PROTECTION OF PERSONS DISPLACED ACROSS BORDERS IN THE CONTEXT OF DISASTERS AND THE ADVERSE EFFECTS OF CLIMATE CHANGE

A REVIEW OF LITERATURE, LEGISLATION AND CASE LAW TO SUPPORT THE IMPLEMENTATION OF THE GLOBAL COMPACT ON REFUGEES

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PLATFORM ON DISASTER DISPLACEMENT
FOLLOW-UP TO THE NANSEN INITIATIVE

UNHCR
The UN Refugee Agency

Table of Contents

EXECUTIVE SUMMARY

The Global Compact on Refugees (GCR) calls for mechanisms for the fair and efficient determination of individual international protection claims in order to ensure that protection gaps are avoided (para. 61). Identifying "climate, environmental degradation and natural disasters" as factors intertwined with drivers of refugee movements (para. 8), it advocates for both guidance and support to manage protection and humanitarian challenges, including for those "forcibly displaced by natural disasters, taking into account national laws and regional instruments as applicable, as well as practices such as temporary protection and humanitarian stay arrangements, where appropriate" (para. 63). Thus, the **GCR contains relevant provisions** for the protection of people displaced across borders when displacement relates to the impacts of climate change, environmental degradation, and disasters. It also recognizes that application of the GCR, to a limited extent, overlaps with the Global Compact for Safe, Orderly and Regular Migration, particularly its Objective 5 on enhancing the availability and flexibility of pathways for regular migration that suggests specific actions to assist persons compelled to leave their country in the context of sudden- and slow-onset disasters (para. 21[g] and [h]).

This review of current State practice shows that authorities in many countries have been confronted with individuals claiming international protection due to the impacts of disasters and climate change. To support implementation of the GCR, this review describes a wide range of **good practices** to provide international protection based on **international and regional refugee and human rights law** or to provide admission and stay based on **migration law** to persons displaced across borders in the context of disasters and adverse effects of climate change who do not or are unable to apply for international protection. Overall, existing practice demonstrates that consensus is growing on the need to protect such persons through national and regional applications of these three areas of law. However, a closer analysis of State practice indicates that the use of these tools is limited, often random, hard to predict, and neither harmonized nor well-coordinated.

While it is widely acknowledged that the relevance of **international and regional refugee law** for people displaced across borders in the context of disasters and climate change is limited, scholars as well as courts increasingly recognize that persecution may still occur *in the context* of such event, particularly where authorities intentionally, and for reasons recognized by the 1951 Refugee Convention:

- inflict environmental harm on a particular group;
- arrest, ill-treat, or prosecute and punish individuals due to their actions or opinions that are perceived as critical of the government's disaster management and response;
- deny (access to) humanitarian assistance; or
- are unwilling or unable to provide protection from harm by non-state actors (e.g. gender-based violence.)

Although cases are rare, courts have also recognized that disasters and the adverse effects of climate change may amplify vulnerability and thus *contribute* to persecution for Convention reasons. Courts have also considered, among other factors, the impacts of disasters and the adverse effects of climate change when assessing whether a specific region in the country of origin can provide an internal flight alternative. The wider refugee notions enshrined at the regional level in the OAU African Refugee Convention and the Cartagena Declaration, with their reference to events or circumstances that are seriously disturbing public order, also have some potential, although use to date has been limited to situations where disasters and the negative impacts of climate change interact with conflict and violence, leading to a breakdown of law and order.

Human rights law, based on its prohibition of forcible return to serious harm in disaster- and climate change-affected countries, also has potential, to protect disaster-displaced persons by providing subsidiary/complementary protection in accordance with the right to life and the prohibition of inhuman and degrading treatment. Cases decided in different jurisdictions have applied this prohibition where there were substantial grounds for believing that the person concerned faced a real risk of serious harm in the country of origin, in particular in situations of:

- disaster-related danger to life;
- dire humanitarian conditions so severe as to amount to inhumane treatment; or
- severe, rapid and irreversible deterioration of health leading to severe suffering or a significant reduction in life expectancy.

In practice, this means that the protection of human rights under current case law is limited to situations of ongoing and foreseeable, rather than more distant disaster- and climate change related harm.

To date, **migration law** has offered the most widespread mechanisms for authorizing the admission, stay, or non-return of persons displaced abroad in the context of disasters and the adverse effects of climate change. Numerous countries have discretionary humanitarian measures that permit authorities to grant entry and/or stay of foreigners from disaster-affected countries or to provide temporary protection for foreigners from such countries who are in an irregular situation. Some of these legal provisions, such as in the Americas, specifically mention disasters in the country of origin, while other countries interpret the notion of humanitarian and compassionate considerations to extend to disaster situations. Bilateral or regional agreements on the free movement of persons, as well as bilateral agreements or domestic laws that establish migration quotas for people from countries particularly vulnerable to disasters and adverse effects of climate change, also have the potential to allow persons to move to other countries in anticipation of, during, or in the aftermath of disasters. However, the discretionary nature of humanitarian measures and the larger economic reasons often motivating the creation of other migration pathways makes the application of migration law unpredictable as tool for addressing cross-border disaster-displacement.

Future research could analyze regional mobility patterns and assess to what extent existing practices meet the protection and

assistance needs of disaster displaced persons. Existing practice could also be analyzed with reference to the criteria for identifying cross-border disaster-displaced persons. Finally, research could further identify and assess the different levels of protection and assistance that existing policy and legal measures provide to disaster displaced persons.

Recommendations: To support the implementation of paragraphs 61 and 63 of the Global Compact on Refugees,

❶ UNHCR should develop further guidance and invest in capacity building by:

a) Systematically highlighting in its non-return advisories and country guidance papers how disasters, the adverse effects of climate change, and environmental degradation, when assessed in light of other factors, can heighten existing vulnerabilities and should be taken into account in decisions related to refugee status determination, non-refoulement subsidiary protection, and cessation of refugee status;

b) Issuing operational guidance, following field research, on the potential application and limits of international and regional refugee and human rights law, as well as temporary protection and humanitarian stay arrangements, with respect to displacement in the context of disasters, the adverse effects of climate change, and environmental degradation;

c) Convening roundtables or other forums with practitioners, academics, and experts on the application and limits of international and regional refugee and human rights law and the use of temporary protection and humanitarian stay arrangements with regard to persons seeking international protection in the context of disasters and the adverse effects of climate change.

❷ States, in order to harness the full potential of the 1951 Refugee Convention, and in accordance with paragraph 61 of the Global Compact on Refugees, should

a) Include the issue of disaster- and climate change-related displacement in training for officials and judges involved in refugee status determination;

b) Ensure the systematic integration of relevant disaster and climate change-related facts and analysis in country-of-origin information;

c) Ensure access to refugee status determination procedures for everyone claiming to be in need of international protection due to persecution in the context of disasters and the adverse effects of climate change; and

d) Ensure that decision makers systematically consider factors related to disasters and adverse effects of climate change as relevant elements when deciding whether an internal flight alternative exists or whether to grant complementary/subsidiary protection.

❸ States should, with respect to paragraph 63 of the Global Compact on Refugees, further consider

a) Developing new or strengthening existing tools based on humanitarian considerations, such as humanitarian visas and temporary protection status, that are harmonized and utilized in predictable ways;

b) Integrating disaster displacement into regional or bilateral agreements on the free movement of persons; and

c) Introducing immigration quotas, in order to create pathways for safe, orderly, and regular migration from countries particularly affected by sea level rise or otherwise losing habitable territory as a consequence of the adverse effects of climate change.

❹ Donors should explicitly include and address cross-border displacement in the context of disasters and the adverse effects of climate change in programs and projects supporting countries hosting refugees, whilst not neglecting efforts to reduce greenhouse gas and to prevent and address displacement in countries of origin, including through climate adaptation and loss and damage financing.

1

Introduction

1.1 OVERVIEW

The Global Compact on Refugees (GCR) calls for mechanisms for the fair and efficient determination of individual international protection claims in order to ensure that protection gaps are avoided (para. 61). Identifying "climate, environmental degradation and natural disasters" as factors intertwined with drivers of refugee movements (para. 8), it advocates for both guidance and support to manage protection and humanitarian challenges, including for those "forcibly displaced by natural disasters, taking into account national laws and regional instruments as applicable, as well as practices such as temporary protection and humanitarian stay arrangements, where appropriate." (para. 63). With this reference to such practices, the GCR builds a bridge to the Global Compact for Safe, Orderly and Regular Migration (GCM) and, in particular its Objective 5 on enhancing the availability and flexibility of pathways for regular migration, which suggests specific actions to assist persons compelled to leave their country in the context of sudden- and slow-onset disasters (para. 21[g] and [h]). Thus, the GCR not only contains relevant provisions for the protection of people displaced across borders when displacement relates to the impacts of climate change, environmental degradation, and disasters, but also recognizes that, to a limited extent, the two Global Compacts have an overlapping scope of application (Bast and others 2024: 4).

As UNHCR (Legal Considerations 2020) has highlighted, in specific circumstances, people displaced across borders in the context of climate change and disasters might be entitled to refugee status under the 1951 Convention as well as certain regional refugee instruments, namely the 1969 OAU Convention governing specific aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration. In addition, cross-border disaster-displaced people might be able to rely on subsidiary and complementary forms of protection under international human rights law based on the principle of non-refoulement, i.e., the prohibition not to return a person to a country where they face a real risk of serious

harm. Further, temporary protection or stay arrangements based on migration law may also be a pragmatic way to provide protection to those in need, especially after a sudden onset disaster.

This review of relevant literature, legislation, and case law aims to identify relevant good practices to provide international protection based on international and *regional refugee and human rights law* or to provide admission and stay based on *migration law* to persons displaced across borders in the context of disasters and adverse effects of climate change who do not or are unable to apply for international protection.[1] Rather than purporting to be comprehensive, it focuses on particularly illustrative academic studies, reports, legislation, and case law. The resulting compilation attempts to provide relevant information in an accessible form to support the development of guidance about how to adequately address protection challenges in the context of disaster- and climate change-related displacement.

After a short discussion on the conceptualization and scenarios (this section), the review focuses on good practices regarding the applicability of the 1951 Refugee Convention (Section II.1) and regional refugee law (Section II.2). This is followed by a review of practice regarding complementary protection under international human rights law (Section III) and humanitarian measures and other migration pathways available under migration law to persons displaced across borders in the context of disasters and the adverse effects of climate change (Section IV). The paper ends with short conclusions and recommendations (Section V).

1.2 CONCEPTUALIZING DISASTER- AND CLIMATE-RELATED DISPLACEMENT

GOOD PRACTICE

Understanding that displacement in the context of disasters and the adverse effects of climate change results from the interplay between exposure to natural hazards and socio-economic vulnerability is helpful for identifying and pinpointing the role of human factors in such situations, paving the way to overcome the truncated view of disasters as "natural" events that are not shaped by human factors.

There is no consensus on how to name and define persons forced to leave their homes and cross international borders in the context of disasters and adverse effects of climate change. This "definitional chaos" (Sciaccaluga 2020:57) is not only due to semantics, but also reflects different perceptions and conceptualisations of such events and the multiplicity of relevant applicable frameworks.

Three distinct approaches can be identified in the literature: The first focuses on **causality**. Biermann and Boas (2007:8), for instance, define "climate refugees" as "people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity". This and similar definitions focus on the cause of the movement, require attributing displacement to an environmental hazard, and highlight its involuntary nature. This "hazard paradigm" assumes that displacement is primarily determined by the hazard, rather than pre-existing social conditions (Scott 2020:13). Attributing a specific hazard to climate change is particularly challenging as, for instance, extreme weather-related events may occur unrelated to global warming, and climate-related sea-level rise may interact

[1] This study does not cover other branches of international law such as international climate, disaster risk reduction, desertification or labour law that also address certain aspects of displacement and other forms of human mobility in disaster and climate change contexts.

with subsidence in complex ways (Nicholls 2021). The focus of this approach on climate change and its role as a driver of displacement is primarily motivated by climate justice considerations.

A second approach highlights the **impacts** of a hazard. An early definition by the United Nations Environmental Programme (UNEP) (El-Hinnawi 1985:4), describes "environmental refugees" as "people who have been forced to leave their traditional habitat, temporarily or permanently, because of marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life". This approach still focusses on environmental events, but also looks at socio-economic impacts in the form of a qualifier. The same is true for IOM's notion of an "environmental migrant" as "a person or group(s) of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are forced to leave their places of habitual residence, or choose to do so, either temporarily or permanently, and who move within or outside their country origin or habitual residence" (IOM 2019:64). The definition of "environmentally displaced persons", suggested in a draft convention on the status of such persons, puts an even stronger focus on impacts as it includes "individuals, families, groups and populations facing a sudden or insidious upheaval in their environment that inevitably endangers their living conditions, forcing them to leave, urgently or in the long term, their usual places of life" (CIDCE 2018, art. 2[3]).

A third approach takes the notion of **disaster** as the starting point to highlight the multicausality of displacement linked to environmental events. Thus, according to the Nansen Initiative Protection Agenda (Nansen Initiative 2015:16):

> *the term 'disaster displacement' refers to situations where people are forced or obliged to leave their homes or places of habitual residence as a result of a disaster or in order to avoid the impact of an immediate and foreseeable natural hazard. Such displacement results from the fact that affected persons are (i) exposed to (ii) a natural hazard in a situation where (iii) they are too vulnerable and lack the resilience to withstand the impacts of that hazard.*

This notion, which is inspired by the UN definition of disaster,[2] focuses on the interaction of these three elements and, by referring to vulnerability, points more clearly than the other definitions to the need for protection. It thus reflects what Scott (2020:15) calls the "social paradigm", which first:

> *sees 'natural' disasters as a consequence of the interaction of natural hazards and social vulnerability. Consequently, human agency is inherent in all 'natural' disasters. Second, it recognises that within this social context, certain individuals may be more vulnerable than others on account of pre-existing patterns of discrimination. Hence, 'natural' disasters do not have an indiscriminate impact. Third, the social paradigm understands 'natural' disasters as process, in the sense that individual and societal vulnerability and exposure to natural hazard events is historically contingent and changes over time.*

These findings are important because they facilitate a determination of when international protection or other forms of admission and stay of persons displaced across borders is warranted. They suggest, in particular, that rather than being caused by natural hazards, including those related to the consequences of global warming, displacement takes place *in the context* of disasters and the adverse effects of climate change.

