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# A THEORETICAL FRAMEWORK FOR THE PROTECTION OF ENVIRONMENTAL REFUGEES IN INTERNATIONAL LAW

MATHIAS G. SAHINKUYE\*

## Abstract

This article analyzes the reality and the criteria for the legal protection of environmental refugees. Using an interdisciplinary approach, it addresses questions about the existence, nature, universality, justification, and legal status of environmental refugees. Despite the lively debates within the community of experts and scientists specializing in migration and/or environmental issues, there is no consensus today on a definition of the term “environmental refugees” since 1985 when it officially appeared. Several descriptions such as ecological refugees, environmental refugees, climate refugees, eco-refugees, climate évacué, environmental migrants, displaced persons due to a natural disaster, environmentally displaced persons, etc. have been used without due regard to the still complex and little-known reality lying behind them. The debate on proper description has stalled, jeopardizing the legal recognition and concomitant protection. Regardless, over the past seventeen years, there has been a proliferation of actions militating for the recognition and protection of environmental refugees. The promotion of this concept as well as its content raises several questions: Does the concept of environmental refugees not undermine the subtle edifice established by the 1951 Refugee Convention? Does it not overturn the right of asylum? But above all, can today’s law provide protections for these “refugees”? Have policies fostered the need for protection? The paper argues that the phenomenon of environmental refugees is a timely illustration of a larger ongoing global development. It is important, in this regard, to rethink the environment in new ways, especially in terms of liability and providing legal protection to victims of environmental catastrophes. A new regime must certainly involve the adaptation and invention of concepts and especially the creation of new legal mechanisms suited to this complexity.

**I. WHILE NUMEROUS ACADEMIC STUDIES** have been increasingly performed concerning environmental refugee law over the past two decades,<sup>1</sup> there is a dearth of academic

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<sup>1</sup> E.F. Kunz, “The Refugee in flight: Kinetic models and forms of displacement” (1973) 7:2 Intl Migration Rev 124; J. Glassman, “Counter-insurgency, Ecocide and the Production of Refugees: Warfare as a Tool of Modernization” (1992) 12:1 Refuge: Canada’s Periodical on Refugees 27; A. Perout, “Environmental Refugees: Defining Environmental Migrants and Long Term Solutions to Deal with Environmental Migration” (Master’s Thesis in Geography, Montreal: Concordia University, 1995); R. Black & M. F. Sessay, “Forced Migration, Environmental Change, and Woodfuel Issues in the Senegal River Valley, (1997) 24 Env Conservation 251; N. Myers, “Environmental Refugees, in Population and Environment” (1997) 19 J of Interdisciplinary Studies 167; R. Black, *Refugees, Environment, and Development* (Singapore: Addison Wesley Longman, 1998); J.B. Cooper, “Environmental Refugees: Meeting the Requirements of the Refugee Definition” (1998) 6:2 NYU Env LJ 480; M.S. Brooks, “Environmentally Induced Migration: Beyond a Culture of Reaction” (2000) 14 Geo Immigr LJ 855; D.C. Bates “Environmental Refugees? Classifying Human Migrations Caused by Environmental Change” (2002) 23:5 Population and Environment 465-477; D. Keane, “The Environmental Causes and Consequences of Migration: A Search for the Meaning of ‘Environmental Refugees’” (2004) 16 Geo Int’l Evtl L Rev 209; C.M. Kozoll, “Poisoning the Well: Persecution, the Environment, and Refugee Status” (2004) 15 Colo J Int’l Evtl L & Pol’y

literature on the philosophical and legal foundations for the protection of environmental refugees. Most of the current scholarship, revolving around the gaps in international refugee, environmental, and human rights law with regard to the protection of environmental refugees,<sup>2</sup> are characterized by a division between environment and migration specialists who adopt often conflicting positions<sup>3</sup> with regard to the responses to be provided.<sup>4</sup> In this regard, two schools of thought have been identified. First is the ‘maximalist’ school whose proponents<sup>5</sup> describe large numbers of existing environmental refugees and predict greater numbers in the future, thus conceiving of the link between changes in the physical environment and human migration as simply causative and direct. Second is the ‘minimalist’ school which emphasizes the complex interaction between environmental and social systems, and thus questions the assumption of a direct causal link between environmental change and migration.<sup>6</sup>

Moreover, in recent years, experts and academics<sup>7</sup>—all disciplines combined—have focused, above all, on debates around terminology and definitions. Should we speak of “migrants”, “refugees”, “displaced” or simply of mobility or exodus, etc.? Should we reduce the debate around climate refugees, understood as climate change victims, or include environmental

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271; V. Vikram Kolmannskog, “The Point of No Return: Exploring Law on Cross-Border Displacement in the Context of Climate Change” (2009) 34 *Refugee Watch* 27; E. Jakobsson, “Global Policy Making on Climate Refugees: What is the Problem?” (2010) 19, online: <<https://www.pol.gu.se/digitalAssets/1309/1309786vt10-elin-jakobsson.pdf>> (accessed 10 August 2018); L.W. Marshall, “Toward a New Definition of ‘Refugee’: Is the 1951 Convention Out of Date?” (2011) 37 *EJTES* 61; C.M. Kozoll, “One Good Reason to Speak of Climate Refugees” (2015) 49 *FMR* 70; S. Jolly & N. Ahmad, “Climate Refugees Under International Climate Law and International Refugee Law: Towards Addressing the Protection Gaps and Exploring the Legal Alternatives for Criminal Justice” (2015) 14 *ISIL YB Int’l Human & Refugee L* 216 at 248; J.R. Wennersten & D. Robbins, *Rising Tides: Climate Refugees in the Twenty-First Century* (Indiana: Indiana University Press, 2017).

<sup>2</sup> Roger Zetter & Heloise Ruaudel, “Climate Change and Displacement” (10 July 2018), *Forced Migration Review* No 31, Oxford University Podcasts, online: <<https://podcasts.ox.ac.uk/keywords/forced-migration-review>> at 80.

<sup>3</sup> François Gemenne, “Migration et Environnement, état des Savoirs sur une Relation Méconnue”, *Les Journées d’Études du GISTI*, (17 Décembre 2007), online: <[https://www.gisti.org/IMG/pdf/je\\_08refugies-environnementaux.pdf](https://www.gisti.org/IMG/pdf/je_08refugies-environnementaux.pdf)> at 5; J. Barnett & M. Webber, “Accommodating Migration to Promote Adaptation to Climate Change” (Policy Research Working Paper 5270, University of Melbourne, 2009); Silja Klepp, *Climate Change and Migration* Online Publication Date Apr 2017 DOI: 10.1093/acrefore/9780190228620.013.42.

<sup>4</sup> “The literature on climate change and migration is generally very pessimistic about mobility arising from climate change. This creates a starting point bias in thinking about policy responses, eschewing the development of policies that seek to harness migration as a strategy to promote adaptation to climate change...” See Barnett and Webber, *supra* note 3 at 19.

<sup>5</sup> E. Mainly El-Hinnawi, *Environmental Refugees* (Nairobi: United Nations Environment Programme, 1985); J. Jacobson, *Environmental Refugees: A Yardstick of Habitability* (Washington DC: World Watch Institute, 1988).

<sup>6</sup> The proponents of the minimalist school are mainly R. Bilborrow, *Rural Poverty, “Migration, and the Environment in Developing Countries: Three Case Studies”* in *Background paper for World Development Report* (Washington: The World Bank, 1992); J. McGregor, “Climate Change and Involuntary Migration: Implications for Food Security” (1994) 19:2 *Food Policy* 120; A. Suhrke, “Environmental Degradation and Population Flows” (1994) 47:2 *J of Intl Affairs* 47(2), 473.

<sup>7</sup> See for example Brooks *supra* note 2; Bates, *supra* note 2; Jakobsson, *supra* note 2; and Marshall, *supra* note 2.

