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03

A FRAMEWORK FOR THE PROTECTION OF INTERNALLY ENVIRONMENTALLY- DISPLACED PERSONS: APPLICATION OF THE UNITED NATIONS GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

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A FRAMEWORK FOR THE PROTECTION OF INTERNALLY ENVIRONMENTALLY-DISPLACED PERSONS: APPLICATION OF THE UNITED NATIONS GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

Carolin Beverungen¹

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1. Introduction

*"Climate change is not just an environmental issue, as too many people still believe. It is an all encompassing threat. It is a threat to health (...) It could imperil the world's food supply, as rising temperatures and prolonged drought render fertile areas unfit for grazing or crops. It could endanger the very ground on which nearly half the world's population live (...) All this and more lies ahead. (...) This is not science fiction. These are plausible scenarios, based on clear and rigorous scientific modelling."*²

Migration has been used by societies throughout history as a mechanism of coping with changes in climate³, which shows that migration induced by environmental factors is not a new phenomenon⁴. However, climate change threatens to exceed the adaptive capacities of those affected by its impact and significantly increase migration within states and across international borders⁵. The Intergovernmental Panel on Climate Change (IPCC) states that "warming of the climate system is unequivocal" and predicts an increased frequency and severity of sudden climate events such as floods, storms, cyclones and hurricanes, as well as slow-onset events like sea level rise and desertification⁶. This is confirmed by the Internal Displacement Monitoring Centre (IDMC), which established that together with armed conflict, human rights violations and generalised violence, natural hazard-induced disasters are among the principal causes of forced displacement, with disastrous impacts on the lives of the poorest and most vulnerable populations⁷.

In 2010 over 42 million people were displaced by sudden-onset disasters caused by natural hazard events⁸, with earthquakes and floods being the principal natural hazards causing new displacement⁹. For example, the Haiti earthquake in January 2011 displaced over 1.5 million people, of whom over 800,000 were still in IDP camps at the end of 2010¹⁰. This data evaluated so far does not take into account people displaced by slow-onset disasters or conflicts that were induced by environmental change. Predictions on how many people will be involuntarily displaced due to the effects of climate change in total ranges from the upper end of one billion¹¹ over 150 million by 2050¹², down to only a few cases of displacement that

² [Speech of the former UNSG Kofi Annan, 15. November 2006 at the World Climate Summit in Nairobi, available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=495&ArticleID=5424&l=en>](http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=495&ArticleID=5424&l=en)

³ W.N. Adger et al., *Adaptation to Climate Change in the Developing World*, 3 *Progress in Development Studies* 179, at 189.

⁴ J. McAdam, Introduction, in J. McAdam (Ed.), *Climate Change and Displacement* (2010) at 1.

⁵ J. McAdam, Introduction, in J. McAdam (Ed.), *Climate Change and Displacement* (2010) at 1.

⁶ IPCC, *Climate Change 2007: Synthesis Report, Summary for Policymakers* (2007) at 30, 31.

⁷ IDMC, *Internal Displacement: Global Overview of Trends and Developments in 2010* (2011) at 96.

⁸ IDMC, *Displacement due to Natural Hazard-Induced Disasters: Global Estimates for 2009 and 2010* (2011) at 4.

⁹ IDMC, *Internal Displacement: Global Overview of Trends and Developments in 2010* (2011) at 96.

¹⁰ IDMC, *Displacement due to Natural Hazard-Induced Disasters: Global Estimates for 2009 and 2010* (2011) at 4.

¹¹ Christian Aid, *Human Tide: The Real Migration Crisis* (2007) at 22.

¹² N. Myers, *Environmental Refugees in a Globally Warmed World*, 43 *BioScience* 252 (1993) at 257.

can be directly linked to the effects of climate change in the light of the complex and multiple causes of migration¹³. This wide range of suggested data reflects the complexity of environmentally-induced displacement, and stems mainly from the unclear causal links between climate change, its impacts and migration. What is predictable is that most environmentally induced migration will be internal and regional¹⁴.

There is no normative framework that deals specifically and exclusively with environmentally-induced displacement, so that recourse needs to be taken to existing protection frameworks to ensure human rights protection of those displaced. Very little research has so far been conducted on assessing which protection frameworks apply to persons internally displaced by environmental events¹⁵. This paper suggests that the Guiding Principles on Internal Displacement¹⁶ (Guiding Principles) are a useful tool for the protection of internally environmentally-displaced persons, and attempts to assess their applicability and application to environmentally-induced displacement. Therefore it will exclusively analyse the protection framework for those displaced internally due to environmental disasters. It is not going to analyse the protection of those who cross international borders, or those who remain in the area affected by climate change.

The Guiding Principles on Internal Displacement¹⁷ were established in 1998 to deal with the protection gap for internally displaced persons (IDPs). They draw upon general principles of international human rights and humanitarian law, as well as analogies to international refugee law. In addressing the different stages before, during and after displacement, they concretise these general principles according to the specific protection needs of IDPs in a non-binding way. They are elaborated by the Operational Guidelines on Human Rights and Natural Disasters by the Inter Agency Standing Committee¹⁸, and applied in regional Convention such as the Kampala Convention¹⁹. The Guiding Principles explicitly mention "natural disasters" as a driver of forced displacement. However, their

¹³ J. Morrissey, Environmental Change and Forced Migration: A State of the Art Review, Background Paper for the Workshop Environmental Change and Migration: Assessing the Evidence and Developing Norms for Response, Refugee Studies Centre Oxford (January 2009) available at www.rsc.ox.ac.uk.

¹⁴ R. Zetter, The Role of Legal and Normative Frameworks for the Protection of Environmentally Displaced People, in Migration, Environment and Climate Change: Assessing the Evidence 389 (IOM 2009) at 411; V. Kolmannskog and L. Trebbi, Climate Change, Natural Disasters and Displacement, in 92 Int. Review of the Red Cross 713 (2010) at 717.

¹⁵ Research regarding normative protection is restricted to the question of applicability of existing normative frameworks, thus does not deal with issues arising during its actual application, or the question of the establishment of a new convention which comprehensively deals with climate migration. Furthermore, research focuses on "environmental refugees" (as first expressed by E. El-Hinnawi, Environmental Refugees, UNEP 1985), thus on cross-border migration and the discussion of the extension of the definition of "refugee" to include environmental disasters as root causes of flight. A comprehensive study on the conjuncture between environmental change, population displacement and frameworks of rights protection is currently being conducted by Prof. R. Zetter (Oxford Refugee Studies Centre), see <http://www.rsc.ox.ac.uk/research/environmental-change/environmental-displacement>.

¹⁶ The Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2 of 11 February 1998.

¹⁷ The Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2 of 11 February 1998.

¹⁸ Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters (2006).

¹⁹ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention") of 22 October 2009.

drafting process and content aimed primarily at dealing with those forcibly displaced by armed conflict, resulting from the increasing crisis of internal displacement due to armed conflict in the 1990's. Thus there is a need to establish whether and in how far they can be applied to environmentally-induced internal displacement.

In order to do so, this paper will at first establish that environmentally-induced displacement is a current reality by describing the different scenarios and currently available general legal protection frameworks. The third part will provide an overview of the Guiding Principles, including their background and establishment, legal status and reception. These two chapters provide the basis and "framework" for the further analysis of protection that can be granted by the Guiding Principles to persons internally displaced by environmental factors. Part four deals with the applicability of the Guiding Principles to environmentally-induced displacement, and focuses on the controversial scenario of slow-onset environmental change. It assesses whether it amounts to a "natural disaster", which is explicitly stated as an accepted root cause for internal displacement, and under which circumstances it causes involuntary displacement as required by the Guiding Principles. Part five examines whether the Guiding Principles "fit" environmentally-induced displacement by comparing protection needs of those displaced by environmental factors and those displaced by conflict. It furthermore highlights selected problems arising during the application of the Guiding Principles to environmentally-induced displacement. These relate to the relationship to environmental law and its allocation of responsibilities, the lack of a clearly mandated international organisation which is responsible for the protection of IDPs and the crucial issue of compensation for land and property destroyed during displacement. In the next chapter the author critically examines whether the Guiding Principles constitute a practicable protection framework for environmental IDPs, or whether a legally binding convention would be more effective to protect their rights. Finally, the conclusive chapter will merge the results of the previous chapters, draw conclusions and highlight further research and promotion needs.

It is important to understand the relevance of climate change and the global response thereto for this study: Even though it is generally accepted that there is an overall link between climate change, environmental disasters and displacement, it is highly controversial whether climate change causes displacement in specific cases²⁰. However, the link between climate change and displacement is not directly relevant for the application of the Guiding Principles since they only mention "natural disasters" as root causes for displacement, without stipulating a causal link to climate change. The relevance of climate change for this paper is derived from the crucial fact that it will certainly increase internal displacement, which should be kept in mind throughout this study. Furthermore, the world community agreed on a global response to climate change. However, this response through the United Nations Framework Convention on Climate

²⁰ C. Jakobeit and C. Methmann, *Klimaflüchtlinge* (Greenpeace 2007) at 24; for an overview of the different empirical methods used to establish the nexus between climate change and migration see E. Piguet, *Linking Climate Change, Environmental Degradation, and Migration: a Methodological Overview*, 4 *Climate Change* 517 (2010).

Change²¹ (UNFCCC) so far focuses on mitigation of climate change and adaptation to its effects. Protection and assistance in cases where mitigation and adaptation have failed and people were forced to leave their homes is excluded from the global response²², and thus also from the governing idea of primary responsibility of developed states. The responsibility to protect and assist environmentally-displaced persons therefore remains with national governments in the first place, which have to ensure human rights for their citizens. In this regard climate change will be relevant where the paper addresses the interplay between the normative protection of IDPs and the global response to climate change, and where it discusses whether global responsibility can be extended to the protection of those displaced by natural disasters.

2. The current reality of international environmentally-induced displacement

Environmentally-induced displacement is a current reality which leaves those affected vulnerable and thus in need of protection and assistance. The acceptance of environmental disasters as a driver of forced migration is essential to the development of effective protection mechanisms.

2.1. Definitions

There is currently no consensus on how to define "environmental displacement", or even on which term should be used to describe this phenomenon²³. Many different expressions and definitions for those leaving their home due to environmental events have been presented in literature, each of them having its own implications regarding the problem. Key issues are the distinction to "refugee" and its persecutory drivers, cross-border or internal movement, and the controversially discussed key questions of causality between climate change and the environmental change on the one hand and the environmental change and displacement on the other hand.