Disaster- and climate-induced displacement is not uniform but occurs in various displacement scenarios. Such scenarios provide insights to help understand the complexity of such displacements. An often cited set of scenarios focussing on situations within which

[2] UNDRR defines disasters as "A serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts."

displacement may take place distinguishes between (1) sudden-onset disasters such as flooding, tropical storms, or earthquakes; (2) slow-onset environmental degradation such as drought or permafrost thawing; (3) the so-called "sinking island" scenario characterized by increasing uninhabitability, affecting most or all of the territory of Small Developing Island States (SIDS), caused by the interaction of slow-onset sea-level rise and sudden-onset events such as storm tides; (4) the designation of areas as high risk zones too dangerous for human habitation or as areas declared off limits for human habitation as a consequence of climate change mitigation or adaptation measures, triggering relocation; and (5) violence linked to conflict over diminishing resources (Kälin 2010:85-86; McAdam 2011:10-11f; Kälin and Schrepfer 2012:13-16).

LEGISLATION EXAMPLES

Bolivia defines "climate migrants" as "[g]roups of persons who are forced to displace from one State to another due to climate effects, when a risk or threat to their life may exist, whether due to natural causes, environmental, nuclear [or] chemical disasters or hunger." (Ley No. 370, art. 4(16) [translation]; Cantor 2021:307)

Cuba defines as refugees "those aliens and persons without citizenship who are authorised to enter the national territory because they have had to emigrate from their country as a result of social calamity, war, cataclysm or other natural disasters or other natural phenomena and who remain temporarily in Cuba until normal conditions are restored in their country of origin" (Decreto No.26, art. 80 [translation]; Cantor 2021:293).

Regardless of the conceptual approach applied, the multicausality of displacement in the context of disasters, climate change, and environmental degradation contributes to the fact that the protection and assistance needs of displaced persons are context-specific. In many situations, fragility, conflict, and violence occur where climate vulnerability is disproportionately high (UNHCR 2023). Displacement triggered by the impacts of seasonal shocks, such as floods and storms, or drought is often recurrent in disaster prone or fragile areas. Climate change and disaster impacts also compound wider conflict situations and other drivers of refugee movements. This leaves, among others, people in pre-existing displacement situations particularly vulnerable to natural hazards. The extent of disruption and losses, how quickly the immediate threats from natural hazards pass, and people's capacity to recover all determine whether and how soon people can return to their homes.

Thus, within the various scenarios, displacement takes different forms, typically varying according to the regional context and wider internal and international migration patterns within which they occur. For example, disaster- and climate-related displacement is mainly internal and often short-term, but some displaced persons cross borders to seek refuge abroad. While some may seek short-term safety abroad from disaster and climate-related impacts that persist for days, weeks or months, others need long-term protection because they remain at risk even long after the disaster occurred. In situations where climate change undermines the habitability of sub-national regions or even whole countries, return might become impossible in the long run.

While comprehensive data do not exist, this review of current practices shows that authorities in many countries have been confronted with individuals claiming international protection due to the impacts of disasters and climate change. The following sections describe the various legal mechanisms that States have used to authorize the admission and/or stay of individuals displaced abroad in the context of disasters, climate change, and environmental degradation. As will be discussed, each mechanism has potential benefits and disadvantages with respect to responding to the specific protection and assistance needs of individuals.

2

Refugee Law

2.1 APPLYING THE 1951 REFUGEE CONVENTION

2.1.1 LIMITED APPLICABILITY

Flooding, tropical storms, earthquakes, volcanic eruptions, drought, landslides, coastal erosion and other environmental sudden- or slow-onset events often cause life-threatening or otherwise serious harm to affected persons. However, these natural hazards, as such, do not constitute persecution. As highlighted by domestic courts, "[t]he legal concept of 'being persecuted' rests on human agency", meaning that persecution must "emanate from the conduct of either state or non-state actors". Thus, in the absence of human agency, the mere occurrence of a *natural* hazard alone does not amount to persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion as required by the Refugees Convention" (Refugee Review Tribunal of Australia 2009, para.49). Relatedly, while the adverse effects of climate change may be attributed to human agency, greenhouse gas emitters cannot be imputed to have acted for a reason under the Convention (ibid., para. 51).

It is thus widely acknowledged that the relevance of refugee law for people displaced across borders in the context of disasters and climate change is limited (e.g., Burson 2010:159-62; Mayer 2011:380-2; Vallandro do Valle 2017:3-10). UNHCR asserts that "[t]he expression 'owing to 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" (UNHCR Handbook 1991, para. 39). The drafting history of the 1951 Refugee Convention (Storey 2023:344 and Zimmermann/Hermann 2024:523 with references) further supports the view that disasters, as such, are not covered by the Convention (e.g., High Court of Australia 1997; UK Upper Tribunal 2020, para 11; US Board of Immigration Appeals 1985) and thus it is not an adequate protection tool for such

situations (Cournil 2017:85). Authors, referring to relevant case law (see references in Goodwin-Gill and McAdam 2021:644-5) also highlight limitations inherent in Article 1A(2) of the Convention, in particular because:

- it is "difficult to characterise disasters and other weather-related events as persecution" (Borges 2020:120). Natural hazards as such cannot constitute harm amounting to persecution because the latter requires action or, in the case of non-state actors, inaction by State agents (Goodwin-Gill and McAdam 2021:644; Zimmermann and Herrmann 2024:524-5);

- the impacts of disasters do not usually contain a discriminatory element (McAdam 2012:44 and 46; Hathaway and Foster 2014:175-6), meaning that they affect everyone and do not target persons with a specific race, religion, nationality, membership of a particular social group or political opinion (Goodwin-Gill and McAdam 2021:644; Zimmermann and Herrmann 2024:525), an argument that can also be found in case law (e.g. NZIPT 2013, para. 67 with references; Refugee Review Tribunal of Australia 2009, para. 48 and id. 2010; UK Upper Tribunal 2020, para. 11); and

- in the case of climate-change impacts, neither authorities in affected countries nor States primarily responsible for greenhouse gas emissions qualify as "persecutors" (Goodwin-Gill and McAdam 2021:644; Refugee Review Tribunal of Australia 2009, para. 51).

Finally, requests for refugee status by applicants who have experienced relevant past persecution during a sudden-onset disaster may also fail when the fear of (future) persecution is not sufficiently well-founded due to the nature of the disaster (e.g., a volcano that only erupts every 200 years) or the unlikelihood of a similar event occurring in the near future.

2.1.2 BUT RELEVANT IN A SERIES OF SCENARIOS

GOOD PRACTICE

Instead of rejecting the applicability of the 1951 Convention altogether, identifying and distinguishing scenarios in which persecution may occur in the context of disasters and adverse effects of climate change facilitates the proper assessment of claims for international protection related to such situations.

Despite these limitations, UNHCR (2020, paras. 6-12) and legal scholars have started to examine more closely the potential of the 1951 Convention to protect persons displaced across borders in the context of disasters and adverse effects of climate change (Marcs 2008; McAdam 2012:39-51; McAdam 2021:835-8; Ragheboom 2017:293-357; Mukuki 2019:83-7; Borges 2020:116-151; Scott 2020: Goodwin-Gill and McAdam 2021:642-645; CGRS 2023:14-31; Storey 2023:344-348; Zimmermann and Herrmann 2024:523-527). They argue that the quadruple requirement of the Convention of (i) well-founded fear of (ii) harm serious enough to amount to persecution experienced (iii) as a consequence of State action or (in the case of non-state actors inflicting harm) inaction (iv) for reasons of race, religion, nationality, membership of a particular social group or political opinion may also be present in the context of disasters and climate change. To this end, UNHCR and scholars have identified a number of scenarios in which the 1951 Convention may apply, particularly in situations of:

- "a deliberate policy to harm specific individuals by either causing unsafe ecological conditions, or by not taking appropriate and feasible measures to ensure protection from environmental disasters due to one or more of the specific reasons" of persecution (Zimmermann and Herrmann 2024:524; similar Borges 2020:123; McAdam 2012:47-48; and Storey 2023:346-347), including "large-scale development projects that, with government consent, destroy the natural environment" (Borges 2020:127);

- consciously creating a life-threatening humanitarian crisis by (i) withholding or obstructing access to humanitarian assistance in disaster contexts; (ii) targeting particular groups reliant on agriculture for survival during armed conflict; or (iii) otherwise inducing famine for reasons relevant under Article 1A(2) (McAdam 2021:836; Hathaway/Foster 2014:176; Goodwin-Gill and McAdam 2021:643);

- an unwillingness or inability to provide protection from harm by non-state actors during or in the aftermath of disasters, such as gender-based violence in emergency shelters (Goodwin-Gill and McAdam 2021:643, McAdam 2021:836); or

- the flight of persons across a border during a disaster who qualify as Convention refugees (McAdam 2021:836).

Thus, there is widespread consensus in legal doctrine that the 1951 Convention has some, albeit limited, relevance for the protection of persons displaced across borders in the context of disasters and the adverse effects of climate change, provided harm amounts to persecution because it is caused by action or inaction of State authorities for reasons of race, religion, nationality, membership of a particular social group or political opinion, or because it occurs in situations where authorities are unwilling or unable to provide protection from relevant action by non-state actors.

As indicated above, these requirements can be fulfilled in different scenarios. Scott, in his seminal 2020 study, identifies and synthesizes the following scenarios where persecution in the context of disasters and adverse effects of climate change might occur:

1. Claims that the State *directly and intentionally inflicts harm* by (i) "intentionally causing environmental damage in order to harm a particular group"; (ii) cracking down "on (perceived) dissent relating to the causes and/or management of environmental degradation or disasters", or (iii) denying disaster relief in discriminatory ways;
2. Claims regarding State *failure to provide protection* because it (i) "causes damage to the environment, or allows such conduct to be perpetrated by non-state actors, not caring about the adverse human impacts because of who the victims are"; (ii) "is unable to protect a population facing adversity in the context of a disaster; (iii) is "simply not 'being bothered' to protect a population facing adversity in the context of a disaster, or arbitrary refusal of international assistance for disaster relief"; (iv) implements "[d] isaster risk management and response measures that amount to human rights violations for a Convention reason, such as in the context of forced relocation"; (v) adopts and implements policies on disaster risk reduction that fail or "expose certain groups to disaster-related harm"; (vi) is unable to protect; and (vii) takes exante discriminatory measures that are "a contributory cause of … serious denials of human rights demonstrative of a failure of state protection in circumstances where a person is exposed and vulnerable to disaster-related harm" (Scott 2020:238-39).

These scenarios have two considerations in common. First, to amount to persecution, serious harm must be caused by action or inaction of a human actor. Natural hazards as such therefore never constitute persecution. Second, this means that - except where natural hazards are triggered by human actors to target a specific category of peoples for Convention reasons - relevant persecution always takes place *in the context* of disasters and adverse effects of climate change.

CASE LAW EXAMPLE

New Zealand's Immigration and Protection Tribunal in *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) identified the following persecution scenarios:

[58] First, the reality is that natural disasters do not always occur in democratic states which respect the human rights of the affected population. Studies conducted in the aftermath of famine and other natural disasters provide evidence of a political weighting of state response in which the recovery needs of marginalised groups are sometimes not met. … In other words, the provision of post-disaster humanitarian relief may become politicised.

[59] Second, although the work is controversial, increasing attention has been given to the linkage between environmental issues and armed conflict and security. There is some general acceptance amongst scholars that environmental issues can pose threats to security and induce violent conflict and displacement, albeit in a highly uncertain manner and through complex social and political processes. … Again, this complex relationship can create pathways into Convention recognition in certain circumstances."

2.1.3 GOOD PRACTICES ON WELL-FOUNDED FEAR OF PERSECUTION

GOOD PRACTICE

Granting refugee status to victims of (i) direct infliction of environmental harm on a particular group for Convention reasons; (ii) political persecution due to activities or (perceived) dissent relating to a lack of governmental preparedness or response to disasters; (iii) denial of (access to) humanitarian assistance for Convention reasons; (iv) lack of state protection due to the unwillingness or inability of relevant authorities; or (v) recognizing disasters and the adverse effects of climate change as a factor amplifying the vulnerability of persons targeted by persecution during armed conflict and other situations.

Direct and intentional infliction of environmental harm

Relevant case law providing examples of good practices is rare. This is due to the limited number of applications for refugee status based on claims of harm experienced in disaster situations, and a result of some authorities' and courts' tendency to deny that the 1951 Convention is applicable in such situations.

A first scenario identified in literature (Scott 2020:95) and case law (New Zealand Immigration and Protection Tribunal 2013, para. 59, cited above) is characterized by actions of State or non-state actors that trigger environmental harm. The prime examples are "the use of methods or means of warfare which are intended … to cause [widespread, long-term and severe] damage to the natural environment and thereby to prejudice the health or survival of the population" as prohibited by international humanitarian law (Protocol I, art. 55; Henckaerts and Doswald-Beck 2005, Rule 45), and the use of starvation of civilians as a method of warfare (Protocol I, art. 54[1]; Henckaerts and Doswald-Beck 2005, Rule 53), implemented through the wilful triggering of environmental harm (e.g., causing drought by diverting a river used for irrigation), provided such action is targeting a specific group for Convention reasons. The same is true when such acts occur in situations not reaching the threshold of armed conflict.