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or ecological refugees, including victims of things like natural disasters, development projects, industrial disasters, etc.<sup>8</sup>

In 2005, some environmental law jurists<sup>9</sup> issued a call<sup>10</sup> for the recognition of an international legal status for ecological refugees. Similarly, at the end of 2007, a report<sup>11</sup> produced by a group of academics and experts proposed a reflection on global governance for climate refugees. A research program called EACH-FOR<sup>12</sup> and experts from the United Nations University also published a number of documents<sup>13</sup> on population displacements due to environmental degradation. Moreover, the expert group of the German Advisory Council on Global Change<sup>14</sup> (WBGU) also highlighted, in a report entitled “Climate Change as a Security Risk”,<sup>15</sup> the issue of climate displacement by means of international security.

The United Nations High Commission for Refugees (UNHCR) and United Nations Environmental Program (UNEP) have engaged experts<sup>16</sup> to evaluate the issue, preferring to focus the debate on “displaced persons” rather than referring to the term “refugees” which the UNHCR especially says is an abuse of language. In their judgment, the legal concept of “refugee” refers only to beneficiaries of the 1951 Geneva Convention relating to the Status of Refugees. Finally, in January 2008, the International Organization for Migration (IOM)

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<sup>8</sup> James Morrissey refers even to persons “whose decision to move is based, in part, on the experience of environmental stress”. J. Morrissey, “Rethinking the 'Debate on Environmental Refugees': From 'Maximalists and Minimalists' to 'Proponents and Critics'” (2012) 19 J of Political Ecology 36.

<sup>9</sup> Members of the International Center for Comparative Environmental Law online: <<https://cidce.org/>>; and the Centre de Recherches Interdisciplinaires en Droit de l'Environnement, de l'Aménagement et de l'Urbanisme online: <<http://www.unilim.fr/crideau/>>.

<sup>10</sup> Limoges Call on Ecological Refugees, 23 June 2005 online: <<https://cidce.org/>>.

<sup>11</sup> F. Biermann & I. Boas “Preparing for a Warmer World, Towards a Global Governance System to Protect Climate Refugees” (2010) 10:1 Global Env Pol 60.

<sup>12</sup> CCEMA, “Environmental Change and Forced Migration Scenarios (EACH-FOR)” online: <<http://www.ccema-portal.org/article/read/each-for-project-publications>>.

<sup>13</sup> F. Renaud, J.J Bogardi, O. Dun, and K. Warner, *Control, Adapt or Flee: How to Face Environmental Migration?* (Germany: UNU-EHS, 2007).

<sup>14</sup> An independent, scientific advisory body, WBGU's principal tasks are to analyze global environment and development problems and report on these, review and evaluate national and international research in the field of global change, provide early warning of new issue areas, identify gaps in research and to initiate new research, monitor and assess national and international policies for the achievement of sustainable development, elaborate recommendations for action and research and raise public awareness and heighten the media profile of global change issues.

<sup>15</sup> WBGU, *Climate Change and Security Risk*, (United Kingdom: Earthscan, 2008) at 204-207.

<sup>16</sup> K.E. McNamara, “The Politics of Environmental Protection at the United Nations” (UNSW Sydney Australia: Doctoral Thesis, 2006) at 361.

published a report on migration and the environment<sup>17</sup> in which it developed a “working definition”. The group used the description “environmental migrants”, to refer to

Persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.<sup>18</sup>

Definitions like this one come amidst others focusing mainly on issues ranging from climate migration,<sup>19</sup> to the contemporary picture of the refugee.<sup>20</sup> They also cover the figure of exiles and refugees,<sup>21</sup> challenges in providing legal status for environmentally displaced people in international law,<sup>22</sup> the relationship between environmental crises and human migration,<sup>23</sup> climate refugees and security,<sup>24</sup> and the responsibility for climate refugees.<sup>25</sup>

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<sup>17</sup> O. Brown, *Migration and Climate Change* (Geneva: IOM, 2008) at 64.

<sup>18</sup> IOM and UNFPA, “Expert Seminar: Migration and the Environment” (2008) 10 *International Dialogue on Migration* at 23.

<sup>19</sup> K. Kartiki, “Climate Change and Migration: A Case Study From Rural Bangladesh” (2011) 19:1 *Gender and Development* 23; Morrissey, *supra* note 8.

<sup>20</sup> C.B. Ruiz, “Les réfugiés, seuil éthique d’un nouveau droit et d’une nouvelle politique”, (2014) 6 *La Revue des droits de l’homme*.

<sup>21</sup> G. Agamben, “Homo sacer. O poder soberano e a vida nua, Belo Horizonte” (2002) *UFMG* 175.

<sup>22</sup> Jean-Jacques Parfait Poumo Leumbe. *Les déplacés environnementaux : problématique de la recherche d’un statut juridique en droit international*. Droit. Université de Limoges, 2015; E. Pigué, A. Pécoud and P. De Guchteneire (eds.) *Migration and Climate Change* (Cambridge: Cambridge University Press, 2013) at 74-101; P.S. Jaswal, and S. Jolly, “Climate Refugees: Challenges and Opportunities for International Law” (2013) 55:1 *J of the Indian Law Inst* 45; M. Lister, “Climate Change Refugees” (2014) 17:5 *Critical Rev of Intl Soc and Pol Phil* 618.

<sup>23</sup> A. Westing, “Environmental Refugees: A Growing Category of Displaced Persons” (1992) 19:3 *Environmental Conservation* 201; A. Westing, “Population, Desertification, and Migration” (1994) 21:2 *Environmental Conservation* 109; M. Islam, “Natural Calamities and Environmental Refugees in Bangladesh” (1992) 12:1 *Refuge: Canada’s Periodical on Refugees* 5; O. Otunnu, “Environmental Refugees in Sub-Saharan Africa: Causes and Effects” (1992) 12:1 *Refuge: Canada’s periodical on refugees* 11; J. Trollalden, N. Birkeland, J. Borgen, P. Scott, and G. Coles, *Environmental Refugees: A Discussion Paper* (Norway: World Foundation for Environment & Development, 1992); A. Suhrke, “Environmental Degradation and Population Flows” (1994) 47:2 *J of Intl Affairs* 473; R. Ramlogan, “Environmental Refugees: A Review” (1996) 23 *Environmental Conservation* 81; S. O’Lear, “Migration and the Environment: A Review of Recent Literature” (1997) 78:2 *Soc Sci Q* 606; S. Castles, “Environmental Change and Forced Migration: Making Sense of the Debate” (New Issues in Refugee Research, Working Paper No. 70) (Oxford: Refugee Studies Centre, University of Oxford, 2002) online: <<http://tinyurl.com/cjrr4cy>>; E. Goffman, “Environmental Refugees: How Many, How Bad?” (2006) *CSA Discovery Guides*, ProQuest; K. McNamara, “Conceptualizing Discourses on Environmental Refugees at the United Nations” (2007) 29 *Population and Environment* 2; Christian Aid, *Human Tide: The Real Migration Crisis* (London: Christian Aid, 2007); S. Rajan, *Blue Alert: Climate Migrants in South Asia* (India: Greenpeace, 2008); K. Campbell, *Climatic Cataclysm: The Foreign Policy and National Security Implications of Climate Change* (Washington DC: Brookings Institution Press, 2008); S. Perch-Nielsen, M. Bättig and D. Imboden, “Exploring the Link Between Climate Change and Migration” (2008) 91:3 *Climatic Change* 375; F. Laczko, “Migration, Environment and Climate Change: Assessing the Evidence” (2009) *The German Marshal Fund of the United States*; J. Morrissey, “Environmental Change and Forced Migration” (Workshop on Environmental Change and Forced Migration, January 8 & 9 2009) (Oxford: Refugee Studies Centre, University of Oxford, 2009); N. Gill, “‘Environmental Refugees’: Key Debates and the Contributions of Geographers” (2010) 4:7 *Geography Compass* 861; A. Panda, “Climate Refugees: Implications for India” (2010) *XLV:20 Economic and Political Weekly* 76; P. Bohra-Mishra, and D. Massey “Environmental Degradation and Out-Migration: Evidence From Nepal” in E. Pigué, A. Pécoud and P.

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Despite the absence of a deep philosophical reflection on the subject, the recent acceleration of studies, reports, expertise and research on the topic reveals the extent to which the academic community is reflecting on this complex issue to which the decision makers have not yet found an effective solution. It is precisely the absence of a philosophical evaluation that could prolong the confusion regarding the protection of environmental refugees, especially since most of the studies insist on legal recognition of environmental migrants and the creation of a new category of refugees.