The International Organisation for Migration (IOM) uses the expression of "environmental migrant" defined as

"persons or a group of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad".²⁴

²¹ United Nations Framework Convention on Climate Change, 1771 UNTS 107.

²² The author does acknowledge that migration is often a form of adaptation. However, given that adaptation is per definition „adjustment“ to the new situation, forced displacement is excluded from the range of adaptation measures since those affected do not adjust to the situation, but rather give in to it and are, without any means of influence or control, defeated by it.

²³ O. Dun and F. Gemenne, Defining "Environmental Migration", 31 Forced Migration Review 10.

²⁴ IOM, Expert Seminar: Migration and the Environment, International Dialogue on Migration No. 10 (2008) at 18-19.

This is a broad definition as it does not explicitly deal with climate change as the cause of environmental change, thus excluding the issue of causality in this regard. It furthermore includes voluntary and forced as well as internal and cross-border migration. This report will refer to the terms of 'internal environmentally-induced displacement' and accordingly 'internal environmentally-displaced persons' in order to include the stipulations of forced displacement within the country of origin – as opposed to migration, which might be forced or voluntary, and across borders – as prescribed by the Guiding Principles. By not linking this definition to climate change, but choosing the environmental event as such as a starting point without trying to link it to climate change, it excludes the controversial conceptual issue of causality between climate change and the environmental conditions. Consequently, only the question of causality between the environmental condition and displacement is relevant. This is regarded as reasonable since the focus of the present study is the protection of those displaced by environmental events by applying the Guiding Principles, for which the cause of the event is not relevant. However, the author will later link this focus to the broader issue of climate change and respective legal frameworks, where the question of causality and responsibility will briefly be addressed.

2.2. Scenarios of Internal Environmentally-Induced Displacement

Four possible scenarios of internal environmentally-induced displacement are proposed in literature²⁵: the first scenario is that of displacement caused by sudden-onset disasters such as flooding, windstorms or mudslides caused by heavy rainfalls. Return will remain possible in many cases depending on the severity of the disaster and recovery efforts, but may last up to several years. While these events must not necessarily be an effect of climate change, their increasing frequency and intensity is believed to result from global warming. Migration is in most cases clearly involuntary. The second scenario deals with certain areas in which these sudden-onset disasters occur on a regular basis, for example along rivers or coasts prone to flooding. These may be designated by governments as areas of high-risk too dangerous to live there. Displacement will usually be forced, if not by environmental facts as such, then by government decree, and will usually be long-term. The third scenario is that of slow-onset environmental degradation leading to deterioration of the affected areas, caused for example by rising sea levels, salinisation of groundwater and soil, droughts and desertification, or recurrent flooding. In cases where the areas become uninhabitable return is often not possible and the displacement needs to be regarded as forced. However, it is difficult to determine the border between situations where adaptation is still possible, which makes migration voluntary, and where it is impossible to adapt to the new environmental conditions so that leaving the area is the only option resulting in involuntary displacement. In most of these cases, the increasing intensity of the environmental change can be linked to global

²⁵ W. Kälin, *Conceptualising Climate-Induced Displacement*, in J. McAdam (Ed.), *Climate Change and Displacement* 81 (2010) at 85-86; The scenarios described by Kälin are also used by UNHCR: UNHCR, *Climate Change, Natural Disasters and Human Displacement: a UNHCR Perspective* (2008) at 4. Note that the scenario of sinking small-island states is not included here because it leads to cross-border migration which is outside the scope of this study.

warming. All three above-mentioned scenarios can result in a fourth one: resource scarce due to degradation or sudden-onset disasters may trigger tension and finally conflicts, which might even be armed. These can, just like any other conflict, lead to displacement. Displacement caused by these scenarios is expected to mostly take place within a country, but some migrants might decide to cross international borders. It needs also be noted that even though the environmental situation may be difficult and even force inhabitants to move, some people might still decide to stay.

The first two scenarios can be illustrated with the example of Bangladesh. Not only is Bangladesh hit by many different consequences of climate change, the fact that 65 percent of the land constitutes lowlands adjacent to rivers, 140 Million inhabitants live below the poverty line and its high population density exacerbate these effects on the population²⁶. Every year more water flows through Bangladesh than through entire Europe²⁷. The frequency and intensity of flooding of rivers is increasing, heavy floods displaced about one million people in 1998 and as many as 30 million in 2004; some of those affected completely lost their means of existence and could never return home²⁸. It is expected that large areas will be regularly flooded²⁹, so that they would become inhabitable. Furthermore the frequency and intensity of storms is likely to increase, which will lead to storm floods along the coast like that of May 1997 which uprooted 1.5 million people³⁰.

In Mali, extreme drought and desertification in the north of the country leads to increasing internal migration to the south. Mali constantly ranks as one of the bottom countries in the World Bank's World Development Report and is thus one of the poorest countries of the world³¹. 80% of income results from farming, the main export commodity is cotton which requires large amounts of water to grow³². Jakobeit states that Mali is the victim of climate change like no other country, and describes absent rainfall and slow-onset desertification in the north of the country due a changing climate, so that large part of the rural population move to the cities in the south³³. He furthermore states that this can lead to conflicts between nomads and farmers, like the Tuareg conflict in the 1990's³⁴.

It should be kept in mind that even though mainly developing countries are affected by climate change and environmentally-induced displacement, this can also occur in developed states. In August 2005 Hurricane Katrina hit the Gulf Coast of the United States, flooding 80% of New Orleans and displacing about 1 million people of which many could not return home for years³⁵. It is established that those most affected by this disaster were

²⁶ C. Jakobeit and C. Methmann, Klimaflüchtlinge (Greenpeace 2007) at 21.

²⁷ Christian Aid, The Climate of Poverty: Facts, Fears and Hopes (2006) at 33.

²⁸ Ibid.

²⁹ Mirza et. al., The Implications of Climate Change on Floods of the Ganges, Brahmaputra and Meghna Rivers in Bangladesh, 57 Climatic Change 287 (2003) at 315.

³⁰ C. Jakobeit and C. Methmann, Klimaflüchtlinge (Greenpeace 2007) at 22.

³¹ Cf. World Bank, World Development Report 2011, available at <http://wdr2011.worldbank.org/>.

³² C. Jakobeit and C. Methmann, Klimaflüchtlinge (Greenpeace 2007) at 18.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid. at 24.

people living below the poverty line and Afro-Americans³⁶, which shows that also in developed countries the protection of human rights of vulnerable persons is relevant.

2.3. Overview of General Legal Protection Frameworks

As IDPs remain within their country, the principle of territorial sovereignty demands that the national government is in the first place responsible for their protection and well-being. In general, the sovereign establishes the content of its human rights obligations towards its nationals and others present on its territory³⁷. However, this sovereignty can be restricted in several ways: first of all, by ratifying international human rights and humanitarian law treaties the state is bound by it regarding the treatment of its nationals and may not invoke national law as a justification for the failure to do so³⁸. Furthermore, even where treaties were not signed, domestic jurisdiction can be limited by customary international law which binds all states³⁹. Finally, membership in international organisations obliges member states to obey certain rules.

Legal protection of environmentally-displaced persons must be seen in the context of wider obligations of states regarding climate change. These extend to three levels⁴⁰: mitigation of climate change, adaptation to its effects, and protection of those forcibly displaced by environmental events after mitigation and adaptation measures could not prevent this. An international framework has been set up to establish a global response to climate change, including mitigation action and cooperation in adaptation measures: The United Nations Framework Convention on Climate Change⁴¹ (UNFCCC) and its Kyoto Protocol⁴² aim at stabilising atmospheric concentrations of greenhouse gases at a level that will prevent dangerous interference with the climate system⁴³. While the UNFCCC states general obligations of all parties regarding mitigation measures, the Kyoto Protocol determines legally binding emission targets for industrialised countries and those with economies in transition⁴⁴. Furthermore the UNFCCC contains numerous mechanisms to support adaptation measures⁴⁵, thus measures which help communities affected by climatic change to modify the ways they work and live to be able to cope with new environmental conditions, which focus on the cooperation between developed and developing states. In doing so, this framework places the principal burden on developed states regarding mitigation (the concept of "common but differentiated responsibilities") as well as adaptation. This takes into account the fact that developed states as the main polluters are those primarily responsible

³⁶ Ibid.

³⁷ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgment, ICJ Reports 1989, para. 263.

³⁸ Cf. Art. 26, 27 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

³⁹ Corfu Channel Case (United Kingdom v. Albania), 194 ICJ Reports, para. 22.

⁴⁰ As described by W. Kälin, Conceptualising Climate-Induced Displacement, in J. McAdam (Ed.): Climate Change and Displacement 81 (2010) at 82, 83.

⁴¹ United Nations Framework Convention on Climate Change, 1771 UNTS 107.

⁴² Kyoto Protocol to the UN Framework Convention on Climate Change, U.N. Doc FCCC/CP/1997/7/Add.1.

⁴³ UNFCCC Climate Change Secretariat, Uniting on Climate (2007) at 27; Art. 2 UNFCCC.

⁴⁴ Art. 2, 3 Kyoto Protocol; UNFCCC Climate Change Secretariat, Uniting on Climate (2007) at 27.

⁴⁵ UNFCCC Climate Change Secretariat, Uniting on Climate (2007 at 19-20.

for climate change and that developing countries are the most affected by it⁴⁶, while they are also the most vulnerable to its impacts because they have fewer social, technological and financial resources to adapt⁴⁷.

While these two components place the main responsibility on developed states, the last stage of protecting and assisting those displaced by the effects of climate change obliges the sovereign host states, which are primarily developing states, to respect and protect the rights of those displaced and to assist them. As the Inter-Agency Standing Committee (IASC) observes, "Neither the UN Framework Convention on Climate Change, nor its Kyoto Protocol, includes any provisions concerning specific assistance or protection for those who will be directly affected by the effects of climate change"⁴⁸. By now, an initial step has been taken at the 16th Meeting of the UNFCCC Conference of the Parties in Cancun in 2011 (COP 16): the outcome document invites states to adopt "measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels"⁴⁹. This "invitation" is a step forward in particular because it accepts that displacement can be induced by climate change, an issue that is controversially discussed and subject to ongoing scientific investigation. However, it remains very general, programmatic and without any binding obligations, so that decisive impacts are not expected. Therefore, the notion of international responsibility of those states which are the main polluters, thus developed states, so far does not extend to the protection of those displaced by environmental events. It will be assessed later on how this relates specifically to the application of the Guiding Principles and protection granted by it.