CASE LAW EXAMPLE

The Immigration and Protection Tribunal in AF (**Kiribati**) [2013] NZIPT 800413 (25 June 2013) recognized that the linkage between environmental issues and armed conflict and security and their:

"complex relationship can create pathways into Convention recognition in certain circumstances. An obvious example is where environmental degradation is used as a direct weapon of oppression against an entire section of the population, such as occurred with the Iraqi Marsh Arabs following the first Gulf War."

Persecution due to action or opinion critical of governmental action

Arrests and prolonged prison sentences, unfair trials, torture and inhuman treatment, and other serious violations of individuals' human rights may amount to persecution if authorities took such actions on account of the real or imputed political opinion of persons who criticized the government for i) its lack of climate action and disaster risk reduction or ii) its failure to adequately prepare for and/or respond to a disaster. Such persons may include members of the opposition, human rights or environmental activists, leaders of marginalized communities, journalists, or organizers and participants of a demonstration. In this scenario, the disaster provides the context for political persecution.

CASE LAW EXAMPLE

New Zealand's Refugee Status Appeals Authority granted refugee status to an activist who had coordinated an opposition party's disaster response in Myanmar. The regime in her country of origin had arrested other activists for similar activities and sentenced them to substantial prison terms. The Appeals Authority concluded:

[40] Having regard to the country information, the Authority finds the appellant's fear is well-founded. The regime has shown a recent interest in the appellant. She will be required to report to the authorities upon her return and, if she does not, there is a real chance she will be arrested. The appellant was the in-country coordinator for the ABC Party's disaster-relief efforts in the wake of Cyclone Nargis. From the photographic evidence on the file, it is clear that the appellant's involvement in this disaster-relief work was done openly. Her role would therefore be known to the local population and now very likely known to the regime. Given that the regime's sensitivity to at least some disaster-relief work is demonstrably established, it is extremely plausible that the interest in her is associated with this activity.

[41] The country information cited above indicates that the appellant faces a real chance of being sentenced to a substantial term of imprisonment as a result of an unfair trial process and that any imprisonment carries with it an attendant risk of physical mist1reatment. By any yardstick, this amounts to a well-founded fear of being persecuted. There can be no doubt that should the Burmese authorities know, or learn by interrogation, of her involvement with the pro-democracy […], the risk she faces of being subjected to very serious harm will only increase (NZRSAA, Refugee Appeal 76374, 2009).

Denial of humanitarian assistance in disaster situations

Withholding available life-saving humanitarian assistance during or in the aftermath of a disaster or denying access to such assistance to members of ethnic or religious minorities or specific political groups may amount to persecution (Hathaway and Foster 2014:176). Discriminatory refusal of (access to) humanitarian assistance can be initiated by state actors, or it can arise in situations where non-state actors block humanitarian access or divert assistance and state authorities are unwilling or unable to intervene.

Denial of (access to) humanitarian assistance for discriminatory reasons may occur in disaster contexts unrelated to armed conflict, as well as where disasters occur during such conflict. In the latter case, the use of starvation of civilians as a method of warfare is, as already mentioned, prohibited by international humanitarian law (Protocol I, art. 54[1]; Henckaerts and Doswald-Beck 2005, Rule 53) and may even amount to a war crime (Rome Statute, Article 8[2][b][xxv]).

CASE LAW EXAMPLE

The UK Asylum and Immigration Tribunal concluded in the case of an applicant who was denied access to food aid:

249. We do accept that discriminatory exclusion from access to food aid is capable itself of constituting persecution for a reason recognised by the Convention.

250. The collapse of the economy and agricultural production has led to severe food shortages. The supermarket shelves are empty so that even those who do have money to spend find it difficult to buy food. For the many others without work or access to any means of financial support access to food aid is essential. The evidence does now establish also that the government of Zimbabwe has used its control of the distribution of food aid as a political tool to the disadvantage of those thought to be potential supporters of the MDC. This discriminatory deprivation of food to perceived political opponents, taken together with the disruption of the efforts of NGOs to distribute food by means of the ban introduced in June 2008, amounts to persecution of those deprived access to this essential support (UK Asylum and Immigration Tribunal, RN (Returnees) Zimbabwe 2008).

Unwillingness or inability to provide protection

Gender-based and other forms of violence in disaster situations commonly occur in evacuation centres, camps, and settlements for internally displaced persons (IDPs). Less often, but also devastating, are situations where law and order collapse in disaster contexts, resulting in rampant crime and violence. Disasters may also ignite pre-existing ethnic, racial, or religious tensions between communities that erupt into violent intercommunity conflict. In such situations, the State may refuse to provide protection for Convention reasons or be unable to do so when relevant persecution emanates from non-state actors.

For instance, Panama and Peru granted asylum based on the 1951 Refugee Convention to a small number of Haitians in the aftermath of the 2010 earthquake in Port-au-Prince and surroundings (Cantor 2018:40 and 52).

Disasters as factor amplifying vulnerability and contributing to persecution

Sometimes, persecution and disasters are not directly linked with each other, but the disaster situation creates a context that is a contributing factor to persecution. Such situations include the following:

- **Interaction of armed conflict and disasters** (so-called "nexus" situations): ICRC reports that 60 per cent of the 20 countries most vulnerable to climate change impacts also experience armed conflict (ICRC 2020:10). As Weerasinghe (2018:8) highlights, disasters often aggravate ongoing armed conflict situations and pre-existing persecution linked to it, thus creating "conditions that reinforce or bolster claims for refugee status under the Refugee Convention". Using starvation as a weapon of war, for instance, may be particularly harmful when a natural hazard like drought sets in or flooding destroys crops.

- **Disasters as a factor amplifying the vulnerability of persons targeted by persecution:** Courts have recognized that persons belonging, for instance, to a particular ethnic or religious minority or to a social group might become even more vulnerable in disaster contexts and therefore more easily targeted by persecutors. As UNHCR highlights, "adverse effects of climate change … may give rise to social, economic or political pressures and particular populations may be left out, leading to some being disproportionately affected or even targeted" (UNHCR 2020: para. 10).

CASE LAW EXAMPLE

In two cases of victims of trafficking who claimed to risk being re-trafficked or becoming victims of bonded labour in case of return, an Italian court granted refugee status on the basis of a well-founded fear of persecution for reasons of being a member of a particular social group because authorities in the countries of origin were unable to protect them. It concluded:

The vulnerability of the applicant is demonstrated due to the experiences lived in the country of origin with particular reference to social and economic marginality; the critical environmental situation due to the phenomena related to the flood and the land dispute resulting from it; the experience lived during trafficking for labor exploitation and finally during the years of living in Italy in a condition of labor exploitation, are such that, in the event of return, in a condition of aggravated vulnerability, the subjective fear is well founded and the objective risk of incurring forms of persecution equally substantiated by re-trafficking, bonded labour, discrimination and social exclusion, together with the retaliations to which he would be exposed today due to his experience of international trafficking and his huge debt still to be paid. (Tribunale Ordinario di Firenze, X c Ministero dell'Interno, E.R.G. 6142 [2023] [translation; emphasis added]. Similar, E.R.G. 2019/16935/2019 [2023]).

2.1.4 INTERNAL FLIGHT ALTERNATIVE

GOOD PRACTICE

Systematically including the impacts of disasters and the adverse effects of climate change in the assessment of whether an internal flight alternative exists for refugees in their country of origin.

Impacts of disasters and the adverse effects of climate change may become relevant when assessing whether persons who qualify as refugees, due to persecution unrelated to environmental factors in one part of the country of origin, can find protection in another region of the same country. According to UNHCR, the concept of internal flight or relocation alternative (IFA) "refers to a specific area of the country where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him/herself and live a normal life" (UNHCR 2003: para. 6). In this context, decision-makers have to assess, among other factors, whether the person would be exposed to "serious harm in the area of relocation" and would be able to "lead a relatively normal life without facing undue hardship" (*ibid:* para. 7). Depending on the situation, natural hazards and their impacts may create specific dangers and make living conditions in the proposed area "unduly harsh and therefore [make it] unreasonable for the person to relocate" (*ibid:* para. 25) because he or she would "face economic destitution or existence below at least an adequate level of subsistence" (UNHCR 2003: para. 29).

While IFA is an obvious area where assessing disaster impacts is highly relevant, it features little in the academic literature[3] beyond approving references to the UNHCR Guidelines (Goodwin-Gill and McAdam 2021:657-658; Huckstep and Clemens 2023:74). However, Storey (2023:519) recognizes in line with UNHCR that even "if what an applicant would face in the [IFA] is not persecution, but intolerable conditions caused by 'natural' disasters (e.g. fire, flood, earthquakes) such conditions, even though not persecutory might well be dire enough to compel him or her to return to their home area, which by definition is a site of persecution". Such a scenario, Storey concludes "affords a (limited) basis for treating environmental and/or climate change factors as relevant considerations within the compass of the refugee definition". He cautions,

[3] Ní Ghráinne in her extensive chapter on IFA (Ní Ghráinne 2022:88 ff), for instance, does not mention disasters and climate change impacts at all. Zimmermann and Herrmann (2024:527) argue that disasters are not relevant because individuals would be able to move to a part of the country not affected by the disasters.

however, that "this notion entails a high standard clearly distinguishable from criteria based on compassionate or humanitarian considerations." Hathaway and Foster (2014:348-349) similarly argue that decision-makers have to assess "whether this applicant – given who she is, what she believes, and her essential makeup – would in fact be compelled to return" to the area of persecution, and thus become a victim of indirect refoulement. Referring to the *Sufi and Elmi* case of the European Court of Human Rights (ECtHR 2011), they identify the need to take into account factors such as "the consequences of a natural disaster, or an inability to sustain an adequate standard of living" in the area considered to provide protection from persecution.

CASE LAW EXAMPLES:

A **Norwegian** court recognized in 2011 that a region in Somalia not affected by armed conflict but suffering from serious drought and a devastating humanitarian situation would not provide an acceptable internal flight alternative for a refugee without family or community support (Borgarting Court of Appeal, *Abid Hassan Jama v. Utlendingsnemnda*, 2011).

New Zealand's Refugee Status Appeals Authority concluded in 2010 that Iraq's Dahuk governorate would not provide an internal protection alternative to a refugee without family or community support due to a lack of sufficient level of enjoyment of socio-economic rights, resulting, among other factors, from a lack of water for IDPs due to drought (NZRSAA, *Refugee Appeal No. 7645,7* 2010, paras. 45-6).

The Federal Court of **Australia** recognized: "It cannot be reasonable to expect a refugee to avoid persecution by moving into an area of grave danger, whether that danger arises from a natural disaster (for example, a volcanic eruption), a civil war or some other cause" (Federal Court of Australia, *Perampalam v. Minister for Immigration and Multicultural Affairs* 1999, para. 19).

2.2 REGIONAL REFUGEE LAW

GOOD PRACTICE

Recognizing that events or circumstances that are seriously disturbing public order may include situations where disasters and the adverse effects of climate change interact with factors such as conflict and violence, resulting in a breakdown of law and order or the unavailability or inaccessibility of life-saving humanitarian assistance.

Regional refugee law may provide broader protection than the 1951 Convention. The OAU Refugee Convention, Article I(2) and the legally non-binding Cartagena Declaration, Conclusion III(3) expand the definition of who is a refugee to include persons fleeing from events or circumstances, respectively, that are "seriously disturbing public order." These instruments neither require that harm is inflicted for discriminatory reasons nor provide for the use of an internal flight alternative as a reason to not grant refugee status.

Presently, 37 African States reflect this wider notion of refugee in their domestic legislation (Hansen-Lohrey 2023:21). The same is true for 15 Central and South American States (Weerasinghe 2018:29). There is widespread scholarly consensus that this notion has the potential of providing protection in some disaster situations (Hansen-Lohrey 2023:61-63; Adeola 2022:361; Sharpe 2019:50-52; Weerasinghe 2018; Wood 2013:23-31). According to a set of indicators proposed by Hansen-Lohrey, an event is only serious enough to be of relevance if the "disturbance to public order involves a threat to the rights to life, physical integrity and/or liberty of individuals within the society"; is widespread or generalized; and the "State is unable or unwilling to restore and ensure public order" (Hansen-Lohrey 2023:57-60).

Although State practice has been inconsistent and very limited, examples of good practice nevertheless exist. In East Africa, when drought was compounded by armed conflict in Somalia in 2011 and 2012 and food aid therefore could not reach affected people in the absence

of a functioning government, Kenya and Ethiopia admitted large numbers of Somalis fleeing famine, primarily using a group-based approach to the recognition of refugee status (Weerasinghe 2018:36-58). While in Kenya most decisions to grant refugee status were formally based on the OAU Convention, it is unclear to what extent this was driven by humanitarian considerations rather than a strict application of the law (*ibid.:* 44-6). Ethiopia's response was based on the assumption that the interaction of conflict, drought, and famine with the inability of persons in need to access humanitarian assistance in Somalia amounted to events seriously disturbing public order (*ibid.:* 55-7). During that time, Djibouti and Uganda also applied the OAU Convention to admit people fleeing Somalia (*ibid.:* 59-60). However, aside from the 2011/2012 Somali drought, other examples in Africa do not seem to have been documented or exist.[4] Significantly, the African Commission on Human and Peoples' Rights highlights the vulnerability of refugees in a declaration on climate change and displacement and recalls Member States' obligations under the OAU Convention, but does not mention the applicability of the OAU Convention in disaster situations (African Commission 2021).

Similarly in the Americas, the application of the wider notion of refugee enshrined in the Cartagena Declaration in disaster situations has been extremely limited.[5] In the aftermath of the 2010 Haiti earthquake and ensuing collapse of law and order, Mexico and Ecuador granted a limited number of Haitians refugee status on the basis of the Cartagena Declaration's wider refugee definition because of the risk of survivors becoming victims of violence (Cantor 2018:41 and 52. See also Weerasinghe 2018:75-81). An expert meeting held in 2013 concluded that persons displaced in disaster contexts are not, strictly speaking, protected under the Cartagena refugee definition (UNHCR 2013: para. 10).

