

PROTECTION STARTS AT HOME
BUT DOES NOT STOP THERE!
THE DYNAMICS OF THE HUMAN RIGHTS
OBLIGATIONS OF STATES FOR PROTECTING
ENVIRONMENTALLY DISPLACED PERSONS*

*¡LA PROTECCIÓN COMIENZA EN CASA PERO
NO TERMINA AHÍ! LAS DINÁMICAS DE LAS
OBLIGACIONES QUE TIENEN LOS ESTADOS
DE PROTEGER LOS DERECHOS HUMANOS
DE LOS DESPLAZADOS AMBIENTALES*

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ABSTRACT

Environmental degradation and the effects of climate change have direct and indirect impacts on the effective enjoyment of human rights. Countries where the effects of environmental change and degradation occur are mostly likely to be vulnerable to human displacement, due to the lack of available adaptation resources, poor human resource implementation capacity and often a deficient human rights protection record. Such countries are also the ones least likely to proactively lobby governments at the national and international levels. While the exact number of people displaced is hard to estimate predictions are of approximately 150 million of environmentally displaced persons by 2050. This analysis starts by portraying the human impacts of environmental change, and then concentrates on the home states obligations under international human rights standards in parallel scrutiny with regional and international jurisprudence. The aim is to establish which duties home states have with regards to respecting human rights and ensuring a healthy and safe environment by avoiding environmental degradation. A further aim is to establish how states duties are transferable in the environmental change context; in particular, what protecting obligations states have towards environmentally displaced persons. This paper explores the duty of states to protect environmentally displaced people through a “dynamic model of internalisation of protection obligations”: respecting and fulfilling people’s needs in an interactive, international assistance, cooperative and participatory process. Ultimately, the global polity of states must find ways to deal with new legislative challenges in this current world of permanent emergencies of natural and human made environmental degradation and change.

Keywords autor: Environmentally displaced persons, climate change, development induced displacement, human rights, mixed migration flows.

Keywords plus: Human rights, climate change, environmental degradation, environmental impact analysis, international humanitarian law.

RESUMEN

La degradación ambiental y los efectos del cambio climático impactan directa e indirectamente en la posibilidad de gozar de los derechos humanos. Los países donde los efectos del cambio ambiental y la degradación son más latentes tienen mayor probabilidad de ser vulnerables al desplazamiento, debido a la falta de recursos disponibles para la adaptación, poca capacidad para la ejecución de los recursos y a menudo un récord insuficiente de protección de derechos humanos. Tales países son también los que con menor probabilidad ejercerán presión en los gobiernos a escala nacional e internacional. Aunque el número exacto de desplazados es difícil de calcular, las predicciones son de aproximadamente 150 millones de desplazados ambientales para el año 2050. Este artículo comienza mostrando el impacto del cambio climático sobre las personas, para luego centrarse en las obligaciones de los Estados según los estándares del derecho internacional humanitario en conjunto con la jurisprudencia regional e internacional. El objetivo es establecer los deberes de cada Estado en términos de respetar los derechos humanos y asegurar un ambiente seguro y sano evitando la degradación del medio ambiente. Un segundo objetivo es establecer cómo los deberes de los Estados son transferibles en el contexto del cambio climático; en particular, cuáles son sus obligaciones sobre proteger a los desplazados ambientales. El ensayo explora el deber de los Estados de proteger a los desplazados ambientales mediante un “modelo dinámico de internalización de deberes de protección”: respetar y satisfacer las necesidades de la gente en un proceso interactivo, cooperativo, participativo y con asistencia internacional. Finalmente, el sistema de gobierno de los Estados debe encontrar formas de lidiar con los nuevos retos legislativos del mundo actual y sus permanentes emergencias de degradación y cambio climático, bien sean naturales o generadas por las personas.

Palabras clave autora: *Desplazados por el medio ambiente, cambio climático, desplazamiento a causa del desarrollo, derechos humanos, flujos migratorios mixtos.*

Palabras clave descriptores: *Derechos humanos, cambio climático, degradación ambiental, evaluación del impacto ambiental, derecho internacional humanitario.*

SUMMARY

I. INTRODUCTION.-II. THE HUMAN IMPACTS OF ENVIRONMENTAL CHANGE.-III. THE HUMAN RIGHTS IMPACTS OF ENVIRONMENTAL CHANGE.-IV. STATE'S OBLIGATIONS FOR PROTECTING ENVIRONMENTALLY DISPLACED PERSONS. *A. Considerations Related to the Right to Life. B. Considerations Related to the Right to Privacy. C. Considerations Related to the Right to Adequate Standard of Living. D. Considerations Related to the Right to Health.*-V. INTERNALISING THE PROTECTION SCOPE OF ENVIRONMENTALLY DISPLACED PERSONS: *QUO VADIS?* *A. Degradation of the environment violates human rights. B. Protection starts at home. C. Need for cooperation and assistance. D. Dealing with risks.*-VI. CONCLUSION.

I. INTRODUCTION

The environmental degradation and the effects of climate change have direct and indirect impact on the effective enjoyment of human rights. The January 2009 report of Office of the United Nations High Commissioner for Human Rights (OHCHR) describes the threats of environmental change in a wide range of human rights such as the right to life, health, food, housing, water, sanitation and self-determination¹. Countries where the effects of environmental change and degradation occur are mostly vulnerable to human displacement, due to the lack of available adaptation resources, poor human resource implementation capacity, and often a deficient human rights protection record². These countries are also the ones least likely to proactively lobby governments at the national and international levels. While the exact number of people displaced is hard to estimate, predictions are of 150 million of environmentally displaced persons (EDPS) by 2050.

International protection obligations are linked to human rights violations committed in the country of origin. To reach a holistic view of protection there is therefore a need to analyse the obligations of the origin country towards human rights protection of EDPS. Protection for EDPS starts at home but does not stop there. A healthy and safe environment is a pre-condition for the enjoyment of human rights. The country of origin has the primary responsibility to *respect* human rights (negative duty of non-violation) to *protect* (positive duty to prevent violation, including of private and international actors) and to *fulfil* (positive duty to take actions for improvement)³ of environmentally displaced persons. However, international assistance and coop-

1 United Nations High Commissioner for Human Rights [OHCHR], *Report Relationship Between Climate Change And Human Rights Annex*. <http://www.unhcr.org/refworld/docid/498811532.html>. (Jan. 01, 2009)

2 S. Humphreys, *Human Rights And Climate Change*, 1 (Cambridge University Press, Cambridge, 2010).

3 M. Nowak, *Introduction To The International Human Rights Regime*, 48 (Brill Academic Publications, Leiden, 2003).

eration are parallel and mutually inclusive obligations of third states and essential for the protection of EDPS.

This analysis begins by focusing on a type of environmental degradation i.e. climate change and its human impacts. While the term environmental change is used interchangeably with climate change, the author's approach builds on the need to take a holistic view to environmental displacement. This means that despite the focus on environmental factors as a cause of displacement in the analysis, one needs to be aware of all environmental change variables (from economical, social and political) to understand and find ways to tackle such increasingly complex legal challenges.

The article then concentrates on the home states obligations under international human rights standards in parallel scrutiny with regional and international jurisprudence. The aim is to establish which duties home states have with regards to respecting human rights and ensuring a healthy and safe environment by avoiding environmental degradation. A further aim is to establish how states duties are transferable in the environmental change context; in particular, what protecting obligations states have towards the environmentally displaced persons. The third and final section explores the duty of states to protect environmentally displaced persons through a "*dynamic model of internalisation of protection obligations*": respecting and fulfilling people's needs in an interactive, international assistance, cooperative and participatory process. Ultimately, states must find ways to deal with new legislative challenges in today's world of permanent emergencies of both natural and human-made environmental degradation and change.

