fundamental human rights.

These examples demonstrate the complex links between two fields of *lex specialist* of public international law: the international environmental law and the international refugee and migration regime. It is important to mention at this point that, although there is divergence in the opinions as to which legal status should be afforded to environmentally displaced persons, all authors agree that ‘environmental migrants’ are not, at the moment, officially recognized in the refugee regime. They receive humanitarian aid on a ‘case-by-case’ approach. Furthermore, the majority of the States, as well as UNHCR, do not want to see the definition expanded. This translates in a lower level of protection for ‘environmental migrants’ since they are not considered differently than economic migrants. Scholars and experts thus propose different solutions regarding environmentally displaced persons.

Some authors argue that the refugee regime is already capable of encompassing a new kind of refugee. In their opinion, the international refugee law, complemented by international human rights law, is adequate to address the problem, which therefore becomes an issue of State willingness to act.

Other authors believe that the current refugee regime is inadequate to provide sufficient assistance to the ‘environmental migrants’. For them, the solution generally lies in the creation of a new instrument designed specifically to address the growing problems of environmentally displaced persons. Other proposals to immediately tackle the problem are also put forward, such as the creation of a coordinating mechanism to direct all efforts

²⁰ Case of *Hilal v. The United Kingdom*, Eur. Ct. H. R., March 6, 2001

²¹ Stockholm Declaration, principle 1 and Rio Declaration, principle 1, *supra* footnote 13.

of the international organizations already focusing on providing relief within their capacity.

Keeping in mind the difficulties encountered in international environmental law, the need to qualify the scope and content of a right to an acceptable quality of environment is important, as it constitutes the first step to paving the way for a new convention that needs to take into account the root causes of environmental degradation, the extent and consequences of such degradation on persons and a way to provide help to those forced to migrate. In the search for a complete solution to this complex problem, several approaches can be envisaged. The international community could consider whether it wishes to adopt an individual approach in the decision-making process of environmental migrant cases or whether it wishes to choose a global assessment method. An individual approach would involve an assessment by the host country on a case-by-case basis, requiring a claimant to demonstrate how a particular environmental situation affects him individually and forced his migration. A global assessment of particular environmental situations would, on the other hand, have the advantage to lighten the administrative burden of individual claims, provide protection to groups of individuals that would not have the means to leave their country to claim protection on an individual basis but who might still need aid. As poverty is often linked with environmental degradation, most 'environmental migrants' do not have the mean to travel further than the neighbouring country. Moreover, measures could be taken to encourage and compel States to deal with environmental degradation, the root causes of migration.

An insight of the forces and weakness of each system will allow a more enlightened choice and a more adapted answer to the challenge of environmentally induced migration.

3 Current Positions in Public International Law: Are Environmental Migrants Refugees?

While there is an implicit harmony amongst the authors on the complex causes of environmental disturbance leading to environmental migration, there is also an on-going debate amongst the experts surrounding the use of the term ‘environmental refugee’. The combination of the legal term ‘refugee’ with the qualifier ‘environment’ is said to have the potential effect of implying a separation in the “political, economic, and environmental causes of migration”.²² This, in turn, implies a certain status of protection and rights granted to refugees but not to migrants, including environmental migrants.²³ Some authors even go further in denouncing the confusion created amongst policy makers and governments by a strategic use of this term so as to lead to a crystallization of the situation by inducing a fear of a flow of displacements if ‘environmental migrants’ were to be recognized as refugees. It is argued that the labeling of ‘environmental refugee’ oversimplifies the root-causes triggering migration that “can imply a sphere outside politics, (...) [which] may encourage receiving States to treat the term in the same way as ‘economic migrants’ to reduce their responsibility to protect and assist”²⁴. This includes the argument that it would diminish the protection for ‘real’ refugees without providing further help to environmental migrants²⁵.

Another group of authors, though agreeing that environmentally displaced persons are not refugees in the narrow legal sense, still prefer using the term ‘environmental refugee’ for reasons of convenience, specifying it should be understood in the popular sense, meaning people forced to move, whether internally or internationally, due to environmental causes, rather than in the narrow legal sense of the term²⁶.

²² *Supra* footnote 17, at p. 158.

²³ Schwartz, Michelle Leighton. *International Legal Protection for Victims of Environmental Abuse*. 18 Yale J. Int’l L. 381 1993.

²⁴ *Supra* footnote 17, at p.162 – view opposed by Bell, Derek R., *Environmental Refugees: What Rights? Which Duties?*, Public Academic Publishers, 2004.

²⁵ King, Tracey. *Environmental Displacement: Coordinating Efforts to Find Solutions*. Georgetown International Environmental Law Review, volume 18 [2006] 543.

²⁶ See Norman Myers, *supra* footnote 2 & Bell, Derek R., *supra* footnote 24.

This debate covers a clash of opinions as to the legal status that should be granted to ‘environmental migrants’. Two major views can be distinguished: first, the view of those who argue that the situation of refugees and of environmentally displaced persons is analogous and that the latter should therefore be recognized the refugee status; second, the view of those who argue that these migrants do not have a place under the international refugee regime. A variety of approaches are taken to arrive to those different conclusions. The examination of the different arguments and counter arguments provides a better understanding of the problematic points of the inclusion of ‘environmental migrants’ in the refugee regime and enables a sounder ground to build a durable solution.

3.1 ‘Environmental Migrants’ Should Be Recognized Refugee Status

Two main trends lead authors to conclude that persons displaced because of environmental factors are refugees in the sense of the Convention Relating to the Status of Refugees²⁷. This conclusion is achieved either through a liberal interpretation of the Convention refugee definition or, for the authors who find that the environmental migrants do not ‘fit’ in the definition as such, through the broader human rights aspect. This theory pleads for the expansion of the 1951 Convention refugee definition so as to include ‘environmental refugees’ in the protection granted by the instrument via its object and purpose, as it is considered to be a human rights instrument.

²⁷ Convention Relating to the Status of Refugees, July 28, 1951, hereinafter referred to as the 1951 Convention.

3.1.1 Liberal Interpretation of the 1951 Convention

Authors supporting the view that the 1951 Convention refugee definition can be interpreted so as to include environmental migrants base their argumentation on the assessment of the components of the definition demonstrating the possible inclusion of ‘environmental migrants’. The following section will therefore discuss briefly each criteria of the 1951 Convention definition, reviewing for each of them the common understanding in refugee law and the main arguments for the inclusion of environmental migrants.

i) *Well-founded fear*: This criterion of the definition requests a double assessment of the fear of the applicant. Fear being a state of mind, the applicant must demonstrate that he, personally, fears the persecution from which he is fleeing. It is underlined in the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status²⁸ that the fear must be individually demonstrated, unless practical reasons in emergency lead to the recourse of ‘group determination’ of refugee status²⁹. The addition of the qualifier ‘well-founded’ demands that the said fear be objectively justifiable or that it be “supported by an objective situation”³⁰ leading a ‘reasonable person’ to reject her State of origin’s protection.

Most authors do not dwell upon this criterion since it seems assumed that both the subjective and the objective aspects of fear can be demonstrated when faced with environmental disruption of a magnitude such as the previously mentioned example of Mozambique. Therefore, authors either provide examples of environmental causes or resume this criterion by underlining that since “[a]n evaluation of the *subjective element* is inseparable from an assessment of the personality of the applicant”³¹, the surrounding conditions and personal background of a claimant must be taken into account in the

²⁸ United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee; HCR/IP/4/Eng/REV.1; Geneva, January 1992; hereinafter referred as UNHCR Handbook.

²⁹ UNHCR Handbook, *supra* footnote 26, at paragraphs 44-45.

³⁰ *Id.* at paragraph 38.

³¹ *Id.* at paragraph 40.

assessment of the fear³². Mothers faced with no land to crop and who are starving and unable to feed their children, families pushed away from their home either by desertification, landlessness or natural catastrophes such as flooding and forced to leave every possession behind are examples of situations demonstrating a fear objectively prompting a 'reasonable person' to migrate, thus rejecting her State of origin's protection. Different factors can serve to explain this rejection of protection: incapacity from the State to offer protection or unwillingness from the government, for various reasons, to grant such protection (situation of war in the country, discrimination based on race or ethnic grounds³³). As this issue is intrinsically linked with the persecution criterion, it will be further addressed below.

It can nevertheless be said at this point that persecution circumscribes the type of fear which allows the recognition of refugee status. If environment is used as a tool by government to persecute, the fear must be related to the environment. In the case of slow onset environmental disruption such as desertification and drought, the individual can anticipate the coming lack of food. But in cases of acute onset disruption or accident, it could be argued that proving the fear, which comprises an element of future prediction as a mental state of strong undesirability of infliction of some sort of harm, will be almost impossible. The fear, in those situations, will relate to the impact of the environmental disruption on the living conditions and other related rights. It will not be a fear of the environment *per se* since not foreseen, but of the management of the situation by the government, which might result in the violation of socio-economic rights, and possibly basics rights. This aspect of the assessment of fear is rarely examined in detail, leaving out a possible way of demonstrating the closer link between the economic, social and cultural rights.

ii) *Persecution*: Persecution is a concept that can hardly be summarized in a simple definition since it depends mostly on the circumstances of each case. This criterion is described by the UNHCR Handbook mostly as 'prejudicial actions or

³² Kozoll, Christopher. *Poisoning the Well: Persecution, the Environment, and Refugee Status*. 15 Colo. J. Envtl. L. & Pol'y 271 2004 at page 280.

³³ *Id.*

threats³⁴ subject to a case-by-case assessment³⁵. Persecution must be viewed in light of the subjective character of fear, which impacts on the “thresholds for which situations [migrants] (...) consider intolerable and thus reason for flight”³⁶. As worded by the UNHCR in the Handbook, “[d]ue to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary”³⁷. Nevertheless, the Handbook concludes that “[f]rom article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution”³⁸. Adopting a similar approach, the European Union Qualification Directive³⁹ defines persecution as a “severe violation of human rights”⁴⁰. Some authors argue that serious threat to life or freedom due to serious environmental degradation might amount to persecution where environmental conditions can be seen as prejudicial actions or threats⁴¹. As persecution doesn’t have a set definition, there is place for evolution of the concept. Persecution through violation of international economic and social rights is more and more recognized, but is still too rigidly applied. Thus the theory of a restriction of persecution to a threat to life or freedom by the interpretation *a contrario* of article 33 of the Convention is getting out of date.