While State practice is inconsistent, disasters, particularly in the context of conflict and violence, can create serious disturbances of public order and associated dangers that emanate from human actors rather than natural hazards. The Somalia and Haiti examples indicate that serious disturbances must, however, be of a life-threatening nature and, thus, go beyond the level of chaos that often erupts during the days and weeks following the occurrence of a sudden-onset hazard.

4 According to Hansen-Lohrey (2023:22 with references), most African States do not report their decisions on applications for refugee status.

5 Significantly, the Brazil Declaration, adopted by Central and South American States on the occasion of the 30th anniversary of the Declaration, avoids any reference to the issue and limits itself to requesting UNHCR to undertake a study on climate change and cross-border displacement that would provide guidance on, among others, the adoption of humanitarian visa programmes (Brazil Declaration 2014:18).

3 Human Rights Law: Subsidiary or Complementary Protection

GOOD PRACTICE

Providing human rights-based subsidiary/ complementary protection in accordance with the right to life and the prohibition of inhuman and degrading treatment in cases where persons (i) would face real disaster-related risks to their life; or, in a disaster context, including those related to climate change, would (ii) risk being exposed to dire humanitarian conditions so severe as to amount to inhumane treatment, or would (iii) experience severe, rapid and irreversible deterioration of health leading to severe suffering or a significant reduction in life expectancy.

While a legally binding definition of subsidiary or complementary protection does not exist (McAdam 2007:19),[6] these notions describe protection based on international or regional human rights law prohibiting the refoulement of persons who do not qualify as refugees but would face a real risk of serious harm such as that prohibited by the right to life and the prohibition of torture and cruel, inhuman or degrading treatment or punishment (e.g., Goodwin-Gill and McAdam 2021:350-399). The availability and extent of such human rights-based protection is determined by regional or domestic law. Domestic law may also provide for (often discretionary) protection based on compassionate or humanitarian considerations (below, Section IV).

6 UNHCR now defines complementary protection as "Mechanisms used by States to regularize the stay of persons found to fall outside the scope of the 1951 Convention relating to the Status of Refugees or its 1967 Protocol, but who are nevertheless in need of international protection", and subsidiary protection as "A form of international protection granted in some countries to persons found not to meet the Convention definition of a refugee but who face a real risk of serious harm in their country of origin or country of former habitual residence. This includes the death penalty or execution, torture or inhuman or degrading treatment, or a serious and individual threat to their life or person by reason of indiscriminate violence in situations of armed conflict" (UNHCR Glossary).

The EU Qualification Directive (EU Directive 2011, articles 7, 15 and 18), for instance, provides that subsidiary protection shall be granted in cases where the applicant for international protection would face serious harm in the country of origin, defined as "(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment …; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict" emanating from State or non-state actors. Similarly, according to Section 131 of New Zealand's Immigration Act 2009 "(1) A person must be recognised as a protected person … if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand." Read narrowly, such provisions limit their relevance for persons seeking international protection in disaster situations to cases of targeted governmental harm (see above Section II.1.3) without a nexus to relevant reasons of persecution.

As recognized by the UN Human Rights Committee, the right to life as guaranteed by Article 6 of the International Covenant on Civil and Political Rights requires States to take positive action to protect life from "reasonably foreseeable threats and life-threatening situations that can result in loss of life" that are linked to climate change (UN Human Rights Committee 2022, para. 8.3), including by "taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms" (UN Human Rights Committee 2020: para. 9.12; see Atapattu 2022:133-144; McAdam 2020).

The European Court of Human Rights (ECtHR 2008) decided in the case of a landslide, which killed several persons due to a lack of disaster risk reduction measures and inadequate evacuation measures, that the right to the protection of life (ECHR, Article 2) obliges States to set up the necessary administrative mechanisms and procedures and take adequate measures to protect people from foreseeable life-threatening natural hazards. Where a person would face a real risk of being exposed to violations of these aspects of the right to life in the country of origin, their refoulement would amount to a human rights violation (Goodwin-Gill and McAdam 2021:377-378 and 648-651 with references). Refoulement may also be prohibited if deported persons face a real risk of being exposed to serious harm in the form of:

(i) dire humanitarian conditions serious enough to amount to inhuman treatment (Ragheboom 2017:293-398; Scott 2014:412-417) due to being exposed to a situation characterized by "very limited access to food and water", extremely "limited access to shelter, water and sanitation facilities" and risk of "violent crime, exploitation, abuse and forcible recruitment" (ECtHR 2011: para. 291) or

(ii) "a serious, rapid and irreversible decline in [their] state of health resulting in intense suffering or to a significant reduction in life expectancy" (ECtHR 2016: para.183).

While this case law has become relevant in many deportation cases, the number of documented examples of decisions on complementary protection in disaster situations is, with the exception of Austria and New Zealand, limited. Domestic courts in Austria routinely consider environmental factors such as recurrent drought or flooding when assessing whether asylum-seekers from countries such as Afghanistan or Somalia are eligible for subsidiary protection. Such protection has been granted when it was determined that a very severe humanitarian crisis and lack of support would expose applicants to risks incompatible with the right to life and the prohibition of inhuman treatment as enshrined in Articles 2 and 3 of the European Human Rights Convention (Ammer, Mayrhofer and Scott 2020; Mayrhofer, and Ammer 2022; see examples below). This case law is inspired by the approach developed by the European Court of Human Rights that the sending State also violates the duty to protect the right to life and refrain from inhuman suffering if a person is returned to a country where he or she is exposed to a life-threatening risk or intense suffering emanating from a situation rather than inflicted or tolerated by authorities of that country (e.g., ECtHR 2011: paras. 218, 278-283; Kälin and Künzli 2019:534-535 with further references).

In line with this approach, courts in Italy (Negozio and Rondine 2022:58-61) are required to consider "conditions of social, environmental or climatic degradation … which pose a serious risk to the survival of the individual" when assessing claims that return would be prohibited. In so doing, they examine whether an environmental disaster in the country of destination is incompatible with the "individual right to life and dignified existence" (Corte di Cassazione 2021; translation; see Raimondo 2021).

In contrast, New Zealand law provides that a person cannot be deported if there are substantial grounds for believing that he or she would be in danger of arbitrary deprivation of life or cruel treatment that emanates from authorities in the country of destination or is tolerated by them (Immigration Act 2009, section 131). Case law therefore highlights that "the focus of the inquiry under section 131 is on state protection from any qualifying harm – arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment – and whether the protection that is available reduces the risk of that harm" to an acceptable level (NZIPT 2014: para. 59; see McAdam 2015). This means that in the case of slow-onset climate change such as sea level rise, no protection is granted as long as the government takes measures within its power to reduce disaster risks and adapt to climate change (*ibid.:* paras. 102-8 and NZIPT 2022, paras. 28-34). Action such as denial of humanitarian assistance (NZIPT 2014: paras. 86-97) and other harmful conduct of the government (NZIPT 2023: para. 147) may amount to relevant treatment making deportation unlawful.

On occasion, courts in other countries, including Germany (e.g., Administrative Tribunal Baden-Württemberg 2020: para 25; 2021: paras. 57 ff; and 2023: para 143; Administrative Tribunal Lüneburg 2022: para. 196-7; see Schloss 2021 and 2022), have also referenced disasters and the adverse effects of climate change as a relevant element for assessing conditions in the country of origin when deciding whether to grant subsidiary protection, although they have never granted such protection solely on this basis. Relying on Section 60(5) of the German Residence Act in conjunction with Article 3 ECHR, courts have held that environmental conditions, such as the climate and natural disasters, may be taken into account as relevant factors when determining if a deportation ban is justifiable (Administrative Tribunal Baden-Württemberg 2020: para. 25) Schloss 2021:1).

CASE LAW EXAMPLES

Regarding the right to life and the prohibition to expose someone to a denial of humanitarian assistance in a climate change context, the **New Zealand** Immigration and Protection Tribunal recognized in an *obiter dictum* that:

… the denial of available domestically situated humanitarian assistance such as essential food aid or shelter may create a risk of the arbitrary deprivation of life. … it can also be seen that a policy which omits a particular section of a disaster-affected population from the provision of available post-disaster relief may constitute a 'treatment' of individuals within that population for the purposes of section 131 of the Act.[7] *(NZIPT, AC (Tuvalu) 2014, para 86.)*

In the case of an elderly couple from **Eritrea**, the Tribunal granted protection on the grounds that their living conditions upon return would expose them to a violation of their right to be free of inhuman treatment (Article 7 ICCPR). Regarding the role of climate change, it found:

[144] The risk of the appellants returning to abject poverty, even starvation, is further heightened by climate change. Country sources establish that climate change is contributing, through droughts and heavy rainfall events, to severe food security challenges in Eritrea. It is

[7] Section 131 of the Immigration Act 2009 provides for protection providing for protection "if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

broadly acknowledged that extreme weather events and disasters brought about by climate change have impacted the Horn of Africa and are increasing in frequency and intensity. Such phenomena disproportionately affect the most vulnerable persons …

[147] The direct and indirect actions of the government of Eritrea (that include the state's military prioritization, poor governance, corruption and abuses significantly impacting the subsistence lifestyle of the appellants), have contributed materially to their predicament and constitute "treatment" within the meaning of cruel, inhuman or degrading treatment or punishment. …

[148] Although the government has recently started to take steps towards sustainable development and risk-reducing adaptation measures in terms of the accelerating effects of climate change, such risk mitigation factors are inadequate to reduce the risk of the appellants facing starvation (AC (Eritrea) [2023] NZIPT 802201–202).

In 2019, the **Austrian** Constitutional Court decided that authorities are obliged to take disasters such as drought into account when examining whether subsidiary protection has to be granted on the basis of ECHR, Articles 2 and 3 regardless of whether an ensuing humanitarian crisis is triggered by a natural hazard or human actors.

The Federal Administrative Court misjudged the legal situation by examining a violation of the rights protected by Art. 3 ECHR only to a limited extent with regard to a violation that is impending due to actors or an armed conflict when examining the conditions for granting subsidiary protection. Since the Federal Administrative Court omitted any examination of the complainant's argument that he could not reasonably be expected to return to Somalia due to the poor supply situation, as well as the country reports [on drought impacts], its decision is arbitrary in this respect (Austria Constitutional Court 2 E 1170/2019-20, para 2.2; translated).

In the case of an applicant from Somalia who was not granted refugee status, the Federal Administrative Court of Austria granted subsidiary protection for, among others, the following reasons:

In view of the very precarious security and supply situation in southern and central **Somalia**, *which has been repeatedly documented in the country reports, and in view of the specific family situation of the complainant, it must be assumed that he will not be able to earn his most basic living with the necessary probability if he returns. In principle, the general basic supply situation, in particular with regard to the prevailing drought and food shortage, must also be included in the assessment in this case. In general, it should be noted that recurring periods of drought with famine crises, extremely poor health care, inadequate access to clean drinking water and the lack of a functioning sewage system have made Somalia the country with the greatest need for international emergency aid for decades.*

… Since the complainant would in all probability have to live in an IDP camp in the event of his return, it must therefore be assumed, taking all the factors in the present case together, that he would in all probability be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 3 ECHR in the event of his return to Somalia (Federal Administrative Court W196 2164577-1/15E, 2019, translated).

4 Humanitarian Measures and Other Migration Pathways

4.1 OVERVIEW

Drawing on their sovereign right to regulate the admission of foreigners, numerous States have developed and applied a series of tools, primarily enshrined in migration law, that allow persons displaced in the context of disasters and the adverse effects of climate change to find temporary or permanent solutions abroad. Measures such as humanitarian visas and temporary protection are particularly important. Agreements on the free movement of persons, as well as bilateral agreements or domestic immigration quotas for persons from climate vulnerable countries, enable disaster displaced persons to access safe, orderly, and regular migration pathways in regions particularly affected by drought, flooding, or sea level rise. Such measures also anticipate and seek to avoid future cross-border disaster-displacement.

Given the rather limited scope of refugee law and complementary or subsidiary protection for persons affected by disasters and adverse effects of climate change, there is increased recognition that tools enshrined in domestic migration law may provide alternative avenues for more comprehensive responses for disaster displaced persons (Francis 2019; Wood 2019; Cantor 2021; Huckstep and Clemens 2023; McAdam and Wood 2023; Millar 2023; Scissa 2023). This includes displaced persons who do not want to apply for international protection under international refugee and human rights law, or who do not qualify for such protection even though their movement was forced. While the migration measures vary widely, in some cases, they may provide comparable, if not higher, levels of protection and assistance than required under international refugee and human rights law (Cantor 2021:308).

Recent scholarship has largely welcomed the use of migration measures in disaster contexts, with research highlighting the numerous existing legal provisions in Africa, the Americas, Europe, and the Pacific that could be used to permit the entry and stay of disaster displaced persons, both in respect to individual claims and large cross-border movements (Wood 2013; Cantor 2015; Wood

2019; Burson et. al. 2021; Cantor 2021; Scissa et. al. 2022). In the Americas, Cantor views such measures as representing "a wider tendency to legislate for discretionary powers to allow entry and stay on broader humanitarian grounds, particularly where protection claims are not recognized" (Cantor 2021:295-296). Measures that allow foreigners to work are particularly welcomed for promoting self-reliance and supporting remittance flows back to the disaster-affected country (Wood 2019; Burson et. al. 2021; Huckstep and Clemens 2023). Some point out that such migration measures are ultimately unpredictable, as they are discretionary and not based on international legal obligations, and therefore may leave those who rely on them in limbo, particularly if the person is not able to convert the permit into a regular migration category (See Cantor 2021:295-296; Huckstep and Clemens 2023). Others express concern that special humanitarian migration categories that only address migrants already in the country with an irregular status, like the United States' Temporary Protected Status, do not protect those most directly affected in disaster situations (Huckstep and Clemens 2023:20). Additional potential constraints include migration measures that require individuals to hold international travel documents, show proof of financial resources, or meet general character or health standards (Wood 2019; Burson et. al. 2021) that may prove difficult for disaster displaced persons. Finally, States may be tempted to use such tools to circumvent more stringent obligations under international and regional refugee law.