II. THE HUMAN IMPACTS OF ENVIRONMENTAL CHANGE

The impacts of environmental change are deemed to be *life-changing*, going further than any environmental challenge

experienced by the international community⁴. Global temperature is predicted to heighten overtime between 2 to 6 degrees centigrade. This will, in turn, augment land degradation, desertification, and droughts; increase the level of floods and cyclones. These factors will affect the availability of the resources of the country of origin, undermine livelihoods, and exacerbate the break-out and spread of diseases, inequalities, food security and poverty. Second, environmental change caused by climate impacts is *unevenly distributed*. While the developed world is in a better position to cope with environmental change (due to human capital and financial resources), developing countries are mostly at risk and will be the most likely to be affected. The Arctic, as predictions of global warming are high on ecosystems and human communities; Africa, because of their low level of adaptation capacity and high risk of predicted climate impacts and Asian and African mega deltas as populations here are mostly at risk from sea level rise, flooding and storms⁵. In 2009 the former Global Humanitarian Forum noted that 300,000 people die per year of climate change related reasons, 325 million people are gravely affected per day, foreseeing deaths of half a million by 2030⁶. The impacts of environmental change are now not only predictions but they are realities happening already today.

Thirdly, the actual and potential impacts of environmental change makes visible a wide range of *human-rights related challenges*⁷ being the most notable, forced human displacement, as

4 S. McInerney-Lankford, S. Darrow & L. Rajamani, *Human Rights And Climate Change. A Review Of The International Legal Dimensions*, 11 (The World Bank, Washington D.C., 2011).

5 See the Intergovernmental Panel on Climate Change, hereinafter [ipcc], *Fourth Assessment Report Emphasizing What Systems And Regions That Are Most At Risk From The Impacts Of Climate Change*, http://www.ipcc.ch/publications_and_data/ar4/syr/en/mains6-2.html (2007). See also preamble to resolution of UN Human Rights Council [UNHRC] *Regarding Climate Change And Human Rights*, http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf (Mar. 26, 2008). See also M. Robinson: "All human beings are borne free and equal in dignity and rights. However [...] it is poor communities who are suffering most from the effects of climate change, and it is rich countries that are contributing to the problem". *Climate change and justice*, http://www.realizingrights.org/pdf/Barbara_Ward_Lecture_12-11-06_FINAL.pdf. (2006). See S. McInerney-Lankford, S. Darrow & L. Rajamani, *Op.cit.*, 11.

6 Global Humanitarian Forum (2009).

7 International Council on Human Rights Policy [ICHRP] (2008).

a reactive or proactive measure⁸. The lack of “*adaptive capacity*” or “*vulnerability*”⁹ of the least developed countries (especially of particular groups such as women, children, disabled, indigenous and older people) will contribute to the snowball effects of the predictive trends of human displacement. While the exact number of people displaced is hard to estimate, predictions are of 150 million of EDPS by 2050¹⁰, even though these numbers must be read with caution, due to a lack of an accurate definition of what constitutes an EDP. The absence of conceptualisation by the international community has resulted into the incapacity of exactly measuring the number of existing and potential EDPS. In this context of this paper we refer to EDPS *as those individuals who are displaced for compelling reasons of sudden disasters* (in particular cyclones, storms surges and floods) or progressive environmental degradation (in particular drought, desertification, deforestation, soil erosion, water shortages and climate change related conditions), whether natural and/or humanly-made¹¹.

8 According to the Office of High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States [UN-OHRLLS] around 860 million people in the developing world and small island developing states will be afflicted by environmental change and many will become “*environmental refugees*” <http://www.unohrlls.org/UserFiles/File/LDC%20Documents/The%20impact%20of%20CC%20on%20LDCs%20and%20SIDS%20for%20web.pdf>. (2009).

9 The 1992 United Nations Framework Convention on Climate Change (UNFCCC) defines “*vulnerability*”: “*The degree to which a system is susceptible to, or unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the character, magnitude, and rate of climate variation to which a system is exposed, its sensitivity, and its adaptive capacity*”, <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

10 N. Meyers & J. Kent, *Environmental Exodus: An Emergent Crisis In The Global Arena*, 1-14 (Climate Institute, Washington D.C., 1995). See also N. Meyers, *Environmental Refugees In A Globally Warmed World*, 43 *Bioscience*, 752-761(1993).

11 By using the wording “*in particular*” the author implies that the listing within the definition is not exhaustive but merely indicative. Other displacement dynamics can be further included within the scope of the definition. It is a flexible concept embedded of both a moral and empirical claim. Moral, because it suggests the existence of rights and duties between the citizen and his country of origin which are at risk or even broken when the citizen crosses the border to a third state due to environmental conditions. Empirical, because the environment is one of the key drivers of human displacement, seriously threatening people’s lives.

III. THE HUMAN RIGHTS IMPACTS OF ENVIRONMENTAL CHANGE

IV. STATE'S OBLIGATIONS FOR PROTECTING ENVIRONMENTALLY DISPLACED PERSONS

Already in 1968 the UN General Assembly (UNGA) acknowledged the continuing and accelerating degradation of the quality of the human environment and its “*consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries*”¹². UNGA further highlighted the evolving relationship between man and its environment in wake of modern science and technological developments. As previously mentioned, the OHCHR has also expanded the relevance of the environmental disruption stating that: “*Global warming will potentially have implications for the full range of human rights*”¹³.

A healthy environment is an essential element of contemporary human rights doctrine in this over crowded and interconnected global village of “*permanent emergencies*” of natural and human-caused environmental degradation and change. States obligations to protect, respect and fulfil human rights are confirmed in many treaties and have been elaborated in national, regional and international jurisprudence. It is important to establish what duties states have with regards to environmental degradation and how the duties are transferrable in the climate change context, in particular with regards to protecting EDPS. While the whole arena of human rights is affected by environmental change (see Table 1) a cursory analysis of the most directly affected and specific state obligations are discussed below.

12 UNGA, Resolution 2398 (XXII), UN Conference on the Human Environment (03.12.1968).

13 OHCHR, *Report Relationship Between Climate Change And Human Rights Annex*, <http://www.unhcr.org/refworld/docid/498811532.html>, para. 20. (Jan. 15, 2009).

THE HUMAN RIGHTS IMPACTS OF ENVIRONMENTAL CHANGE

Climate Impact	Human Impact	Rights Implicated
<p>Sea Level Rise</p> <ul style="list-style-type: none"> • Flooding • Sea Surges • Erosion • Salination of land and water 	<ul style="list-style-type: none"> • Loss of land • Drowning, injury • Lack of clean water, disease • Damage to coastal infrastructure, homes, and property • Loss of agricultural lands • Threat to tourism, lost beaches 	<ul style="list-style-type: none"> • Self-determination [ICCPR; ICESCR, 1] • Life [ICCPR, 6] • Health [ICESCR, 12] • Water [CEDAW, 14; ICRC 24] • Means of subsistence [ICESCR, 1] • Standard of living [ICESCR, 12] • Adequate housing [ICESCR, 12] • Culture [ICCPR, 27] • Property [UDHR, 17]
<p>Temperature Increase</p> <ul style="list-style-type: none"> • Change in disease vectors • Coral bleaching • Impact on Fisheries 	<ul style="list-style-type: none"> • Spread of disease • Changes in traditional fishing livelihood and commercial fishing • Threat to tourism, lost coral and fish diversity 	<ul style="list-style-type: none"> • Life [ICCPR, 6] • Health [ICESCR, 12] • Means of subsistence [ICESCR, 1] • Adequate standard of living [ICESCR, 12]
<p>Extreme Weather Events</p> <ul style="list-style-type: none"> • Higher intensity storms • Sea Surges 	<ul style="list-style-type: none"> • Dislocation of populations • Contamination of water supply • Damage to infrastructure: delays in medical treatment, food crisis • Psychological distress • Increased transmission of disease • Damage to agricultural lands • Disruption of educational services • Damage to tourism sector • Massive property damage 	<ul style="list-style-type: none"> • Life [ICCPR, 6] • Health [ICESCR, 12] • Water [CEDAW, 14; ICRC 24] • Means of subsistence [ICESCR, 1] • Adequate standard of living [ICESCR, 12] • Adequate and secure housing [ICESCR, 12] • Education [ICESCR, 13] • Property [UDHR, 17]
<p>Changes in Precipitation</p> <ul style="list-style-type: none"> • Change in disease vectors • Erosion 	<ul style="list-style-type: none"> • Outbreak of disease • Depletion of agricultural soils 	<ul style="list-style-type: none"> • Life [ICCPR, 6] • Health [ICESCR, 12] • Means of subsistence [ICESCR, 1]