The suggestion of a new category of “environmental refugees” warrants critical reflection and questioning to shed light on the foundations of current law and enlightening the feasibility of environmental refugee protection *de lege ferenda*. The purpose of this article is therefore to explain, predict, and understand the underpinnings of a human rights-approach as basis for environmental refugee protection. I will address the following questions: Who are environmental refugees and how can they be characterized? What values are involved in this characterization? What special needs do environmental refugees have? Can the international legal system address them?

These questions are based on the fact that refugees and environment are part of the same conception of that responsibility expressed by the Stockholm Conference in 1972 when it was said that “man has a special responsibility to safeguard and wisely manage the heritage (...) now gravely imperiled by a combination of adverse factors”,<sup>26</sup> involving awareness and acceptance of the consequences of human behavior. The point is to match up the concepts of law in order to determine whether their recombination offers a more coherent picture of reality, which would

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De Guchteneire (eds.) *Migration and Climate Change* (Cambridge: Cambridge University Press, 2013) at 74-101; F. Gemmene, “How They Became the Human Face of Climate Change: Research and Policy Interactions in the Birth of the ‘Environmental Migration’ Concept” in E. Piguet, A. Pécoud and P. De Guchteneire (eds.) *Migration and Climate Change* (Cambridge: Cambridge University Press, 2011) at 225-259; S. Carvalho, “What Has Climate Change Got To Do With Human Rights?” (Amnesty International, 2015) online: <[www.amnesty.org/en/latest/campaigns/2015/12/climate-change-human-rights/](http://www.amnesty.org/en/latest/campaigns/2015/12/climate-change-human-rights/)>.

<sup>24</sup> T. Doyle and S. Chaturvedi, *Climate Refugees and Security: Conceptualizations, Categories, and Contestations* (Oxford: Oxford Handbook of Climate Change and Society, 2011).

<sup>25</sup> Biermann, *supra* note 11; T.T.V. Duong, “When Islands Drown: The Plight of ‘Climate Change Refugee’ and Recourse to International Human Rights Law” (2010) 31 *U Pa J Int’l L* 1240; K. Andrews, “Colonial Nostalgia is Back in Fashion, Blinding Us to the Horrors of Empire” (Guardian News and Media Limited, London, 2016); B. Ahmed, “Who Takes Responsibility for the Climate Refugees?” (2018) 10:1 *Intl J of Climate Change Strategies and Management* online: <<https://doi.org/10.1108/IJCCSM-10-2016-0149>>.

<sup>26</sup> “Report of the United Nations Conference on the Human Environment” (Stockholm, June 1972) online: <<http://www.un-documents.net/unchedec.htm>>.

allow the legal instrument to serve the “destiny and common aspirations of humanity”<sup>27</sup> to its needs. Indeed, while the concept of refugee is based on a well-established legal basis, it now appears too narrow in light of recent situations;<sup>28</sup> rethinking it is all the more necessary since we now combine it with the environment concept.

Whereas refugee protection appears well established in international law, its values are rooted both in history and in the imagination of men. The reception and humane treatment of refugees has always constituted a significant value of any society—from the Mosaic Law to indigenous customs, religious practices and moral rules. The rules permitted the welcoming of foreigners and the persecuted, be they alone or in groups. As Edward Feser put it, this virtue is rooted in both “religious faith and secular principles”.<sup>29</sup> Recently, the religious basis for welcoming strangers which had long dominated in different societies seems to fade in favor of solidarity. The legal protection of refugees is thus premised on Judeo-Christian principles pertaining to welcoming the stranger, moral solidarity, uniting men and placing “refugees under the responsibility of the whole of humanity”.<sup>30</sup>

The article is organized as follows: In section I, I discuss the values of charity and solidarity as well as the concept of humanity considered as the foundations for effective legal protection of refugees. In Section II, I propose legal protection based on the “collective” status of environmental refugees. This thinking will not distinguish between the causes of the departure or the disaster, but acts on their consequences. This is unlike the refugee status under the 1951 Convention and subsequent instruments which are confined to an individual procedure or a procedure with individual tendencies, which, I argue, are inadequate as to empty the envisaged protection regime of substance.

## **II. FROM CHARITY TO SOLIDARITY: THE FOUNDATIONS FOR LEGAL PROTECTION OF REFUGEES**

The phenomenon of human mobility today does often involve suffering caused by the inevitable uprooting of persons from their countries. Every person has “the right not to emigrate, that is, to

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<sup>27</sup> “Report of the World Commission on Environment and Development: Our Common Future” (UN Documents) online: <[www.un-documents.net/our-common-future.pdf](http://www.un-documents.net/our-common-future.pdf)>.

<sup>28</sup> See Bohra-Mishra and Massey, *supra* note 23; Campbell, *supra* note 23; and Castles, *supra* note 23.

<sup>29</sup> E. Feser, *The Philosophy of Mind: A Short Introduction*, (OneWorld Publications, 2005).

<sup>30</sup> D.S.J. Hollenbach, “Borders and Duties to the Displaced: Ethical Perspectives on the Refugee Protection System” (2016) 4:3 J on Migration and Human Security 148.

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live in peace and dignity in [their] own homeland”.<sup>31</sup> However, some people are forced to move because of, *inter alia*, persecutions, natural calamities, environmental disasters or other factors that cause extreme hardships, even to the peril of their lives, and/or they can no longer live with dignity. Refugees and others who have been forced to leave their country have always been a challenge for communities that would receive them while the exigency to receive and treat refugees with dignity emanates from the consciousness of human fraternity. This involves the concept of humanity construed for the benefit of the victims of persecution, while the moral solidarity uniting men places, in a way, the refugees under the responsibility of the entire humanity. It is therefore a question of how to apply the values of charity and solidarity.

### A. CHARITY AS A RELIGIOUS VALUE

Scholarship<sup>32</sup> explains charity as, since the advent of the Christian religion, a high theological virtue consisting in the love of God and that of the neighbor in view of God. Charity compensates the effects of inequality, calling for compassion for the poor, the destitute, the psychologically and physically wounded who are, however, required to take their pain, redemption coming with eternal life. But this charity fails to question its reasons for being which are in the established order.<sup>33</sup>

To this extent, the great monastic orders, especially the Benedictines, provided care for the sick and poor stray by creating homes and leper colonies, welcoming the stray because they did not come from their monasteries or give up any of their privilege nor any of their wealth in the name of charity.<sup>34</sup> The Cistercians will revive, in the twelfth century, the tradition of poverty

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<sup>31</sup> Jean-Paul II, *JMMR* 2004, n° 3 : *O.R.*, édition hebdomadaire en langue française, 23 décembre 2003, 2.

<sup>32</sup> Ryan Lincoln, Christopher A. Morrissey, Peter Munday, “Religious Giving: A Literature Review” (2008) *Science of Generosity* 2; E.L. Queen, “The Religious Roots of Philanthropy in the West: Judaism, Christianity, and Islam” (Working Paper Series, 96-4) (Indianapolis: Indiana University Center on Philanthropy, 1996); J.D. Davidson, & R.E. Pyle, “Passing the Plate in Affluent Churches: Why Some Members Give More Than Others” (1994) 36:2 *Review of Religious Research* 181; N. Krause, “Altruism, Religion, and Health: Exploring the Ways in Which Helping Others Benefits Support Providers” in Stephen G. Post (ed.) *Altruism and Health: Perspectives from Empirical Research* (New York: Oxford University Press, 2007) at 410-421; J. Peifer, “Religious Giving as a Response to Community” (Working Paper 42, Center for the Study of Economy and Society) online: <[http://www.economyandsociety.org/publications/wp42\\_peifer\\_07.pdf](http://www.economyandsociety.org/publications/wp42_peifer_07.pdf)>.

<sup>33</sup> Lincoln et al, *supra* note 32 at 21.