There is no one convention or international framework aiming at the protection and assistance regarding environmentally-induced displacement, be it internal or across borders. International refugee law does not apply to internal displacement caused by environmental factors, since those affected do not cross an internationally recognised border and environmental factors are not accepted as a persecutory agent by the 1950 Convention on the Status of Refugees⁵⁰. However, a number of existing legal frameworks apply to those internally displaced due to environmental factors⁵¹.

Since IDPs remain within their own country, human rights guarantees protect them from infringement by their government, just like they protect

⁴⁶ For overviews on the regional impacts of climate change in Africa, Asia and Latin America see the tables on p. 19, 21 and 23 in UNFCCC Climate Change Secretariat, *Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries* (2007).

⁴⁷ UNFCCC Climate Change Secretariat, *Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries* (2007) at 5.

⁴⁸ IASC, *Climate Change, Migration and Displacement: Who Will Be Affected*, Working Paper of 31 October 2008, available at www.unfccc.int/resources.

⁴⁹ COP 16 Outcome document of 15 March 2011, FCCC/CP/2010/7/Add.1, cf para 14 (f).

⁵⁰ 1951 Convention Relating to the Status of Refugees, 189 UNTS 137.

⁵¹ For an overview see R. Zetter, *The Role of Legal and Normative Frameworks for the Protection of Environmentally Displaced People*, in *Migration, Environment and Climate Change: Assessing the Evidence*, 389 (IOM 2009), at 405 ff.; M. Leighton, *Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons*, German Marshall Fund Publication (2010).

the rest of the population. The most relevant rights⁵² include the right to life⁵³, the right to property⁵⁴, the right to health⁵⁵, the right to food⁵⁶ and water⁵⁷, as well as the freedom of movement⁵⁸. Human rights law grants special protection to vulnerable groups such as women, children, minorities and indigenous people⁵⁹. This is especially important since climate change and resulting resource scarce is a threat to civil and political rights and can weaken states' capacities to protect their population and cater for basic survival needs⁶⁰. In cases where resource scarce due to a changing environment leads to armed conflict, international humanitarian law may apply depending on the intensity of the conflict. Thus, even though these general legal frameworks do grant a certain degree of minimum protection, they not specifically deal with displacement, be it protection from or during displacement, or durable solutions in cases where displacement is permanent.

3. Overview of the guiding principles of internal displacement

In order to assess the role the Guiding Principles can play as a protection tool regarding environmentally-induced displacement, it is important to understand their background, legal status and reception and therefore their relevance and potential. The Guiding Principles on Internal Displacement constitute "An Innovation in International Standard Setting"⁶¹. They are not a legally binding treaty negotiated by states or declaration adopted by the General Assembly, but a set of non-binding guidelines prepared by legal experts and submitted by the Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons to the international community.

3.1. The Need for and Drafting of the Guiding Principles

With the number of persons displaced within their own countries by armed conflict and human rights abuses increasing dramatically from 1.2 million

⁵² For an overview see D. Ardiiles-Martinez et al., Human Rights and Climate Change Study, OHCHR and New South Wales Young Lawyers (2008), available at http://www2.ohchr.org/english/issues/climatechange/docs/submissions/NSW_Young_Lawyers_HR_ClimateChange.pdf

⁵³ Art. 10 UDHR, Art. 6 ICCPR.

⁵⁴ Art. 17 UDHR

⁵⁵ Art. 25 (1) UDHR, Art. 12 (1) ICESCR.

⁵⁶ Art. 11 ICESCR.

⁵⁷ Economic and Social Council, General Comment 15 on the Right to Water – stating that the right to water should be considered as part of Art. 11 ICESCR on the right to an adequate standard of living.

⁵⁸ Art. 13 UDHR, Art. 12 ICCPR.

⁵⁹ 1989 Convention on the Rights of the Child, 1577 UNTS 3; 1979 Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13; UN Declaration on the Rights of Indigenous Peoples UNGA Res A/RES/61/295 of 13 September 2007.

⁶⁰ R. Zetter, The Role of Legal and Normative Frameworks for the Protection of Environmentally Displaced People, in Migration, Environment and Climate Change: Assessing the Evidence 389 (IOM 2009) at 409.

⁶¹ R. Cohen, The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting, 10 Global Governance 459 (2004); see also V. Kolmannskog, Future Floods of Refugees (RC 2008) at 29.

in 1982 to an estimated 20 to 25 million in 1995⁶², the UN Commission on Human Rights in 1992 appointed Francis M. Deng as the first Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons⁶³ to meet the protection needs. Since there was no international treaty dealing with internal displacement, the Commission on Human Rights and the General Assembly requested a study of existing protection standards under international law⁶⁴. Deng together with a group of legal experts submitted the "Compilation and Analysis of Legal Norms"⁶⁵ in which it analyses that even though existing international law does provide protection to internally displaced persons, this protection is not sufficient in important areas⁶⁶. These established insufficiencies are the following: there are real gaps in the law, e.g. on personal documentation or compensation for property lost during displacement; norms are too general and thus require specific interpretation to be applicable to internal displacement, e.g. there is a general norm on freedom of movement, but no specific prohibition of forcible return to places of danger, so that the spelling out of specific legal rights would strengthen protection; the existent law itself does not protect in certain situations, e.g. international humanitarian law in situations of tension and disturbance that do not constitute armed conflict, or derogation from human rights are allowed in times of emergency; international law binds only states, not non-State actors whom IDPs might be controlled by; and finally, some states have not ratified key human rights instruments and/or the Geneva Conventions and their Additional Protocols so that they are not bound to provisions which do not constitute customary international law.

In order to fill these gaps and grey areas, the Commission on Human Rights and the General Assembly asked the Representative to develop an "appropriate" framework for the protection of the internally displaced⁶⁷. The choice of its form, which was not specified to be "legal", was thus left to Deng. After extensive consultations with legal experts and representatives of non-governmental as well as intergovernmental organisations, he presented a set of non-binding guidelines rooted in existing law to the Commission in 1998, the Guiding Principles on Internal Displacement⁶⁸.

3.2. The Legal Status of the Guiding Principles

The Introductory Note of the Guiding Principles states that:

⁶² R. Cohen and F. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, D.C.: Brookings Institution Press, 1998), at 3, 32.

⁶³ F. Deng, *The Global Challenge of Internal Displacement*, 5 *Washington University Journal of Law and Policy* 141 (2001), 141-144.

⁶⁴ Commission on Human Rights, UN Doc. E/CN.4/1995/57 of 3 March 1995.

⁶⁵ UN Doc. E/CN.4/1996/52/Add.2 of 22 February 1996.

⁶⁶ UN Doc. E/CN.4/1996/52 of 22 February 1996 at paras 9 and 10; UN Doc. E/CN.4/1996/52/Add. 2 at para 411.

⁶⁷ F. Deng, *The Global Challenge of Internal Displacement*, 5 *Washington University Journal of Law and Policy* 141 (2001) at 147.

⁶⁸ *The Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 of 11 February 1998.

"The Guiding Principles identify rights and guarantees relevant to the protection of the internally displaced in all phases of displacement. Although they do not constitute a binding instrument, the Principles reflect and are consistent with international human rights law and humanitarian law and analogous refugee law."⁶⁹

Since the Principles were not negotiated and adopted by states, they cannot by themselves be legally binding on them by means of the the states' agreement to restrict their sovereignty. Neither are they a declaration, resolution or recommendation adopted by an international organisation and resting upon the consensus of states. Thus, as a framework written by a group of independent experts, Kälin argues that it does not constitute typical soft law, and might be "even softer than soft law"⁷⁰. He argues that the Principles are "very well grounded in international law", the specific norms are deduced from more general principles shown in a number of existing legal provisions for every principle, so that "no new law in the strict sense of the word was created in most cases"⁷¹. As such, the Introduction to the Principles states in paragraph 3 that they "reflect and are consistent with international human rights law and international humanitarian law". An example will clarify this: Principle 6 states the right to be protected against being arbitrarily displaced. While no international treaty explicitly comprises such a right, some treaties imply such a right. Humanitarian law prohibits displacement under specific circumstances, and human rights law guarantees the freedom of movement, which includes a right to remain in a place of choice⁷². It is argued that the implicit right not to be arbitrarily displaced can be inferred from these existing provisions⁷³. It is important to note that in any case the general principle of international law behind the specific Principle can be invoked to secure the respective right. Furthermore, the Guiding Principles should be seen as a development of law themselves. It was an initial aim of the Guiding Principles to develop the law in terms of substance rather than merely reflect existing law, but this emphasis has been dropped in recent years⁷⁴. What should also be kept in mind is the potential of the Guiding Principles to develop the status of customary international law, especially as regional law in Africa, where their acceptance is considerable. However, a question worth thinking about would be whether this status would also extend to displacement induced by environmental events, given the background and common use of the Principles aimed at conflict-induced displacement.

3.3. Reception of the Guiding Principles

⁶⁹ Ibid.

⁷⁰ W. Kälin, How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework, Presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, December 9 2001, at 6.

⁷¹ Ibid at 6. See also W. Kälin, Guiding Principles on Internal Displacement, Annotations, ASIL (2000), which highlight the legal bases for each Principle.

⁷² See Art. 12 (1) ICCPR, Art. 49, 147 Geneva Convention IV, Art. 51 (7), 78 (1), 85(4) of Protocol I, Art. 4 (3), 17 of Protocol II.

⁷³ W. Kälin, How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework, Presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, December 9 2001, at 6.

⁷⁴ C. Droege, Developments in the legal protection of IDPs, in FMR-GP10 (2008), at 8.

Despite the fact that they are not legally binding, the Guiding Principles have reached a considerable degree of acceptance and implementation by UN bodies, regional organisations, NGOs, states and even non-state actors. The UN Commission on Human Rights in 2003 called them a “standard” and welcomed their dissemination, promotion and application worldwide⁷⁵. Former Secretary-General Annan was a strong supporter of the Guiding Principles. He called upon the UN Security Council to encourage states to observe the Guiding Principles⁷⁶ and recommended to the UN General Assembly to encourage member states to develop national laws and policies in accordance with the Guiding Principles⁷⁷. Furthermore, the UN Security Council has begun citing the principles in its resolutions and presidential statements⁷⁸. The major international organisations in the field of displacement endorsed the principles through the UN Inter-Agency Standing Committee and most of them declared their support⁷⁹. They also began to apply them in the field by developing programmes based on the principles, organising training sessions and disseminating them worldwide⁸⁰.