The general view is that persecution must be inflicted by the State or its agents or “by the local populace (...) if [the acts] are knowingly tolerated by the authorities”⁴². The Qualification Directive also enlarges the scope of the protection offered by including the

³⁴ UNHCR Handbook, *supra* footnote 28, paragraphs 51 to 64.

³⁵ *Id.*

³⁶ Shanmugaratnam, Ragnhild Lund and Kristi Anne Stølen (Eds). *In the Maze of Displacement; Conflict Migration and Change*. Kristiansand: HøyskoleForlaget Norwegian Academic Press, 2003. at p. 183.

³⁷ UNHCR Handbook, *supra* footnote 28, paragraph 52.

³⁸ UNHCR Handbook, *supra* footnote 28, at paragraph 53.

³⁹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; hereinafter referred as the Qualification Directive.

⁴⁰ *Id.* article 9, paragraph 1, subparagraph (a).

⁴¹ *Supra* footnote 32. at page 283.

⁴² UNHCR Handbook, *supra* footnote 28, at paragraph 65.

acts of non-State actors as persecution⁴³. This recognition is based on the duty of the State to provide protection to its citizens as a part of its sovereignty. If a State shows unable or unwilling to protect the claimant against the alleged persecution or serious harm, this will amount to persecution under the Qualification Directive⁴⁴. Nevertheless, the State is presumed to provide such protection if it demonstrates that reasonable steps were taken in order to prevent such persecution, steps generally shown through an examination of the efficiency of the legal system to detect and prosecute authors of the inflicted harm as well as through the availability of legal actions to the claimant⁴⁵. This evolution is of particular relevance in the case of environmental migrants since private actors cause the greater part of the environmental degradation leading to displacement. Examples of companies destroying the surrounding environment in total impunity are abundant⁴⁶. Whether such impunity is due to a lack of regulations and standards to ensure a minimum level of quality of environment, a lack of will to enforce those regulations for economic and/or political reasons, or to technical difficulties for the victim of the pollution to claim reparation and cessation of the pollution, it might be said that the State is unable or unwilling to protect its citizens and often carries a policy of intentional ignorance. In cases of environmental harm, the duty to prevent serious harm and degradation is of much importance since the process of repairing environmental damages is laborious, long and the results mostly uncertain.

It is in the perspective of this duty that omission or failure by the State to protect might also amount to persecution. Two possibilities are generally recognized: first, generalized attacks against which no protection of the State is provided by reason of one of the enumerated grounds, and second discriminated attacks targeting part of the population because of one of the recognized 'grounds', for which there's a general

⁴³ Qualification Directive, *supra* footnote 39, article 6.

⁴⁴ *Id.* article 6.

⁴⁵ *Id.* article 7.

⁴⁶ For instance, the case of *Sarei v. Rio Tinto PLC* in Papua New-Guinea; the many factories surrounding township of Yixing (province of Jiangsu, China) and poisoning the Tai Lake; oil drilling and spilling in fragile environment such as Alaska; federal government agencies allowing illegal dumping of sediment laced with aluminium sulphate into the Potomac River threatening several endangered species in the United-States; the Bhopal disaster in India; illegal dumping of toxic waste in Ivory Coast and Africa in general; etc.

absence of protection by the State⁴⁷. In the case of environmental causes, the omission or failure can result from the incapacity of a government to respond to an emergency situation after a natural disaster either for reasons of lack of means or political policies (as after the Chernobyl accident⁴⁸), or by its incapacity and unwillingness to enforce environmental regulations to protect the living environment of the population as, for example, the Brazilian government's struggle to protect the land of the Yanomami people from mining and logging pollution and deforestation, as well as its own development program in the Amazon. Nevertheless, a claim of persecution based on the inaction of the State or its failure to protect must still show a nexus between the alleged persecution and one recognized ground of the definition in the 1951 Convention. Thus, in addition to the degree of harm caused by the failure to protect the environment in order to amount to persecution, the motive for such failure must also be evaluated. As will be discussed later in relation to persecution through violation of socio-economic rights, this requirement is one of the main challenges in the situation of 'environmental migrants' as it is usually argued that governmental failures incidentally affect to a higher degree some communities within a population. In this sense, the persecution is not *carried out* against those communities.

Thus 'environmental persecution' is defined as occurring "when governments knowingly induce environmental degradation and that degradation harms people by forcing them to migrate"⁴⁹. "Knowingly induced" is not confined to the acts or positive gestures of a State, but also includes economical or environmental policies which a government takes, knowing it will lead to major environmental degradation⁵⁰. This definition of environmental persecution opens the door to arguing that persecution can be inflicted through violation of economic and social rights.

⁴⁷ UNHCR *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002, at paragraph 23

⁴⁸ See Cooper, Jessica. *Environmental Refugees: Meeting the Requirements of the Refugee Definition*. 6 N.Y.U. Envtl. L.J. 483 1997-1998 for discussion on Chernobyl management policies resulting in persecution.

⁴⁹ *Id.* at page 520.

⁵⁰ *Id.*

Some authors draw a parallel between environmental and economic migrants on the basis that they are not perceived as fleeing fear of persecution but “as those voluntarily leaving their countries based on a calculation of self-interest”⁵¹. Although economic migrants are not granted refugee status, the UNHCR handbook underlines that the assessment of the motive of flight must not be overlooked too quickly only because economic motives are involved in the grounds amounting to persecution. It acknowledges that “the distinction between economic and political measure in an applicant’s country of origin is not always clear”⁵². C. M. Kozoll argues that an analogy with the combined political-economical factors can be made with environmental-political ones, thus concluding that, “where a direct and specific environmental harm destroys the cultural existence of certain peoples, this also may amount to persecution”⁵³. Transposing the argument of political motive justifying the inclusion of economic factors on the environmental level, the author is careful to remind that a high degree of environmental disturbance would be needed:

“It seems likely that for such an individual to meet the definition of refugee (...), the individual will have to show severe environmental harm that affects the individual in her capacity as a member of a protected category to a greater degree than other persons, and that such environmental harm either threatens her life or freedom, or is of such nature or extent that would reasonably induce fear”⁵⁴.

The argumentation in favour of the inclusion of economic components in the ‘political opinion’ ground of persecution is based on the use of the economy as a tool to silence political dissent. It was explained in the *Otuñez* case⁵⁵ that the fight over lands, which was to be considered as an economic factor, had in fact deeper roots of “stereotypical socio-political class struggle” thus distinguishing the political causes from the economic causes.

⁵¹ *Supra* footnote 32, at page 284.

⁵² UNHCR Handbook, *supra* footnote 28, at paragraph 63.

⁵³ *Supra* footnote 32, at page 284.

⁵⁴ *Id.*

⁵⁵ *Otuñez-Tursios v. John Ashcroft*, United States Court of Appeals for the Fifth Circuit (2002), 303 F. 3rd 341

Because of the growing recognition that in certain situations, violation of political rights will amount to persecution affecting the claimant's life less seriously than the level required to amount to persecution in the case of socio-economic rights, the usual distinction between political and socio-economic rights as resulting in persecution is slowly vanishing. Nevertheless, the conception of a weaker enforceability combined to the difficulty of determining the occurrence of a violation of socio-economic rights is used to argue that persecution through violation of 'third level'⁵⁶ rights must result in total denial of such a right or in conditions threatening life and freedom. This is based on the separation of the 'positive' and 'negative' obligations of a progressive rather than immediate application. It is argued that contrary to 'negative' obligations, which are of immediate application as they are obligations of conduct imposing a duty on the State to refrain from infringing a right, 'positive' obligations impose a duty to take action, implying the expenses of resources thus "underlining their aspirational nature"⁵⁷. This reasoning is based on article 2 of ICESCR which demands States to take steps "with a view to achieving progressively" the fulfillment of the rights. Thus, even recognizing that States have a minimum 'core' duty, the violation of which would result in total denial of a given right, it is argued that this progressive implementation renders the determination of a violation impossible and leads to a lack of justiciability of the socio-economic rights.

In an assessment of persecution based on hierarchization of human rights, violation is used as an indicator for persecution⁵⁸. The view that the ICESCR does not give rise to obligations of a same nature as of the ICCPR prevents a similar assessment in their role as an indicator. This differentiation of role ensues from the differentiation of human rights in two categories.

Recent trends in the interpretation of human rights obligations underline the indivisibility of political and socio-economic rights as well as their multi-faceted aspects

⁵⁶ According to Hathaway's hierarchisation of obligations connected to human rights and amounting to persecution; as explained and cited in Foster, Michelle. *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*. Cambridge university press, 2007.