Recognized in the GCR under paragraph 63, these collective practices addressing cross-border disaster-displacement are also in line with the approach adopted by States in the GCM. Under GCM Objective 5 on enhancing the availability and flexibility of pathways for regular migration, States commit to draw from a series of measures, including using or developing practices based on humanitarian considerations, to temporarily admit "migrants compelled to leave their countries of origin owing to sudden-onset natural disasters …, while adaptation in or return to their country of origin is not possible" (GCM: para. 21[g]). UNHCR's *Guidelines on Temporary Protection or Stay Arrangements* are helpful for reflecting on how migration measures can be implemented in a manner that complements refugee and human rights protection. The Guidelines respond to, among other scenarios, "large-scale influxes" in humanitarian crisis situations and "other exceptional and temporary conditions in the country of origin" where "individual status determination is … not applicable" because "persons would generally not be considered to fall within the Convention, such as persons fleeing natural disasters." (UNHCR 2014: paras. 9-19, footnote 9).

While migration pathways help many disaster displaced persons cope with the impacts of disasters and climate change, it is important to note that not all affected individuals seek migration as a primary solution. New Zealand's attempt in October 2017 at creating a specific humanitarian visa category for so-called "climate refugees" displaced by climate change impacts in the Pacific Islands, announced by New Zealand's climate change minister, was ultimately rejected by the States whose citizens the measure sought to protect (Dempster and Ober 2020). Pacific Island nations reportedly viewed the proposed measure's to allocate some 100 visas a year as a "last resort," preferring "efforts to concentrate on climate change mitigation before looking at options such as gaining refugee status or implementing mass migration" (News24 2018). Pacific Island States thus urged New Zealand to "institute a step-wise approach: reduce emissions, support adaptation efforts, provide legal migration pathways, and finally, if all fails, grant a form of legally protected status" (Dempster and Ober 2020). Consequently, New Zealand's 2019 development plan in the Pacific region includes measures to assist "the Pacific to avert, delay, prepare for, and support climate change-related human mobility" alongside other priorities, including promoting the reduction of global greenhouse gas emission and supporting Pacific Island States in their climate change-related adaptation efforts (Huckstep and Clemens 2023:282). A 2007 bill in Australia to establish a similar "climate refugee" bill was also quickly abandoned (*ibid.*). Notably, the recently adopted Pacific Regional Framework on Climate Mobility recognizes "the desire of Pacific people to continue to live in their own countries" and highlights that "[h]elping our people stay in their homes with safety and

dignity is a fundamental priority for the Pacific" (Pacific Island Forum 2023: para 18).

This section describes examples of how States have relied upon national and regional migration law to create legal pathways for disaster-affected individuals to find immediate safety, build their resilience to future disaster situations, and find solutions in anticipation of their homes becoming uninhabitable.. In particular, this section discusses: i) humanitarian measures on admission and stay; ii) humanitarian measures for foreigners already abroad in an irregular situation or otherwise required to leave; iii) administrative measures for regular migration categories; iv) migration agreements and immigration quotas; and v) regional coordination of migration measures.

4.2 HUMANITARIAN MEASURES ON ADMISSION AND STAY

GOOD PRACTICE

Developing humanitarian measures to authorize the entry and/or stay of foreigners affected by disasters, who do not apply for or do not qualify for protection under refugee or human rights law, through the use of humanitarian visas, temporary admission, or temporary protection status.

Several countries enshrine humanitarian measures in domestic laws and policies on immigration and the status of foreigners that can be utilized when persons: i) are compelled to leave their country in the context of disasters and adverse effects of climate change, ii) seek to enter or continue to stay in a country where they are already present, but, iii) do not want to apply for or cannot be granted international protection even though they have been displaced. These measures do not derive from international law and are usually discretionary. For example, humanitarian measures such as humanitarian visas, temporary admission, or a temporary protection status allow authorities to grant admission and stay for humanitarian or compassionate reasons in line with the measures suggested in GCR, para. 63.

4.2.1 MEASURES SPECIFICALLY ADDRESSING DISASTERS

Some States have developed a wide variety of measures specifically authorizing the entry and stay of individuals affected by disasters.

Such measures are particularly common in the Americas. The immigration laws of countries such as Argentina, Brazil, Canada, Ecuador, El Salvador, Guatemala, Mexico, Paraguay, and Peru (Cantor 2021: 306-308) contain explicit references to risks associated with disasters as a situation that justifies granting entry or temporary stay.

LEGISLATION EXAMPLES

Argentina's Special Environmental Humanitarian Visa Programme, launched in 2022, provides humanitarian protection, planned relocation and durable solutions to disaster-displaced persons from Mexico, Central America, and the Caribbean (PDD 2023: 2).[8] It grants an entry permit and a three-year visa based on humanitarian reasons, which later may be converted to permanent residence. Resettled persons will have access to housing, maintenance, and support for a period of one year, through the sponsorship of a civil society organisation.

In **Brazil**, "temporary visas for humanitarian reception may be granted to stateless persons or nationals of any country in situations of … major calamity [or] environmental disaster … ." (Law No. 14.455, art. 14(3)) .

As previously noted, **Bolivia**'s 2013 Migration Law contains a provision for "climate migrants" (Article 4[16]).

[8] Argentina's Special Humanitarian Visa Program relies on article 23, subparagraph m) of Immigration Act No. 25 to grant admission and temporary visas on humanitarian grounds (PDD 2023:2).

Canada's Immigration and Refugee Protection Regulations state: "The Minister may impose a stay on removal orders with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of … an environmental disaster resulting in a substantial temporary disruption of living conditions" ((SOR/2002-227), 11 June 2002, Regulation 230(1)(b)).

In **El Salvador**, foreigners can receive temporary residence visas for "humanitarian reasons" that include, among other criteria, an "internationally-recognized crisis" or when they are in "a situation of vulnerability or danger to life owing to … natural disasters [or] environmental [disasters]" but do not otherwise fall within a regular migration category (Art. 109 of the law on migration in conjunction with art. 181(1) of the accompanying Regulation; Cantor 2021:308).

Article 22 of **Paraguay**'s 2022 Immigration Act includes provisions for "Immigration from countries in crisis situations," calling on the National Direction of Migration to coordinate with the National Commission of Refugees to facilitate entry procedures when orders are issued for humanitarian reasons to "benefit of individuals and groups from countries that are in a crisis situation due to internal war, ethnic, political, religious discrimination or natural disasters".

Article 29.1(m) of **Peru**'s migration law provides for temporary admission and stay for, among others, "those who have migrated due to natural and environmental disasters".

In Europe, Finland[9] and Sweden[10] are commonly cited for their humanitarian measures that were specifically designed to respond to disaster situations, although neither was ever applied and both are now repealed. Italy is currently the only European country with humanitarian measures expressly addressing disaster situations. Article 20-bis of the Consolidated Immigration Act (CAI) offers "protection against calamities" for foreigners already in Italy whose "country of origin is in a situation of 'contingent and exceptional calamity' that does not allow for a safe return" (Scissa 2022:18).[11] Foreigners can easily request "protection against calamities" by contacting a local police authority, called *"Questura,"* which has the authority to grant the six-month residency permit. Judicial authorities may also issue the permit to individuals who otherwise fail to receive international protection. The permit can be renewed once, with the holder able to access employment and state health services. However, the most recent revisions of the legislation stipulate that it cannot be converted into an employment permit and does not authorize family reunification. Between 2018 and May 2023, 153 such residence permits were granted by 44 *Questure* to applicants from every continent except Oceania, with even more permits issued by judicial authorities (Scissa, RLI Blog) such as a case decided in Bari relating to the 2019 earthquakes in Albania (Scissa 2023).

Under CAI Article 20, the Italian President of the Council of Ministers may also authorize granting "temporary protection" as a collective and temporary measure in response to humanitarian needs associated with "conflicts, natural disasters or other serious events in non-EU countries" (Scissa, 2022:16-17). The temporary protection measure has never

9 Section 88a of 2004 of Finland's Aliens Act granted humanitarian protection if the person "cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe". The provision was never used, with its removal in 2016 justified by the Finish Government with reference to the possibility of granting a temporary residence permit based on individual compassionate circumstances under paragraphs 51 and 52 of the Aliens Act (Scott and Garner 2022:119).

10 Similarly in Sweden from 2005 until 2016, when the provision was suspended and the ultimately repealed in 2021, individuals could seek protection as "persons who are unable to return to their country of original because of an environmental disaster" (Swedish Aliens Act, Chapter 4, section 2a [2]). Analysis of preparatory work concluded that the Swedish measure was intended to protect individuals affected by sudden-onset disasters with no internal protection alternative (Ragheboom 2017:352; Scott and Garner 2022:110). The Government also reserved the right to refuse the issuance of permits to those "otherwise in need of protection" if the asylum system was overwhelmed with claims (Ragheboom 2017:352). Despite numerous claims between 2006 and 2015 to access protection under the measure, no claimant met the provision's strict eligibility requirements (Scott and Garner 2022:112), among others because "judicial authorities frequently failed to carefully consider" such claims (Scissa, et.al. 2022).

11 Although legislators did not define "calamity," according to Scissa, the formulation means "that only sudden and singular events, such as earthquakes or floods, could be considered as eligible events under this provision and that slow-onset events were excluded from its scope of application" regardless of whether they were "natural or manmade" (Scissa 2022:18-19).

been applied by Italy in disaster contexts, and was otherwise only used twice in the Balkan context in the 1990s and in response to the 2011 Arab Spring.

In Africa, Angola's 2015 Refugee Law (Article 32) provides that authorities "may grant" temporary refugee status in case of a large-scale influx of persons leaving a neighboring country, inter alia, "as a consequence of … natural disasters."

In the Asia and Pacific region, Section 11(f) of Nauru's "2014 immigration regulations also provide for a 'special purpose visa', including for 'a person who arrives in Nauru due to stress of weather or a medical or other emergency or other similar cause'", which arguably could be interpreted to include disaster situations (Burson et. al. 2021:61).

4.2.2 MEASURES FOR "HUMANITARIAN CONSIDERATIONS" WITHOUT SPECIFIC REFERENCES TO DISASTERS

Other countries in the Americas, Europe, and the Pacific permit the entry and stay of disaster-displaced persons for humanitarian and compassionate reasons based on laws that do not refer to disasters. On numerous occasions, such countries have applied provisions on admission and temporary stay for "humanitarian considerations" to persons at risk in disaster-affected countries of origin although relevant laws and policies do not explicitly mention them. Such exercises of discretion to authorize the entry and/or stay of foreigners motivated by humanitarian considerations may be based on the inherent discretion of immigration officials, or may be expressly included in the law.

In the Americas, research has identified at least 15 countries[12] that have some form of discretionary power to provide entry and stay for individuals under an exceptional migration category relying on varying versions of the notion "humanitarian considerations" (Cantor 2021:304-305) that may be used to assist individuals affected by disasters. In Canada, for instance, the "humanitarian and compassionate" provision (Immigration and Refugee Protection Act, art. 25) is interpreted to apply to "unusual and undeserved or disproportionate hardship", assessed according to factors in the country of origin that include, among others, "a direct negative impact on the applicant such as … natural disasters" (Citizenship and Immigration Canada 2016; See also Cantor 2021:306). Discretionary powers have been used to authorize the stay of groups of individuals following disasters, for instance by Argentina and Brazil in the aftermath of the 2010 Haiti earthquake.[13]

In the Pacific, Section 205 of New Zealand's Immigration Act 2009 requires tribunals to systematically assess whether there are grounds for humanitarian considerations for those who fail to receive refugee or protected person status and would otherwise be subject to deportation. Thus, Tribunals have relied on Section 207 of the Immigration Act 2009 to grant stay on humanitarian grounds for individuals who would otherwise be subject to deportation when:

> *1(a) there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and (b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.*

Environmental factors are considered alongside other factors including, most importantly, the appellant's connection to New Zealand, such as family members who are New Zealand citizens. For example, in *AJ*

[12] These countries, by sub-region, include: "Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama (Central America); Argentina, Bolivia, Brazil, Ecuador, Peru, Uruguay (South America); Trinidad and Tobago, the Dutch Antilles islands of Bonaire, Sint Eustatius, and Saba (Caribbean); and Mexico (North America)" (Cantor 2021, footnote 192).

[13] Argentina interpreted "humanitarian considerations" in its national migration law to include disaster-related considerations to regularize Haitians in the country in 2017 (Cantor 2021: 306). Brazil also relied on its discretionary authority in early 2011 to grant five-year, conditional "permanent residence for humanitarian reasons" to regularize the stay of Haitians irregularly in the country. The practice evolved in January 2012, when Brazilian legislators passed a resolution creating establishing the five-year "permanent residence for humanitarian reasons" as a regular immigration pathway that could be granted upon registering with the Brazilian Federal Police (Weerasinghe 2018: 65).

(Tuvalu) [2017] NZIPT 801120-123, the Tribunal denied the appellants' claims for refugee or protected person status, but found they may have humanitarian considerations related to climate change impacts and the presence of family members in the country (para 5). Individuals granted humanitarian protection may either receive a resident visa or a temporary visa not exceeding 12 months (see also below, Section IV.4).

Other countries in the Asia and Pacific region, such as China, Japan, Thailand, and Tuvalu, also have discretionary measures in their migration laws to permit entry or stay on humanitarian grounds (OHCHR 2022:8-9), although the research did not identify evidence of the measures being expressly used to assist individuals affected by disasters or the impacts of climate change. For instance, India's "e-Emergency X-Misc" visa was introduced to facilitate and fast track urgent applications by any foreign nationals who require to enter India urgently for emergency or compassionate reasons" (OHCHR 2022:8). Other countries like Fiji and Kiribati have discretionary measures for the issuance of special visas without detailing specific grounds guiding their issues (Burson et. al. 2021:61). For instance, in Niue, "the Immigration Act 2011 confers a power for regulations to be promulgated which amend the purposes of any visitor, work or study permits or create 'other types of temporary permits and the purposes for them'" (Burson, et. al. 2021:62). The Solomon Islands' 2012 Immigration Act, as set out in the 2013 Associated Regulations, also allows the Director of Immigration to issue a "special purpose visa" for a residual "other" category, alongside other purposes like research and volunteer work (Burson 2021:62).