At regional level, most intergovernmental organisations have accepted and implemented the Guiding Principles. The Organisation of American States (OAS) has promoted the application of the Principles extensively. The Inter-American Commission on Human Rights endorsed them, created the position of a Special Rapporteur on Internally Displaced Persons, and applied the Guiding Principles as a standard in assessing the conditions of IDPs in its member states, especially in Colombia and Peru⁸¹. Furthermore, The Commission and the Inter-American Court of Human Rights have issued a number of binding orders obliging Colombia to protect its IDPs⁸². The General Assembly of the OAS in June 2008 again urged its member states to develop national policies based on the Guiding Principles and emphasised the national governments' primary responsibility to protect IDPs⁸³. In Africa, the continent with the most IDPs, the reaction to the Guiding Principles was strong. The African Union acknowledged the Principles and the Economic Community of West African States encouraged its member states to disseminate and apply them⁸⁴. The most notable achievement at regional level is the 2009 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa⁸⁵ (“Kampala

⁷⁵ UN Commission on Human Rights, Res. 2003/51 of 23 April 2003.

⁷⁶ United Nations, Report of the Secretary-General to the Security Council, Protection of Civilians in Armed Conflict, UN Doc. S/1999/957, see recommendation 7.

⁷⁷ United Nations, Report of the Secretary-General to the Economic and Social Council, Strengthening the Coordination of Emergency Humanitarian Assistance, UN Doc. E/2003/85.

⁷⁸ As reported by R. Goldman, Internal Displacement, 2 *Colombian Yearbook of International Law* 59 (2009) at 72, and R. Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 *Global Governance* 459 (2004) at 469.

⁷⁹ R. Cohen, *ibid.* at 468.

⁸⁰ *Ibid.* at 469.

⁸¹ R. Goldman, *Internal Displacement*, 2 *Colombian Yearbook of International Law* 59 (2009) at 72. R. Goldman held the position of the OAS Special Rapporteur on Internally Displaced Persons from 1998 until 2004.

⁸² *Ibid.*

⁸³ OAS General Assembly Resolution 2417, AG/Res.2417, of June 2008, available at http://www.brookings.edu/projects/idp/Laws-and-Policies/regional_policies.aspx.

⁸⁴ R. Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 *Global Governance* 459 (2004) at 470.

⁸⁵ Available at [www.africa-union.org/.../au/.../Convention%20on%20IDPs%20\(Eng\)%20-%20Final.doc](http://www.africa-union.org/.../au/.../Convention%20on%20IDPs%20(Eng)%20-%20Final.doc).

Convention”) and the 2006 “Great Lakes Pact”⁸⁶ signed by the eleven heavily-affected countries of that region, which are the first instruments to legally bind an entire region on matters of internal displacement. This is extremely important regarding that three of the world’s top five countries with the largest populations of conflict-induced IDPs are in Africa, headed by Sudan with an estimated 4.9 million IDPs⁸⁷. The Organisation for Security and Cooperation in Europe acknowledged the Principles as a useful framework for its work, and the Council of Europe called upon its member states to incorporate them into their domestic laws⁸⁸. The committee of Ministers of the Council of Europe renewed this recommendation in April 2006⁸⁹. In contrast, the Association of South-East Asian Nations has not acknowledged the Principles at all, fearing infringement of the states' sovereignty⁹⁰.

What is crucial in the end is the application of the Guiding Principles on the ground by national governments, by implementing jurisdiction, developing policies and applying them to their internally displaced. This has happened only to a limited extent⁹¹. Twenty two states in total have implemented laws or policies based on the Guiding Principles in their national systems, of which seven are in Europe, six in Africa, four in Asia and the Americas, and one in the Middle East. Another four countries are currently working on the implementation of the Guiding Principles. Despite this success, the Oslo Conference in October 2008 on “Ten Years of Guiding Principles on Internal Displacement – Achievements and Future Challenges” concluded: “The majority of states affected by internal displacement remain unable or unwilling to take on their responsibilities for protecting IDPs. In the worse cases, the humanitarian space required to prevent displacement or to provide protection to IDPs is limited as a result of obstruction by governments or non-state actors. ...a number of states remain more committed to the doctrine of national sovereignty when it comes to dealing with internal displacement”⁹².

What is considerable though, especially keeping in mind the controversial discussion of human rights obligations of non-state actors, is the fact that some non-state actors have begun to acknowledge the Guiding Principles: The Sudan People's Liberation Army drafted a policy on internal

⁸⁶ 2006 Pact on Security, Stability and Development in the Great Lakes Region, of whose ten Protocols two relate to IDPs. Available at http://www.brookings.edu/projects/idp/Laws-and-Policies/regional_policies.aspx.

⁸⁷ A. Solomon, An African Solution to Internal Displacement: AU Leaders Agree to Landmark Convention, available at http://www.brookings.edu/papers/2009/1023_african_union_solomon.aspx.

⁸⁸ R. Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 *Global Governance* 459 (2004) at 470; R. Goldman, *Internal Displacement*, 2 *Colombian Yearbook of International Law* 59 (2009) at 72. See Recommendation 1631 (2003), *Internal Displacement in Europe*, Parliamentary Assembly of the Council of Europe, available at http://www.brookings.edu/projects/idp/Laws-and-Policies/regional_policies.aspx.

⁸⁹ Council of Europe, Recommendation Rec(2006)6 of the Committee of Ministers to member states on internally displaced persons, April 2006, available at http://www.brookings.edu/projects/idp/Laws-and-Policies/regional_policies.aspx.

⁹⁰ R. Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 *Global Governance* 459 (2004) at 470.

⁹¹ For an overview see the list of laws and policies on internal displacement by the Brookings-LSE Project on Internal Displacement: http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx#Regional.

⁹² Summary of outcomes of the GP10 Conference, Achievements, challenges and recommendations, in FMR GP10 Special Edition (October 2008), at 6.

displacement based on the Principles, and in Sri Lanka the Liberation Tigers of Tamil Eelam have accepted to receive training based on the Principles⁹³.

This shows that despite the considerable implementation gaps, a process of acceptance and willingness to apply the Guiding Principles has begun. It needs to be noted that, especially in countries with large IDP populations like Colombia and Bangladesh, application is not only an issue of political will, but also one of financial and technical means. Providing up to millions of people uprooted from their homes with food, water and shelter in emergency relief, and then supporting their return or resettlement is not only a timely but also costly undertaking. Once again this raises the issue of responsibility: while developing countries are those mainly responsible for climate change and resulting environmental disasters which cause displacement (however disputed both causality links may be), due to a lack of an international framework those who have to carry the burden of protection are the national governments of affected developing states.

4. Applicability of the guiding principles to environmentally-induced displacement

When applying the Guiding Principles to internal environmentally-induced displacement, several problems occur, in particular regarding displacement caused by slow-onset environmental change. It is unclear whether and under which circumstances gradual environmental degradation leads to involuntary displacement as stipulated by the Guiding Principles, and when environmental conditions amount to a "disaster". Furthermore, the fact that many principles are derived from general principles of international humanitarian law raises the question in how far these can be applied to displacement caused by natural disasters, thus not in times of armed conflict as required for the application of humanitarian law.

4.1. The Problematic Scenario of Slow-Onset Environmental Change

The term "internally displaced persons" as understood by the Guiding Principles is defined in Paragraph 2 of the Introduction as

"persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border."

This is a descriptive definition, and not a legal one which confers a special legal status in the same sense as for example the refugee status⁹⁴. The IDPs' entitlement to all guarantees granted to them by human rights and

⁹³ R. Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 *Global Governance* 459 (2004) at 471.

⁹⁴ W. Kälin, *The Guiding Principles on Internal Displacement*, Annotations, ASIL (2000) at 3, 4.

humanitarian law in times of vulnerability results from their citizenship or habitual residence in the state within which they are displaced⁹⁵.

The question whether the Guiding Principles should include the root cause of natural disasters in the definition was controversially discussed during their drafting process⁹⁶. The final document holds on to natural disasters as a cause of displacement. The same applies to the regional conventions which build on the Guiding Principles⁹⁷. Despite the inclusion of natural disasters in the definition, it is not clear whether all scenarios described above are covered by it. While several authors correctly conclude that the scenarios of sudden-onset disasters, conflicts induced by environmental change and adaptation measures resulting in displacement as imposed by governments are included in the definition, they hesitate to come to the same conclusion regarding the scenario of slow-onset environmental degradation⁹⁸. The central question is whether, and when exactly, slow-onset environmental degradation, such as droughts or desertification, constitutes a disaster which forces people to flee their place of habitual residence, thus leading to involuntary displacement as stipulated by the definition of IDP in the Guiding Principles⁹⁹.

4.1.1 "Disaster"

As mentioned above, the definition of IDP includes the root cause of natural disaster. Thus, not all environmental events are comprised, they need to amount to a "disaster". In literature, this is emphasised by Attaputu, who questions whether gradual degradation leading to desertification would meet this condition¹⁰⁰, and Leighton, who argues that involuntary displacement caused by serious or prolonged drought may lead to the application of the Guiding Principles¹⁰¹. However, neither the Guiding Principles nor the authors suggest a definition of the term disaster, or criteria for when an environmental event amounts to a disaster. This leaves room for interpretation.

⁹⁵ Ibid at 4.

⁹⁶ R. Cohen, For Disaster IDPs: An Institutional Gap, Brookings-Bern Project on Internal Displacement (2008) at 1.

⁹⁷ Art. 1(k) African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa; International Conference on the Great Lakes Region: 2006 Pact on Security, Stability and Development in the Great Lakes Region, Art. 1.4 Protocol on the Protection and Assistance to Internally Displaced Persons.

⁹⁸ V. Kolmannskog and L. Trebbi, Climate Change, Natural Disasters and Displacement: a Multi-Track Approach to Filling the Protection Gaps, 92 Int. Review of the Red Cross 713 (2010) at 717-720; S. Atapattu, Climate Change, Human Rights and Forced Migration: Implications for International Law, 27 Wis. Int'l L.J. 607 (2009) at 618; R. Zetter, The Role of Legal and Normative Frameworks for the Protection of Environmentally Displaced People, in Migration, Environment and Climate Change: Assessing the Evidence 389 (IOM 2009) at 416 ff.; M. Leighton, Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons, German Marshall Fund Publication (2010) at 6; Report of the SRSG on the Human Rights of IDPs to the Human Rights Council on the Promotion and Protection of all Human Rights, UN Doc. A/HRC/10/13 of 9 February 2009, at 8.