<sup>34</sup> Dwight Longenecker, *Saint Benedict for Busy Parents* (New Haven: Knights of Columbus Supreme Council, 2008).



and generosity of the monastic orders.<sup>35</sup> Saint Francis of Assisi will be found, in the following century, the mendicant orders, practice, beforehand, of the revolutionary charity without naming it and without too much calling to revolt against the established order.<sup>36</sup> Meanwhile, Jesuits started and continued their apostolate worldwide: providing healthcare, educating and protecting the converted Indians by allowing them, however, to keep their primitive culture. They welcomed, depending on events, refugees, the sick, the stray, the hunted.<sup>37</sup> From the seventeenth century onwards, the Brothers and Sisters of Charity worked to implement the charity as understood by Saint Vincent de Paul, founder of the first apostolic order of women, up to then still in the convent.<sup>38</sup>

Charity, thus understood, consisted in an interpretation of the holy texts.<sup>39</sup> Recently, charity has been envisaged in a disruptive way, respectful of the established order; it is, then, justice: every believer can take the defense of the poor in the name of Christ who has always presented himself as the defender of the poor, the persecuted and the banished. This interpretation leads necessarily to the questioning of the social order.<sup>40</sup> Liberation Theology commends, in this context, charity raised against an unjust established order: Dom Helder Camara, Archbishop of Recife, Brazil, maintained radical positions for the defense of the rights of the poor through non-violent methods.<sup>41</sup> This was relayed in France by the speech of Father Pierre, or Father Delorme.<sup>42</sup>

However, the Church does not have any more the monopoly of this action whose foundation has shifted, from charity, religious virtue, to solidarity, secular value. Numbers of people and non-religious associations are fighting every day to help the needy.<sup>43</sup> The association

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<sup>35</sup> *Ibid.*

<sup>36</sup> Father Candide Chalippe, "The Life and Legends of Saint Francis of Assisi" (Blackmask, 2002) online: <<http://www.blackmask.com>>.

<sup>37</sup> G.B. Nicolini, *History of the Jesuits: Their Origin, Progress, Doctrines and Designs* (California: HardPress Publishing, 2013) at 592.

<sup>38</sup> *A Scripture Rule for the Brothers and Sisters of Charity at Little Portion Hermitage* (Berryville, The Brothers and Sisters of Charity, 1985).

<sup>39</sup> International Theological Commission, "Theology Today: Perspectives, Principles and Criteria" online: <[http://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_cti\\_doc\\_20111129\\_teologia-oggi\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_doc_20111129_teologia-oggi_en.html)>.

<sup>40</sup> J. Peifer, "Religious Giving as a Response to Community" (Working Paper 42, Center for the Study of Economy and Society) online: <[http://www.economyandsociety.org/publications/wp42\\_peifer\\_07.pdf](http://www.economyandsociety.org/publications/wp42_peifer_07.pdf)>.

<sup>41</sup> J. Hoffman French, "A Tale Of Two Priests: Three Decades of Liberation Theology in the Brazilian Northeast" (Kellog Institute: Working Paper 328, October 2006).

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

<sup>43</sup> E. Ferris, "Faith-Based and Secular Humanitarian Organizations" (2005) 87:858 *Intl Rev of the Red Cross* 311.

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movement, prerogative of democratic societies, functioning as a “salutary social buffer” appears as an efficient counter-power, born of the individual momentum, replacing deficient public structures.<sup>44</sup> Charity, formerly established by religious orders, turns into a mosaic of international development and cooperation resulting in changes on the perspective and the purpose of the action taken. The religious value of charity is therefore replaced gradually by the secular value of solidarity.

### **B. SOLIDARITY AS A MORAL VALUE**

In their *Anthology of Interracial Literature*, David Goodman Croly and George Wakeman endeavor to make plain the proposition that “as by the teaching of science, religion, and democracy, the whole human race is of one family, it follows that there should be no distinction in ... rights on account of color, race, or nativity, in a republic”.<sup>45</sup> This proposition confirms the undeniable fact that the rise of human rights after World War II was prefigured and inspired by a defense of the dignity of the human person that first arose in Christian churches and religious thought in the years just prior to the outbreak of the war. From this perspective, we can say that refugees, migrants, mobility people and the local population, all form one family. From there, human solidarity and charity should not exclude any person, culture or people.<sup>46</sup> The most vulnerable are not just people in need for whom we are acting in solidarity, but they are members of our family, to whom we have a duty to share the resources we have.

In domestic law, solidarity refers to a precise legal situation, expanding to the international plane, and it is, in addition, a moral value. The evolution of the world, or the awareness of its finitude, its complexity and the interdependence of its animate and inanimate elements, leads to the conception of a common fate for all humans. The increasing interdependence being coupled with the increase of his conscience, man leaves his physical isolation by the development of means of high-speed transportation and communication, as well as his intellectual isolation by recognizing the common destiny that awaits humanity. Man is for the first time confronted with fundamental questions which he cannot decide alone but of which

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<sup>44</sup> N. Ormerod and S. Clifton, *Globalization and the Mission of the Church* (London: T & T Clark, 2009) at 167.

<sup>45</sup> W. Sollors, B. Henry and A.M. Cabot (eds.) *An Anthology of Interracial Literature: Black-White Contacts in the Old World and the New* (New York: NYU Press, 2004) at 675.

<sup>46</sup> T. Balasuriva, “Globalization and Human Solidarity” online: <<https://www.religion-online.org/book-chapter/chapter-9-human-solidarity-in-the-context-of-globalization/>>.

it is up to everyone to participate in the progression. Solidarity between humans reappears, renewed by the gravity and urgency of possible dangers.

Challenging the idea of a “natural” inequality, Enlightenment thinkers discovered equality: men are born and remain equal; liberty and fraternity: all human beings, whatever their differences are humans and can rise by education. They contribute thus to renew the political systems, from monarchy to the republic, as well as to establish the principles of the new order.<sup>47</sup> The freedom of association was so strongly proclaimed as well by the Declaration of the Rights of Man and of the Citizen of 1789 as by the First Amendment to the U.S. Constitution in 1791, and finally consecrated in article 20 of the Universal Declaration of Human Rights. It is a pillar of any democratic system and therefore largely protected or restricted.

The association movement<sup>48</sup> is today an essential link, particularly in our post-industrial societies where the State is no longer providential. In the North, the over-development of capitalism created new forms of exclusion which developed through the cracks of all nets. In poorer countries, the associative network<sup>49</sup> overcame the shortcomings of the State in areas as diverse as funding support projects to cushion the effects of unemployment, sickness, loss or failure of citizenship, the establishment of networks of solidarity for specific or broader purpose, as well as in the area of environment, health and education in particular.

The result is a profusion of solidarity networks whose diversity is amazing as it does not appear reserved for rich countries but is extended also to the South where associations proliferate<sup>50</sup>. Active solidarity of men is fed of small daily actions enabling some to survive, others to regain their dignity, others again to relearn the group’s strength and hope every day. This form of secular assistance is based on a rediscovery of the common destiny of men and their capacity increased by the group, to force destiny.

At the international level, solidarity borrows from somewhat different forms because, *inter alia*, addressing the States, the offer of international assistance can, in principle, be denied. The debate seems, however, to have in recent years, evolved from the ground of interference to that of humanitarian. This shift reflects a lesser concern to encroach on the internal affairs of a

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<sup>47</sup> *Ibid.*

<sup>48</sup> A. Mitchell, “The Association Movement of 1792-3” (1961) 4:1 *The Historical Journal* 56.

<sup>49</sup> A. Paliwal, “Extending Associative Network Theory: The Role of Affect in the Bi-Directional Image Transfer Process” (Theses and Dissertations, 2014) at 44 online: <[https://repository.hkbu.edu.hk/etd\\_oa/44](https://repository.hkbu.edu.hk/etd_oa/44)>.