⁵⁷ *Id.* p.159

⁵⁸ Hathaway, James. *The Law of Refugee Status*. Toronto: Butterworths, 1991.

and support the view of a ‘tripartite typology’ of rights present in all rights in a ‘multilayered’ fashion⁵⁹. Thus, in my opinion, the strength of the analogy between economic and environmental migrants lies in the type of right violation leading to persecution. To limit such analogy by requiring that denial of rights lead to a threat to life or freedom results in the introduction of two different thresholds for the consequences of violations of political or socio-economical rights, and undermines the analogy. Furthermore, having different thresholds for violation of human rights seems inconsistent with the preventive aspect of refugee protection, which is a prospective assessment of the risks faced by the claimant if returned to the situation he is fleeing.

iii) *‘for reasons of’*: The grounds on which an applicant may argue persecution are specified in the refugee definition of the 1951 Convention: “race, religion, nationality, membership in a particular social group or political opinion”. This definition being exhaustive, environmental motives of migration do not trigger protection as conventional refugee. It is specified in the UNHCR Handbook that “[t]he expression ‘owing to a well-founded fear of being persecuted’ – for the reasons stated – by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, *unless they also* have well-founded fear of persecution for one of the reasons stated”⁶⁰. Environmental migrants must therefore show a combination of grounds for persecution comprising one of the stated reasons of the definition such as inaction of a government leading to a failure to protect indigenous victims of major environmental degradation on racial or ethnic basis. In those circumstances, the migrants might have a chance to be recognized as refugees, but ‘for reasons of’ race. This is well illustrated by the case of *Sarei v. Rio Tinto PLC*, in which the territory and way of life of Bougainville’s citizens, in Papua New-Guinea, was destroyed by Rio Tinto’s operation of its open pit copper mine. Building the mine forced the displacement of villagers and destroyed rain forests; the dumping of chemical and mine product wastes caused serious environmental degradation such as the destruction of

⁵⁹ The concept of tripartite typology of rights is explained by M. Foster as a concept that all human rights comprise “interdependent duties of avoidance, protection and aid” or, in other words, imposing three “levels of obligations on States Parties: the obligation to respect, to protect and to fulfil” (Concept elaborated by Asbjørn Eide). *Supra* footnote 56, at p. 173-174.

⁶⁰ UNHCR Handbook, *supra* footnote 28, at paragraph 39, emphasis added.

the flora and fauna of the Jaba River, serious air pollution, annihilation of forest and shore fertility, etc. Discriminatory hiring practices and employee treatment by Rio Tinto support the allegations that the company's destruction of the population's environment, which started in the 1960's, was not an important issue because they were considered racially inferior. From the beginning of the operation, the government received 19,1% stake of the profit for its cooperation. In 1988, when a violent protest ended up in a popular insurrection and closing of the mine, Rio threatened the government to withdraw its investment if no actions were taken to remedy the situation. It further supported the government's blockade of the city, which prevented the transport of medicine, clothing and other essential supplies, and killed more than 2,000 children⁶¹.

The common position of the authors who interpret the 1951 Convention refugee definition as including environmental migrants without any amendment is that they are included in the 'social group' category. According to the UNHCR:

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights⁶².

This definition by the UNHCR combines both the 'social perception' and the 'protected characteristics' approaches. The 'protected characteristic' approach requires an assessment of the inclusion in a social group based on a characteristic that is innate and immutable to the component of the group while the 'social perception' approach requires an assessment of inclusion in a social group based on a characteristic which is perceived by the society or persecutor as the basis of forming a distinct group⁶³. The requirements of innate characteristics and of a distinct identity by the surrounding society in the assessment of a social group are also cumulative in the Qualification Directive⁶⁴.

⁶¹ *Supra* footnote 32, at page 30-31

⁶² UNHCR Handbook, *supra* footnote 28, at paragraph 11.

⁶³ *Id.* at paragraph 13.

⁶⁴ Qualification Directive, *supra* footnote 39, article 10(1)d).

Thus, at this point, an assessment of common fundamental characteristics of the group is necessary. According to J. B. Cooper, ‘environmental refugees’ constitute “a social group composed of persons lacking political power to protect their own environment”. This lack of political power distinguishes them from the rest of the population, leading the State to carry on policies inducing an environmental degradation leading to persecution. The qualification of political power as a protected characteristic that is both innate and immutable is highly debatable. Groups and individuals’ political power varies according to the government in place, international pressure, rights or political policies at stake, etc. Moreover, the nexus attached to persecution for reason of membership in a particular social group demands a demonstration that persecution is aimed at overcoming that ‘protected characteristic’⁶⁵. Furthermore, the existence of a particular group must have existed before the occurrence of the claimed persecution⁶⁶. Thus, an event affecting more strongly a part of the society does not in itself create a social group, even if people affected lack the political power to demand help from the government.

Most authors on the other hand mention the difficulties of distinguishing the root causes for migration and, by the same token, for persecution. This dilemma is one of the ‘breaking-points’ for the inclusion of environmental migrants in the refugee definition.

iv) *Nexus between the persecution and grounds of protection*: The terms ‘for reasons of’ in the definition of refugee of the 1951 Convention has been interpreted in the case law to imply the requirement of a demonstration that the persecution feared by the applicant is rooted in one the protected grounds enumerated further in the definition. This was explained in *Otunez-Tursio v. U.S.A.*⁶⁷ as a requirement that the persecution be “in any way related to” one of the grounds recognized by the 1951 Convention. Thus, the motive of persecution by the persecutor must be “at least in part” for reasons of race, religion, nationality, membership of a particular social group or political opinion.

⁶⁵ Department of Justice, Board of Immigration Appeals Decision In Re Fauziya Kasinga, June 13, 1996, 35 ILM 1145 (1996) (United States).

⁶⁶ *Bernard Lukwago v. John Ashcroft*, United States Court of Appeals for the Third Circuit, 2003 U.S. App. LEXIS 9328.

⁶⁷ Case of *Otunez-Tursio*, *supra* footnote 55.

Persecution and ‘for reasons of’ criteria are the two main problematic aspects of a refugee claim based on environmental disruption. In certain cases, both requirements could be satisfied. But the requirement of a nexus between those two criteria makes it difficult, if not impossible, to grant refugee status generally to ‘environmental migrants’.

v) *Outside the country of nationality*: The meaning of nationality in this context differs from the one given to the ground for persecution. Here, nationality is to be understood in the narrow sense, as referring to citizenship⁶⁸, as opposed to including particular ethnicities or religious, linguistic, cultural communities⁶⁹. In order for an applicant to claim a fear of persecution linked to his country of nationality, it is logical that “it should be established that he does in fact possess the nationality of that country”⁷⁰ since “as long as he has no fear in relation to the country of his nationality, he can be expected to avail himself of that country’s protection”⁷¹. Thus, in order to avail himself of international protection, a refugee has to cross an internationally recognized border.

vi) *Unable or unwilling to avail himself of State’s protection*: The unavailability of protection to a claimant may result from ‘unability’ or ‘unwillingness’. The refugee’s ‘unability’ to avail himself of the protection of his country of nationality involves circumstances that are beyond the claimant’s reach, either because the State is not in a position to offer such protection or because it refuses to grant it to the claimant. Such a denial of protection might serve as circumstantial evidence for persecution⁷². Either way, the ‘unability’ will be determined by the circumstances surrounding each case⁷³.

The only motive justifying a Convention refugee claimant’s ‘unwillingness’ to accept the State’s protection is the fear of persecution. The qualification ‘owing to such fear’ follows the same logic as the nationality prerequisite. It would seem contradictory

⁶⁸ UNHCR Handbook, *supra* footnote 28, at paragraph 87.

⁶⁹ Goodwin-Gill, Guy. *The Refugee in International Law*, 2nd ed. Oxford: Oxford University Press, 1996. at page 45.

⁷⁰ UNHCR Handbook, *supra* footnote 28, at paragraph 89.

⁷¹ *Id.* at paragraph 90.

⁷² *Id.* at paragraph 98.

⁷³ *Id.* at paragraph 99.

for a claimant to be willing to avail himself of the protection of his country of origin while claiming international protection against persecution of that country. Hence, “whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee”⁷⁴.

As underlined by the UNHCR handbook, this criterion is intrinsically linked to the notion of persecution and its fear. Since most causes of environmental migration are due to negligent governmental policies or to a failure of the country of origin to offer protection, this criterion is usually not seen as problematic in the literature pertaining to ‘environmental refugees’.

3.1.2 The ‘Broader Human Rights Aspect’ Argument

After assessing the criteria of the 1951 Convention refugee definition, a majority of authors conclude that environmental migrants do not meet the requisite requirements of article 1A of the Convention. Nevertheless, some argue that environmental migrants should still be offered protection because they face a situation of desperation and helplessness similar to that of refugees. These authors argue that there should be an expansion of the definition so as to make it consistent with the object and purpose of the Convention, on the basis of article 31 of the Vienna Convention on the Law of Treaties⁷⁵.

Supporters of this view generally put forward the history of the creation of the 1951 Convention and of the evolution that made it a major human rights instrument. The mandate given by the Economic and Social Council (ECOSOC) to the special Ad Hoc Committee on Statelessness and Related Problems to draft an instrument implementing and giving effect to articles 14 and 15 of the Universal Declaration on Human Rights⁷⁶

⁷⁴ *Id.* at paragraph 100.

⁷⁵ Vienna Convention on the Law of Treaties of May 23, 1969.

⁷⁶ UN GA/RES/217 A (III) Universal Declaration of Human Rights of December 10, 1948.

(UDHR) resulted in the 1951 Convention⁷⁷. The chronology of events demonstrates that the Convention was adopted not long after the UDHR and not long before the complementary Covenants⁷⁸. Furthermore, the Convention is drafted as a typical human rights convention, first defining the terms and scope of application and then enumerating the rights granted to those covered.

In analyzing the object and purpose of the 1951 Convention, the reference, in the preamble, to the Universal Declaration of Human Rights, the inclusion in the Convention refugee definition of basic human rights as ‘reasons of’ persecution, and the principle of *non-refoulement* constitute the main arguments to conclude that it constitutes a human rights instrument.

Authors follow with an assessment of the right to an appropriate environment as a human right. One of the main paths to recognize environmental rights the status of human rights is to establish a link between environmental degradation and its impact on an established fundamental human right (such as right to life and to freedom)⁷⁹. As to environmental instruments *per se*, the main dispositions are contained in the Rio Declaration on Environment and Development⁸⁰ and in the Stockholm Declaration⁸¹, which are both soft law instruments. The principles set out in the Declarations are read in conjunction with article 25 of the UDHR establishing a “right to a standard of living adequate (...), including food, clothing, housing and medical care”, articles 11 and 12 of the ICESCR further developing the right to a decent standard of living through environmental improvements, and article 47 of the ICCPR addressing the right of utilization of natural resources. Although the right to a healthy environment seems recognized, its content and threshold are still to be defined⁸².