Table 1. Source: Maldives Submission under Resolution Human Rights Council 7/23 (2008) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf

A. Considerations Related to the Right to Life

The right to life is protected and well established in major international and regional frameworks such as the Universal Declaration of Human Rights¹⁴ (UDHR), the International Covenant on Civil and Political Rights¹⁵ (ICCPR), African Charter on Human and People’s Rights¹⁶ (Banjul Charter), American Convention on Human Rights¹⁷ (ACHR) and European Convention on Human Rights¹⁸ (ECHR). It has been referred to as the “*first right of*

14 UDHR, Art. 3 (1948).
 15 ICCPR, Art. 3 (1966).
 16 Banjul Charter, Art.4 (1981).
 17 ACHR, Art. 4 (1978).
 18 ECHR, Art. 2 (1950).

man”¹⁹ and the most fundamental of all rights²⁰ from which no derogation is permitted, even in the case of a public emergency²¹. In its *General Comment 6*²² of the ICCPR on the scope and content of the right to life, the United Nations Human Rights Committee (UNHRC) stressed the right to life as “*supreme*” and should not be interpreted in a restrictive way. The Committee has highlighted that the inaction of states to prevent, mitigate or remedy life-threatening harms from environmental degradation or change (within national borders or effective control of the situation) could theoretically amount to violation of the right to life. The *jus cogens* essence of the right to life emphasizes the importance of the home state as the duty-bearer not only in case of inadequate action, but also in case of failure when it was supposed to prevent its violation²³. In a way it recognizes today’s complexity of violation of human rights by national and international actors where governments cannot simply rely on non-interference in the enjoyment of a particular human right. Instead, the state is required to take positive actions to ensure that traditional civil and political rights are guaranteed.

The Human Rights Committee has reinforced this idea under its *General Comment 31* acknowledging that states parties have both positive and negative obligations²⁴. States are required to take positive actions in order to protect human life; reduce child mortality, increase life expectancy, eradicate hunger and malnutrition and the proliferation of diseases²⁵. The UNHRC has “*opened the door for the right to life to stretch beyond the traditional threat coming from public authorities, to include environmental threats affecting the welfare and livelihoods of millions of people around*

19 F. Newman & K. Vasak, *Civil And Political Rights in The International Dimensions Of Human Rights*, 135- 173, 144 (K. Vasak, Ed., Greenwood Press, Paris, 1982).

20 Committee Cultural and Political Rights [CCPR], *General Comment 14*, Art. 6, Right to Life (1984).

21 CCPR, *General Comment 6*, Right to life (1982).

22 *Op.cit.*, para. 1.

23 L. Leib, *Human Rights And The Environment. Philosophical, Theoretical And Legal Perspectives*, 72 (Martinus Nijhoff Publishers, Leiden, 2011).

24 CCPR, *General Comment 31*, Nature of the General Legal Obligations on State Parties to the Covenant, para. 6 (2004).

25 CCPR, *General Comment 6*, Right to life, para. 5 (1982).

the world”²⁶. Environmental stresses act a threat multiplier in already fragile regions aggravating the conditions that lead to failed states, challenge global peace and stability putting at stake people’s lives²⁷.

There are particular communities at risk especially those living in the Arctic and coastal regions. These communities are already suffering from the impacts of environmental change on their right to life. For example, in 2005 the *Inuit petition* to the Inter-American Commission on Human Rights (IACHR) (despite unsuccessful) explained the adverse effects of climate change on their right to life, stating: “*Changes in ice and snow jeopardize individual Inuit lives, critical food sources are threatened, and unpredictable weather makes travel more dangerous at all times of the year*”²⁸. The petition highlighted the responsibility of US government of the failure to take appropriate action to tackle climate change. Previously the IACHR, in the Yanomami²⁹ case had already established the close link between a healthy envi-

26 Leib, *Op. cit.*, 73.

27 This was highlighted in recent reports and studies by national governments: United Kingdom of Great Britain and Northern Ireland, *The National Security Strategy of the United Kingdom: Security in an interdependent world* (2008); German Advisory Council on Global Change, *World in transition-Climate Change as a Security Risk* (2008). Climate change a global challenge to peace and security was also emphasised in 2007 by the Norwegian Nobel Committee: “*The chief threats may be direct violence, but deaths may also have less direct sources in starvation, disease or natural disasters. A goal in our modern world must be to maintain ‘human security’ in the broadest sense*”, http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/presentation-speech.html.

28 Organization of American States, Inter-American Commission on Human Rights, *Petition Seeking Relief From Violations Resulting From Global Warming Caused By Acts And Omissions Of The United States*, 90-91(2005) (hereinafter *Inuit petition*). The petition explains how Inuit lives are at jeopardy from the effects of climate change: the sea ice on which Inuit travels and hunts freezes; thaws earlier and is thinner; food supplies are threatened making harvesting more difficult; increase of unforeseen weather events and decrease of snow disables the Inuit from building emergency shelters which have caused increased life casualties and accidents among hunters; and the decrease in summer ice makes travelling more dangerous due to rougher seas and increase of dangerous storms. <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>.

29 IACHR, Yanomami Indians, Case 7615 (Brazil), OAS/Ser.L/V/II.66 doc. 10 rev. 1-6 (Mar. 5, 1985). The actions of the Brazilian government in allowing the construction of a trans-Amazonian highway in the Yanomami territory and the exploitation of its surrounding mineral resources lead the influx of non indigenous populations allied to the spread of diseases resulting in the decimation of lives. Among other things, the court found that the state failed to take appropriate “*timely and effective measures*” to protect the integrity of Yanomami’s rights to life, liberty and personal security guaranteed by Article 1 of the American Declaration. <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>.

ronment and the right to life and the role of the state to protect these rights.

Further, the IACHR has stated that the “*realisation of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one’s physical environment*”³⁰. The IACHR does not limit its interpretation of the right to life to Article 4 of the American Convention on Human Rights (ACHR) as protection solely against arbitrary killing, but expands its approach.

The violation of the right to life by home states is emphasized again by the Inter-American Court of Human Rights in *Sawhoyamaxa Indigenous Community vs. Paraguay*³¹ which acknowledges the failure of Paraguay to protect the right to life of the Sawhoyamaxa, by disregarding to protect their lands and displacing them to peripheral roadside areas, thereby causing them to lose their traditional means of subsistence. As a consequence, many members of this community, including older people and children, died due to undernourishment and lack of medical attention. The Court sustained that “[s]tates have the duty to guarantee the creation of the conditions that may be necessary in order to prevent violations of such inalienable right”³² and “*must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life*”³³. The right to life is warrant by States’ positive obligations. The Inter American System not only indirectly advances the protection of the environment for present and future generations but also dissipates the division between individual and collective human rights towards a humanity approach (where the protection of an individual is also of the collective and vice versa).

In 2008 the government of the Maldives submission to the OHCHR, as part of its preliminary study on climate change and

30 ICHR, *The Report On Human Rights Situation In Ecuador*, OAS/Se.L/V/II.96, doc.10 rev.1, chap. VIII (1997).

31 *Sawhoyamaxa Indigenous Community vs. Paraguay*, Inter-American Court of Human Rights (2006).