<sup>50</sup> *Ibid.*

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State, and a strengthened will to intervene in any situation qualified as humanitarian, which term includes, where applicable, crises whose causes are political.<sup>51</sup>

The European Community has inscribed its approach to the forefront of this evolution of the doctrine of international public aid. It clearly put that humanitarian aid it provides is intended “to people in distress” who “have the right to receive humanitarian assistance”. The operations of Community assistance are thus not meant for the affected State or its government, decisions on the matter being taken “solely according to the needs and interests of victims”.<sup>52</sup>

These developments clearly illustrate the concept of solidarity implemented by the international community and the transformation of its principles relayed by States. Refugees are a good example of the diversity which, by manifesting itself, can borrow solidarity. It has never failed in this area, except in western countries which, wishing to stick to a narrow reading of the 1951 Convention, refused to put the issue of refugees on the moral ground of fraternity and solidarity.<sup>53</sup>

Solidarity is, however, one of the key words of the Preamble to the Statute of UNHCR of 1950 and, although the term does not appear in the text of the 1951 Convention, it is, nonetheless, affirmed as the mainstay of public and private international action in this area, countries implement the moral solidarity uniting men. There is, however, another form of solidarity, a specific legal situation that leaves nothing to the good will or the morale of the parties.

### III. SHIFTING THE PARADIGM FOR EFFECTIVE LEGAL PROTECTION

Although the twenty-first century is by necessity oriented towards the environment and periodically signaled through natural disasters, environmental vulnerability is still a major challenge. People whose environments are destroyed by ecological disasters remain largely ignored at the global level. Do people facing such disasters have a status under international law?

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<sup>51</sup> See however A.A. Abdullahi & J. Amzat, 211, on the controversies embedded in foreign aid and account for the socio-institutional factors responsible for aid failure.

<sup>52</sup> European Commission, “The Union’s Humanitarian Aid: Fit for Purpose? Stakeholders Consultation Documents” online: <[http://ec.europa.eu/echo/files/policies/consultations/20121210\\_Fit-for-purpose.pdf](http://ec.europa.eu/echo/files/policies/consultations/20121210_Fit-for-purpose.pdf)>.

<sup>53</sup> V. Moreno-Lax, “Solidarity’s Reach: Meaning, Dimensions, and Implications for EU (External) Asylum Policy” (2017) 24:5 Maastricht J of Eur and Comp L 740; J. Allsopp, “Contesting Fraternité—Vulnerable Migrants and the Politics of Protection in Contemporary France” (Working Paper Series No. 82, Refugee Studies Centre, Oxford Department of International Development, July 2012).

How can international law guarantee their dignity, security, the right to life? My aim in this section is to consider the situation of populations affected by ecological disasters and to outline a proposal for an international status guaranteeing them protection and dignity.

The premise for this proposal is simple. Ecological disasters are major events that seriously disrupt the order of things, and produces major losses to affected areas and to the populations concerned. Ecological disasters destroy the environment or render it so dangerous that the survival of the population living there is under threat. International legal norms hesitate to fix the term for this reality,<sup>54</sup> although the phenomenon is real. I will use the term ecological disaster to designate a risk that induces serious consequences for man, considered collectively, and for the environment.

The cause of the disaster is irrelevant here as it is to be considered *ex ante*, i.e., from the perspective of precaution and prevention. This perspective is outdated insofar as once the disaster has occurred, attention moves to the effects that it has or may have on human beings. It is true that the cause of the disaster is important as regards the question of responsibility, but the issue here is less about pinpointing the causes than taking care of the victim population.<sup>55</sup> That is why I will focus on these questions: Who are the victims of the ecological disaster? How can they be characterized? What special needs do they have? Can the international legal system address them? The proposal for an international status of environmental refugees offers a ground to explore some solutions.

### **A. WHO ARE THE VICTIMS OF ENVIRONMENTAL DISASTERS?**

The link between environmental disasters and the victims of other environmental harms<sup>56</sup> is singular because it is impossible, in most cases, to link a cause to a consequence. This link is not just confined in a recognizable fact. There is a chain of causality that results from the interdependence of the elements of the environment and various kinds of human activity. This

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<sup>54</sup> The terms of major accidents, natural disasters, man-made disaster, cataclysm, damage or super injury are variously used. They cover a wide range of phenomena, often differently qualified with regard to their causes, while these causes produce similar or comparable effects, A. Gresh, (ed.) *Planet in Peril: An Atlas of Current Threats to People and the Environment* (Paris: Le Monde diplomatique, 2006) at 38.

<sup>55</sup> A. Jacquard, "Moi et les Autres, initiation à la génétique" (1983) Éditions du Seuil, coll. Virgule at 111; V. Magniny "Les réfugiés de l'environnement : hypothèse juridique à propos d'une menace écologique" (PhD Thesis, Paris I - Panthéon-Sorbonne, Paris, June 1999) at 645.

<sup>56</sup> The term victim in this article refers to a community: all the people who were at the place where the disaster occurred and transformed inhabitants into victims. The mutation, the passage from person to victim, or from inhabitant to victim could, if it was dug, prove interesting.

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causal chain could make the environment unfit for human life or otherwise dangerous as in the case of serious pollution. The environment could also be destroyed by soil aridity or acidification.<sup>57</sup> This is different from a sudden disastrous event.

When disaster strikes, the entire population residing in the area affected by the disaster is threatened by its effects. Unlike the damage that reaches specific persons, the impact reaches equally all those who are in the perimeter of the disaster. To that extent the disaster could be said to be neutral, which is the same as saying that it is indifferent to the identity of individual victims. It occurs in a given place at a given time, and all those present in this place at this time are equally victims of the disaster. There is no place in the world today that is safe from ecological disasters, and this reality underlines the neutral and collective nature of disasters. Every place on earth can be, at one time or another, the scene of a disaster, predictable or not.<sup>58</sup>

The characteristics of certain populations or segments of population can help to minimize or increase exposure to disasters. It is common, for example, for the poorest populations of large cities to live in the most prone areas, such as hills, banks of rivers, and industrial peripheries while the wealthy live generally in better built, less polluted neighborhoods, distant from industrial centers. Regardless, violence and disasters could sweep away these seeming advantages in seconds. The emergency situation that disasters represent erodes social, cultural, and economic differences. It acts as a common denominator by placing all victims on an equal footing. The entire population is in an emergency situation, the alternatives being either fleeing to survive or dying on the spot.

Victims of environmental disasters are threatened by the extreme events which force them to flee their homes. We see here the idea of a refugee which could be internal within a country or external when those affected are forced into exile, thereby leaving a territory that once was home to seek asylum and survival elsewhere.<sup>59</sup> This could be a proper situation to talk about “environmental victims” or “environmental refugee”?

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<sup>57</sup> F. Ramade, *Eléments d'écologie, T.2, Ecologie appliquée : action de l'homme su la biosphère* (Paris: McGraw-Hill, 1982) at 452.

<sup>58</sup> On the various disasters typically presented according to their origin, see J. Sørensen, et al., “Natural Hazards and Disasters Drawing on the International Experiences From Disaster Reduction in Developing Countries” (Report, NIBR, 2006).

<sup>59</sup> Biermann, *supra* note 11; McNamara, *supra* note 16; McNamara, *supra* note 23.

## **B. CHARACTERISTIC OF THE VICTIMS OF ENVIRONMENTAL DISASTERS**

Victims of environmental disasters have unique identifying features. They are collective victims as earlier stated; they are displaced, and they are displaced by environmental causes. When environmental disasters happen, we speak not of singular victims, but of victim populations. The individual is engulfed by the disaster and melts within a mass of other victims. All the people that make up this group are affected but cannot be identified or considered individually. The disappearance of the individual within a group is therefore characteristic of the ecological disaster itself.

In some contexts, international law has recognized the concept of collective victimhood. For example, the Preamble to the United Nations Charter proclaims “We the peoples of the United Nations” by which all humanity is recognized as a collective. The same understanding could be found in the International Convention Against Genocide,<sup>60</sup> the International Convention against Racial Discrimination,<sup>61</sup> and Article 41 of the International Covenant on Civil and Political Rights and its First Optional Protocol.<sup>62</sup> These instruments recognize that a group of people could be victims of serious violations of human rights.

In addition to the collective nature of their circumstance, victims of ecological disasters are also often displaced. The population within the area that the disaster occurred must flee to a safer place where the environment is intact. The displacement of the affected population is both spatial and temporal. The emergency situation controls the flight to safety. The victims grab what they can take and flee as quickly as possible to a place beyond the scope of the disaster. The displacement is therefore in space as it is impossible to predict that this will be the case prior to the disaster occurring. It cannot also be predicted how far the movement to a safe place will be. Will it be domestic (within the country where the disaster took place) or international (which is

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<sup>60</sup> *Genocide Convention*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1953).