⁹⁹ W. Kälin, The Guiding Principles on Internal Displacement, Annotations, ASIL (2010) at 3; R. Zetter, The Role of Legal and Normative Frameworks for the Protection of Environmentally Displaced People, in Migration, Environment and Climate Change: Assessing the Evidence 389 (IOM 2009) at 418.

¹⁰⁰ S. Atapattu, Climate Change, Human Rights and Forced Migration: Implications for International Law, 27 Wis. Int'l L.J. 607 (2009) at 618.

¹⁰¹ M. Leighton, Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons, German Marshall Fund Publication (2010) at 6.

The term “disaster” implies a certain intensity of the situation. Whether it implies a restriction to sudden-onset disasters is strongly doubted, since the definition lists other situations as examples for causes of displacement which can also evolve gradually, like human rights violations or generalised violence. What is crucial in the end is that the event leads to involuntary displacement, which is reflected in the fact that most authors do not even discuss the requirement of a “disaster” but focus on the stipulation of involuntary displacement. It is thus submitted that the natural disaster requires a certain intensity, which is automatically given if it causes involuntary displacement, so that a distinct assessment whether the environmental event constitutes a disaster is not necessary. Furthermore it needs to be kept in mind that the list of root causes in the definition is merely exemplary as indicated by the term “in particular”, so that the definition can comprise other, comparable situations which lead to involuntary displacement.

4.1.2 Involuntary Displacement

The Guiding Principles assume that displacement needs to be involuntary, as reflected in the stipulation of the definition of IDP that the person must have been forced or obliged to leave his/her home¹⁰². The most controversial issue with the application of the Guiding Principles to environmentally-induced displacement is the question whether and when exactly slow-onset disasters can lead to involuntary displacement. For slow-onset environmental change to fulfil this stipulation it needs to be established that it is the sole and compelling reason for displacement.

In order to assess this, it is fundamental to understand that the relationship between gradual environmental change and migration is a very complex one. Environmental degradation occurs gradually and does not cause forced displacement from the beginning; at first it can be met with a number of adaptation strategies, of which migration is only one and can itself occur in a number of forms and be triggered by a number of reasons¹⁰³. To clarify this, coping mechanisms to a decline in local productive resources in rural Asia as described by Hugo¹⁰⁴ can serve as an example: families react to a decline in resources, which can be caused by environmental degradation, by deploying family members, usually young adults, to cities or internationally. These working family members can then send the money they earn home to their families in order to support them. This can take place on a temporary or permanent basis. The family is thus enabled to remain in its habitual surrounding and survive there with the money sent from their working family member. Furthermore, where gradual environmental change leads to a general deterioration of conditions of life and economic opportunities, entire families might decide to leave their home and migrate within the country to look for better conditions. This illustrates that environmental factors do play a role in the

¹⁰² W. Kälin, *The Guiding Principles on Internal Displacement, Annotations*, ASIL (2010) at 3; R. Zetter, *The Role of Legal and Normative Frameworks for the Protection of Environmentally Displaced People*, in *Migration, Environment and Climate Change: Assessing the Evidence* 389 (IOM 2009) at 418.

¹⁰³ G. Hugo, *Climate Change-Induced Mobility in Asia and the Pacific*, in J. McAdam (Ed.), *Climate Change and Displacement* 9 (2010) at 13.

¹⁰⁴ *Ibid* at 14-15.

decision to migrate, but other factors such as economic development opportunities, the role of and dependence on natural resources in the local communities, and the social structures in general influence migration. Thus, even though environmental degradation certainly does play a role, it is not the sole factor triggering migration, and migration can take place before those affected are forced to leave. The question is how to draw the line between migration as a strategy to adapt to environmental change which can be considered as voluntary, and displacement in cases where environmental deterioration is so extreme that people are forced to leave their homes. How long do inhabitants of an area affected by, for example, drought have to wait until their migration can be regarded as forced so that they can be protected accordingly by the Guiding Principles?

The Guiding Principles do not contain criteria for this distinction and thus leave room for interpretation. Kälin proposes that criteria should be based on "an assessment of whether such persons may be reasonably expected to remain at or go back to their place of residence, taking into account the prevailing circumstances there as well as the particular vulnerabilities of affected persons"¹⁰⁵. This includes the criteria of permissibility, possibility and reasonableness¹⁰⁶: with permissibility he refers to situations where return is prohibited by human rights or analogous refugee law, such as the principle of non-refoulement and the prohibition of collective expulsion. Possibility relates to physical possibility, which may not be given if for example roads are cut off or the IDP lost documentation so that administrative impediments exist. Finally, the last criterion of reasonableness refers to situations where return cannot be expected if the government does not provide any assistance or protection at all, especially regarding durable solutions. If one of these elements is not given, then individuals concerned should be regarded as forcibly displaced¹⁰⁷.

What is notable about these suggested criteria is that they are formulated from the point of view of an IDP who has already left his home: it thus equates the impossibility of return to the place of habitual residence with forced displacement from the place. This seems problematic at first sight, given that the Guiding Principles stipulate that departure needs to be forced. However, an interpretation of the definition of IDP in line with the spirit and purpose of the Guiding Principles suggests that those who left voluntarily, but are now not able to return because it is physically impossible, and are thus not the place away from home voluntarily anymore, should also be included in the definition. However, it is suggested that in line with the initial definition, criteria to distinguish between voluntary and forced migration should first and foremost focus on the situation of those affected by environmental degradation before they actually migrate. The question should be whether staying in the place of habitual residence -as opposed to returning there- will be permissible, possible and reasonable.

¹⁰⁵ W. Kälin, The Climate Change – Displacement Nexus, Speech presented to ECOSOC Panel on Disaster Risk Reduction on 16 July 2008.

¹⁰⁶ W. Kälin, Displacement Caused by the Effects of Climate Change: Who Will be Affected and What are the Gaps in the Normative Framework for their Protection?, Brookings-Bern Project on Internal Displacement (2008) at 8.

¹⁰⁷ Ibid. at 9.

The criteria of permissibility and reasonableness can be specified further by taking into account the human rights of those affected: if they leave their home because of a threat to human rights, that needs to be comparable in intensity to one faced by persons affected by the other exemplary root causes (armed conflict, generalised violence) since this enumeration shows that not all threats to human rights were meant to be covered by the definition, then their displacement is involuntary. Human rights relevant in situations of environmental degradation are especially the right to life, the right to health, respect for a person's dignity and the right to live in humane conditions. Thus, where a person or family will not be able to survive because of the effects of environmental change on resource availability, they cannot be expected to stay. Coming back to the scenario described before, where a family deploys one of its members to another city or internationally, while the rest of the family remains home living from this one person's income, the right to family life requires special attention. It ensures that a family shall not be separated, so that the question of forced displacement should look at the family as a whole. Thus arguing that leaving their home would not be forced because one family member could look for work elsewhere which would enable the family to remain in their place of habitual residence, is insofar not valid. If a family leaves its home because resources are not sufficient to ensure its survival, displacement is forced. Furthermore, special attention needs to be paid to the social and cultural background of those affected, especially where indigenous people are concerned. Those communities who for example have a close relationship to their land and live from its resources, like farmers and pastoralists, are more vulnerable where this land gradually deteriorates, they have a reduced adaptive capacity to for example teachers or plumbers. In a nutshell, displacement is "involuntary in nature, where the relevant persons have no real choice"¹⁰⁸, as the ICTY Trial Chamber stated.

What so far has not been discussed in the debate on involuntary movement of those fleeing from slow-onset disasters is the fact that the Guiding Principles comprise migration not only as a result of the mentioned causes, but also "in order to avoid" them¹⁰⁹. With this explicit statement the Guiding Principles accept that preventive migration can also be regarded as forced, and that those affected are not expected to wait until the threat actually occurs in order to fall within the scope of the Guiding Principles' protection. This requires certainty about and imminence of the threat, which can be difficult to assess in some cases. However, the aim of this extension to preventive migration needs to be kept in mind when determining whether migration due to slow-onset disasters is involuntary, implying that standards to comply with this requirement should not be too strict.

4.2 Applicability of those Principles Based on International Humanitarian Law?

¹⁰⁸ Prosecutor v Krnojelac, IT-97-25, Trial Chamber Judgment of 15 March 2002, para 475.

¹⁰⁹ See definition of IDP in Paragraph 2 of the Introduction to the Guiding Principles.

Another question that arises when applying the Guiding Principles to environmentally-induced displacement is the applicability of Principles derived from international humanitarian law. The Guiding Principles were established out of a need for protection of increasingly large numbers of persons internally displaced due to armed conflict in the 1990's. Given this factual background, the drafters had mainly conflict-induced displacement in mind while establishing the Guiding Principles, which is shown in the strong reliance on general principles of humanitarian law. While international humanitarian law stipulates the existence of an armed conflict in order for its guarantees to apply, most scenarios of environmentally-induced displacement described above do not occur in the course of an armed conflict. Can these Principles still be applied to these scenarios?

Technically the general principles on which those Principles that are derived from international humanitarian law are based can not be applied to environmentally-induced displacement, except if there is an armed conflict at the same time. However, the states and other actors responsible can still apply those Guiding Principles if they want to offer the respective protection. When applying Principles based on human rights law as well as Principles based on international humanitarian law, the Principles are not legally binding as discussed above. However, while with the former the underlying, legally binding principle can be invoked, this is not the case with the latter group, as the stipulation for application -the existence of an armed conflict- is not given.

However, two aspects need to be noted. First of all, the Guiding Principles in some cases also draw from an analogy to refugee law. Thus, this concept of invoking not legally binding, underlying principles is inherent in the Guiding Principles and part of its intended protection mechanism. In the end, whether to apply the Principles depends on the political will of the governments and other actors responsible. Secondly, it needs to be kept in mind that most of the principles that are derived from international humanitarian law also have a strong basis in human rights law. This relates to the fact that in many cases international humanitarian law aims at protecting human rights in the specific situation of armed conflicts, so that the two fields of law are closely affiliated.

It can be concluded that, since the Guiding Principles themselves are not legally-binding, their application, irrespective of the field of law they draw from, depends on the political will and capabilities of the relevant actors. Regarding environmentally-induced displacement, a difference only exists regarding the invocation of the underlying principles, whose stipulations need to be assessed for the situation for which protection guarantees are invoked.