32 *Ibidem*, para. 151.

33 *Ibid.*, para. 153.

human rights, also described how climate change (sea level rise; warming water, melting ices) endangers the right to life of its citizens (increased floods, storms surges and erosion)³⁴. By 2025 predictions of increase 0.5 meter of the level of water would inundate 15% of the most populated island of the *Maldives (Male')* and by 2100 inundate half of it³⁵. Furthermore, because circa 42 percent of the population live within 100 m of the shoreline even partial flooding overtime is “*likely to result in drowning, injury and loss of life*”³⁶.

The European Court of Human Rights (ECTHR) has been as well adamant in acknowledging the responsibility of States in protecting the right to life. The relevance of the European jurisprudence for EDPS is mainly focused on two important cases. The first one deals with the failure of the state to prevent a mudslide that destroyed a dam (leading to eight deaths)³⁷ and the second case concerns the explosion of methane at a waste plant (leading to the death of twenty-six people and injuring eleven others)³⁸. In both cases the court emphasized the importance of the state of having an adequate framework in order to prevent the threats to the right to life and the need for states to take positive measures to protect those whose life might be at risk.

In particular, in the case regarding the fatal mudslide, the court highlighted the importance of the Russian government in protecting people’s basic human rights before, during and after a particular disaster occurs. The court found that Russia did not have into place an early-warning system to facilitate evacuation in time; ignored the early warnings that a mudslide might happen, disregarded the protection and repair of dams³⁹

34 Submission of the Maldives to the Office of the UN High Commissioner for Human Rights, Resolution 7/23 (Sep. 25, 2008). http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf.

35 Submission of the Maldives to the Office of the UN High Commissioner for Human Rights, Resolution 7/23, 19-20 (Sep. 25, 2008).

36 *Ibidem*, para.21.

37 Budayeva vs. Russia, 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 ECtHR, para. 132 (March, 20, 2008).

38 Oneryildiz vs. Turkey, 48939/99, ECtHR, para. 89-90 (November 30, 2004).

39 Budayeva vs. Russia, 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECtHR, para. 147-58 (March 20, 2008).

and further, did not conduct any investigations into the causes of the mudslide⁴⁰. The court acknowledged that positive and procedural duties of the states arise from the right to life. In the context of EDPS, this acknowledgment puts into perspective two main ideas: firstly, of the need to have adequate frameworks to protect the right to life and secondly, that the breach of the right is effectively tackled. Considering the loss of life that has occurred in many human-induced climate change hurricanes, storms, and heat waves over the past years, one can foresee in the near future claims (for example in European Courts) towards states for their irresponsibility of not tackling the problem of environmental change proactively or for not complying with mandatory reduction Green House Gas emissions.

The same is true with regards to pollution and generally environmental degradation. As judge Jambrek puts it (in his concurring opinion in *Guerra vs. Italy*):

It may therefore be time for the Court's case law on Article 2 (right to life) to start evolving, to develop the respective implied rights, articulate situations of real and serious risk to life, or different aspects of the right to life. Article 2 also appears relevant and applicable to the facts of the instant case, in that 150 people were taken to hospital with severe arsenic poisoning. Through the release of harmful substances into the atmosphere, the activity carried on at the factory thus constituted a "major accident hazard dangerous to the environment"⁴¹.

The law needs to evolve in order to consider situations of real risk towards a preventive approach to avoid the violations of human rights.

40 *Ibidem*, para. 159-160.

41 *Guerra vs. Italy*, 14967/89, ECHR, (February 19, 1998). Jambrek, J. concurring (1998).

B. Considerations Related to the Right to Privacy

The right to privacy as a civil and political right is relevant in the context of EDPS as it imposes the obligation of the state to protect one's private and family life. The ICCPR states under Article 17 that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence (...) Everyone has the right to protection of the law against such interference or attacks”. Similar provisions can also be found under the American Convention on Human Rights (ACHR)⁴² and the European Convention on Human Rights (ECHR)⁴³. Many cases brought before the ECHR have been prolific in using Article 8, under the allegation that environmental degradation impact on the individual's right to privacy.

In *Lopez Ostra vs. Spain*⁴⁴ the applicant argued the positive duty of the state to secure her rights under Article 8 from a leather processing waste treatment plant near her home which emitting toxic fumes and smells that “*immediately caused health problems and nuisance*”⁴⁵. The court did not affirmatively acknowledge the duty of the State to prevent pollution but indirectly did so. As the court found that the government did not strike “*a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life*”⁴⁶. Thus indirectly acknowledging the balancing of the state's duty to prevent pollution for the enjoyment of the applicant's right to privacy, even when the individual's health was not acutely endangered⁴⁷ (finding a breach of Article 8 and ordering the allocation of compensation). In

42 ACHR, Article 11 (2) and 21.

43 ECHR, Article 8 (1).

44 *Lopez-Ostra vs. Spain* 16798/90, ECHR, (December 04, 1994).

45 *Ibidem*, para. 8.

46 *Ibid.*, para. 56.

47 *Lopez-Ostra vs. Spain*, 16798/90, ECHR, para. 51 (Dec. 09, 1994). It is enough for the pollution to impact “*individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely*”.

Guerra & Others vs. Italy⁴⁸ the court reinforced its view of the impact of environmental pollution and the state's violation of Article 8 (in the failure of the state to act, to provide local population with information about risk factor and how to proceed in event of an accident). Similarly, in Fadeyeva vs. Russia⁴⁹, the court ruled the State's unwillingness to provide effective solutions to help the applicants to move from the polluted area⁵⁰ and take positive measures to regulate the emission levels⁵¹ near Russia's largest iron smelter plant: it held that "*despite the wide margin of appreciation left on the respondent state, it has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. There has accordingly been a violation of Article 8*"⁵². Although the acknowledgment by the court that the adverse polluting effects must reach a "*certain minimum level*" to severe endangerment of health is not needed as it depends on "*all the circumstances of the case*"⁵³.

C. Considerations Related to the Right to Adequate Standard of Living

Article 25(1) of the UDHR states: "*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family (...)*". There is a strong link between an individual and his/her surrounding natural environment. A healthy environment is a pre-requisite for an individual's health and well-being. State parties to the ICESCR also acknowledge the right of everyone to have an adequate standard of living for themselves and for

48 Guerra and others vs. Italy 14967/89, ECTHR, (February 19, 1998).

49 Fadeyeva vs. Russia, 55723/00, ECTHR, (June 09, 2005).

50 *Ibidem*, para. 88.

51 *Ibid.*, para. 133.

52 Fadeyeva vs. Russia, 55723/00, ECTHR, para. 134 (June 09, 2005). The Russian government was obliged to pay compensation to the applicant amounting to 6,000 Euro for non pecuniary damages in addition to all costs and expenses related to the case (para. 152).

53 Fadeyeva vs. Russia, 55723/00, ECTHR, para. 69 (June 09, 2005). "*The assessment of that minimum is relative and depends on all circumstances of the case, such as the intensity and duration of the nuisance, its physical or mental effects [and] (...) [t]he general environmental context*".

their family (Article 11) as an inclusive or overarching right. The composition bundles the right to adequate food, clothing, access to safe and potable water, housing, continuous progress of living conditions⁵⁴ and the right to be free from hunger (adequate supply of safe food and nutrition)⁵⁵. The World Health Organisation has determined that these basic health determinants will be most at risk by environmental changing conditions⁵⁶.