<sup>61</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>62</sup> The Optional Protocol to the International Covenant on Civil and Political Rights, beginning to be widely known to the public, we have witnessed the proliferation of communications from individuals complaining of violations of their rights by their States. The Human Rights Committee decisions made under the Optional Protocol have helped to change the jurisdiction of some States. In a number of cases, prisoners were released and compensation was given to the victim whose rights were violated. In 1990, the Committee instituted a mechanism by which it seeks to observe more closely the attitude of States Parties on measures taken to give effect to its decisions; State cooperation was encouraging to see the document on the website of the High Commissioner for Human Rights, online: <<http://www.unhcr.ch/french>>.

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to another country)? If international, how will the victims be treated under international law? I answer this question next.

### IV. LEGAL PROTECTION *DE LEGE FERENDA*

How can international law respond to the reality of environmental victimhood and what status should be accorded to environmental refugees? This question calls for numerous practical and legal sub-questions including, but not limited to the following: Who will host the populations of today's sovereign Pacific islands when the rise in sea level will condemn them to exile? Where will the populations of deltas and coasts nibbled and swallowed by the increase in the water level flee to? Which States will host the peoples of the Far North deprived of land by ice melt, or the people of Africa threatened by floods, landslides and droughts? The list of environmental disasters likely to drive people from their homes are numerous.<sup>63</sup> While the challenge of such disasters is humanitarian in small part, it is also political in the sense that it combines ethical, social and common-values questions regarding international law.

It may seem that victims of environmental disasters are close to the classical notion of refugees. Yet refugee status is already strictly defined in international law. The question therefore is whether it is possible to tailor-make refugee status for environmental disaster victims based on the elements of current international law in force. The answer to this question is inspired by the principle of humanity<sup>64</sup> around which revolves autonomy and rationality as a foundation for human dignity. Why does thinking about humanity involve considering man, and especially his protection in case of threat? Respect for human dignity is the first requirement of the right and also dependent on personal security in real life.

When applied to refugee situations, the right acquires a particular and more significant content. In a situation of physical threat and material deprivation, respect for dignity appeals to the satisfaction of basic material needs and respect for the integrity of the individual. When all are put together, respect for the human person induces, in this case, the qualification for asylum.

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<sup>63</sup> Many books describe the different befallen and potential disasters. I refute their natural or non-natural-anthropoc classification on the grounds that whatever catastrophe happens, man will always a role therein, either because he has made it possible, or he favored the occurrence of the disaster, or his action has increased tenfold the effects of the disaster.

<sup>64</sup> J.E Atwell, *Ends and Principles in Kant's Moral Thought* Vol 22 (Dordrecht: Springer, 1986) at 105-137.



The need for asylum is the first element and the pillar of protection sought in fleeing away from harm. The right to seek asylum and the right to be granted asylum is the first right that environmental refugees need. Therefore, the international law-making system has the responsibility to recognize that there is a real need to protect populations living in total material and legal deprivation.

The Universal Declaration of Human Rights (UDHR) and subsequent international human rights texts recognize the “inherent dignity of all members of the human family”<sup>65</sup> as the cornerstone of all human rights.<sup>66</sup> Every person should be treated with dignity, and seen as having rights in the context of human rights instruments intended to achieve self-respect.<sup>67</sup> Respect for human dignity is therefore the first condition for dignified individual and collective life. Refugees deserve no less. They should be treated humanely, and all their rights should be respected.

Respect for the person individually or as part of a group suggests in its negative version freedom from torture, cruel, inhuman and degrading punishment, xenophobia, racial, gender, religious and other forms of discrimination. It means, in positive terms, respect for fundamental intangible rights like freedom of thought, free speech, freedom of association, religion, and freedom of information. These rights and freedoms are all contained in the UDHR. Emphasis is to be put on the importance of respect for human dignity in the case of environmental refugees in particular, considering that they are in a precarious situation, weakened and susceptible of easy abuse. But dignity is the very essence of man, while the satisfaction of his needs, although essential, is not particular to him.<sup>68</sup>

The material version of dignity induces an extensive conception of the subsistence minimum in compliance with the host environment. Catering for the physical needs of environmental refugees is a necessity without which the entire status loses its meaning. It induces the construction of sufficiently large camps, their installation on safe ground, their supply with drinking water, food, fuels, physical and health organization, in living areas, the

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<sup>65</sup> That is how begins the Preamble to the Universal Declaration of Human Rights, adopted in San Francisco August 10, 1948.

<sup>66</sup> A. Schweitzer, *Vivre, Espaces libres*, (Albin Michel, 1970) at 228; *Le droit d’être un homme*, Anthologie mondiale de la liberté, J. Hersch Ed. JC Lattes, UNESCO, Paris, 1990 at 588.

<sup>67</sup> A. Camus, “The Only Dignity of Man: The Tenacious Revolt Against His Condition” and Pascal, “The Whole Dignity of Man Lies in Thought”.

<sup>68</sup> M.L. Balanda, “Le droit de vivre at 33” in Daniel Prémont (ed) *Essais sur le concept de ‘droit de vivre’ in Memory of Y. Khushalani* (Brussels: Bruylant, 1988) at 321.

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establishment of adequate health care for the treatment of existing diseases and for the prevention of epidemics and possible diseases. All of this requires adapted human and material logistics. The location of the host camp is very important as refugees have been often placed in risk areas near the areas where fightings or guerrillas are conducted.<sup>69</sup>

The implementation of the recognition, to every human, of his dignity passes, even for refugees, by a wide application of the principle of *non-refoulement* most often expressed negatively, requiring, in its conventional sense, that a refugee is neither expelled nor sent back to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, political opinion or social group.<sup>70</sup> This transposed definition of Article 33-1 of the 1951 Convention presents a ban on returning (*refouler*) individually refugees.

The principle of *non-refoulement* would mean, in the case of environmental refugees, that a State shall not expel, nor convey, in any manner whatsoever, refugees to territories where their life or safety is threatened because of the ecological disaster and its dangerous effects. It induces that a State cannot deny access to its territory the victims of an ecological catastrophe, no border closure, frank or disguised, to environmental refugees, being acceptable, States have the duty to temporarily accommodate environmental refugees victims of an ecological disaster.

For the purpose of this article, it is important to conceive the principle of *non-refoulement* collectively, a direct consequence of the collective nature of the victim, and to renew the formal prohibition of *refoulement*. The principle of *non-refoulement* is absolute, admitting no reservations or limits as provided in the 1951 Convention. Its content requires, however, a precise substantive definition.

Is the principle of *non-refoulement* applicable to all persons claiming to be victims of an ecological disaster, regardless of the medium that allowed them to escape? Is there a way to distinguish according to the nature of the means of escape? Those arriving by land, mostly on foot, perhaps by bus, bicycle, car, or even by train, do not raise any particular doubts, I think, these means of transport being so widespread that they appear normal to banality. However,

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<sup>69</sup> J. Hathaway, *The Rights of Refugees Under International Law* (United Kingdom: Cambridge University Press, 2005).

<sup>70</sup> Article 33-1 of the 1951 Convention, entitled "Prohibition of expulsion or refoulement"; K. Röhl, "Fleeing Violence and Poverty: Non-Refoulement Obligations Under the European Convention of Human Rights" (UNHCR, January 2005, Working Paper No. 111); J. Crisp, "A New Asylum Paradigm? Globalization, Migration and the Uncertain Future of the International Refugee Regime" (December 2003, Working Paper No. 100).

reducing the benefit of the status of environmental refugees to the only people fleeing on foot would be anachronistic, since environmental refugees fleeing a brutal destruction of their environment would use the most practical means available immediately. The means of transport used does not, in this case, pose any particular problems to the extent that the movement stops when a venue is reached. But people fleeing by sea may pose some other questions.