5. Application of the guiding principles to internal environmentally-induced displacement

This chapter will analyse selected challenges which arise when applying the Guiding Principles to internal environmentally-induced displacement. It

will in a first step assess whether the content of the Guiding Principles generally “fits” this category. In doing so, it will establish whether the protection needs of environmentally-displaced persons are equal, or at least similar to those of persons displaced by conflict, whose situation was the focal point during the establishment of the Guiding Principles. In a second step selected issues arising with the application of the Guiding Principles to this category of environmentally-displaced persons will be discussed.

5.1. Do the Guiding Principles “fit” the category of environmentally-induced displacement?

The Guiding Principles were established after conflict had induced large numbers of internally displaced persons in the 1990's in order to clarify their human rights protection standards. Their focus was thus conflict-induced displacement. Even though natural disasters are included in the definition of IDP and thus falls within the scope of the Guiding Principles, it is not entirely evident whether human rights threats faced by persons displaced by environmental events are the same than, or at least similar to those faced by persons displaced by conflict. This is disputed in literature. While Geissler argues that the definition of IDP should be restricted to refugee-like situations of persecution because those displaced by natural disasters face only part of the problems encountered by persons displaced by armed conflict or severe human rights violations¹¹⁰, others argue that displacement caused by slow-onset change is more similar to economic migration resulting in different protection needs.¹¹¹ The annotations to the Guiding Principles justify the inclusion of environmentally-induced displacement with the argument that experience shows that they “can, as consequence of their displacement, become victims of human rights violations such as discrimination (e.g. because they have to move to an area where they constitute an ethnic minority), sexual and gender based violence, or disregard of their property rights”.¹¹² Kälin emphasises the common vulnerabilities and protection needs of conflict and environmentally-induced IDPs, resulting from displacement as such, regardless of its underlying reasons¹¹³.

Whether the Guiding Principles fit the specific protection needs resulting from threats to human rights guarantees faced by those displaced by natural disasters cannot be conclusively determined at this point. Such an assessment would require as a basis an extensive study of the exact form of migration and the accompanying threats to human rights before, during and after displacement. However, qualitative research on threats to human rights and resulting protection needs is not sufficient at this point¹¹⁴. So far the focus of attention was the provision of humanitarian assistance, while

¹¹⁰ N. Geissler, *The International Protection of Internally Displaced Persons*, 11 IJRL 451 (1999) at 453.

¹¹¹ V. Kolmannskog and L. Trebbi, *Climate Change, Natural Disasters and Displacement: A Multi-track Approach to Filling The Protection Gaps*, 92 Int. Review of the Red Cross 713 (2010) at 717.

¹¹² W. Kälin, *The Guiding Principles on Internal Displacement*, Annotations, ASIL (2010) at 4.

¹¹³ W. Kälin, *Natural Disasters and IDPs' Rights*, *Natural Disasters and IDPs Rights, Forced Migration Review, Special Issue - Tsunami: Learning from the Humanitarian Response 11* (2005) at 11.

¹¹⁴ As concluded by leading authors in the field of environmentally-induced displacement: V. Kolmannskog, *Climate Changed: People Displaced* (NRC 2009) at 7; IDMC, *Displacement Due to Natural Hazard-Induced Disasters, Global Estimates for 2009 and 2010* (2011) at 4.

less attention was given to the protection of specifically endangered human rights¹¹⁵. The leading Internal Displacement Monitoring Centre issued a global estimate of displacement caused by extreme natural hazard events for the second time in 2011 for the years 2009 and 2010¹¹⁶, which shows that the conduction of any form of comprehensive research on natural disasters was only developed recently. However, this study is restricted to a quantitative estimate of the scale and type of disaster, and does not include slow-onset disasters¹¹⁷. It emphasises that there are research needs regarding complementary qualitative studies to uncover specific protection needs and barriers to their achievement, especially regarding durable solutions¹¹⁸.

However, the existence of threats to human rights of environmentally displaced persons addressed by the Guiding Principles is supported by numerous punctual examples from past natural disasters. Cohen mentions several human rights violations faced by those displaced by the 2004 tsunami in Asia amongst which sexual and gender-based violence, discrimination in access to assistance on ethnic, caste and religious grounds, recruitment of children into fighting forces, a lack of safety in areas of displacement and return areas and inequities in dealing with property and compensation¹¹⁹. In assessing the humanitarian response to the earthquake in Pakistan in 2005, Wilder identified that IDPs were pressured to leave camps without adequately preparing their return home or arrange for support of vulnerable groups in rebuilding their houses or receive assistance in claiming their property¹²⁰. The UN Human Rights Committee called upon the United States to ensure full consideration of the rights of Afro-Americans and the poor in reconstruction plans after Hurricane Katrina in accordance with the Guiding Principles¹²¹, and after the 2007 cyclone in Bangladesh CARE attested an exclusion of Hindu women from relief assistance¹²².

This is supported by the Inter-Agency Standing Committee (IASC), which has identified human rights challenges faced in the aftermath of a natural disaster by those affected based on a comprehensive study of natural disasters, in order to issue guidelines regarding protection¹²³. The study assesses the situation of all people affected by natural disasters, whether displaced or not. Since those displaced by natural disasters are part of this group, the results of the study can also be applied to them, which makes it a helpful starting point in identifying such challenges particularly faced by those displaced by said disasters. The following human rights threats were

¹¹⁵ IASC, Addressing the Humanitarian Challenges of Climate Change (2009) at 1.

¹¹⁶ IDMC, Displacement Due to Natural Hazard-Induced Disasters, Global Estimates for 2009 and 2010 (2011) at 4.

¹¹⁷ Ibid. at 4-5.

¹¹⁸ Ibid. at 5.

¹¹⁹ R. Cohen, For Disaster IDPs: An Institutional Gap, Brookings-Bern Project on Internal Displacement (2008) at 1.

¹²⁰A. Wilder, Perception of the Pakistan Earthquake Response, Humanitarian Agenda 2015 Pakistan Country Study (2008) at 40-41 Box 6, available at <https://wikis.uit.tufts.edu/confluence/display/FIC/Humanitarian+Agenda+2015+Perceptions+of+the+Pakistan+Earthquake+Response>.

¹²¹ UN Document CCPR/C/USA/CO/3/Rev.1, para. 26.

¹²² CARE Bangladesh, Rapid Gender Assessment of SIDR Response (2007).

¹²³ IASC, Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (2011) at 1.

identified: lack of safety and security; gender-based violence; unequal access to assistance, basic goods and services and discrimination in aid provision; abuse, neglect and exploitation of children; family separation, particularly for children, older persons, persons with disabilities and other individuals who may rely on family support for their survival; loss/destruction of personal documentation and difficulties to replace it, in particular due to inadequate birth registration mechanisms; inadequate law enforcement mechanisms and restricted access to a fair and efficient justice system; lack of effective feedback and complaint mechanisms; unequal access to employment and livelihood opportunities; forced relocation; unsafe or involuntary return or resettlement of persons displaced by the disaster; or lack of property restitution and access to land¹²⁴. Especially relevant for the present question is the fact that it identifies a particular risk of violations of these rights for those who are forced to leave their homes and as a result become IDPs¹²⁵. These are threats addressed by the Guiding Principles since they are faced by conflict-induced IDPs.

There are several distinctions one needs to keep in mind while comparing the human rights protection needs resulting from conflict and environmentally-induced displacement. The fact that the root causes of displacement are fundamentally different does not necessarily mean that the threats this causes before, during and after displacement need to be different. Secondly, needs for human rights protection and humanitarian assistance need to be distinguished: the fact that humanitarian needs might be different for both groups due to differences in migration pattern or the duration of displacement does not necessarily mean that potential human rights threats must also be different. For example, where slow-onset degradation force people to leave and most of them may decide to settle in the cities, and not in camps as is usually the case for those displaced by conflict, the right to shelter is still highly relevant for both groups. However, humanitarian assistance needs to be conducted differently for both cases. Furthermore, it needs to be kept in mind that the scenarios of environmentally-induced displacement are fairly diverse and lead to different migration patterns, as established above. While not all human rights might be equally relevant for all groups to the same extent, existing potential threats justify the full relevance of the Guiding Principles. It is thus concluded that a preliminary assessment of human rights threats faced by those displaced by natural disasters shows that their protection needs are similar to those of persons displaced by conflict as addressed by the Guiding Principles. Further comprehensive research is needed in order to clarify their protection needs and identify whether the Guiding Principles fully address them.

5.2. Selected Issues Specific to Environmentally-Induced Displacement

The next part will highlight selected issues arising specifically when applying the Guiding Principles to environmentally-induced displacement.

¹²⁴ Ibid.

¹²⁵ Ibid. at 2.

First of all the overarching role of environmental law, in particular the allocation of responsibilities regarding the mitigation of climate change and adaptation to its effects by the UNFCCC and its Kyoto Protocol will be discussed. This paper will assess how this division of responsibilities relates to the protection of environmentally-displaced persons after mitigation and adaptation has failed. Secondly, the role of environmental law specifically within the Guiding Principles, which emphasise the national authorities' obligations under international law to prevent and avoid displacement, will be addressed. Regarding the protection during displacement, the lack of a clearly mandated, leading international organisation which is responsible for humanitarian assistance to IDPs in general, and environmentally displaced persons specifically, will be discussed. Finally problems arising with ending displacement and finding durable solutions will be established, taking into account the frequent long-term destruction of land which makes the option of return impossible, and the issue of compensation for the loss of land and property as foreseen in the Guiding Principles.

5.2.1. The Role of Environmental Law and the Responsibility of Developed States

One overarching issue is the question how the primary responsibility of developed states for mitigation of climate change and adaptation to the effects of climate change as prescribed by environmental law relates to the protection and assistance of those displaced by environmental events in general, and as specifically granted by the Guiding Principles. As established above, the generally accepted notion of primary responsibility of developed states for climate change and all its impacts - subject to a controversially discussed line of causality - does not extend to the protection of those displaced by environmental events. The Guiding Principles aim at securing human rights guarantees of IDPs, which traditionally empower citizens towards their government since it is responsible for securing these guarantees. Therefore the national authorities of the sovereign state are the main addressees of the rights and respective obligations of the Guiding Principles. And rightly so, since the governments of sovereign states are primarily responsible for the fulfilment of human rights guarantees and are the primary actors. However, even though the role of developed states, who are supposed to be the primary actors regarding mitigation and adaptation measures, is of no direct relevance to the protection mechanism of the Guiding Principles, this does not exclude the possibility to regulate a supportive role of developed states with clear obligations for financial or technical support within another legal and institutional framework. Biermann and Boas describe this lack of an extension of responsibilities of developed states to the level of displacement as contradicting the global responsibility for the victims of climate change¹²⁶.