The right to adequate food, for example, is protected in many international human rights instruments⁵⁷. Environmental instruments have also raised the importance of the right to food and of climate mitigation measures to “ensure that food production is not threatened”⁵⁸. The right entails a progressive realisation of the right of everyone to food, including a core obligation to ensure that minimum standard is immediately met. “States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters”⁵⁹. The CESCR has highlighted the importance of the right to food as an inherent part of the dignity of the human person and essential for the fulfilment of other human rights mirrored in the International Bill of Human Rights⁶⁰. The committee has noted the availability and accessibility to food provisions as a major component of the right food and

54 ICESCR, Article 11 (1).

55 *Ibidem*, Article 11(2).

56 World Health Organisation [WHO] 6, *Protecting Health from Climate Change*, WHO, Geneva (2008).

57 The ICESCR recognises under Article 11 (1), “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions” while pursuant to Article 11 (2) they recognise that urgent steps may be necessary to ensure “the fundamental right to freedom from hunger and malnutrition”. In 2001 the UN special rapporteur on the right to food defined the right to food as: “[A] human right, inherent in all people, to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food to the cultural traditions of people to which the belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear”, J.Ziegler, *The right to food (Report by the Special Rapporteur on the right to food to the Commission on Human Rights 57th session*, UN Doc E/CN.4/2001/53,2(2001). The right to food has been included under Article 25 of UDHR; Article 12(2) CEDAW; Articles 24 (2) (c) and 27; and in many national constitutions such as Bangladesh, Brazil, Colombia, India, Iran, Pakistan, South Africa and Sri Lanka.

58 UNFCCC, Article 2 May 9 (1992).

59 CESCR, *General Comment 12*, Right to adequate food, para.6. (1999).

60 *Op.cit.*, para. 4 (1999).

the interdependency between the environment and right to food (indicating the need to take “*appropriate economic, environmental and social policies*”⁶¹). Further, the CESCR has linked the effects of environmental conditions to the right to food stating that “*even where the State faces severe resources constraints, whether caused by a process of economic adjustment, economic recession, climate conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals*”⁶².

There is strong evidence that environmental changing conditions impact on the right to food (both availability and accessibility) in a significant way⁶³. In 2008, Olivier de Schutter, the special rapporteur on the right to food, argued for the increased reliance on technology for agricultural production as a means to cope with population growth and climate change⁶⁴. He further pinpointed the negative effects of the development of agrofuel as a means to replace fossil fuels for transports as a measure to mitigate climate change⁶⁵. The rapporteur has prompted states in general and the international community in particular to develop policies and encourage sustainable and diverse resilient agricultural practices, as a means to cope with climate disruptions⁶⁶.

Another fundamental right subsumed in the right to adequate the standard of living is the right to water, on which human

61 CESCR, *General Comment 12, Right to adequate food*, para.4 (1999).

62 *Op.cit.*, para.28.

63 J. Doussa, A. Corkery & R. Chartres, *Human Rights And Climate Change*, 5 (Human Rights and Equal Opportunity Commission, Background Paper, 2008); See generally Bals, C. *et. al*, *Climate Change, Food Security And The Right To Adequate Food* (2008); S. Söllner, *The Breakthrough Of The Right To Food*, 11 *Max Planck Yearbook of UN Law*, 391-415 (2007).

64 O. De Schutter, *Report Of The Special Rapporteur On The Right To Food: Building Resilience: A Human Rights Framework On World Food And Nutrition Security*, UN Doc. A/HRC/9/23. <http://www.unhcr.org/refworld/docid/48cf71dd2.html>. (08.09.2008).

65 *Op.cit.* para. 25-34.

66 O. De Schutter, *Statement, Special Rapporteur On The Right To Food, Interactive Thematic Dialogue Of The UN General Assembly On The Global Food Crisis and The Right To Food*. <http://www.un.org/ga/president/63/letters/conceptfoodcrisis.pdf>. (06.04.2009); O. De Schutter, *United Nations Special Rapporteur On The Right To Food, Contribution To The UN Commission On Sustainable Development At Its 17th Session*. <http://www.srfood.org/images/stories/pdf/otherdocuments/19-srftsubmissioncsd-01-05-09-1.pdf>. (May. 04-05, 2009)

existence is dependent. State protection of EDPS implies too the protection of water resources. Forecasts predict that the increase of global temperature will threaten water availability for 50 million people. This trend will be further exacerbated by weather extremes such as drought and flooding. Today, it is estimated that 1.1 billion people are denied access to safe drinking water, which is a major cause of illness and morbidity⁶⁷. Environmental stresses further aggravate this situation.

Further considerations need to be made on the right to adequate housing and its importance within EDPS context. The right to housing is understood as “*the right to live somewhere in security, peace and dignity*”⁶⁸. The right to housing is found under Article 11 of the ICESCR and in an array of other conventional instruments⁶⁹, international declarations and general comments⁷⁰.

*Human rights guarantees in the context of climate change include: (a) adequate protection of housing from weather hazards (habitability of housing); (b) access to housing away from hazardous zones; (c) access to shelter and disaster preparedness in cases of displacement caused by extreme weather events; (d) protection of communities that are relocated away from hazardous zones, including protection against forced evictions without appropriate forms of legal or other protection, including adequate consultation with affected persons*⁷¹.

67 UNHRC, *Report Of the Office of the United Nations High Commissioner for Human Rights On the Relationship Between Climate Change And Human Rights A/HRV/10/61*, para.29 (2009) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement>

68 CESCR, *General Comment 12*, Right to adequate food, para.6 (1999).

69 The right to adequate housing is found also under Article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 14 of the CEDAW; Article 27 of the CRC; Article 43 of the International Convention on the Protection of the Rights of All Migrant Workers (IMWC).

70 See, for example, Principle 4 of the Declaration on the Rights of the Child, UNGA, Res. 1386 (XIV) (Nov.29, 1959); Article 10 (f) of the Declaration of Social Progress and Development, UNGA, Res. 2542 (XXIV) (Dec.11, 1969); Se. III (8), Chap. II(A.3) of the Vancouver Declaration on Human Settlements, adopted by the UN Conference on Human Settlements in 1976; Article 8.1 of the Declaration of the Right to Development, UNGA, Res. 41/128 (Dec.4, 1986) and CESCR, *General Comment*, 4 (1991); Article 11 (1), Right to adequate housing.

71 UNHRC, *Report Of the Office of the United Nations High Commissioner for Human Rights On the Relationship Between Climate Change And Human Rights A/HRV/10/61*, para. 38 (2009) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement>

Environmental disruptions have a tremendous impact on the right to housing. Drawing conclusions from previous UNDP and IPCC reports the OHCHR observes that:

[s]ea level rise and storm surges will have a direct impact on many coastal settlements. In the Arctic Region and in low-lying island States such impacts have already led to the relocation of peoples and communities. Settlements in the low-lying mega-deltas are also particularly at risk, as evidenced by millions of people and homes affected by flooding in recent years⁷².

However, the right to housing can be a doubled-edged right for EDPS. While it is fundamental that states tackle in a proactive manner the relocation of populations at risk to safer areas, it is important that where it is possible to return to their land, that people are given the choice. The special rapporteur on the right to adequate housing, Raquel Rolnik, has highlighted that one needs to learn from post-tsunami reconstruction process where in some countries certain populated areas were entirely relocated to resettle in safer spots but were never given the opportunity to return to their homes. Instead these areas became tourist and commercial areas⁷³ (and in essence constituted a form of indirect forced evictions)⁷⁴. Safety and security of the population becomes a camouflaged priority of States over other governmental and commercial interests. The realisation of the right to housing requires therefore, that states take adequate “*resource alloca-*

72 *Op.cit.*, para.36.

73 *Climate change talks must include focus on adequate housing, says UN expert*, UN News Centre, <http://www.un.org/apps/news/story.asp?NewsID=32695> (Oct.23, 2009). See also *The Joint Statement By Special Rapporteur On Housing, Ms. Raquel Rolnik And United Nations Special Rapporteur For Internationally Displaced Persons, Ms. Chaloka Beyani, During World Habitat Day Celebrations*. <http://www.unhabitat.org/content.asp?cid=10482&catid=7&typeid=8&AllContent=1>. (Oct. 3, 2011).