⁷⁷ McAdam, Jane. *Complementary Protection in International Refugee Law*. Oxford: Oxford University Press [monographs in international law], 2007. 283 pp.

⁷⁸ International Covenant on Civil and Political Rights of December 16, 1966; International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

⁷⁹ *Supra* footnote 23, at page 359

⁸⁰ The Rio Declaration, *supra* footnote 13, Principle 1.

⁸¹ The Stockholm Declaration, *supra* footnote 13, Principle 1.

⁸² *Supra* footnote 23, at page 363-364.

After a demonstration of the potentiality of environmental law as a human right, the analogy is drawn between the object and purpose of the 1951 Convention as a human rights instrument and the need to encompass environmental issues of migration in the protection offered.

It is unfortunate that authors do not link the right to environmentally sound conditions of living with other socio-economic rights. Such an analogy, as discussed above, would complement and reinforce the object and purpose approach, as States are reluctant to expand the scope of obligations under the Convention.

3.2 'Environmental Migrants' Do Not Qualify for Refugee Status

Another group of authors addressing the issue of environmentally displaced persons do not consider 'environmental migrants' to be included in the international refugee regime. After analyzing the 1951 Convention refugee definition criteria, they conclude that the text cannot be interpreted as comprising the eventuality of environmentally displaced persons. The two criteria seen as preventing such a qualification are, for the majority, the recognized grounds of persecution and the notion of environmental disruption as amounting to persecution. I will briefly explain why these authors perceive those two criteria as being obstacles to the inclusion of environmentally displaced persons in the definition. Counterarguments for the view of including environmental migrants in the scope of the 1951 Convention protection through the 'broader human rights aspect' will follow.

3.2.1 Arguments Against a Liberal Interpretation of the 1951 Convention

i) *Persecution*: Even when faced with serious environmental degradation that might reach a degree which poses threats to life, ‘environmental migrants’ are not considered persecuted since the governments do not intentionally carry a persecution⁸³. An element of *mens rea* is thus seen a necessary component of persecution. ‘Environmental migrants’ are therefore seen as being able to “usually count on the protection of their State, even if it is limited in its capacity to provide them with emergency relief or longer-term reconstruction assistance”⁸⁴. Commenting on the possibility that omission or failure by the State to act might amount to persecution with a nexus based on ‘particular social group’, D. Z. Falstrom points out that such a connection would require a causal connection of too high a degree to ever realistically happen⁸⁵.

This argumentation seems to recognize the possibility of a level of harm sufficient to constitute persecution through environmental means, but suggests that the lack of the *mens rea* element prevents the qualification of the threat feared as persecution in the legal sense of the term as applied to refugees. It ensues that the persecution criterion is divided in two components: first, a minimum necessary level of harm, and second an intent to persecute. This point of view goes against the generally accepted principle that intent is not relevant in the assessment of persecution even if it can serve as evidence to show a nexus⁸⁶. In addition to blurring the relevant component of each criterion, the inclusion of *means rea* in the persecution assessment also results in the imposition of a higher degree of nexus between the persecution and the protected ground as it requires an ‘act’ to be ‘carried out’ by the government.

⁸³ See Falstrom, Dana Zartner. *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*. 13 Colo. J. Int’l Envtl. L. & Pol’y 1 2002 and *supra* footnote 25 for further discussion.

⁸⁴ Position supported by Tracey King, *supra* footnote 25 and Dana Z. Falstrom, *supra* footnote 83, both citing the UNHCR publication *The State of the World’s Refugees*, www.unhcr.ch/refworld/pub/state/97/box1_2.htm

⁸⁵ *Supra* footnote 83 at page13.

⁸⁶ *Pitcherskaia v. INS*, No. 95-70887, United States Court of Appeals for the Ninth Circuit, 118 F 3rd. 641, June 24, 1997.

It is unfortunately in this trend that the concept of persecution through interference with socio-economic rights evolves. The recognition as a violation of those rights as possibly constituting persecution is growing but it is still rigidly applied. The attempt to enlarge the scope of potential sources of persecution remains linked to the conceptual frame that persecution must constitute an ‘act’ over the individual, which comes close to the ‘single out’ ideology, focusing on the physical harm done to the individual as well as on the “breaking of the relationship between the State and the claimant”, which makes the individual either unable or unwilling to avail himself of his country’s protection. That frame is the main obstacle to expanding the recognition of violations of socio-economic rights beyond necessarily threatening life or freedom or beyond the required ‘complete denial’ of rights, which is defined as a refusal to grant and thus an ‘act’ of the government. In that sense, failure is seen as the decision to take no action or the willful ignorance more akin to negligence than simple failure. This view is usually justified by the argument that it is impossible to determine the occurrence of a violation of socio-economic rights on the basis of the progressive achievement argumentation and sovereignty of States in the allocation of their resources.

ii) *‘for reasons of’*: The grounds of persecution recognized as granting Convention refugee protection are exhaustive. It should be reminded that the only possible way to include ‘environmental migrants’ in the 1951 Convention definition is by demonstrating that they constitute a ‘social group’. Such a qualification is found impossible on the basis that “they do not have the immutable characteristic required to provide refugee status under the existing definition”⁸⁷. Being a victim of the same environmental disruption does not include the intrinsic element required to constitute a social group, according to D. Z. Falstrom. She furthermore responds to the view expressed by J. B. Cooper, stating that “political powerlessness is not an immutable characteristic that will make a person or a group of persons members of a particular social group”⁸⁸. The American court of Appeal has also stated in *Bernard Lukwago v.*

⁸⁷ *Supra* footnote 83, at page 11.

⁸⁸ *Supra* footnote 83, at page 13.

*U.S.A.*⁸⁹ that the particular social group must have existed before the persecution began in order to create a presumption of persecution based on past persecution and that can be used as evidence to demonstrate the well-foundedness of fear of future persecution, a situation which does not exist in the majority of examples of environmentally induced migration.

3.2.2 Arguments Against the ‘Broader Human Rights’ Aspect Argument

According to M. L. Schwartz, the conjunction of certain cases⁹⁰ could support the assertion that States have an obligation to protect their citizens from situations within their jurisdiction that are likely to imperil their life. The difficulties do not arise from the principle of environment as a human right, but from its content. Schwartz underlines that, although such a right has been recognized by some courts, these cases “did not clearly delineate the scope of these rights”, thus leaving the interpretation of such right uncertain⁹¹ which, in turn, precludes the use of the object and purpose argument in order to expand the scope of recognition of refugee status to ‘environmental migrants’.

Foster argues that interdependency and inseparability of rights is such that the assessment of the violation of one right alone should be enough to amount to persecution⁹². This reasoning follows Hathaway’s theory of the human rights violation as an indicator of persecution on the scheme of hierarchization of obligations. Combined with the repeated notion of intertwined root causes of migration, it should be argued that the right to environment is inseparable from the other rights as it serves as their context. Thus, even if not as developed and precise in its content, it should be used in conjunction with other human rights. If the causes are intertwined, then the rights affected will also be. One problem with the assessment of Foster is that she mostly uses the examples of violation of economic rights in a State controlled economy, again incorporating a

⁸⁹ *Supra* footnote 66.

⁹⁰ The author makes an assessment of the *Vasquez Rodriguez* case, Inter. Am. Ct. H. R. 1988, App. VI, at 70-71, OAS/Ser.L/V/III.19, doc.13 (Aug. 31, 1988) and of *Soering v. United-Kingdom*, 161 Eur. Ct. H. R. (ser.1)(1989). See *supra* footnote 23 at pages 362-363.

⁹¹ *Supra* footnote 23, at page 363-364.

⁹² *Supra* footnote 56, at page 105.

requirement of an 'act' to the notion of persecution, thus not really encompassing the idea of failure to protect.

4 Choice of Approaches to Decision-Making Process

Poverty, population growth, economic and political factors, corruption, environmental degradation, education, health problems, etc. all have a circular impact on each other to bring situations to unbearable levels of problems triggering migration. The difficulty or, according to certain authors, the impossibility to dissociate causes of migration because of the intertwining factors of livelihood degradation must be kept in mind in designing a new international instrument. Drafters of a convention for the individual assessment of environmentally displaced people should avoid setting too rigid a definition of the 'environmental migrant' or circumscribing too narrowly situations giving rise to the duty to provide help.

Such duty needs to be complemented by a method of assigning the States' respective responsibilities. A determination of circumstances which would bind the international community as a whole, yet leave member States free to divide among themselves the duties towards environmental migrants would not effectively solve the problem. It would more or less resemble the present situation.

The adoption of an instrument is useless if it is not observed. In that sense, the elaboration of an international instrument and of the obligations it contains is only the first step towards the resolution of the issue. Proper implementation and compliance is another important stage. Report mechanisms, sanctions and incentives are of course important tools to ensure compliance but, as put by R. Mitchell, "[t]he simplest explanation of why a government or other actor regulated by a treaty undertakes a given behaviour is because they believe it furthers their interest"⁹³. Therefore, the adoption of obligations that would be deemed too burdensome would not further the cause of 'environmental migrants'. On the other hand, the adoption of diluted obligations would not improve their situation on a practical level. Thus, in the elaboration of the new

⁹³ Zaelke, Durwood, Kaniaru, Donald & Kružíková, Eva (Eds). *Making Law Work; Environmental Compliance & Sustainable Development*. London: Cameron May International Law & Policy, 2005. at page 85.

convention, the obstacles retaining most States to act at present need to be identified and evaluated in order to prevent reasons for non-compliance.

Most developed countries funding aid through international organizations fear a flow of migration⁹⁴ and are concerned about high levels of direct aid funding obligations arising out of international law⁹⁵. But there is a consensus that the elaboration of environmental solutions assessing the root causes of migration would help avoiding those problems. Already in 1993, the President of the Climate Institute in Washington stated “if the developed nations truly want to protect themselves from massive refugee flows and aid expenditures, the sensible response is to address the problem now by recognizing long-term trends”⁹⁶.