This demonstrates a significant impediment to protection regarding displacement after mitigation and adaptation has failed: developed states

¹²⁶ F. Biermann and I. Boas, Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees, 10 Global Environmental Politics 60 (2010) at 74.

are not obliged to support the national government in the provision of shelter, food, water, education, or compensation of land that has become useless due to environmental change; they can provide humanitarian assistance on a merely voluntary basis in accordance with the provisions in the Guiding Principles. This is particularly crucial since the preventive mechanisms of the global response framework are not activated to their fullest capacity: states are hesitant to agree on comprehensive emission cuts, and the funding mechanism for adaptation measures foreseen in the Global Environmental Facility has been described as "poorly-implemented"¹²⁷. Consequently, climate change will proceed, with its effects continuing to mainly strike developing countries, whose governments are often unwilling or simply unable to handle these challenges. It is expected that as long as the causality between climate change, environmental disasters, be they sudden- or slow-onset ones, and displacement is not clearly proven to such an extent that developed states can no longer deny it, an extension of the notion of responsibility beyond the stages of mitigation and adaptation will not be accepted. And even then will such an extension depend on the political will of developed states, which, regarding their current hesitation to extent their obligations regarding mitigation and adaptation, will not be easily achieved.

5.2.2. Protection from Displacement and the Role of Environmental Law

The Guiding Principles oblige the national authorities and international actors to prevent and avoid displacement according to their obligations under international law. Principle 5 states that

"All authorities and international actors shall respect and ensure respect for their obligations under international law (...) so as to prevent and avoid conditions that might lead to displacement of persons. "

Principle 9 stresses the protection of those with a special dependency on and attachment to their lands, like pastoralists. This is particularly relevant since environmental degradation and sudden-onset events directly affect the land and can cause long-term damage. Principle 5 emphasises the importance of compliance with public international law in order to reduce the risk of internal displacement¹²⁸. Besides the explicitly mentioned human rights and humanitarian law, environmental law can be considered to play a key role in preventing displacement caused by natural disasters.

The obligations of the host states regarding mitigation and adaptation according to the UNFCCC, as described above, can be regarded to fall within the obligations mentioned in Principle 5. However, two important constraints must be taken into account. First of all, Principle 5 seems to address obligations that can directly prevent and avoid conditions that might lead to displacement. Adaptation measures can be seen as such direct obligations since they enable those affected to adapt to the environmental change without having to migrate. It appears more difficult

¹²⁷ R. Zetter, Protecting People Displaced by Climate Change: Some Conceptual Challenges, in J. McAdam (Ed.), *Climate Change and Displacement* (2010) at 148.

¹²⁸ W. Kälin, *The Guiding Principles on Internal Displacement*, Annotations, ASIL (2010) at 25.

to justify the inclusion of mitigation obligations in this provision, since they do not directly avoid displacement and raise the difficult question of causality between climate change and the environmental event which causes displacement. Secondly, the above established fact that the primary responsibility of developed states for mitigation and adaptation is not relevant to the provisions of the Guiding Principles is particularly relevant to these provisions on the protection from displacement. The Guiding Principles solely oblige the national governments of the states affected by natural disasters, thus those actors who are not considered as the primarily responsible, and most capable actors within the global response framework. In line with the Guiding Principles being a human rights instrument which aims at empowering citizens towards their governments, the responsibility of developed states, which would be crucial for their protection from displacement, is not taken into account by the Guiding Principles.

5.2.3. Protection During Displacement and Humanitarian Assistance

Regarding protection during displacement it should be noted that some principles refer to protection needs due to ongoing hostilities, for example Principle 10.2 which prohibits attacks on IDPs who do not take direct part in hostilities, or Principle 13.1 which emphasises the prohibition to recruit or oblige children to take part in hostilities. These provisions are less relevant for environmentally-induced displacement since it was not caused by conflict. However, hostilities and its potential dangers for IDPs can exist independently of the natural disaster or even be caused by resource scarce or other tensions caused by the environmental event. This then makes the protection standards relevant also for environmentally-induced displacement. Furthermore, some emphasise that migration patterns change, resulting in increased movements of displaced persons into cities instead of camps, which might be exacerbated by environmentally-induced displacement¹²⁹. These "urban IDPs" will require different forms of humanitarian assistance to fulfil their protection needs.

One major gap in the protection of and assistance to IDPs in general is the lack of a clearly mandated leading international organisation which assumes responsibility for them¹³⁰. Principle 27.2 emphasises the special role of international organisations which have been specifically entrusted with a mandate for protection of IDPs. Thus, while the primary responsibility of protection lies with the national authorities, the Guiding Principles also take into account the role of international organisations. As the national authorities are frequently unwilling or simply unable to provide the necessary protection, international organisations often have a crucial role in protecting IDPs and providing humanitarian assistance. However, protection leadership of humanitarian agencies in situations of disaster-induced displacement remains inadequate¹³¹. The Cluster Approach

¹²⁹ S. Leckie, Human Rights Implications, 31 FMR 18 (2008) at 19; Chair's Summary of the Outcome of the GP10 Conference, Achievements, Challenges and Recommendations, FMR - GP10 (2008) at 7.

¹³⁰ R. Cohen, For Disaster IDPs: An Institutional Gap, Brookings-Bern Project (2008) at 3; V. Kolmannskog, Future Floods of Refugees (NRC 2008) at 30.

¹³¹ Chair's summary of the outcome of the GP10 Conference, Achievements, challenges and recommendations, FMR - GP10 (2008) at 7.

developed by the Inter-Agency Standing Committee divides responsibilities and labour of humanitarian agencies¹³². It foresees a shared leadership role for protection after natural disasters of the Office of the United Nations High Commissioner for Refugees (UNHCR), the Office of the High Commissioner for Human Rights (OHCHR) and UNICEF, which agreed on the lead agency for the coordination of protection and humanitarian assistance on a case-by-case basis¹³³. UNICEF has assumed this leading role in most cases given its extensive coverage of most areas¹³⁴. All three agencies have expressed doubts as to their capabilities to accept additional responsibilities for those displaced by natural disasters¹³⁵. The fact that the mandates of all three agencies do not focus on IDPs, and certainly not on disaster IDPs specifically, so that they operate on several levels, can lead to scenarios where these other protection interests block effective action to a maximum extent regarding environmentally-displaced persons¹³⁶. As Kolmannskog states, the arrangement of shared responsibility has been criticised for a lack of predictability and rapidity of response, so that a review of this mechanism is now taking place¹³⁷. It is expected that the steadily increasing environmentally-induced displacement puts further pressure on humanitarian agencies involved, which might speed up the reform process. Its results, however, remain to be seen¹³⁸.

5.2.4. Return, Resettlement and Reintegration: the Importance of Land and Property

In the post-displacement phase the Guiding Principles foresee three solutions among which the IDP can freely choose: the primary one being return to the former home, and if this fails the IDP can be integrated at the location where he/she was displaced to or resettled to another part of the country¹³⁹.

What is specific to environmentally-induced displacement regarding durable solutions is the fact that environmental events often destroy the place of origin, or at least make it uninhabitable, so that many IDPs displaced by environmental disasters will never be able to return home¹⁴⁰, thus the naturally primary option of return to one's home, including one's land and other property is often non-existent. A well-functioning mechanism of resettlement or reintegration is thus crucial for those

¹³² IASC, Guidance Note on Using the Cluster Approach to Strengthen Humanitarian Response (2006).

¹³³ IASC, Global Protection Cluster Working Group, Handbook for the Protection of Internally Displaced Persons (2007) at 41-43; V. Kolmannskog, Climate Changed: People Displaced (NRC 2009) at 11; UNHCR ExCom, EC/58/SC/CRP.18 of 4 June 2007, at 2.

¹³⁴ R. Cohen, For Disaster IDPs: An Institutional Gap, Brookings-Bern Project, Brookings-Bern Project (2008) at 3.

¹³⁵ As stated in the Chair's summary of the outcome of the GP10 Conference, Achievements, challenges and recommendations, FMR - GP10 (2008) at 7.

¹³⁶ As a scenario described by Cohen shows: R. Cohen, For Disaster IDPs: An Institutional Gap, Brookings-Bern Project (2008) at 4.

¹³⁷ V. Kolmannskog, Climate Changed: People Displaced (NRC 2009) at 11.

¹³⁸ For one proposal on the establishment of an "International Coordinating Mechanism for Environmental Displacement" see T. King, Environmental Displacement: Coordinating Efforts to Find Solutions, 18 Georgetown Int'l Envtl. Law Review 543 (2005) at 559; V. Kolmannskog furthermore mentions the One UN Initiative, which aims at enhancing a system-wide UN coherence at country level including one leader, one programme, one budget and, where appropriate, one office, see V. Kolmannskog, Climate Changed: People Displaced (NRC 2009) at 11.

¹³⁹ W. Kälin, The Guiding Principles on Internal Displacement, Annotations, ASIL (2010) at 127.

¹⁴⁰ K. Koser, Gaps in IDP Protection, 31 FMR 17 (2008).

displaced by environmental disasters. This puts extreme pressure on the national authorities to allocate land for those displaced. This is exacerbated by several factors: the importance of land in many developing states is crucial, since many citizens are subsistence farmers or pastoralists and thus completely depend on their land and its good condition. Land is not only a means of income; its role is deeply rooted in culture and represents a way of life. Those strongly attached to their land are particularly vulnerable, which is recognised by Principle 9, which regulates their increased protection from displacement. They will also be in need of increased assistance once displaced, especially if they settle in cities, since their adaptive capacity is weaker than that of other IDPs.

This relates to the issue of compensation for land lost to sudden- or slow-onset disasters. In order to re-establish the situation before displacement as much as possible, Principle 29.2 provides for the protection of the right to property at the time of return or resettlement:

"Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form or just reparation."