74 The CESCR has defined a forced eviction as “*the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of and access to, appropriate forms of legal or other protection*”. *General Comment, 7, Right to adequate housing, force evictions*, para. 3 (1997). In the case of EDPS indirect forced evictions take place when environmental degradation or catastrophe was the major cause of eviction. While the government enacted temporary measure of protection allocating individuals housing elsewhere, they never had the possibility of return to their property as the state decided to confer their land to other commercial interests.

tions and policy initiatives” and develop effective “international cooperation” strategies.⁷⁵

D. Considerations Related to the Right to Health

The ICESCR also recognises the right of everyone to all “the enjoyment of the highest standard of physical and mental health” (Article 12 (1)). *General comment* 14 further elaborates on how the enjoyment of the right to health is intricately reliant on environmental circumstances⁷⁶.

The right to health is also referred to in a series of articles in the CRC⁷⁷, CEDAW⁷⁸ and regional instruments such as the Protocol of San Salvador⁷⁹ and the Banjul Charter⁸⁰. State action is seen as obligatory as states *shall* take adequate and appropriate measures to pursue the full implementation of and to promote and encourage *international cooperation* with the view to achieving the full realisation of the right to health. Unilateral and cooperative state responsibility in realising the right to adequate standard of living and health is warranted.

75 CESCR, *General Comment*, 4 (1991): Right to adequate housing, para.10-15.

76 The CESCR states under *General Comment*14 (2000): Right to the highest attainable standard of health as, para. 11 (emphasis added): “An inclusive right extending *not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international level*”.

77 Article 24 (1) of the CRC (emphasis added) stipulates: “*States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illnesses and rehabilitation of health. States parties shall strive to ensure that no child is deprived of his or her right of access to such health care services*”.

78 Article 12 CEDAW says (emphasis added): “1. *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation*”.

79 Article 10 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (more commonly known as the Protocol of San Salvador) (1988).

80 Article 16 of the African Charter on Human and Peoples’ Rights (also known as the Banjul Charter).

Further, the right to health is not confined to medical assistance but includes all aspects of environmental improvements and protection from hazards (air, water, food pollution)⁸¹. This is reflected in the Draft Declaration of Principles on Human rights and the Environment⁸² and under other environmental instruments such as the Stockholm Declaration⁸³ and the Rio Declaration⁸⁴, Agenda 21⁸⁵, the UNFCCC⁸⁶ and in many other multi environmental agreements⁸⁷. The main difference here is the recognition that the attainment of the right to an adequate standard of living and the right to health is a “*duty of* [not only the state of origin/residence but of] *all Governments*” it is a “*shared responsibility*”. Facts from a World Health Organization (WHO) report show that more than 160,000 deaths from malaria and malnutrition may be due to an increase in the world tempera-

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- 81 M. Thorne, *Establishing environment as a human right*, 19 *Denver Journal of International Law and Policy*, 301-342, 322 (1991).
- 82 The Draft Declaration of Principles on Human Rights and the Environment Annex I, States under Principle 7. “*All persons have the right to the highest attainable standard of health free from environmental harm*” (1994).
- 83 The Stockholm Declaration asserts under “*Principle 1 Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated*” (1972).
- 84 The Rio Declaration enlightens under (emphasis added) Principle 1, “*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature*” and under “*Principle 14 States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.*”(1992).
- 85 Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment. (1992)
- 86 The UNFCCC refers to the adverse effects that climate change will have including Article 1 (1): “*Significant deleterious impacts on human health and welfare*” urging state parties to take, inter alia; Article 4 (1) (f) health impacts into account in the relevant social, economic and environmental policies. (1992).
- 87 The 1979 Convention on Long-Range Transboundary Air Pollution (Article 2). http://treaties.un.org/doc/Treaties/1991/02/19910214%2005-04%20PM/Ch_XXVII_01_cp.pdf; The 1979 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Article 2 (8) (9). http://treaties.un.org/doc/Treaties/1992/05/19920505%2012-51%20PM/Ch_XXVII_03p.pdf, and the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Article 1). <http://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.aspx>.

tures and the number is predicted to double in the next decade⁸⁸. Paul Hunt, the Special Rapporteur on the Right to Health has also reiterated how health is a broad concept, which entails more specific elements such as the right to healthy workplaces and the natural environments⁸⁹. He documented how pollution, lack of clean drinking water and poor sanitation had affected the most marginalised parts of the population such as children, indigenous people and the poor in Peru⁹⁰.

State action at national and international levels to protect EDPs and humankind is not only timely, but also necessary. As the Alma-Ata Declaration acknowledged; “*The gross inequality in the health status of the people, particularly between developed and developing countries, as well within countries, is politically, socially and economically unacceptable and is, therefore, of common concern of all countries*”⁹¹. The health inequalities gap between countries all over the world will increasingly widen with environmental change.

The right to health and its inextricable dependency on the environment has also been called upon in regional and national courts with regards to pollution of air and water, environmental protection, food scarcity⁹². The African Commission on Human and People’s Rights (ACHPR) in the case Social Economic

88 S. Bhattacharya, *Global warming kills 160,000 a year, New Scientist*. <http://www.newscientist.com/article/dn4223-global-warming-kills-160000-a-year.html>. (Oct. 1, 2003)

89 P. Hunt, *Report Of The Special Rapporteur: Mission to Peru*, para. 52 (2005).

90 The report notes real violations of the right to health in Peru. In Belen, (water and sanitation) with the contamination of the River Nanay with mercury from mining companies lead to increase of infant mortality due to diarrhoea and other water related diseases. In Callao, (lead poisoning) due to the export and storage of lead ore, it was documented that more than half of children possess high levels of lead in their blood. In San Mateo de Huanchor (the impact of mining) toxic mining affected local residence and in particular indigenous populations.

91 The 6-12 September 1978 Declaration of Alma-Ata (Article II). http://www.searo.who.int/LinkFiles/Health_Systems_declaration_almaata.pdf.

92 For example, the IACHR in the afore mentioned Yanomami case, where the government of Brazil forced indigenous populations out of their territory without compensation to build a high way, was peremptory in acknowledging the impact that such action had on the right to life but also on the right to health and well-being. The petitioners also claimed that other rights were stalled such as free movement, residence, liberty and security. While the decision did not grant any sort of remedy or forced the government to halt or overturn the situation to the previous environmental status quo it nevertheless, recommended the state to take action to protect the Yanomami Indians.

Rights Action Centre vs. Nigeria⁹³ found that the Nigerian government violated, amongst other things, the right to health, the right to dispose of wealth and natural resources, the right to a clean environment and family rights, due to the fact that it condoned and facilitated the operations of oil corporations in Ogoniland⁹⁴. The commission urged the government of Nigeria “to ensure protection of the environment health and livelihood of the people of Ogoniland”⁹⁵. In this sense it insisted on the governments duties of protection in the present and in the future. The commission highlighted that Nigeria should guarantee “adequate compensation to the victims of human rights violations, including relief and undertaking resettlement assistance to victims of government sponsored raids and a comprehensive clean up of lands and rivers damaged by oil operations”⁹⁶. The Commission claimed that the government should take positive measures to stop and reverse the environmental degradation. In the future, appropriate environmental and social impact assessments by independent bodies, procedural information access to regulatory and decision-making bodies, to communities likely to be affected, were recommended to ensure safe operations and any further oil extraction developments⁹⁷.

Similarly, the Inter-American Commission on Human Rights (IACMHR) in the 1997 report on human rights in Ecuador⁹⁸ acknowledged the adverse effects from pollution (including contaminations and deaths in the local community) of oil and mining exploitation in the Orient region, and the consequent vio-

93 Social and Economic Rights Action Centre vs. Nigeria, 155/96, ACHPR (May 27, 2002).

94 *Ibidem*, 12 (emphasis added): “[D]espite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given green light to private actors, and oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter”.