As appealing as the formulation of obligations in a manner similar to the current refugee regime sounds, environmental migration is deeper rooted and its causes are complex to pinpoint. An answer modelled on fixed circumstances such as those prevailing in the refugee regime would not encompass the whole problem, but would at the best provide a temporary solution, pushing its resolution in time. On the other hand, even in cases where environment could be isolated as the specific cause for migration, difficulties related to international environmental law (IEL) remain, notably identifying the State or actor responsible for an environmental damage. IEL being part of public international law (PIL) and therefore having a responsibility regime based on the balance of probability standard, liability is highly problematic. Moreover, the standard is heightened in this specific field by an inflated threshold of proof dependent on the provision of sufficient scientific evidence to fulfil such standard. This obstacle constitutes one of the elements which prevent attributing liability for a migration trend arising from an environmental damage to one specific State, therefore precluding the imposition of reparation either through funding, through *in situ* restoration of the environment to its original level of quality or through the resettlement on its territory of the displaced persons.

⁹⁴ *Supra* footnote 6 and *supra* footnote 17.

⁹⁵ *Supra* footnote 6.

⁹⁶ Interview of G. McCue with John Topping in March 1993, *supra* footnote 6, at page 177.

As both systems are, at the moment, unfit to deal with ‘environmental migrants’, the need for a complete solution enhances the importance of the decision-making method in the search of a durable solution. The determination and creation of specific duties on the basis of environmental and human rights or a standard or model designed specifically for environmental migration is surely a decision of prime importance. But in order to be efficient, an instrument must anticipate the potential obstacles to its practical use, affecting States’ compliance. As both refugee and environmental fields of law are mostly translated in administrative law at the national level and depend on efficient implementation, the assessment of standards of proof, including modes of evidence, as well as of principles elaborated in order to overcome the specific challenges of both regimes in the granting of protection will help gain a broader perspective on their respective strengths and weaknesses and provide a better context to decide on this issue.

4.1 Individual decision-making approach

The assessment of an individual claim presented by an ‘environmental migrant’ to authorities outside his country of origin under the new instrument would require the claimant to show that he personally meets the criteria for the protection offered by the instrument. In order to claim entitlement to the obligations and duties triggered by the convention, the claimant would need to show that the environmental situation is particularly affecting him to the level of the pre-established threshold.

As an individual approach would be similar to a claim based on the refugee model, an assessment of the potential difficulties of environmental law cohabitating with the refugee law decision-making process is necessary to avoid creating obstacles in the new instrument.

In assessing this potential impact of IEL on an asylum claim, the standard of proof must be distinguished from the necessary evidence one needs to demonstrate in order to satisfy such standard. The former relates to the threshold to meet in order to get

recognition of a status, either as a Convention refugee or as a victim of a breach of an obligation, and the latter relates to the evidence pertaining to the elements needed to fulfill the said threshold.

4.1.1 Well-Founded Fear

It is a generalized standard in law that the burden of proving a claim lies with the claimant. One particularity of asylum claim is the sharing of this burden between the applicant and the authorities of the host country⁹⁷. This particularity would also likely apply in the environmental migrant regime. To better understand this repartition of burden, it may be useful to distinguish the burden of persuasion from the burden of providing evidence⁹⁸.

As stated in Chapter 1, the term “well-founded fear” implies a subjective and objective assessment. This twofold aspect of the fear often divides the burden of producing the evidence between the claimant and the host country decision-making agency

The subjective component of the assessment is contained in the element of fear constituting the state of mind felt by the claimant. Thus, he has the burden of producing evidence to satisfy the decision-maker of the existence of a fear which is reasonable. Due to the particularity of this intrinsically personal criteria and the difficulty to prove a state of mind, the testimony of the claimant will be sufficient to prove that element if found credible by the decision-maker. Inclusion of the personality of the applicant in the determination of the existence of such fear⁹⁹ keeps its relevance in the case of environmentally displaced persons as not all individual have the same threshold of resistance in face of environmental degradation or disaster.

⁹⁷ UNCHR Handbook, *supra* footnote 28, at paragraph 196.

⁹⁸ Zahle, Henrik. *Evidentiary Assessment*. in Noll, Gregor (Ed). *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*. The Hague: Martinus Nijhoff Publishers [The Raoul Wallenberg Institute Human Rights Library], 2005. 233pp.

⁹⁹ UNHCR Handbook, *supra* footnote 28, paragraph 40-41.

In order to be well-founded, the fear alleged in the refugee regime requires the existence of an objective risk that the applicant would be persecuted if returned to his country of origin. Because “the feared persecution must be based on a factual situation that makes the fear reasonable”¹⁰⁰, it must be evaluated in light and on the basis of the available information on the situation prevailing in the country of origin. Due to his particular situation, the applicant is generally incapable of providing corroborating information. This burden is therefore taken on by the authorities, who have access to reports of governments, delegations and NGOs as well as to political information. The main assessment being the fear felt by the applicant, the information provided by the host country State agent to assess its well-foundedness should have a complementary role, serving as a supplementary and perhaps counter purpose¹⁰¹.

‘Environmental migrants’ find themselves in the same vulnerable situation as asylum seekers. Thus, the motives for the sharing of burden of proof, namely that the claimant does not have access to documentation and means of proof, is analogous if not increased. Even with an easier access to basic environmental data, such as information on catastrophes and disaster, gathering and mostly understanding and conveying the consequences of the circumstances described in such data, will in most cases be above the capacity of the average claimant, as even scholars and politicians establishing the standard can hardly predict consequences of environmental damage. Thus, the sharing of the burden of proof stays highly relevant as authorities not only have access to reports from departments and embassies as well as from NGOs and other organizations on the field, but they also have access to more specific information within the framework of Multilateral Environmental Agreements (MEAs) containing obligations of research and information-sharing through the Secretariat¹⁰², and more confidential information on the environmental impact of private actors based on national legislation (such as the means

¹⁰⁰ *Regina v. Secretary of State for the Home Department v. ex parte Sivakumar*, [2003] UKHL 14.

¹⁰¹ Position supported by Zahle, Henrik, *supra* footnote 98.

¹⁰² Such as World Charter for Nature, paragraph 18, Stockholm Declaration, *supra* footnote 13, principle 20, UNCLOS, *supra* footnote 13, articles 119(2), 200-202; FCCC, *supra* footnote 13, article 4(1)(h); CDB, *supra* footnote 13, articles 14(1)(c) and 17; Vienna Convention for the Protection of the Ozone Layer of Marc 22, 1985, article 2(2)(a) and its Montreal Protocol on Substances that Deplete the Ozone Layer, article 7 and 9.

of disposal of waste, the nature and quantity of the toxins, fumes and others release, results of impact assessment carried on, etc.). Furthermore, the parties may retain the services of experts to explain the impact of scientific data as well as its potential link and combined effects. The possibility of a neutral international body making the assessment of situation of environmental disruption leading to international protection will be further discussed below.

The burden of persuasion completes the burden of proof in determining the level of evidence the parties have to present in order to meet the threshold of the standard of proof. This leads to the question of what evidence is needed to objectively demonstrate that the claimed fear is well-founded.

In a regime applicable to environmental migrants, just as in the case of Convention refugee claimants, the applicant's statement will be the starting point of the assessment of the well-foundedness of the alleged fear¹⁰³. Thus, the principles relating to the assessment of Convention refugee claims could apply to claims filed by environmental migrants under a new convention. In order to qualify a statement as credible, one must place it in the broader context of a communication process between the decision maker and the applicant. In such process, the decision-maker must make abstraction of his own cultural references and traditions to evaluate the trustworthiness of the applicant and accept that he may not fully understand certain behaviors without it necessarily amounting to an incredible statement. Moreover, the decision-maker is to assess the veracity of facts presented to him by an applicant pleading his own cause, in a context where the usual tools to assess credibility are lacking¹⁰⁴. The difficulty of determining the tolerable amount of inconsistencies leads to suggest that the decision-maker, in its assessment, "should be open to trust not only tragic but even surprising statements that are not without discrepancies"¹⁰⁵. This acceptance of facts beyond the scope of comprehension of the decision-maker plays a major role in environmental

¹⁰³ UNHCR Handbook, *supra* footnote 28, paragraph 37 and 195.

¹⁰⁴ Zahle, *supra* footnote 98, quotes namely the "repetitive experiences with the person at hand", a broader familiar context, and situations relating to a known pattern, at p.16

¹⁰⁵ Zahle, *supra* footnote 98, at page18.

assessment. The understanding of a chain of effects in such a scientific based field has shown to be a challenge in other areas of international law where decision makers had to evaluate evidence presented by environmental experts. That issue is, for example, problematic in adjudication of claims pertaining to the environmental exception in the GATT¹⁰⁶ as the panel and appellate body of the World Trade Organization are composed mostly of trade experts. In a context of communication as the one in refugee law, this difficulty would either require the decision-making panel to have an expertise in environment and scientific data analysis and an acceptance of facts that could be uncertain and shocking.

At the stage where the claimant is deemed credible, and because of the difficulty of obtaining corroborating documents and testimonies concerning the claimant's personal situation, the concept of 'benefit of the doubt', imported in asylum adjudication, might also apply to 'environmental' claimants. It has been adapted by leading to the "acceptance of applicant's statements which (...) might under other conditions raise doubt"¹⁰⁷. It is the 'benefit of the doubt' that gives the credible and reliable statement status of sufficient proof.

As mentioned in Chapter 2, fear of harm or hardship in an environmental context is a very difficult assessment. Containing an element of undesirability of a future situation, the emotion of fear has to be well-founded or, in other words, consistent to what a 'rational and objective man' in the same situation would feel. With regard to environment, where the consequences of slow onset disruption are disputed, and with the unforeseeable character of certain acute onset disruptions and the difficult analysis of the impact of foreseeable environmental damage, how is it possible to prove an objectively well-founded fear?

4.1.2 Serious Hardship

¹⁰⁶ General Agreement on Tariffs and Trades, as of 1994.

¹⁰⁷ Zahle, *supra* footnote 98, at page 18.