In Europe, the European Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons (Temporary Protection Directive) could, according to some authors, be applied in a disaster context (e.g., Ragheboom 2017:474-475). Its application requires a determination that nationals from outside the EU were "unable to return in safe and durable conditions because of the situation prevailing in that country" and were, in particular, "at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights" (Article 2(c)). However, to date, the measure has never been used for this purpose. Its stated purpose is for use "in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation" (Article 2[a]). Considering that this scenario appears to refer to a mass influx of persons in which many individuals may qualify as refugees, serious doubts are justified as to whether such circumstances will ever arise.

For many years, Italy granted "humanitarian protection" to permit the stay of disaster-affected foreigners on numerous occasions, relying on Article 5(6) of the Consolidated Immigration Act (CAI).[14] The Court of Cassation found that "the right to be issued a humanitarian permit, together with refugee status and subsidiary protection, constitutes a fundamental part of the right of asylum enshrined in the Constitution" (Carta 2018: sec.1.1). Thus, when Italian legislators removed Article 5(6) in 2018,[15] it was replaced by a list of humanitarian circumstances that would permit stay, including "protection against calamities" under Article 20-bis, as detailed above. Under CAI Article 19, competent authorities are also required to "assess whether the environmental conditions of the country of origin may constitute a violation of their basic human rights and human dignity" before a third-country national may be deported (Raimondo 2021; Scissa, 2022:20). Thus, in a landmark 2021 case of an appellant from the Niger Delta, the Court of Cassation found that a judge erred when considering claims for subsidiary protection and

14 The flexible remedy was granted when a person was found to have "suffered, or would have been at risk of suffering upon removal, an 'effective deprivation of human rights'" (Scissa 2022:18, citing, *inter alia,* Court of Cassation, I Civil Section, Judgment of 23 February 2018, n 4455, 8). Importantly, the Court of Cassation held that assessments for humanitarian protection must include environmental and climate factors (Scissa 2022:17). The assessment includes the objective conditions in the country of origin and personal situation of the applicant, which include the person's "exposure to famine, natural or environmental disasters and land grabbing, as well as the general environmental and climatic conditions of the country of origin" (Scissa 2022, summarizing Tribunal of L'Aquila, Order of 16 February 2018, 4).

15 Article 5(6) remains law for pending claims.

humanitarian protection by failing to consider the risk that environmental disaster posed to compromising the appellant's fundamental rights and only assessing danger associated with armed conflict.[16] Over the years, numerous individuals affected by "serious natural disasters, droughts, famine and floods" benefited from humanitarian protection (Scissa 2022: 18).[17] For example, in 2019, the Tribunal of Cagliari granted a Senegalese national humanitarian protection in the context of a humanitarian situation linked to the country's severe drought, compounded by poverty and a weak healthcare system (Raimondo 2023).[18]

CASE LAW EXAMPLE

The **Italian** Court of Cassation (Corte di Cassazione, Ordinanza no. 5022/2021) held that when a court identifies:

in a given area a situation capable of constituting an environmental disaster […], the assessment of the condition of widespread danger existing in the applicant's country of origin, for the purposes of granting humanitarian protection, must be carried out with specific reference to the particular risk to the right to life and dignified existence resulting from environmental degradation, climate change or unsustainable development of that area.

The Court highlighted that not only armed conflict "can compromise an individual's dignified living conditions" but also other situations:

in which the socio-environmental context is so degraded as to expose the individual to the risk of seeing his fundamental rights to life, liberty and self-determination wiped out, or in any case of seeing them reduced below the threshold of their essential and inescapable core. […] the concept of "ineliminable core constituent of the status of personal dignity" affirmed by this Court with reference to the scrutiny that the court of merit must conduct in order to ascertain the risk arising from repatriation, and the consequent individual vulnerability that legitimizes the recognition of humanitarian protection, constitutes the essential level below which dignified living conditions are not discernible and, therefore, the fundamental right to life of the individual is not ensured.

Denmark has, on discretionary grounds, granted humanitarian protection "to single women and families with young children from areas where living conditions are considered to be extremely difficult, for example due to famine or drought" (UNHCR 2009:12-13). Based on Article L425-9 of the French foreigners' law providing for temporary stay for health-related reasons, a Court recognized that a person suffering from respiratory problems could not be sent back to his country of origin, where the combination of a very high degree of atmospheric pollution and a weak medical system would have seriously affected his health.[19]

In **Switzerland**, it is possible to grant temporary admission ("admission provisoire") under Article 83 of the Federal Act on Foreign Nationals and Integration when it is determined that "removal is not possible, not permitted or not reasonable".[20] Enforcement of a deportation order "may be unreasonable for foreign nationals if they are specifically endangered by situations such as war, civil war, general violence and medical emergency in their native country or country of origin" (para. 4), thus providing a possibility to grant temporary protection based on humanitarian grounds. Such conditions could arguably arise in the

16 *IL v Ministry of the Interior,* 23925/2019, 11 December 2020.

17 See, for example: Tribunal of Naples, Order of 5 June 2017, n 7523. Tribunal of Milan, Order of 31 March 2016, n 64207. Tribunal of Cagliari, Order of 31 March 2019, n 4043. Territorial Commission for the Recognition of International Protection of Rome, Section II, Decision of 21 December 2015.

18 Tribunal of Cagliari, Order of 31 March 2019, n 4043.

19 Cour administrative d'appel de Bordeaux (France), 2ème chambre, 18 décembre 2020, n° 20BX02193-20BX02195.

20 Loi fédérale sur les étrangers et l'intégration.

context of disasters and climate change.[21] Swiss authorities recognized in 2023 that asylum seekers from Türkiye, whose claims were rejected, could not be sent back to areas affected by the February 2023 earthquake (see Federal Administrative Court August 2023: para. 10.3.2). In 2023, the Swiss Federal Administrative Court accepted that return to disaster- and conflict-affected Southern Ethiopia would not be reasonable for a person without family or community support (Federal Administrative Court November 2023: para. 7.4.4; similar id., 2021: para. 10.5 regarding return to Western Afghanistan affected at that time by humanitarian crises triggered, *inter alia,* by drought and ensuing internal displacement, and id., 2020: para. 11.2.3 regarding return to Somalia).

Similarly, **Norway's** 2010 Immigration Act under section 38 allows for the granting of a residence visa "provided that strong humanitarian considerations apply", which may include an assessment, among other factors, of "social or humanitarian circumstances related to the return situation". Although disaster situations are not specifically included in the Act, the preparatory report indicates that, in principle, it would be possible under section 38 to grant at least a temporary residency permit for an applicant from a "humanitarian disaster situation" (Ministry of Labour and Social Inclusion 2006-2007:157).[22]

4.3 ADMINISTRATIVE MEASURES FOR REGULAR MIGRATION CATEGORIES

In the aftermath of sudden-onset disasters, countries in the Americas and Europe have also authorized entry or stay by prioritizing visa applications for regular migration from people affected by a sudden-onset disaster, as Canada, Belgium, Germany, and Switzerland did in the immediate aftermath of the 2023 earthquake in south-eastern Türkiye (Fragoment 2023).[23] States such as the British Virgin Islands, Monserrat, Colombia, and Costa Rica have also waived or flexibly applied requirements for regular visa applications for individuals from certain disaster-affected countries to either extend existing resident visas or grant new permits (Cantor 2021).

Canada has a policy authorizing immigration authorities to exercise their discretionary powers to expedite applications or waive formal criteria normally required to access regular migration categories when justified by "humanitarian and compassionate considerations" (Cantor 2021:300). Following some situations,[24] Canadian officials have been instructed under "special measures" policies to assist applicants who are "seriously and directly affected" by a disaster by waiving certain criteria or expediting applications for ordinary migration categories (Cantor 2021:300). Similarly, the United States's standing "temporary relief measures" policy has enabled immigration officers to exercise their discretion in response to disasters triggered by a range of natural hazards, including storms, volcanic eruptions,

21 See the answers of the Federal Council to parliamentary interpellations by Delphine Klopfenstein Broggini ("Le changement climatique comme motif d'asile. Pour un statut de réfugié" L'Assemblée fédérale – Le Parlement suisse, 10 March 2021. Available at: https://tinyurl.com/2seupy5n) and Josef Ziszadis ("Statut international pour les exiles environnementaux," L'Assemblée fédérale – Le Parlement suisse, 19 December 2007. Available at: https://tinyurl.com/2673wfze).

22 The preparatory document report states: "In principle, it may also be relevant to grant residence permits (possibly temporary) to applicants who come from an area affected by a humanitarian disaster situation, such as after a natural disaster. In practice, however, this has not emerged as a case category of scope. The Ministry therefore believes that there is no reason to mention this type of situation separately in the Act, as proposed by the UDI" (Ministry of Labour and Social Inclusion 2006-2007:157) translated by DeepL Translate.

23 Spain also expedited the resettlement of 89 Syrian refugees who had been living in Türkiye during the earthquake. IOM. 'IOM, UNHCR Welcome Spain's Expedited Resettlement of Syrian Refugees from Türkiye in Earthquake Aftermath,' 4 March 2023. Available at: https://tinyurl.com/ypmeeut2 .

24 Canada used "special measures" during "the 1998 Turkey earthquake, the 2004 Asian tsunami, the 2010 Haiti earthquake and the 2013 Typhoon Haiyan in the Philippines" (Cantor 2021, note 170, p. 300).

tsunamis, and wildfires,[25] when requested by migrants (Cantor 2021:300).

4.4 HUMANITARIAN MEASURES FOR FOREIGNERS WITH IRREGULAR STAY

Many States have also used humanitarian measures that suspend deportation orders for individuals who would otherwise be required under national migration laws to return to their country of origin or habitual residence, or allow an extension of their stay. Such non-return measures are based on humanitarian considerations and international solidarity for disaster-affected countries.

For example, States in the Americas, such as the Bahamas, Canada, Jamaica, Mexico, and the United States, temporarily suspended removal orders for Haitian nationals following the 2010 earthquake (Cantor 2021:304). In the United States, immigration authorities may grant "Temporary Protected Status" to regularize disaster-affected individuals already present in the country. TPS has been designated following disasters in Honduras, Nicaragua, El Salvador, Haiti, Monserrat (Cantor 2021:295) and Nepal (Nansen Initiative 2015(b):20).

LEGISLATION EXAMPLE

Under the **US** Immigration and Nationality Act, Section 244A(b), citizens of a designated state may be eligible for "Temporary Protected Status" if:

(i)there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,

(ii)
the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and

(iii)
the foreign state officially has requested designation under this subparagraph.

Temporary Protected Status arguably replaces historical legal measures by the United States to assist disaster displaced persons. Notably, the United States 1952 Immigration and Nationality Act, later updated by the Refugee Relief Act of 1953, stated that "'persons uprooted by catastrophic natural calamity as defined by the President' were eligible for protection in a procedure almost identical to presidential parole" (Huckstep and Clemens 2023:281, citing Kandalaft 2000:8). The 1953 Act further specified that "all refugees must be 'in urgent need of assistance for the essentials of life or for transportation'" (Murray and Petrin Williamson 2011:28). Repealed in 1980 when the United States aligned its refugee laws to the 1951 Refugee Convention, the "natural calamity" measure was never used. For example, Congress separately passed the Azorean Refugee Act of 1958 (Huckstep and Clemens 2023:281) to issue some 5,000 non-quota visas for Portuguese citizens displaced by earthquakes and volcanic eruptions on the Azores Islands (John F. Kennedy Presidential Library and Museum).[26]

In the Asia and Pacific region, New Zealand regularly relies on Section 207(1)(a) of the Immigration Act 2009 to grant stay on humanitarian grounds for individuals who would otherwise be subject to deportation. As in assessments following the denial of international protection (described above Section IV 2.2), tribunals have granted humanitarian protection to numerous individuals citing risks associated with environmental degradation and disasters,

[25] Cantor noted the following disaster situations: "Tropical storms in the Caribbean in 2008; the 2010 Icelandic volcano eruption; the 2010 Chile earthquakes; Tropical Storm Agatha in Guatemala in 2010; the 2011 earthquakes and tsunami in Japan; extreme flooding in Central America in 2011; Hurricane Sandy in the Caribbean in 2012; Typhoon Haiyan in the Philippines in 2013; Hurricane Harvey in the U.S. in 2017; California Wildfires in 2007 and 2018; Hurricane Florence in the U.S. in 2018; and the 2018 Typhoon Mangkhut in the Philippines" (Cantor 2021: 301).

[26] This measure was intentionally, and reportedly uncontroversially, supported by the US Congress, which stated that the inclusion of aliens "uprooted by catastrophic natural calamity" was "to provide relief in those cases where aliens have been forced to flee their homes as a result of serious natural disasters, such as earthquakes, volcanic eruptions, tidal waves, and in any similar natural catastrophes" (Huckstep and Clemens 2023: 281, citing Murray and Williamson 2011:29).

assessed alongside other humanitarian considerations.[27]

CASE LAW EXAMPLES

In *AD (Tuvalu)* [2014] NZIPT 501370-371, the **New Zealand** Immigration and Protection Tribunal explains how it assesses whether disasters and environmental degradation amount to "exceptional circumstances of a humanitarian nature":

[32] As for the climate change issue relied on so heavily, while the Tribunal accepts that exposure to the impacts of natural disasters can, in general terms, be a humanitarian circumstance, nevertheless, the evidence in appeals such as this must establish not simply the existence of a matter of broad humanitarian concern, but that there are exceptional circumstances of a humanitarian nature such that it would be unjust or unduly harsh to deport the particular appellant from New Zealand.