95 *Ibid.*, 15.

96 Social and Economic Rights Action Centre vs. Nigeria, 155/96, ACHPR, p. 14 (May 27, 2002).

97 *Ibidem*, para. 15.

98 IACHR, *Report On The Situation Of Human Rights In Ecuador*. <http://www.cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm>. (1997).

lation of the right to life and health of the affected communities. Echoing the conclusions of the African Commission, it said that the state's obligation is extended beyond negative impact of the actions by private actors, and that states have an obligation “*to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury*”⁹⁹. Further, that states should take a preventative approach to life and health threatening harm and “*respond with appropriate measures of investigation and redress*”¹⁰⁰.

In the context of EDPs, these cases are of extreme importance as they reinforce the protection obligations of home states to protect and can potentially act as a precedent for future climate change litigation. It highlights the government's duty and its failures for not taking action in the past, it urges the government to take steps now to reverse the situation (by allocating compensation and resettlement mechanisms to the victims). Furthermore, it looks into the future, guaranteeing substantive and procedural instruments (environmental and social impact assessments; right to access to information and community participation) to prevent the violation or the undermining of human rights.

V. INTERNALISING THE PROTECTION SCOPE OF ENVIRONMENTALLY DISPLACED PERSONS: *QUO VADIS?*

A. *Degradation of the environment violates human rights*

Human rights violations of EDPs capture a range of concerns that are relevant when the surrounding environment is ultimately affected, in the present, as well as in the future. As environmental degradation and change affects the enjoyment of human rights,

⁹⁹ *Op.cit.*, Chapter VIII.

¹⁰⁰ *Ibidem.*

states have obligations to promote and protect the bundle of internationally agreed human rights of displaced persons and the environment surrounding them. This interdependency between human beings and environment, while evident, dissipates especially with regards to EDPs. In many cases, the environment *per se* is one's life and one's home (e.g. indigenous populations). A healthy environment is therefore, a *conditio sine qua non* for the protection of substantive rights. Regional jurisprudence has paved the way for recognizing that degradation of the environment violates human rights. While the recognition of a human right to health and safe environment may be implicitly or explicitly recognized in human rights instruments, the analyses shows that courts tend to interpret the wide-range of the aforementioned rights in ways to protect its people from a deteriorating environment. In this context, home states must be able to internalise their protection obligations enshrined in the various human rights instruments.

B. Protection starts at home

Protection starts at home, however, at the same time governments must protect human rights in the present and allow them to thrive in the future, in the global commons. Protection of EDPs and of the environment “*is not subject to a single polity; it is inherently a trans boundary problem on a global scale*”¹⁰¹. By analogy the European jurisprudence is relevant for EDPs as it clearly makes emphasis on the obligations of the national states to take positive actions to generally protect them against environmental harm: either directly caused by pollution¹⁰² or failing to protect against environmental hazards and private actors¹⁰³. The ECtHR has used the “*fair balance*” approach between the rights of the individual and the interests of the wider community,

101 J. Knox, *Climate Change An Human Rights Law*, 50 *Virginia Journal of International Law*, 164-218, 196 (2010).

102 *Hutton and Others vs. United Kingdom*, ECtHR, 36022/97 [2003] ECHR 338 para. 96 (October 2, 2001).

103 *Op. cit.*, para. 98.

whether environmental harm is caused directly by the State or a private actor¹⁰⁴. In determining this balance, they defer to states on how to reach the acceptable environmental threshold. And while states may undertake or allow environmental degradation that impact on the enjoyment of human rights, they must take the necessary steps to protect against environmental harm¹⁰⁵. Similarly, the Inter American System has also indirectly advanced the human rights protection obligations of states in the present and in the future towards a humanity approach.

C. Need for cooperation and assistance

Internalising the scope of protection of EDPs also means that many national governments will only be able to meet their protection obligations with the help of other states and non-state actors. National states may not have the resources or the know-how to protect and fulfil the human rights of EDPs (especially of socio-economic rights which do not have a jurisdictional clause that restricts their scope and application). An additional argument is that people in the communities that are/will be most affected contributed the least to the problem. In a way, certain countries have not only imposed climate change but they have also created the environment of violations of human rights in developing countries¹⁰⁶. Here extraterritorial duties of third states and the role of international cooperation and assistance are salient as existing parallel and mutually inclusive obligations¹⁰⁷.

104 *Ibidem*. para. 98; Fadeyeva vs. Russia, 55723/00, ECHR, para. 105 (Jun. 09, 2005); Lopez-Ostra vs. Spain 16798/90, ECHR, para. 51 (Dec. 09, 1994); see Taskin vs. Turkey 46117/99, ECHR, para. 116 (November 10, 2004).

105 S. McNerney-Lankford, M. Darrow & L. Rajamani, *Human Rights And Climate Change. A Review Of The International Legal Dimensions*, 32-33 (The World Bank, Washington D.C., 2011).

106 M. Limon, *Human Rights Obligations And Accountability In The Face Of Climate Change*, 38 *Georgia Journal of International and Comparative Law*, 543-592, 572 (2010). Limon cites the declaration of Marghoob Saleem, Butt Counselor, Permanent Mission of Pakistan to the United Nations at Geneva, Panel on human Rights and Climate Change at the eleventh Session of the Human Rights Council.

107 While Article 2 (1) of the ICCPR requires states parties “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”, Article 2 (1) of the ICESCR requires each party “to take steps, individually and

In this sense, “[i]nternational human rights law complements the United Nations Framework Convention on Climate Change by underlying that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realisation of human rights”¹⁰⁸. This may include the reduction emission to “safe levels” for the enjoyment of human rights¹⁰⁹; creation of adaptation funds and mitigation strategies for EDPs in well-known vulnerable areas and appropriate national and international forums where they can participate and be heard. “Climate change cannot be used as an excuse by states not to pursue the full enjoyment of human rights, but equally the fulfilment of human rights by vulnerable states will only be possible in a permissive international environment in which all states also abide by their extraterritorial duties and obligations”¹¹⁰.

D. Dealing with risks

Internalising the scope of protection has a significant meaning because states have over the years allowed for increasing risks and uncertainties (tolerating pollution and degradation of the environment) at the expense of new technological and economic development without having envisaged, from the very beginning, stabilized institutions, legal standards to deal with the environmental and human challenges¹¹¹. Internalising the protection of EDPs means that states have to find ways to deal with and legislate on these new challenges. The risks of climate change are becoming increasingly comprehensible (for e.g. the

through international assistance and cooperation, especially economic and technical, to the maximum of is available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means”.

108 UNHRC, *Report Of the Office of the United Nations High Commissioner for Human Rights On the Relationship Between Climate Change And Human Rights A/HRV/10/61*. (2009) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement>.

109 M. Limon, *Human Rights Obligations And Accountability In The Face Of Climate Change*, 38 *Georgia Journal of International and Comparative Law*, 455 (2010).

110 *Óp cit.* 559

111 I. Sand, *The Legal Regulation Of The Environment And New Technologies-In View Of Changing Relations Between Law, Politics And Science*, 22 *Zeitschrift für Rechtssoziologie*, 1-38, 7 (2001).

IPCC expert predictions with high confidence the increases in death, disease and harm as an outcome of flooding; droughts, storms, fires from environmental change) and visible, and can be translated into “*systematic uncertainties with possibly serious consequences*”¹¹² including human displacement. Environmental human rights jurisprudence does show that human rights law is potentially well placed to protect EDPs and at the same time address the climate change related-challenges. While human rights violations are generally established after the harm has occurred, contemporary judicial review and OHCHR has acknowledged that the impact on a human right does not have occurred in order for a violation to exist but that the effect may be “*imminent*”¹¹³. Figure 1 tentatively captures the dynamic model of how states and other international actors should internalise their protection obligations of EDPs.