As explained in Chapter 2, persecution, in refugee law, takes many forms and is highly dependant of a case-by-case analysis. Some common criteria have been demonstrated to, at least, sketch a delimitation of what may constitute persecution and its means of proof. At this point, the question is not so much what constitutes persecution as to what level of harm is necessary in order to amount to persecution. The question is the same with regard to the level of harm required to trigger ‘environmental migrant’ protection.

As for the well-founded fear, the threshold of persecution in refugee law cannot be formulated mathematically, often taking the form of phrasing such as to “what a reasonable person would deem offensive”¹⁰⁸. This might be explained by the informal presence of a subjective aspect in the assessment of this objective criterion since the threshold of each individual to cope and endure pain, sufferance, threats, and harm, be it because of persecution or because of environmental damage, will vary. In that sense, V. Vevstad underlines, in her discussion of persecution as a violation of human rights, the more difficult issue arising from the violation of those rights which are neither seen as fundamental nor non-derogable, concluding on the example of harassment that “[i]t is often difficult to determine when ‘harassment’ becomes ‘persecution’, and is therefore one area in which States tend to set a too high threshold on the interpretation of what constitutes persecution”¹⁰⁹. This is certainly true in the case of environmental disruption. Even with the increasing recognition of decent environment as a human right, it has not reached the level of recognition as a possible source of persecution as harassment. It may therefore be inferred that the threshold of environmental degradation necessary to amount to persecution be unrealistically high to effectively deal with the problem. Even in the growing trend recognizing violation of socio-economic rights as potentially amounting to persecution, as discussed above, persecution is nonetheless a concept that does not seem apt to delimit environmental situations justifying the displacement of migrants. In opting for the creation of a new instrument to effectively encompass the variety of sources of migration due to environmental disruption, a concept of wider application seems

¹⁰⁸ Pitcheskaia case, *supra* footnote 86.

¹⁰⁹ Vevstad, Vigdis. *Refugee Protection; A European Challenge*. The Norwegian Refugee Council, 1998. at page 70.

required. Thus, it could be established that the claimant needs to demonstrate a fear of ‘serious hardship’ on his conditions of living, work, health, resources, etc. caused by environmental disruption.

In that sense, the special situation of civil war is worth mentioning because it shares some similarities with the context of vast environmental disruptions triggering migration flux. The threshold of harm amounting to persecution will rise in the civil war context as a minimal level of suffering must be expected by the population from the general situation of conflict¹¹⁰ since all individuals affected face similar misfortune and the whole population could therefore be considered as a victim. The need for discrimination in the infliction of the persecution can be drawn from this reasoning leading to the need of showing a “differential impact” or a “fear of persecution above ordinary risks of clan warfare”¹¹¹. This particular situation, which is due to the general chaos prevailing in time of war, is similar to most of environmental disruption triggering migration in the sense that the victims are not ‘selected’ for persecution by tsunamis, desertification, global warming and rise of sea level, famine, drought, natural catastrophes, etc. Thus, in cases where natural catastrophes or environmental degradation affect a whole population, an individual approach would require the claimant to demonstrate that he fears ‘serious hardship’ of a higher degree than the minimal level expected to be tolerable in such a situation.

¹¹⁰ *Regina v. Secretary of State for the Home Department v. Ex Parte Adan*, United Kingdom House of Lords, 19 December 2000.

¹¹¹ *Id.*

4.1.3 Grounds of ‘serious hardship’

The nature of the causes of environmental migration will affect parts of the population globally in the sense that, as mentioned above, it does not select individuals. It might then be said that the affected region will create a group that might potentially suffer ‘serious hardship’. Thus, a claimant alleging serious hardship would have to demonstrate its membership in this group.

In refugee case law, social group is subject to criteria ensuring the particularity of a group and the belonging of the claimant to this group. The applicant basing his claim of persecution on this ground must demonstrate three basic elements: first, he must identify a particular group as constituting a ‘social group’ in conformity with the ‘protected characteristics’ and ‘social perception’ criteria. In this assessment, the special situation of the applicant must be kept in mind, allowing an analogy with the shared burden of provision of evidence for the well-founded fear and, thus, allowing the identification of a particular social group to be based on the testimony of the applicant, complemented by the general situation and information available to the authorities. The assessment of the ‘seriously affected group’ could be inspired of this model, requiring the claimant to identify as a member of a group that suffers ‘serious hardship’ based on his testimony that should be supported by the information available pertaining to the situation. As in a refugee claim, no requirement of cohesiveness or of effective association amongst the members of the group would be necessary¹¹².

Finally, the migrant would need to show that the ‘serious hardship’ he encounters is attributable to environmental degradation. Such nexus, at first quite similar to the one present in refugee context, would encompass the negative effects of environmental disruption on living conditions and would thus be as wide as the ‘serious hardship’ criteria in its application.

¹¹² UNHCR Handbook, *supra* footnote 28, paragraph 15.

4.2 Global Assessment Basis Approach to Decision-Making

Because only a fraction of victims of environmental situations can be expected to be able to reach out to international protection on an individual basis, the international community could also envisage to design, either as an alternative or as a complementary solution, an international framework for providing assistance to populations who face severe hardship due to environmental damage or catastrophes. At present, States contribute to reconstruction after environmental disasters on a case-by-case basis, but given the common responsibility of industrialized States for degradation of the environment, a more structured and binding approach should be planned.

An assessment based on specific environmental situations would come close to a decision based on environmental law as it would concern itself with a particular situation of environmental disruption and its impact on the population. Many issues would need to be discussed in such a context, such as the rights of victim populations, the obligations and duties of States and the sharing of those duties. In order to enlighten a reflection on a approach to adopt, three main issues may be examined, namely a) the means of qualification of a situation giving rise to the international assistance; b) the method of assessment of the group qualifying for protection; and c) the host country, as the case may be, as well as the international sharing of the responsibilities towards a given group.

4.2.1 Situation Assessment

Situations qualifying for international protection could be divided into slow onset environmental degradation, and sudden environmental disruption. The predetermined characteristics of situations triggering application of the instrument would have to be broad enough and easily modifiable through an efficient amending system in order to allow it to evolve and adapt to environmental evolution. The fulfilling of the established criteria would further need to be assessed on the international level by an impartial body

to legitimately impose obligations without too many risks of dispute. This role could be played by the Conference of the Parties (COP), which could also have the power to make proposals for amendments, since it would be best placed to see the difficulties encountered. In this sense, COPs usually have vast powers to ensure the good functioning of the MEA in question¹¹³.

An objective assessment of situations by the impartial body would require objective criteria. As it was mentioned above and repeatedly addressed in the literature pertaining to environmentally triggered migration, the challenge of such an assessment lies mostly in the intertwined causes of displacement. Thus, the links between all relevant factors must be kept in mind in the adjudication of which situations require help and protection. The parameters of a ‘disruption threshold’ could therefore be based in part on the already existent various indexes of special UN agencies and other specialized organizations, such as the World Bank. Most of them are already compiled for the purpose of serving the millennium development goal data indicators¹¹⁴.

Some situations leading to displacement are, and might continue to be, caused by governmental policies¹¹⁵. Thus, the convention should specify if the affected country’s government approval be necessary in order to intervene. If so, the humanitarian theory pleading loss of sovereignty in cases of major human right violations on the basis of the incapacity of governmental protection could be transposed to environmental degradation situations in order to justify intervention; however, this theory needs to be more universally accepted. The sovereignty barrier is at the basis of the weak enforcement of international economic, social and cultural rights and at the foundation of the argument of ‘progressive achievement’ to justify the discretionary management of resources.

¹¹³ When the MEA does not explicitly grant such power to the COP by a residual catchphrase such as the one present in FCCC, *supra* footnote 13, article 2(m) and CBD, *supra* footnote 13, article 23(4)(i) “Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of the experience gained in its operation”, MEAs usually grant vast powers such as to adopt its own rule of procedure, protocol, budget, amendments, annexes, and establish subsidiary bodies.

¹¹⁴ <http://mdgs.un.org/unsd/mdg/default.aspx> ; see annex 1 for a list of the indicators and of the organizations providing data.

¹¹⁵ Such as deforestation, development projects, non-implementation of very low level of environmental regulation, etc.

Although this trend of interpretation is slowly overturning, clarification of such theory, or at least its recognition, would be an improvement and surely avoid many potential problems. A wider recognition could enable the COP to determine when a situation reached the level of disruption amounting to a loss of sovereignty, calling for intervention and international assistance.

4.2.2 Group Determination

The identification of a particular group being closely linked with the determination of the qualification of a situation, such assessment could be made by the COP simultaneously with the situation determination process.

The demonstration of the membership in the affected group raises the issue of determining how such a decision would be made. Would such an assessment be made in the country of origin, before departure with humanitarian aid getting migrants to destination or would it be a frontier decision where each migrant would be required to show he belongs to such a group and is a victim of the situation? This latter option is quite similar to an individual assessment with group criteria, thus not really lightening the administrative burden, one of the main advantages of a group situation assessment. In a group assessment approach, one possibility would be for the migrants to simply present themselves at one designated office (e.g. at a UNHCR camp or government base) and show they possess the nationality.

To identify migrants solely seeking economic opportunities, States might still want to impose parameters demanding that migrants demonstrate the relationship between their migration or displacement and the environmental situation prevailing. Attention should be given not to slip back in the refugee closed compartmental model of the nexus requirement, unduly restraining protection because of a fear of a flow of migration. This recurrent fear is also as the basis of the hesitancy to accept 'environmental migrant' on a State territory. As mentioned above, the impact of refugee camps can have disastrous consequence, which is one of the reasons States are reluctant

to take them in. However, particularly in situations of sudden environmental disruption where migrants often lose all possessions, the identification with certainty of certain migrant will be almost impossible and, thus, they should be granted the benefit of the doubt after certain verification.