Thus, in *Teaitala* [2022] NZIPT 505518-519, while accepting evidence of the significant adverse effects of climate change pose challenges for all inhabitants on Tuvulu, the Tribunal found that the situation did not give rise to "exceptional circumstance" because *it has not been demonstrated that the appellants would, on a return there, be unable to access the necessaries of life now or in the near future. It has also not been demonstrated that they would be unable to resume living the same sort of life that they had there previously (para 40).*

By comparison, in AV (Tuvalu) [2022] NZIPT 505532, when granting humanitarian protection to the appellant noting their strong familiar and community connections within New Zealand, the Tribunal also found "exceptional circumstances of a humanitarian nature" associated with the impacts of disasters and climate change in Tuvalu:

[26] In addition to the generalised risks faced by Tuvalu's population, as a deaf and mute person, the appellant is inherently going to be more vulnerable to natural hazards. For example, being hearing impaired, he would not be in a position to hear early warnings of impending events that may be broadcast over the radio and would need to rely on communication and sign language. There is no evidence that such extended family members in Tuvalu are proficient in sign language and the appellant would struggle to be able to have meaningful communication and interaction with his extended family members if he were in Tuvalu, let alone communication to keep him safe in the event of cyclonic wind and storm surge such as those associated with Tropical Cyclone Pam which devastated Tuvalu (and other Pacific countries) in 2015...

In *Loygo* [2021] NZIPT 505447, the Tribunal's consideration, and ultimate granting, of a humanitarian appeal assessed, among other factors, evidence of the appellant's home in the Philippines having been "irreparably damaged" by flooding in 2020 (paras. 30-31, 39).[28]

Other countries also have humanitarian measures that could potentially be used in disaster contexts. The Cook Islands 2021 Immigration Act allows for "the principal immigration office" to extend a visa or permit "if there is an emergency situation that affects the ability of person to travel to and from or stay in the Cook Islands" (Section 89). Tajikistan has a national instrument that permits the suspension of return to disaster-affected countries (Mokhnacheva 2022:54). Malaysia permits immigration authorities to issue a temporary, short-term Special Pass "that enables migrants to extend their stay, because of special circumstances (such as illness or accident) or because a situation in the migrant's country of origin prevents safe return" (OHCHR 2022:8).

Similarly, European countries also take into account humanitarian considerations when deciding whether to refrain from sending someone back to their country of origin.

[27] See also: *AW (Tuvalu)* [2022] NZIPT 505648; *Nimo* [2019] NZIPT 504542; *Vaisua* [2014] NZIPT 501465.

[28] Other recent examples include: *Pasama* [2023] NZIPT 506000; *Teaitala* [2022] NZIPT 505518-519; *AW (Tuvalu)* [2022] NZIPT 505648; *AW (Kiribati)* [2022] NZIPT 802085; *Tuwainikai* [2021] NZIPT 505185).

In Italy, as noted above, CAI Article 19 also requires authorities assess environmental conditions in the country of origin as part of deportation hearings (Raimondo 2021; Scissa, 2022: 20). Thus, individuals affected by disasters may receive "protection against calamities" under Article 20-bis, as detailed above, and would have also potentially been eligible for "humanitarian protection" under CAI Article 5(6) prior to the measure's repeal.

4.5 MIGRATION AGREEMENTS AND IMMIGRATION QUOTAS

GOOD PRACTICE

Integrating disaster and climate changed related human mobility considerations in bilateral and regional free movement agreements and migration quota schemes.

4.5.1 INTRODUCTION

Most agreements on the free movement of persons are created within the context of regional economic groups. Bilateral agreements or immigration quotas are also primarily established to serve economic purposes. Such agreements typically "provide for the relaxation or removal of restrictions on travel between states for citizens of certain states" (Wood 2019: 13) that are implemented in accordance with national laws regarding the entry of foreigners. Consequently, free movement agreements "have not been developed with protection needs of disaster displaced persons in mind," and "do not always guarantee entry" (Wood 2019: 7 and 12).

Nonetheless, in some parts of the world, such measures have enabled disaster-affected people and persons from climate vulnerable countries to access safe, orderly, and regular migration pathways in regions particularly affected by drought, flooding, or sea level rise. Migration agreements may also allow individuals to anticipate and seek to avoid future cross-border disaster-displacement. This section shows how such migration measures have already been applied in contexts of disasters and environmental degradation and identifies the potential for their future use.

4.5.2 BILATERAL AND REGIONAL FREE MOVEMENT AGREEMENTS

Bilateral free movement agreements have facilitated the entry and stay of disaster displaced persons, such when New Zealand nationals travelled to Australia in the aftermath of the 2010 Christchurch earthquake (Nansen Initiative 2015(b):33-34). Similarly, disaster-affected persons from Nepal crossed the border to India following the devastating 2015 Kathmandu Valley earthquake (Nansen Initiative 2015(b):28).

In Africa and the Caribbean, sub-regional agreements on the free movement of persons have allowed individuals and families to travel to neighbouring countries in disaster contexts. For instance, individuals in West Africa were able to find refuge and employment during times of drought and flooding relying on the ECOWAS free movement agreement[29] (Wood 2022:63. See also Wood 2019). Notably, in 2021, Member States[30] adopted the Protocol on Free Movement of Persons in the IGAD Region (IGAD Free Movement Protocol, not yet in force) that expressly provides for the entry and stay of disaster-affected people in the territory of another Member State. Article 16(1) states:

> *"Member States shall allow citizens of another Member State who are moving in anticipation of, during or in the aftermath of disaster to enter into their territory provided that upon arrival they shall be registered in accordance with national law."*

In Africa, transhumance agreements under ECOWAS, CEMAC, and IGAD also allow the cross-border movement of pastoralists in the context of disasters and environmental degradation. For example, the 2020 IGAD Protocol on Transhumance commits Member

[29] ECOWAS Member States include: Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Senegal, Sierra Leone, and Togo.

[30] IGAD Member States comprise: Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, and Uganda.

States to "Allowing free, safe and orderly cross-border mobility of transhumant livestock and herders in search of pasture and water as an adaptation mechanism to climate change and weather variability within the IGAD region" (Article 2(a)).

States in the Caribbean have also relied on freedom of movement agreements to authorize the entry and stay of foreigners. For example, both the CARICOM[31] (Revised Treaty of Chaguaramas, Article 33) and OECS (Revised Treaty of Basseterre, Protocol, Article 12) free movement provisions facilitated the entry and stay of disaster-affected persons in the immediate aftermath of tropical storms in 2017 (Francis 2019; Cantor 2021:302). According to Francis, the agreements:

> *i) provided disaster displaced persons a right of entry in other islands; ii) supported the waiver of travel document requirements where documents had been lost or damaged; iii) granted indefinite stays to some disaster displaced persons, facilitating permanent resettlement; and iv) eased access to foreign labor markets through a mutual recognition of skills scheme and/or a waiver of work permit requirements" (Francis 2019:i).*

In particular, Antigua and Barbuda, Saint Lucia, Saint Vincent, and Grenada relied on the OECS provision regarding entry and short-term stay to expediate applications and waived the requirement to submit documents lost during the disaster (Cantor 2021:302). Similarly, Trinidad and Tobago used the CARICOM provisions to admit Dominicans with "short-term visa-free stay provisions" (Cantor 2021:302).

The OESC protocol allows for the indefinite stay of all nationals of Member States. Free movement under CARICOM is currently limited to six-month stays on arrival for skilled nationals holding verified certificates (Caribbean Migration Consultations 2019:11). However, in 2024, CARICOM plans to expand free movement for all individuals who are nationals of the CARICOM Single Market and Economy (CSME) to live and work in Member States (LoopNews 2023).[32] MERCOSUR (Southern Common Market) Member States are also discussing a regional draft text on cross-border disaster-displacement, which could be legally binding if approved by all countries.[33]

In the Pacific region, citizens of the Federated States of Micronesia, the Marshall Islands, and Palau have the right to enter, work and live in the US under the Compacts of Free Association between these States (Yildiz Noorda 2022:107). While focusing on the mobility of skilled labour and not providing for free movement, the Arrangement on Labour Mobility, which is a component of the Pacific Agreement on Closer Economic Relations (PACER) Plus, may allow some people affected by disasters and climate change to move the territory of one of the nine States Parties (Yildiz Noorda 2022:110 ff.).[34]

In late 2023, the Member States of the Pacific Island Forum[35] adopted the Pacific Regional Framework on Climate Mobility. In paragraph 39, the Framework commits States, in accordance with domestic law, to:

> *explore opportunities to provide people who are compelled to cross borders in the context of the adverse effects of climate*

31 Member States comprise: Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

32 While Article 33 on the freedom of establishment does not guarantee full freedom of movement, CARICOM leaders agreed in 2023 "to work towards the free movement of all CARICOM nationals within the Community by 31 March 2024. They acknowledged that there are certain basic guarantees that should be afforded to all CARICOM nationals exercising their right to freely move and remain indefinitely in another Member State of the Community." For this purpose, they envisage amendments to the Revised Treaty of Chaguaramas (Communique issued at the conclusion of the Forty-Fifth Regular Meeting of the Conference of Heads of Government of the Caribbean Community, 3-5 July 2023).

33 See Platform on Disaster Displacement, Reporting back from Brazil - Regional Workshop on Disaster Displacement (30 July 2023).

34 During the 2023 Pacific Labour Mobility Annual Meeting associated with PACER Plus, the Forum Island Countries (FIC) Labour Mobility Caucus requested, among other issues, that the final Report on the Review of the Arrangement on Labour Mobility "recognise climate change and necessary risk management systems and pathways for Pacific labour sending countries" (Pacer Plus Implementation Unit 2023:3). FIC represents 14 countries: Cook Islands, Federated States of Micronesia, Fiji, Kiribati, the Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, the Solomon Islands, Tonga, Tuvalu, and Vanuatu.

35 PIF Member States comprise: Australia, Cook Islands, Fiji, Kiribati, Marshall Islands, Micronesia, Nauru, Niue, New Zealand, Palau, Papua New Guinea, Solomon Islands, Samoa, Tonga, Tuvalu, Vanuatu, French Polynesia, and New Caledonia.

change with opportunities for humanitarian admission and stay as well as access to longer-lasting and sustainable solutions including resettlement and regularisation of their legal status.

Research has identified multiple advantages of relying on free movement agreements to facilitate the entry and stay of cross-border disaster-displaced persons (Black et. al. 2011; Wood 2019; Francis 2019; Cantor 2021). As compared to the tools described above, free movement agreements have much broader eligibility requirements that enable disaster-affected persons to more easily enter or stay in a receiving country without having to prove that they were displaced. Some agreements, such as in Africa, even allow individuals to regularize their status if they are already on the territory, "increasing the prospects for lawful stay and work, and reducing the risks of exploitation and abuse" (Wood 2019:8) and ultimately supporting durable solutions.

However, scholars caution that because free movement agreements were not created as instruments to address disaster displacement, numerous challenges must be overcome before they can serve as predictable measures that allow disaster displaced persons to enter, stay, and find lasting solutions (Wood 2019). Border officials maintain a high degree of discretion as to whether or not to allow individuals to enter a country (Francis 2019). In the African context, Wood identified, among numerous potential barriers:

- "suspension of free movement agreements in a disaster situation for reasons relating to public order, public health or national security;
- disaster displaced persons' inability to meet procedural requirements, such as documentation and financial requirements;
- disaster displaced persons' inability to obtain relevant residence or establishment permits that enable work;
- lack of protection against forcible return of disaster displaced persons … ;
- lack of pathways to permanent residence for disaster displaced persons" (2019: 43).

In Africa, free movement agreements typically allow for a 90 stay, with extension subject to immigration authorities discretion (Wood 2019:33-34). While States, such as Kenya, Rwanda, and Uganda, have agreed that some professionals do not need work permits or have agreements simplifying the process, other countries maintain strict eligibility requirements. Consequently, disaster displaced persons' ability to access livelihood activities relying on free movement agreements can be extremely complex and depend on the discretion[36] of the host State (Wood 2019:33-34).

Notably, the 2021 IGAD Protocol, by including provisions obliging Member States to accept the entry, stay, and non-return of citizens from other Member States affected by disasters, addresses some of the weaknesses that free movements agreements may pose and could provide a model for other regions. Similarly, while recognizing their limitations, Francis argues that free movement agreements can serve as effective protection tools because they can respond to regional realities, support "individual and structural resilience," and more easily expand in scope to address climate-related migration because negotiations involve a smaller number of states who are neighbours (Francis 2019:20). Others emphasize the use of free movement agreements alongside other migration measures, such as temporary stay and humanitarian visas (Burson et. al. 2021, Cantor 2021; Wood 2019).

Standard Operating Procedures between Kenya, Ethiopia, and Uganda

In the IGAD region, efforts have been made to enhance preparedness and operational readiness for cross-border disaster displacement through the development and practical testing of Standard Operating Procedures (SOPs). These SOPs, tailored for the Kenya-Uganda and Kenya-Ethiopia

[36] See, however, IGAD, Art. 16(2) with reference to Member States' obligation to "take measures to facilitate … the exercise of other rights", which includes ensuring access to livelihood activities, by disaster-affected citizens when return is not possible or reasonable.

border zones, were formulated against a backdrop of increasing disaster displacement risks, such as landslides in the Mount Elgon area and drought-induced movements between Ethiopia and Kenya. They are the result of a series of national workshops and the conclusion of two binational simulation exercises between Kenya-Ethiopia and Uganda-Kenya, respectively.

The SOPs address admission and stay in cross-border disaster displacement contexts, covering:

1) Entry and reception;

2) Registration and stay;

3) Assisted return or extension of stay.

Each SOP details the relevant policy and hazard context in each country and the roles and responsibilities of the specific government agencies and other stakeholders on each side of the border. They identify specific steps and sub-steps for each stage of the process, including gender-specific needs and other protection concerns.