112 *Óp.cit.*, 8.

113 OHCHR, para. 70 (2009).

VI. CONCLUSION

This paper seeks to provide a basis for understanding EDPs human rights impacts against the backdrop of environmental change. In this exercise, it examines regional and international jurisprudence as well as other relevant legal processes to determine parallel states obligations for protecting EDPs. The analysis of human rights law for the protection of EDPs is important in this context. Human rights law provides the framework within which home states must be able to afford to people affected by environmental conditions. Further it enables the assessment of which rights are violated and the obligations of governments and wider international community for their protection.

In the current state of permanent emergencies of environmental change and human displacement, home states must be able to internalise their protection obligations and create an enabling environment for human rights of EDPs to thrive in the present as well as in the future. While responding to the climate change symptoms might always be beneficial to tackle the root cause of the problem, it is hoped that states face the current challenges not as a single polity but as a global community affair that recognises parallel and mutually inclusive obligations. In this regards, the role of international assistance and cooperation of third states cannot be disregarded.

Beyond the conceptual wrangling over the establishment of a right to health and safe environment, protecting EDPs is embedded in the clear assumption that a healthy environment is a necessary condition for the protection and realization of their substantive human rights. Protection also means creating appropriate discussion forums at local, regional and international levels for EDPs to be heard and take part in decision-making processes in issues that are likely to affect both their survival and their own existence. By internalizing their protection obligations states strive to realize the human rights of the most vulnerable, and ultimately, of us all.

BIBLIOGRAPHY

BOOKS/CHAPTERS OF BOOKS

- Giddens, A., *The Politics Of Climate Change* (Polity, Cambridge, 2011).
- Humphreys, S., *Human Rights And Climate Change* (Cambridge University Press, Cambridge, 2010).
- Leib, L., *Human Rights And The Environment. Philosophical, Theoretical And Legal Perspectives* (Martinus Nijhoff Publishers, Leiden, 2011).
- McInerney-Lankford, S., Darrow, M. & Rajamani, L., *Human Rights And Climate Change. A Review Of The International Legal Dimensions* (The World Bank, Washington D.C., 2011).
- Meyers, N. & Kent J., *Environmental Exodus: An Emergent Crisis In The Global Arena* (Climate Institute, Washington D.C., 1995).
- Newman, F. & Vasak, K., *Civil And Political Rights*, in *The International Dimensions Of Human Rights*, 135- 173 (K. Vasak, Ed., Greenwood Press, Paris, 1982).
- Nowak, M., *Introduction To The International Human Rights Regime* (Brill Academic Publications, Leiden, 2003).
- Robbins, P. Hintz, J. & Moore, S., *Environment And Society* (Wiley-Blackwell, Chichester, 2010).

ARTICLES

- Bhattacharya, S., *Global Warming Kills 160,000 A Year*, *New Scientist* (2003).
<http://www.newscientist.com/article/dn4223-global-warming-kills-160000-a-year.html>.
- Hahn, R., *Climate Policy: Separating Fact From Fantasy*, 33 *Harvard Environmental Law Review*, 557-591(2009).
- Knox, J., *Climate Change An Human Rights Law*, 50 *Virginia Journal of International Law*, 164-218(2010).
- Kravchenko, S., *Right To Carbon Or Rights To Life: Human Rights Approaches To Climate Change*, 9 *Vermont Journal of Environmental Law*, 514-547(2008).
- Limon, M., *Human Rights Obligations And Accountability In The Face Of Climate Change*, 38 *Georgia Journal of International and Comparative Law*, 543-592 (2010).
- Mc-Inerney-Lankford, S., *Climate Change And Human Rights: An Introduction To Legal Issues*, *Harvard Environmental Law Review*, 33, 431-437(2009).
- Meyers, N., *Environmental Refugees In A Globally Warmed World*, 43 *Bioscience*, 752-761(1993).
- Naser, M., *Human Rights Implications Of Climate Change Induced Displacement*, 21 *Bond Law Review*, 3, 139-153(2009).

- Pedersen O., *European Environmental Human Rights and Environmental Rights: A Long Time Coming?*, 21 *Georgetown International Environmental Law Review*, 73-111(2008).
- Sand, I.-J., *The Legal Regulation Of The Environment And New Technologies-In View Of Changing Relations Between Law, Politics And Science*, *Zeitschrift für Rechtssoziologie*, 22, 1-38 (2001).
- Sjåfjell, B., *Internalizing Externalities in EU Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers*, 40 *George Washington International Law Review*, 4, 977-1024(2008).
- Söllner, S., *The Breakthrough Of The Right To Food*, 11 *Max Planck Yearbook of UN Law*, 391-415 (2007).
- Thorne, M., *Establishing Environment As A Human Right*, *Denver Journal of International Law and Policy*, 19, 301-342(1991).
- Wewerinke, M. & Doebbler, C., *Exploring The Legal Basis Of A Human Rights Approach To Climate Change*, *Chinese Journal of International Law*, 141-160(2011).

ELECTRONIC SOURCES

- Bals, C. et. ál, *Climate Change, Food Security And The Right To Adequate Food*. <http://www.brot-fuer-die-welt.de/downloads/fachinformationen/climfood.pdf>. (2008)
- De Schutter, O., *Report Of The Special Rapporteur On The Right To Food: Building Resilience: A Human Rights Framework On World Food And Nutrition Security*, *UN Doc. A/HRC/19/23*. <http://www.unhcr.org/refworld/docid/48cf71dd2.html> (08.09.2008).
- De Schutter, O., *Statement, Special Rapporteur On The Right To Food, Interactive Thematic Dialogue Of The UN General Assembly On The Global Food Crisis and The Right To Food*. <http://www.un.org/ga/president/63/letters/conceptfoodcrisis.pdf>. (06.04.2009);
- De Schutter, O., *United Nations Special Rapporteur On The Right To Food, Contribution To The UN Commission On Sustainable Development At Its 17th Session*. <http://www.srfood.org/images/stories/pdf/otherdocuments/19-srrtfsubmissioncsd-01-05-09-1.pdf>. (05. 04-05, 2009)
- Doussa J., Corkery, A. & Chartres, R., *Human Rights And Climate Change* (Human Rights and Equal Opportunity Commission, Background Paper, 2008). http://www.hreoc.gov.au/pdf/about/media/papers/hrandclimate_change.pdf.
- Global Humanitarian Forum, *The Anatomy Of A Silent Crisis, Human Impact Report Climate Change*. http://www.preventionweb.net/files/9668_humanimpactreport1.pdf. (2009).
- ICHRP, *Climate Change And Human Rights, A Rough Guide*. http://www.ichrp.org/files/reports/45/136_report.pdf. (2008).
- IPCC, *Fourth Assessment Report Emphasizing What Systems And Regions That Are Most At Risk From The Impacts Of Climate Change*. <http://www.ipcc.ch/>

- publications_and_data/ar4/syr/en/mains6-2.html. (2007).
- Posner, E., *Climate Change And International Human Rights Litigation: A Critical Appraisal*. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=959748. (2007).
- Robinson, M., *Climate Change And Justice*. http://www.realizingrights.org/pdf/Barbara_Ward_Lecture_12-11-06_FINAL.pdf. (2006).
- UN Human Rights Council, *Report Of The Office Of The United Nations High Commissioner For Human Rights On The Relationship Between Climate Change And Human Rights, A/HRC/10/61*. <http://www.unhcr.org/refworld/docid/498811532.html>. (01.15.09).
- World Health Organisation [who] *Protecting Health From Climate Change*. http://www.who.int/world-health-day/toolkit/report_web.pdf. (2008).