4.2.3 Host Country and International Responsibilities

In the refugee regime, the country where the claim is made will generally assess it and become the host country of the refugee if the request is granted. Although certain principles redirect the asylum seeker in given situations¹¹⁶, it can be said that the refugee 'chooses' his country of refuge as opposed to cases of massive displacement of population, such as in the Iraqi and Sudanese conflicts, where the neighboring countries usually accept the setting up of refugee camps on their territory.

The nature of environmental migration being more similar to those massive displacements of population situation, the transposition of the situation usually draws a picture of the arrival on the territory of a great number of migrants. Such an assumption constitutes one fear at the basis of current inaction. Since such mass arrival of population is quite improbable in countries other than the neighbours of the State of departure, the burden could be composed of different obligations. Neighboring countries will likely not be able to assume responsibility for all migrants, as some regions are more prone to environmental migration than other. Poverty being a root cause of environmental migration, the countries most affected, and thus their neighbours, will often be countries who lack the means to take charge. The obligation of receiving migrants could be taken on by one State while others' could be the provision of help through other means, as for example the funding of resettlement reconstruction in host countries. Furthermore, the

¹¹⁶ Principle of third safe country and first country of arrival, as opposed to country of transit, present in EU directives as well as "take back" and "take charge" mechanisms present in the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Dublin II Regulation).

administrative burden attached to migration could also be shared through financial contribution and technical cooperation.

The designation of a specific country receiving migrants who flee a given situation could be based on a voluntary basis complemented by a responsibility mechanism. To avoid a solution tainted with the import of international environmental law liability, a special internal regime of strict environmental liability could be established to help overcome the problem of remoteness of liability by reducing the threshold of causal link needed between a given environmental degradation and a breach of a State's obligation in order to establish a fault and, thus, a State's responsibility. In this sense, the system could be based on the prevention principle to diminish the negative impacts of the principle of sovereignty of States in order to limit the damages that a State could theoretically carry on its own territory. Following the logic that prevention is better than cure, this principle requires that action be taken at an early stage to prevent damages to the environment, prohibiting activities or actions contrary to standards and norms of international law. Therefore, it might impose to a State the obligation to prevent from damaging its own environment and thus, come to limit the principle of sovereignty over natural resources that may otherwise lead to excess and cause global damages¹¹⁷. Such a principle would also press on the implementation of the socio-economic rights, as it would concern international community before the total denial or a degradation of the situation to a point of no return.

The elaboration of such a system could furthermore serve as an incentive to comply with the environmental obligations contained in the convention. A report mechanism following the implementation and compliance with the different types of obligations contained in the new convention could use different kinds of incentive. Non-compliance with a 'negative' obligation, or 'obligation of result', could entail liability in the internal strict responsibility regime and serve to motivate States in their application of

¹¹⁷ Philippe Sands. *Principles of International Environmental Law*. Cambridge University Press, 2003. at pages 246-247.

their ‘obligations of means’ addressing the root causes of migration, namely ICESCR obligations.

It could moreover be an opportunity to apply the common but differentiated responsibility principle in a new way. Recognizing the different role played by developed countries and countries in development in the deterioration of the environment, this principle calls for a distinction in the nature and degree of obligations and, when read in conjunction with the co-operation principle, calls for a transfer of technology and capitals as well as of technical assistance to help countries in development comply with their obligations. Such a principle could serve to divide the different burdens related to a situation where no ‘fault’ attaches responsibility to particular States.

Furthermore, the gains deriving from the polluter pays principle could be used at the global level to help international funding such as the CERF. Although described as closely related to environmental standards as well as to civil and State liability applicable rules, and being dependant on problematic factors such as the valuation of direct and indirect environmental damages, contributing to a fund that would help lighten the monetary obligations of States could motivate them to make more proper use of this principle often unused for political reasons.

Finally, as is the case at present but in a more structured way, member States could be called upon to contribute to the resolution of environmental damages through the COP, regardless of whether their liability in a given situation is at issue or not.

4.3 An Integrated Solution

Those two proposed options to deal with ‘environmental migration claims’ show common characteristics shared by those *lex specialist*. Both depending strongly on ‘soft-law’ such as guidelines and recommendations, reports, adoption of principles and interpretation, they face similar challenges. They struggle with implementation, as shows for example the lack of consistency found in each domain at national level. The system of adjudication of asylum claims is often strongly criticized for the inconsistencies¹¹⁸, in its interpretations from one State to another and from one system of law to another and in the application of the refugee definition criteria, just as in environmental law, which faces major inconsistencies in the adoption of regulations having the same threshold between States, and, if adopted at all, leading the ‘free-riders’ to push the ‘race to the bottom’¹¹⁹. Both options also present problems enforcing compliance with international standards. Those similarities suggest challenges to come in either model of assessment, such as the determination an eligible group of environmental victims.

Asylum adjudication is described by Gregor Noll as being a double hybrid, incorporating features of both inquisitional and adversarial models as well as adapted concepts from administrative and penal procedure¹²⁰. Fragmentation and inconsistencies in refugee adjudication scheme are explained mostly by “the freedom of states to choose a procedural system of their liking (...), [thus] the core issue of evidentiary assessment are sparingly addressed.”¹²¹. It is thus interesting to examine the possibility of a hybrid refugee and environmental procedural system aiming at international consistency,

¹¹⁸ Greg Noll argues that “the issues related to evidentiary assessment in asylum cases are exposed to a higher degree of fragmentation and indeterminacy [at international level] than what applies to other areas of adjudication, and, second that this fragmentation and indeterminacy is reproduced rather than remedied in international law and scientific research”; Noll, Gregor (Ed). *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*. The Hague: Martinus Nijhoff Publishers [The Raoul Wallenberg Institute Human Rights Library], 2005. 233pp.

¹¹⁹ The ‘race to the bottom’ is a phrase used in international environmental law to describe the phenomenon of levelling down in legislation and regulation in order to prevent the moving out of investment by companies. Those countries not applying international norms and standards in order to attract investments are said to be ‘free riders’.

¹²⁰ Gregor Noll, *supra* footnote 118, at page 3.

¹²¹ *Id.* at page 5.

thriving to overcome common weaknesses through a combination of both regimes as well as through the inclusion of other relevant concepts. Could the strength of both domains of international public law, dependant on an efficient and complex implementation at the national level, through administrative law, and struggling with the present challenges of environmentally induced migration, create a new system that is complete or is the import of weaknesses unavoidable?

In my opinion, a convention dealing with environmental issues of a magnitude forcing population to be displaced, as well as with the rights of individuals displaced and obligations of the States towards them is no doubt a human rights instrument. Thus, the debate about which particular field should be retained as offering the appropriate solution is not compulsory. As a decent environment is gradually officially recognized as a human right and refugee law has long been determine as such, there are few reasons why both aspects of those two fields, that is through the individual and the global approaches, could not complete one another. As suggested by D. Falstrom, any new convention could adopt the skeleton of CAT, creating rights and obligations inspired by the *lex specialist* of concern by the intertwined root-causes of migration.

Thus, a new convention, as stated, could set up an international body, the Conference of Parties (COP), which would assess global environmental situations giving rise to international protection and determine the duties of the members States with regard to such a situation and the victims thereof. The convention could also include provisions allowing for the individual assessment, as in the 1951 Convention refugee regime, of environmental migrants who were able to leave their country and reach signatory States to seek individual asylum.

The examination of an individual decision-making process based on the Convention refugee model showed the difficulty of requiring environmental migrants to establish a fear directly linked to the persecution concept, which is anchored by the necessity of an 'act' of the government. This obstacle, which sets too restrictive a limit to the vast spectrum of environmental degradation, could be circumvented by a more simple

and flexible ‘serious hardship’ criterion, with regard to which a claimant would have to demonstrate that he is a victim of a situation which has been found to meet the ‘disruption threshold’ by the COP. The objectivity of the fear in a field tinged with uncertainty would also gain from a more universal determination by the COP, composed of experts. COP’s decisions would further be based on information that could be made accessible to an international organization’s secretariat.

As for the global determination by the COP of a particular group affected by a qualifying situation, it could draw from the refugee regime, which has already experienced group situations and developed certain concepts regarding mass flux movements, such as ‘good offices’ and ‘persons of concern’. Those concepts could be sources of inspiration in manner to deal with current challenges. The ‘good office’ concept was elaborated to deal with situations where it is difficult to apply an individual assessment or where the flight is based on political reasons but the concept of persecution is inappropriate. It results in practice in the *prima facie* granting of temporary status of refugee to a specific group in a given situation, by applying more flexibly the Convention criteria.

The first and foremost process could thus be a global assessment by the C.O.P. of the particular situation and a determination of whom is or is likely to be seriously affected, meeting the pre-established threshold of disruption and creating a *prima facie* application of the protection provided in the instrument. Based on reports required of the countries, the location of the environmental disruption, the application of the ‘internal liability regime’, the C.O.P. could then designate the host country or countries and other obligations linked to the migration and settlement. This would give the C.O.P. a quasi-judicial aspect, but such a body would not be a novelty. It would further have the legitimacy of representation of the different signatory States.

The second process, offering individuals the possibility of seeking asylum on their own, as in the Convention refugee regime, would give a complementary role to adjudication systems already present in States. With a previous global assessment by the

COP, an assessment of individual claims at national level would serve the purpose of probing the serious hardship faced by the claimant and of preventing the inclusion of economic migrants, though identification may still be an issue. In such an assessment, it would be important to take from the 1951 Convention refugee model so as to put emphasis on the communication process in which the credible claimant would be given the 'benefit of doubt', and encourage decision-makers to accept facts or testimony which cannot be clearly proven.

Finally, when dealing with a situation of war, attention should be given to make sure not to import the high threshold of environmental damage in the attribution of obligations to different countries, as IHL would be the main *lex specialist* applicable in time of armed conflicts.

5 Conclusion

‘Environmental refugees’ is a controversial legal term used to describe the problematic situation of people forced to migrate due to environmental causes. This *de facto* situation finds itself in a lack of *de jure* context. This leads to a set of interesting and complex legal issues, such as the existence of a duty on States to mitigate the root causes of environmental migration and to take charge of the persons forced to displacement, as well as the current and future status of those migrants and the rights they should be recognized under international law.