The issue of people fleeing a serious danger by sea has arisen about the Indochinese fleeing the peninsula by boat. Is the fact of fleeing a contaminated territory by boat inconsistent with the notion of environmental refugees? The rescue of ships and people in need on the high seas is a universally diffused, accepted and respected rule of customary international law.<sup>71</sup> With this principle in mind, the question resurfaces when it comes to offload the people: what status and therefore what rights do they have in the host country? Since the causes of departure, destruction or contamination of the environment led to the forced departure of the population, does the usual means of transportation to escape matter and to what extent?

More than the transportation itself, the important thing is the distance traveled and the chosen docking location: if the boat has rallied the nearest healthy coast or among the closest, the flight by boat turns comparable to an exodus by land, the aim being the survival and the safety of the victims.<sup>72</sup> If, by contrast, the boat crossed the seas to a distant destination, of course less logic, it appears that on the desire to escape the disaster was superimposed that of trying one's luck elsewhere, motivation and behavior similar to economic immigration. The collective nature of the flight and the objective causes of departure could, however, obliterate the distance traveled and the motivation to find better living conditions, on condition of concrete assessment of the situation.

The fact that people have used a boat to flee is, therefore, not in itself a sufficient ground liable to prohibit the recognition of the status of environmental refugees to these people, even less that the sea sometimes is the only means used in the event of rising sea levels, floods, or rupture of a dam. The relevant authority will have to assess specifically the elements specific to each situation, with, of course, a sovereign power.

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<sup>71</sup> See I. Papanicolopulu, "The Duty to Rescue At Sea, in Peacetime and in War: A General Overview" (2016) 98:2 Intl Rev of the Red Cross 491.

<sup>72</sup> In this regard, Albanians docking in southern Italy rallied the nearest country hoping to find some security, see *Le Monde*, 17 and 18 March 1997, without prejudging the nature of people fleeing. But see also T. Malaspina, "Italy, Albanian Exodus? A mafia colonization (1997) *Espresso*, Rome, reproduced in *Le Courrier International*, No. 334, (27 March-2 April 1997) at 13.

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Does the fact of chartering a plane and flying through the air close the door to the status of environmental refugees? The plane, as a means of transportation, does prejudge neither the causes for departure nor the conditions of arrival. However, the act of taking a plane induces a remote destination. But environmental refugees flee, hypothetically, a severe but localized situation inducing *a priori* a movement limited in space. It is not clear whether beyond this perimeter the displacement meets the same motivation. However, the aircraft being the most rapid means of public transport, it may be the most appropriate in emergency situations, by air contamination, for example in case of chemical or nuclear pollution. The plane has become a means of transport so common that it does not seem that we should reserve it a special attention. It is by contrast especially suitable for large emergency situations—in case of emergency like civil war in a country, States evacuate their nationals by air. Therefore, it seems consistent to apply the same treatment to environmental refugees.

Where will this plane or these planes offload their passengers? These passengers are not illegal in the sense in which many countries understand, within the Schengen area for example.<sup>73</sup> These are refugees and the difference is essential. Their first reason is the flight for survival, not the desire to emigrate elsewhere. The principle of first asylum takes on its full force, as practiced in African countries but also in India for Burmese refugees or Pakistan for Afghan refugees. People flee a mortal danger—they have the right to be welcomed and protected outside the contaminated area. The countries have a duty to welcome these people faster, even then move them into a more suitable location. The principle of first asylum contains both support and protection against the danger fled.

The right not to be sent back means the ability for people fleeing the consequences of an ecological disaster to access a non-hazardous healthy territory, beyond the devastated area. *Non-refoulement* includes physical access, that is, non-closure of the territory and the border, and the lack of intimidation to impress or deter refugees from entering. This right induces, in positive terms, allowing refugee populations access to the territory by providing them with a home ground, a necessary corollary that the right to asylum is as discussed below.

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<sup>73</sup> Europe: un espace 'de soft-apartheid' Schengen, Dublin, Maastricht ... L'esprit des conventions, *Plein droit*, (Paris, No. 20, 1993) at 6-70.

The principle of *non-refoulement* has, in the case of environmental refugees, a collective dimension, again, applying to the whole group that can be accepted only in block, any differentiation between individuals therein being impossible. This principle appears, in this collective version, widely used in the South, while Northern countries are sticking to an individualistic conception<sup>74</sup> impossible to apply to environmental refugees, on risk of emptying the proposed status of any sense.

## V. HOW TO ORGANIZE INTERNATIONAL LEGAL PROTECTION

The envisaged status of environmental refugees would be material because, unlike conventional refugees for whom the existing status replaces the faulty legal relationship with their country of nationality or habitual residence with a new legal relationship with the host State, this link is not broken. There is no need for a new legal relationship, the former remaining, although the disaster has rendered it inoperative. It is therefore necessary to consider the establishment of a material status during the time when victims remain environmental refugees, which would consider the temporary inefficiency of the protection of the State of origin in order to provide material assistance to refugees without replacing the legal relationship that continues and will later resume its full force.

### A. MATERIAL STATUS

It is a matter of providing solutions that cater for the needs of recognized environmental refugees, by means of “light” survival as it is temporary: logistics adapted according to the situation being required to install the camps, to supply them with food, drinking water, kitchen equipment, fuels, to allow a healthy lifestyle through latrines, a drainage system, as well as care, drugs and vaccines to prevent epidemics in particular. The experience of the UNHCR and the ICRC particularly is, in this respect, valuable for assessing the population, negotiate the establishment of camps with host countries and regions, allowing an organized facility and to repatriate the refugees to their place of normal life when camps will be closed, and to limit environmental disturbances on the venue. The strictly material character of the status partakes of the temporary nature of the reception of environment refugees.

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<sup>74</sup> The Movement of Foreigners Within Europe: Schengen and Dublin Conventions, Maastricht Treaty, Agreement on the European Economic Area, EEC-third States Agreements, Border Crossing Convention, (Plein droit No 24, 1994).

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### **B. TEMPORARY STATUS**

The status of environmental refugees aims, in principle, at protecting these people by the time the effects of the disaster are dissipating and a safe return is possible, the resettlement of refugees on their traditional living places resulting in the loss of the qualification of environmental refugees. Although this principle may seem clear, it nonetheless stumbles on the issue of the permanent environmental disaster that makes the place in which it occurred uninhabitable for a long time. Is a time scale possible for environmental refugees? Can they remain so indefinitely? If not, what do they become then, in the case of temporary status?

The cases of massive deforestation, nuclear or chemical disasters<sup>75</sup> resulting in long-lasting water or soil pollution during the storage or disposal of hazardous waste, global warming, rising water levels, for example, are all situations that generate the permanent displacement. It seems, for various reasons, difficult to conceive a status of permanent environmental refugees:

- A status conceived to regulate a temporary situation cannot last more than a generation;
- A permanent departure requires, too, a permanent solution;
- It is important to differentiate between temporary environmental refugees and permanent refugees, each requiring a regime adapted to their respective situations, otherwise the status runs the risk of not being useful to anyone.

So, on what basis to establish the distinction and what are the consequences attached to it? The distinction between temporary and permanent environmental refugees seems able to settle only on a case by case basis. It might be possible to set a time below which we are in a situation of environmental refugees as here conceived, and beyond, permanent refugees; but what time to fix? 5 years? 10 years? 25 years? More or less? The time for a generation, that is about 25 years, seems very long for the displaced population as well as for the host State and the international community through the organization in charge, and five years is short to restore a badly damaged environment. While most disasters are absorbed quickly, in a few days or months, we cannot exclude in advance some non-permanent disasters that may take long to disappear. Shouldn't one consider an environmentally stateless status when a population is deprived of its State because the latter has physically disappeared?

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<sup>75</sup> Chernobyl, 10 years later, *Le Monde* and *Libération*, 10-30 April 1996. About these disasters in the former USSR, see in particular B. Komarov, "Le rouge et le vert, La destruction de la nature en U.R.S.S" (Seuil, Paris, 1981) at 214.

It seems premature to answer from now, many views and discussions appearing, in this case, essential. The only option in respect of permanent refugees would perhaps be relocation, that is, to find a place that could accommodate them permanently. The role of the international community in the search for a long-term solution is essential, implementing active solidarity to take responsibility for the relocation of the population with a lasting, humane and realistic solution. Can't one imagine a body responsible for proposing permanent relocation solutions to then be submitted to the States directly concerned and to environmental refugees? Everything depends on the will of the international community to address the problem.