4.5.3 BILATERAL AND REGIONAL IMMIGRATION QUOTAS

While free movement agreements usually only allow for temporary admission before permitting permanent stay, bilateral migration agreements could usefully address the issue of permanent admission of persons from countries that are losing substantial parts of their territory due to sea level rise and other long-term impacts of slow-onset disasters. On 9 November 2023, Australia and Tuvalu signed the Australia-Tuvalu Falepili Union Agreement, under which Australia committed in Article 3 to grant residency to citizens of Tuvalu, noting that one of the purposes of the agreement was to "provide the citizens of Tuvalu with a special human mobility pathway to access Australia underpinned by a shared understanding and commitment to ensuring human mobility with dignity" (Article 1[b])).[37] However, the treaty quickly came under scrutiny for its security-related provisions and a lack of national-level consultation prior to signature, and may require parliamentary approval in both States before it comes into force. Nonetheless, the treaty highlights the potential of bilateral treaties.

Finally, States have established immigration quotas for individuals from countries particularly affected by disasters and the adverse effects of climate change. While not introduced with the purpose to protect people affected by climate change, New Zealand's Pacific Access Category offers permanent admission to a certain number of people from Kiribati, Tuvalu, Tonga or Fiji (Yildiz Noorda 2022:207 f.), with annual quotas recently doubled between 2022 and 2023.

The Pacific Australia Labour Mobility (PALM) scheme allows workers from climate vulnerable Pacific Island States to take up seasonal jobs in the agricultural sector, develop their skills, and send home income to support their families and communities. Australia recently launched the new Pacific Engagement Visa (PEV) ballot-based scheme that will allow workers and their families from Pacific Island countries and Timor-Leste to permanently stay in Australia, and thus help countries affected by sea level rise and losing habitable territories to build and strengthen a viable diaspora in Australia in the mid-to-long term.

Between 2007 and 2012, the Colombia-Spain Temporary and Circular Migration Programme brought some 1,500 vulnerable Colombians, including individuals from "environmentally-vulnerable communities, such as rural populations whose crops are vulnerable to floods and other environmental disruptions" (de Moor 2011:13), to work as agricultural labourers in Spain. The programme included training and was cited, among other benefits, for helping participants send back remittances

[37] The terms of this new mobility scheme have not been formalized. For example, although the Prime Minister of Australia has stated that this new migration pathway would initially allow a maximum of 280 Tuvaluan citizens to migrate to Australia each year to work, live or study (Albanese, 2023), it is not clear whether this includes permanent residency with a pathway to citizenship, and to what extent Tuvaluans would have access to social services and additional financial or cultural assistance to support integration (Kitara and Farbotko, 2023).

and contribute to rebuilding after disasters (Huckstep and Clemens 2023:302-305).

In addition to humanitarian visas and regular labour migration categories, researchers also advocate for exploring the potential of "place-based visas" to create new migration pathways (Ozimeck et. al. 2019:4). As opposed to being linked to one employer, place-based visas require migrants to live in a particular, often rural, area for a certain period of time before the holders are able to freely choose their residence in the country (Huckstep and Clemens 2023: 283- 286). Programmes are currently being developed and trialled in the USA and Europe, such as a program called Operation 500 in Catalonia, Spain that integrates asylum seekers, refugees, and other immigrants in villages with less than 500 inhabitants, providing them with an annual salary and a home for one year (Burgen 2022). Huckstep and Clemens contend that such an approach could benefit both the most-vulnerable from climate-affected countries and the receiving communities.

Numerous researchers advocate for States to expressly acknowledge the roles that labour agreements can play in addressing disaster and climate vulnerability and adjust the programmes to accentuate these potential benefits (Brickenstein and Marvel Tabucanon 2014; ILO 2022; Dun and others 2023; Huckstep and Clemens 2023). Such temporary labour migration programmes may be particularly beneficial when they include training for workers and support integration in the receiving community, with some advocates encouraging existing seasonal worker programmes to integrate vulnerability criteria related to climate change and disaster impacts (Huckstep and Clemens 2023:302). Analysis of previous labour migration schemes concluded that the use of "intermediaries to target vulnerable households in selected countries can allow a more granular targeting of those who would most benefit from access to migration", although the recruiters themselves need to be carefully selected to ensure they are reliable and do not select beneficiaries based on ease of access or prior international employment experience (Huckstep and Clemens 2023:290). Without proper measures in place, the schemes may also result in exploitation, even unintentionally, due to potential unemployment between seasons, unsafe working conditions, lack of overtime or paid sick leave, or difficulties accessing legal support if needed (Huckstep and Clemens 2023:304; Bedford and Bedford 2022; ILO 2022).

4.6 REGIONAL COORDINATION OF MIGRATION MEASURES

GOOD PRACTICE

Harmonizing national legal, policy. and operational measures at the regional level regarding the admission and stay of disaster displaced persons, adapted to each region's specific context.

Given the diversity of State approaches, there have been numerous recommendations to harmonize the use of migration measures at the regional level with respect to human mobility in the context of disasters and climate change (Wood 2019; Francis 2019; Cantor 2021; Burson et. al. 2021; Vélez-Echeverri and Bustos 2023). Guidance to harmonize the application of humanitarian measures on admission and stay of disaster-displaced persons have been developed by States in Central and South America under the Regional Conference on Migration (RCM 2016) and South American Conference on Migration (SCM 2018), respectively (Cantor 2021:315-319). Cross-border simulation exercises bringing together migration and disaster response actors have been conducted by neighbouring States in Central and South America and the Horn of Africa[38] that led to the revision of Standard Operating Procedures for relevant authorities and the development of bilateral Memoranda of Understanding (see box above).

[38] To date, such simulation exercises have been conducted between Costa Rica and Panama, Colombia and Ecuador, Ethiopia and Kenya, and Kenya and Uganda. For example, see Platform on Disaster Displacement, "Uganda and Kenya Conclude Simulation Exercise on Managing Cross-Border Disaster Displacement," 25 May 2023.

5

Conclusions and Recommendations

5.1 CONCLUSIONS

As this review illustrates, existing measures derived from international refugee law, human rights law, as well as migration law offer legal and policy options for admitting and protecting people displaced across borders in the context of disasters and the adverse effects of climate change. The good practices highlighted from different parts of the world further demonstrate that consensus is growing on the need to protect such persons, with a number of States introducing new migration legislation in recent years specifically addressing disaster situations. There are also notable efforts to harmonize regional approaches to human mobility in the context of disasters and climate change. However, a closer analysis of State practice indicates that the use of these tools is limited, often random, hard to predict, and neither harmonized nor well-coordinated. In other words, implementation remains partial and unpredictable.

As regards **refugee law**, it is not contested that negative impacts of natural hazards and global warming on the enjoyment of human rights, as such, do not constitute to persecution as defined by the 1951 Refugee Convention. At the same time, scholars as well as courts increasingly recognize that persecution may still occur in the context of disasters and adverse effects of climate change, particularly where authorities intentionally, and for Convention reasons:

i) inflict environmental harm on a particular group;

ii) arrest, ill-treat, or prosecute and punish individuals due to their actions or opinions that
are perceived as critical of the government's disaster management and response;

iii) deny (access to) humanitarian assistance; or

iv) are unwilling or unable to provide protection from harm by non-state actors, such as gender-based violence.

Courts have also recognized that disasters and the adverse effects of climate change may amplify vulnerability and thus contribute to persecution for Convention reasons. Courts have also considered, among other factors, the impacts of disasters and the adverse effects of climate change when assessing whether a specific region in the country of origin can provide an internal flight alternative.

Overall, however, court cases addressing such situations are very rare. While it is difficult to assess the reasons for the scarcity of case law, they may include problematic assumptions by decision makers, lawyers, and other stakeholders that:

- persecution must emanate from human actors and thus "natural" disaster contexts are not covered by refugee law;
- harm experienced during a past disaster does not provide a basis for a well-founded fear of future harm, unless it is clear that not only the disaster impacts but also the associated persecution are recurrent; or
- political and social conflicts fade into the background during major humanitarian challenges, especially in the event of sudden, large-scale disasters, resulting fewer incidents of persecution.

The wider refugee notions enshrined in the African Refugee Convention and the Cartagena Declaration, with their reference to events or circumstances that are seriously disturbing public order, have considerable potential to grant refugee status to persons displaced across borders in disaster situations, including those associated with the adverse effects of climate change. However, States rarely, if ever, apply these instruments, limiting their use to situations where disasters and the negative impacts of climate change interact with conflict and violence, leading to a breakdown of law and order, such as in the aftermath of the 2010 Haiti earthquake, or when life-saving humanitarian assistance, as during the 2011/2012 Somalia drought and famine, is unavailable or inaccessible for large segments of the population over an extended period of time.

Human rights law, based on its prohibition of forcible return to serious harm in disaster- and climate change-affected countries, also has potential, as several cases decided in different jurisdictions show, to protect disaster-displaced persons by providing subsidiary/complementary protection in accordance with the right to life and the prohibition of inhuman and degrading treatment. This includes situations where persons would:

- face real disaster-related risks to their life;
- risk being exposed to dire humanitarian conditions so severe as to amount to inhumane treatment; or
- experience severe, rapid and irreversible deterioration of health leading to severe suffering or a significant reduction in life expectancy.

In the event of sea level rising making low-lying island States uninhabitable, case law has not yet clarified how close in time a life-threatening situation must be for the right to life to prohibit deportation, other than indicating that such a scenario is not likely to materialise in the near future. In practice, this means that the protection of human rights under current case law is limited to situations of ongoing, rather than future, harm – such as a risk of suffering or dying due to a very serious humanitarian crisis in the country of origin. While human rights law provides absolute protection from non-refoulement, provided its high threshold of application is met, it leaves it largely to domestic law to determine the specific rights of protected persons in the receiving country.

To date, the most widespread mechanisms for authorizing the admission and stay of persons displaced in the context of disasters and the adverse effects of climate change can be found in **migration law**. Numerous countries have instruments permitting the discretionary grant of humanitarian entry and/or stay or temporary protection for foreigners in an irregular situation. Particularly in the Americas, many relevant legal provisions specifically mention disasters in the country of origin. In other countries, the notion of humanitarian and compassionate considerations is interpreted in such a way as to extend to disaster situations. However, the discretionary nature of these tools makes their application unpredictable. Bilateral or

regional agreements on the free movement of persons, while mainly serving economic purposes, have the potential to allow persons to move to other countries in anticipation of, during, or in the aftermath of disasters. The same is true for bilateral agreements or domestic laws that establish migration quotas for people from countries particularly vulnerable to disasters and the adverse effects of climate change. All these measures provide for migration pathways as envisaged by the GCM and recognized by the GCR in para. 63. However, a baseline analysis report under the GCM concluded that preventative "[e]fforts to address and minimize adverse drivers of human mobility", such as through disaster risk reduction and climate change adaptation action, have received greater attention as compared to other policy areas related to human mobility in the context of disasters and climate change (Mokhnacheva 2022:67).

Future research could analyze regional mobility patterns and assess to what extent existing practices meet the protection and assistance needs of disaster displaced persons. Existing practice could also be analyzed with reference to the criteria for identifying cross-border disaster-displaced persons as set out in the Protection Agenda (para. 33), and the extent to which they are congruent with existing State practice, including case law. Finally, research could further distinguish the different levels of protection and assistance that existing policy and legal measures provide to disaster displaced persons (Wood 2019), such as with respect to questions such as: How easily are displaced people able to access them? What rights and responsibilities do persons have under the respective measures? To what extent do the measures support finding lasting solutions? What are their strengths and weaknesses? In what displacement contexts are the measures most appropriate?

5.2 RECOMMENDATIONS

To support the implementation of paragraphs 61 and 63 of the Global Compact on Refugees:

❶ **UNHCR should develop further guidance and invest in capacity building by:**

a) Systematically highlighting in its non-return advisories and country guidance papers how disasters, the adverse effects of climate change, and environmental degradation, when assessed in light of other factors, can heighten existing vulnerabilities and should be taken into account in decisions related to refugee status determination, non-refoulement subsidiary protection, and cessation of refugee status;

b) Issuing operational guidance, following field research, on the potential application and limits of international and regional refugee and human rights law, as well as temporary protection and humanitarian stay arrangements, with respect to displacement in the context of disasters, the adverse effects of climate change, and environmental degradation;

c) Convening roundtables or other forums with practitioners, academics, and experts on the application and limits of international and regional refugee and human rights law and the use of temporary protection and humanitarian stay arrangements with regard to persons seeking international protection in the context of disasters and the adverse effects of climate change.

❷ **States, in order to harness the full potential of the 1951 Refugee Convention, and in accordance with paragraph 61 of the Global Compact on Refugees, should:**

a) Include the issue of disaster- and climate change-related displacement in training for officials and judges involved in refugee status determination;

b) Ensure the systematic integration of relevant disaster and climate change-

related facts and analysis in country-of-origin information;

c) Ensure access to refugee status determination procedures for everyone claiming to be in need of international protection due to persecution in the context of disasters and the adverse effects of climate change; and

d) Ensure that decision makers systematically consider factors related to disasters and adverse effects of climate change as relevant elements when deciding whether an internal flight alternative exists or whether to grant complementary/subsidiary protection.

❸ **States should, with respect to paragraph 63 of the Global Compact on Refugees, further consider:**

a) Developing new or strengthening existing tools based on humanitarian considerations, such as humanitarian visas and temporary protection status, that are harmonized and utilized in predictable ways;

b) Integrating disaster displacement into regional or bilateral agreements on the free movement of persons; and

c) Introducing immigration quotas, in order to create pathways for safe, orderly, and regular migration from countries particularly affected by sea level rise or otherwise losing habitable territory as a consequence of the adverse effects of climate change.

❹ **Donors should explicitly include and address cross-border displacement in the context of disasters and the adverse effects of climate change in programs and projects supporting countries hosting refugees, whilst not neglecting efforts to reduce greenhouse gas and to prevent and address displacement in countries of origin, including through climate adaptation and loss and damage financing.**

6

Annexes

6.1 BIBLIOGRAPHY

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