‘Environmental migrants’ are not recognized as refugee at present in international law and are thus considered on the same level as economic migrants. Nonetheless, they are in deep need of protection from the international community as their country of origin is often unable, for multiple reasons, to do so. The path proposed to offer such protection to the environmentally displaced persons varies in the literature: the pleading of their inclusion in the current refugee regime by broadening its interpretation; attempts to deal with the problem using available tools in international law; or suggesting the adoption of a new instrument based on different models and designed specifically to address the problem.

In my opinion, a new instrument constitutes the best solution to fully encompass the problem. The decision of modeling a new convention on refugee law, environmental law or human rights law needs to be carefully thought. An assessment of the hypothetical implementation of a convention based on either refugee or environmental law in a daily basis decision-making process reveals the weaknesses and forces of both models. On the one hand, the refugee regime is too restrictive to apply generally to environmentally induced migration. Even though it may encompass certain situations, the concept of persecution is still too limited to appropriately address the problem of ‘environmental migrants’. Furthermore, the constitution of a social group represents another obstacle as the affected migrants do not share common and innate characteristics that differentiate them in the society. Lastly, due to intertwining of causes related to environmental

degradation and leading to migration, the demonstration of a nexus between the persecution through environmental means and the membership in a particular group is highly problematic. As for the environmental branch of international law, it is characterized by its deficient enforcement and struggle with responsibility allocation. The high requirements of IEL liability prevent protection based on responsibility. This leads to propose combining both regimes in the broader context of a human rights instrument in an attempt to overcome one system's weaknesses through the other's strengths. This would not amount to such a novelty as those two *lex specialist* have a lot of points in common and are both more flexible than they first appear. Indeed, both are related to the human rights branch of international law, and both are of a hybrid type of law, including aspects of administrative, penal and trade law as well as being inquisitorial and adversarial. The usual creativity and flexibility of MEAs could cohabit with relevant adapted notions of refugee law in a human rights convention elaborating obligations on States as well as rights and conditions for the beneficiaries of international protection. Such an instrument would promote and gain from the growing recognition of socio-economic rights in the refugee regime.

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Annex: Millennium Development Goals Indicators

Effective 8 September 2003

Millennium Development Goals (MDGs)	
Goals and Targets (from the Millennium Declaration)	Indicators for monitoring progress
Goal 1: Eradicate extreme poverty and hunger	
Target 1: Halve, between 1990 and 2015, the proportion of people whose income is less than one dollar a day	1. Proportion of population below \$1 (PPP) per day 2. Poverty gap ratio [incidence x depth of poverty] 3. Share of poorest quintile in national consumption
Target 2: Halve, between 1990 and 2015, the proportion of people who suffer from hunger	4. Prevalence of underweight children under-five years of age 5. Proportion of population below minimum level of dietary energy consumption
Goal 2: Achieve universal primary education	
Target 3: Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling	6. Net enrolment ratio in primary education 7. Proportion of pupils starting grade 1 who reach grade 5 ⁱⁱ 8. Literacy rate of 15-24 year-olds
Goal 3: Promote gender equality and empower women	
Target 4: Eliminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015	9. Ratios of girls to boys in primary, secondary and tertiary education 10. Ratio of literate women to men, 15-24 years old 11. Share of women in wage employment in the non-agricultural sector 12. Proportion of seats held by women in national parliament
Goal 4: Reduce child mortality	
Target 5: Reduce by two-thirds, between 1990 and 2015, the under-five mortality rate	13. Under-five mortality rate 14. Infant mortality rate 15. Proportion of 1 year-old children immunised against measles
Goal 5: Improve maternal health	
Target 6: Reduce by three-quarters, between 1990 and 2015, the maternal mortality ratio	16. Maternal mortality ratio 17. Proportion of births attended by skilled health personnel
Goal 6: Combat HIV/AIDS, malaria and other diseases	
Target 7: Have halted by 2015 and begun to reverse the spread of HIV/AIDS	18. HIV prevalence among pregnant women aged 15-24 years 19. Condom use rate of the contraceptive prevalence rate ⁱⁱⁱ 19a. Condom use at last high-risk sex 19b. Percentage of population aged 15-24 years with comprehensive correct knowledge of HIV/AIDS ^{iv} 19c. Contraceptive prevalence rate 20. Ratio of school attendance of orphans to school attendance of non-orphans aged 10-14 years
Target 8: Have halted by 2015 and begun to reverse the incidence of malaria and other major diseases	21. Prevalence and death rates associated with malaria 22. Proportion of population in malaria-risk areas using effective malaria prevention and treatment measures ^v 23. Prevalence and death rates associated with tuberculosis 24. Proportion of tuberculosis cases detected and cured under directly observed treatment short course DOTS (Internationally recommended TB control strategy)
Goal 7: Ensure environmental sustainability	

Target 9: Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources	25. Proportion of land area covered by forest 26. Ratio of area protected to maintain biological diversity to surface area 27. Energy use (kg oil equivalent) per \$1 GDP (PPP) 28. Carbon dioxide emissions per capita and consumption of ozone-depleting CFCs (ODP tons) 29. Proportion of population using solid fuels
Target 10: Halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation	30. Proportion of population with sustainable access to an improved water source, urban and rural 31. Proportion of population with access to improved sanitation, urban and rural
Target 11: By 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers	32. Proportion of households with access to secure tenure

Goal 8: Develop a global partnership for development

<p>Target 12: Develop further an open, rule-based, predictable, non-discriminatory trading and financial system</p> <p>Includes a commitment to good governance, development and poverty reduction – both nationally and internationally</p> <p>Target 13: Address the special needs of the least developed countries</p> <p>Includes: tariff and quota free access for the least developed countries' exports; enhanced programme of debt relief for heavily indebted poor countries (HIPC) and cancellation of official bilateral debt; and more generous ODA for countries committed to poverty reduction</p> <p>Target 14: Address the special needs of landlocked developing countries and small island developing States (through the Programme of Action for the Sustainable Development of Small Island Developing States and the outcome of the twenty-second special session of the General Assembly)</p> <p>Target 15: Deal comprehensively with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term</p>	<p><i>Some of the indicators listed below are monitored separately for the least developed countries (LDCs), Africa, landlocked developing countries and small island developing States.</i></p> <p><u>Official development assistance (ODA)</u></p> <p>33. Net ODA, total and to the least developed countries, as percentage of OECD/DAC donors' gross national income</p> <p>34. Proportion of total bilateral, sector-allocable ODA of OECD/DAC donors to basic social services (basic education, primary health care, nutrition, safe water and sanitation)</p> <p>35. Proportion of bilateral official development assistance of OECD/DAC donors that is untied</p> <p>36. ODA received in landlocked developing countries as a proportion of their gross national incomes</p> <p>37. ODA received in small island developing States as a proportion of their gross national incomes</p> <p><u>Market access</u></p> <p>38. Proportion of total developed country imports (by value and excluding arms) from developing countries and least developed countries, admitted free of duty</p> <p>39. Average tariffs imposed by developed countries on agricultural products and textiles and clothing from developing countries</p> <p>40. Agricultural support estimate for OECD countries as a percentage of their gross domestic product</p> <p>41. Proportion of ODA provided to help build trade capacity</p> <p><u>Debt sustainability</u></p> <p>42. Total number of countries that have reached their HIPC decision points and number that have reached their HIPC completion points (cumulative)</p> <p>43. Debt relief committed under HIPC Initiative</p> <p>44. Debt service as a percentage of exports of goods and services</p>
Target 16: In cooperation with developing countries, develop and implement strategies for decent and productive work for youth	45. Unemployment rate of young people aged 15-24 years, each sex and total ^{vi}
Target 17: In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries	46. Proportion of population with access to affordable essential drugs on a sustainable basis

Target 18: In cooperation with the private sector, make available the benefits of new technologies, especially information and communications	47. Telephone lines and cellular subscribers per 100 population 48. Personal computers in use per 100 population Internet users per 100 population
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The Millennium Development Goals and targets come from the Millennium Declaration, signed by 189 countries, including 147 heads of State and Government, in September 2000 (<http://www.un.org/millennium/declaration/ares552e.htm>). The goals and targets are interrelated and should be seen as a whole. They represent a partnership between the developed countries and the developing countries “to create an environment – at the national and global levels alike – which is conducive to development and the elimination of poverty”.

Note: Goals, targets and indicators effective 8 September 2003.

- ⁱ For monitoring country poverty trends, indicators based on national poverty lines should be used, where available.
- ⁱⁱ An alternative indicator under development is “primary completion rate”.
- ⁱⁱⁱ Amongst contraceptive methods, only condoms are effective in preventing HIV transmission. Since the condom use rate is only measured among women in union, it is supplemented by an indicator on condom use in high-risk situations (indicator 19a) and an indicator on HIV/AIDS knowledge (indicator 19b). Indicator 19c (contraceptive prevalence rate) is also useful in tracking progress in other health, gender and poverty goals.
- ^{iv} This indicator is defined as the percentage of population aged 15-24 who correctly identify the two major ways of preventing the sexual transmission of HIV (using condoms and limiting sex to one faithful, uninfected partner), who reject the two most common local misconceptions about HIV transmission, and who know that a healthy-looking person can transmit HIV. However, since there are currently not a sufficient number of surveys to be able to calculate the indicator as defined above, UNICEF, in collaboration with UNAIDS and WHO, produced two proxy indicators that represent two components of the actual indicator. They are the following: a) percentage of women and men 15-24 who know that a person can protect herself/himself from HIV infection by “consistent use of condom”; b) percentage of women and men 15-24 who know a healthy-looking person can transmit HIV.
- ^v Prevention to be measured by the percentage of children under 5 sleeping under insecticide-treated bednets; treatment to be measured by percentage of children under 5 who are appropriately treated.
- ^{vi} An improved measure of the target for future years is under development by the International Labour Organization.