The treatment of environmental refugees should be framed by legal rules while I have, paradoxically, emphasized the material nature of the status, refusing to replace the natural legal relationship between the State and its citizens. I should, however, insist on the legal nature of the proposed status: a "legal" status induces qualification and treatment of refugees rooted in the legal norm, beyond a factual practice.

### C. UNITARY STATUS

In recent years, the issue of "climate refugees", "hunger refugees", "environmental refugees" etc ... attracted the attention of researchers and set back from politics. Various theories are emerging. Some argue for a categorization of refugees according to the causes of the disaster at the origin of their departure. Thus, of "climate refugees",<sup>76</sup> some consider necessary to imagine a protection for victims of global warming. And of "chemical refugees", one could imagine a special status for victims of a chemical accident like Minamata, Seveso, Bhopal, Feyzin, or a nuclear accident like Chernobyl.<sup>77</sup> It is permissible to imagine all the possible differentiations. The major risk is the fact of classifying, sorting and selecting that leads to bureaucratic problems: who is competent to "choose" the beneficiaries? This would lead, as for the 1951 convention-

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<sup>76</sup> Collectif Argos, *Climate refugees, Réfugiés climatiques*, COLLECTIF ARGOS, Éd., INFOLIO, 2007 at 350; Etienne Laberge and Claude Bouchard, *Bangladesh: menace H2O "Oui, ils sont des réfugiés climatiques"*, February 3, 2008 online: <<http://bangladeshclimat.blogue.ca/>>; at the United Nations, Al Gore called for a climate treaty for 2009, UN News Centre online: <<http://www.un.org/apps/>>; François Gemenne, *Réfugiés climatiques : un défi majeur pour le XXIe siècle*, *le Monde*, 20.06.2008; Martin Beniston, *Natural and anthropogenic forcing of climate: current knowledge and uncertainties*. FORCE Seminar (Forest Resources in a Changing Environment), Freiburg-im-Breisgau, Germany, October 8, 2007; M. Beniston, *Humanitarian Action in the face of climatic change*, Annual Assembly of the UN Office for the Coordination of Humanitarian Action (OCHA), Montreux, Switzerland, June 26, 2007; M. Beniston, *Environmental security of large urban areas*. UCLA seminar on Security in Europe and Eurasia, Los Angeles, USA, June 1, 2007.

<sup>77</sup> "Main Environmental Events in the Twentieth Century" online: <<https://www.coursehero.com/file/p6hoptki/Table-1-Main-environmental-events-in-the-twentieth-century-Year-Event-1947-Ship/>>.

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type refugees, to an individual procedure or a procedure with individual tendencies, totally inadequate, which would empty any substance out of the envisaged protection regime.

In this regard, it seems more realistic to consider a “collective” status of environmental refugees, that is to say, a status that does not distinguish between the causes of the departure and the disaster, but which acts on its consequences. The concept of “hunger refugees”<sup>78</sup> has been proposed in international circles. If we can talk endlessly about the implications of a particular word, it is clear that as soon as a person or a group of people is hungry, that is, that the environment is not able to feed them, we are very close to the concept presented here of environmental refugees.<sup>79</sup>

The idea supporting hunger refugees and environmental refugees is one: when a population is seriously endangered by its environment, it must be able to find the support of the international community as a whole. It is the responsibility and accountability of the international community, States and relevant organizations, including the UNHCR, to get around a table in order to honor their first mission: respect for the dignity of each and every one in all situations, especially the most serious.

## VI. CONCLUSION

The legal protection of environmentally displaced persons at the international level poses a serious problem, especially in view of the legal vacuum due to the lack of protection in current international instruments and the reluctance of the international community to commit to clear legislation on migration in relations to the environment. It is clear that the protection instruments in force today regarding the status of refugees, human rights and disaster law do not effectively protect the environmentally displaced. It is this legal vacuum thus found that has opened the field

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<sup>78</sup> Jean Ziegler, Press Conference, Special Rapporteur on the Right to Food, October 26, 2007; J. Ziegler, *Les réfugiés de la faim*, in *Le Monde Diplomatique*, March 2008; A UN expert called for immediate end to the persecution of hunger refugees on Chinese soil, E/C.12/Q/CHN/1, China. 07/06/2004, CESCR Committee on Economic, Social and Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights.

<sup>79</sup> Christelle CURNIL “Vers la reconnaissance du ’réfugié écologique’?” “Vers la reconnaissance du ’réfugié écologique’?” (Revue du droit public, July-August 2006, No. 4) at 1035; Pierre Mazzega “Catastrophes écologiques et flux migratoires : Comment protéger les ’réfugiés écologiques’?”, in *Revue européenne du droit de l’environnement*, No. 4 (December 2006) at 417-427; Idem, “Réflexions prospectives sur une protection juridique des réfugiés écologiques”, (2007) 23:1 Revue Européenne des Migrations Internationales 7; P. Mazzega, “Comment protéger les “réfugiés écologiques”?” (2007) 23:1 Revue Européenne des Migrations Internationales, 7-34.



for a strong doctrinal controversy between supporters of *lege lata* and those of *lege ferenda*, a controversy reinforced above all by the lack of consideration, in the analyzes, of the values of charity and solidarity as well as the concept of humanity, as the basis of effective legal protection.

And yet, these environmentally displaced people, in fact these refugees, are an expanding reality that cannot be ignored. The condition of environmental refugees has been analyzed here from a philosophical-legal perspective. On the basis of the available reflections, the condition of environmental refugees has been presented as precarious on the legal plane, the refugee representing an otherness unassimilable by the notions of the established order. As an alterity, he makes an ethical category that has the potential to make it possible to judge the validity of current international law. In fact, it is the relationship between law and environmental refugees that revives the debate about the connection between law and human life, because life without law is a life abandoned and condemned to live in the condition of faction whose exception becomes the norm since, in the void created by the absence of law, the arbitrariness of a sovereign will be queen.

The vacuum condition in which the environmental refugee lives appears as a threshold from which it is necessary to think of a new law, namely the adoption of a new convention recognizing the international legal status of the environmentally displaced. This proposal lays the groundwork for further research on concrete legal solutions to the international protection of environmentally displaced people in a number of ways. First of all, it is necessary to fill the legal void found by many scholars where they recognize the fact that the Geneva Convention of July 1951 on refugees is legally inadequate since it does not concern environmental refugees. It does not consider the fact that, by destroying a place, the ecological disaster reaches everyone usually inhabiting it, whence all victims should also benefit from the proposed protection. It applies only to people crossing a border, individuals, not groups, and no amendment should be made to it at the risk of weakening it. The new instrument should be based on solid legal foundations, in particular the international conventions on human rights, which must be applied in all circumstances, both in normal times and in times of disaster, the right to life which “is also a right to survival in the event of a disaster”: organizing the flight is a condition for survival and as specified in article 4, 2 of the International Covenant on Civil and Political Rights, this right to life is one of those to which States cannot derogate, even in cases of “public emergency”. The

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new instrument should also be based on a series of declarations, starting from the Rio Declaration of 1992 in principle 18, which stipulates the duty of ecological assistance by stating that: “Every effort shall be made by the international community to help States so afflicted”.

In addition, to ensure its implementation, the new instrument should also stipulate the creation of appropriate institutions that can respond in a concrete way to the need to protect environmental refugees. It must also appeal to the international community for more solidarity, more responsibility and above all not to regress but to evolve. Indeed, international law as a whole must evolve to meet the different challenges of this century as well as those of the coming centuries. The fight against environmental damage resulting in the massive displacement of the population is at the center of these challenges. New concepts must be invented, new institutions created, and especially sufficient funds collected.

Does this seem realistic? Will today’s society, aware of profound changes that lie ahead, have the courage and strength of utopia required to lay the foundations of an ecological haven? These elements should allow States to work out a status of environmental refugees. A fair and well-functioning protection of environmental refugees must rely on clear principles and rights, established and adopted.