The right of IDPs to reclaim abandoned property was disputed during the establishment of the Guiding Principles, since the right to return was limited to return to the country as such, and the right to legal remedies for violations of the right to property merely included a procedural right¹⁴¹. Therefore it was agreed to focus on the states duties to support the individual, rather than formulating a clear right of the individual¹⁴². Kälin describes the situation of properties found destroyed, confiscated, expropriated or occupied by other people upon return, and confirms that there is a "certain trend" in general human rights instruments to grant a right of restitution or compensation for the loss based on the right to property¹⁴³. However, the situation of persons affected by environmental disasters is a different one, since their right to property is not "violated" by another person or the government, but by nature. A right to compensation for these situations is not covered by existing human rights law, which leaves those affected without protection. Furthermore, the government often does not have the means to support them. Therefore the situation of loss of land and property in general to natural forces is not sufficiently addressed by human rights law, so that a basis for respective protection by the Guiding Principles is not given. Those affected thus completely depend on general support by the government to find durable solutions as prescribed by Principle 28.

¹⁴¹ R. Williams, Guiding Principle 29 and the Right to Restitution, FMR-GP10 (2008) 23.

¹⁴² Ibid.

¹⁴³ W. Kälin, The Guiding Principles on Internal Displacement, Annotations, ASIL (2010) at 134.

6. The guiding principles as a practicable protection framework for internal environmentally-induced displacement

This chapter will analyse whether the Guiding Principles on Internal Displacement are suited as a protection framework for internal environmentally-induced displacement. Emphasis is put on assessing whether they would constitute a practicable framework which can be realistically applied in practice in the near future, thus keeping in mind that environmentally-induced displacement is a current reality as described above which needs current answers. It is argued that the Guiding Principles are a useful tool for the protection from and during environmentally-induced displacement, supported by the same arguments that already justified the choice of the form of Guiding Principles as an appropriate tool for the protection of IDPs in the 1990's. In a second step the study will further support this statement with the so far fairly successful reception of the Guiding Principles. This will take into account the question whether the establishment of a new, legally binding convention would be a more favourable approach in order to reach a more effective protection for those displaced by environmental events, or whether the "softness" of the Guiding Principles is indeed an advantage for the promotion of human rights for environmentally-displaced persons.

6.1. An "Appropriate" Protection Framework Then and Now

Four arguments which justified the choice for the "appropriate" framework of Guiding Principles instead of a legally-binding convention also justify the option of focusing on the application of the Guiding Principles instead of the establishment of a new convention: (1) a new Convention dealing comprehensively with environmentally-induced displacement is desirable, but does not currently have the necessary political support, (2) the adoption of a treaty does not guarantee its implementation, (3) environmentally induced displacement is an existent problem that needs prompt answers (4) of which the application of the Guiding Principles is one, since they address the needs of IDPs.

A number of actors promote the creation of a (new) legal framework to meet the challenges of environmentally-induced displacement, mainly focusing on cross-border migration¹⁴⁴. This option of establishing a new legal framework, or adapting existing legal frameworks is as impracticable today regarding the protection of internal climate migrants as it was in the 1990's regarding the protection of IDPs in general. The explanation used by the then Representative of the Secretary-General on Internal Displacement to opt for the "appropriate" framework of Guiding Principles based on general principles, as opposed to a binding "legal framework" can today be applied to justify the same choice regarding environmentally-induced displacement. The reasons were the following:

¹⁴⁴ For reference to and descriptions of the different proposals, ranging from the amendment of the 1951 Refugee Convention, a new Protocol to the UNFCCC, an entirely new convention or an additional protocol to the European Convention on Human Rights see: J. McAdam, Why a Climate Change Displacement Treaty is Not the Answer, 23 IJRL 2 (2011) at 6-7.

First of all, just like at the time of the establishment of the Guiding Principles, there is no sufficient political support from governments for a new convention¹⁴⁵. Especially in the field of human rights law it has become increasingly difficult to find a common denominator for differing opinions, and the added challenge of combining this with humanitarian law in order to cover all possible situations of displacement aggravated this problem¹⁴⁶. This applies just as much to the present situation of environmentally-induced displacement. The failure of states to negotiate new binding commitments regarding the mitigation of climate change, and the only very hesitant and vague statement on migration at COP16 as mentioned above shows that there is no political will, let alone consensus of the parties, to submit themselves to binding protection commitments regarding environmentally-induced displacement¹⁴⁷. This relates to the lack of political will not only to create a new binding legal instrument, but to create protection and assistance mechanisms for an additional vulnerable group in general¹⁴⁸. Zetter points out the advantage that by using the Guiding Principles as a protection tool for environmentally-induced migrants one does not propose that they constitute a new category of persons protection and international recognition¹⁴⁹. This might encourage states to accept the application of the Guiding Principles to environmentally-induced displacement without feeling too threatened by additional protection obligations. What should be emphasised at this point is that, as mentioned several times throughout this paper, stronger mechanisms - not only institutional, but maybe also legal ones - are needed in which the clear responsibility of developed states to assist those forcibly displaced by the impacts of climate change is accepted and facilitated. This extension of primary responsibility of the main polluters would be in line with the general assumptions of the global response to climate change and help overcome the crucial problem that most developing states, as the victims of climate change, do not have the means to fulfill their assistance obligations. However, the Guiding Principles, stating obligations of the state which hosts IDPs, is not the right framework for this.

Secondly, even if a treaty is adopted, there is no guarantee that it is successful¹⁵⁰. States might agree to it but then refrain from ratification, or use reservations to reduce their obligations or simply not implement enacted legislation. This applies to treaties agreed upon by states in general, even those which contain enforcement mechanisms. Regarding

¹⁴⁵ R. Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 *Global Governance* 459 (2005) at 464.

¹⁴⁶ W. Kälin, *How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework*, Presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, December 9 2001 at 2, 4.

¹⁴⁷ R. Zetter, *Protecting People Displaced by Climate Change*, in J. McAdam (Ed.), *Climate Change and Displacement* 131 (2010) at 141.

¹⁴⁸ As described by J. McAdam, *Why a Climate Change Displacement Treaty is Not the Answer*, 23 *IJRL* 2 (2011) at 16.

¹⁴⁹ R. Zetter, *The Role of Existing Legal Frameworks for the Protection of Environmentally Displaced Persons*, in F. Laczko and C. Aghazarm (Eds.), *Migration, Environment and Climate Change: Assessing the Evidence* 387 (IOM 2009) at 405.

¹⁵⁰ W. Kälin, *How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework*, Presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, December 9 2001, at 3.

environmentally-induced displacement, McAdam emphasises that even if states agreed on a treaty, "its ratification, implementation and enforcement could not easily be compelled"¹⁵¹. Also regarding implementation, what is crucial is the political will of those responsible for protection, and not necessarily the legal character of the obligation.

Thirdly, the time factor is crucial¹⁵². When the request for an appropriate protection framework was issued in the 1990's internal displacement was an existent problem and the needs of those affected could not wait until a treaty had been negotiated, agreed upon, ratified, enacted and implemented. Just like internal displacement was existent at that time, environmentally-induced displacement is now an existent problem. The Internal Displacement Monitoring Centre (IDMC) states that "(t)ogether with armed conflict, human rights violations and generalised violence, natural hazard-induced disasters are among the principal causes of forced displacement"¹⁵³. Furthermore, it emphasises the increasing frequency and intensity of extreme weather events and its disastrous impact on populations¹⁵⁴, thus referring to a possible increase of environmentally-induced displacement in the future. People are thus currently being affected and need to rely on a comprehensive protection framework that suggests policy contents for protection from displacement, during displacement and for long-term solutions.

Finally, the legal experts establishing the appropriate framework concluded that a new treaty was not necessary as existing international law covered, at least implicitly, the needs of IDPs¹⁵⁵. This argument is not entirely convincing, as the Human Rights Commission asked for the establishment of a framework also in order to address the grey zones and gaps assessed by the team of the Special Representative. Nonetheless, the point that there are general principles, often constituting binding customary international law, on which a protection framework can be solidly based, also applies to current internal environmentally-induced displacement. However, it is not argued that the establishment of a new treaty is not "necessary". In order to come to this conclusion, one will have to assess the needs of environmentally-induced migrants extensively and compare them with the existing protection tools. But, as McAdam states, the assumptions, which are the premises for treaty proposals, are not borne out in the necessary empirical studies¹⁵⁶. The IDMC comes to the same conclusion that

"Global data on internal displacement caused by natural disasters has not been systematically collected or analysed. To increase global awareness and support evidence-based decision making that

¹⁵¹ J. McAdam, Why a Climate Change Displacement Treaty is Not the Answer, 23 IJRL 2 (2011) at 17.

¹⁵² Ibid. at 2; R. Cohen, The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting, 10 Global Governance 459 (2005) at 464.

¹⁵³ N. Birkeland and E. Jennings (Eds.), Internal Displacement: Global Overview of Trends and Developments in 2010 (IDMC 2011) at 96.

¹⁵⁴ Ibid.

¹⁵⁵ W. Kälin, How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework, Presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, December 9 2001, at 4; R. Cohen, The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting, 10 Global Governance 459 (2005) at 467.

¹⁵⁶ J. McAdam, Why a Climate Change Displacement Treaty is Not the Answer, 23 IJRL 2 (2011) at 8.

*effectively targets the needs of displacement affected populations, there is an urgent need to provide annual global estimates of the numbers of people displaced by different types of natural disasters*¹⁵⁷.

Thus, whether the establishment of a new, extended protection framework for environmentally displaced persons is necessary and what additional content it should have cannot be conclusively assessed at this point. However, the controversial issue of how far the general principles actually cover the Guiding Principles, and the implications this might have for their acceptance by governments and other relevant actors, suggests that a binding clarification of this topic might be desirable, given the political will.

6.2. Legally Binding is Not Necessarily Better

Besides these arguments that were already valid when the Guiding Principles were established in 1998, additional arguments result from the application and reception of the Guiding Principles until now. Their positive reception underpins the argument that they are a practicable protection framework for those displaced by environmental events: the Guiding Principles are fairly successful, their further promotion in times of climate change can further strengthen them, and the Guiding Principles' "weakness" of not being legally binding can be used as an advantage to influence states successfully without putting too much pressure on them with the request for a new convention. The Guiding Principles have reached a considerable degree of acceptance and application by different actors including states, as assessed above, which shows that even soft law instruments can influence governments and international organisations, especially since the Guiding Principles have an increased persuasive power due to their roots in existing law¹⁵⁸. In particular since natural disasters are expressly mentioned as a cause for displacement, this furthers the hope that states will also be willing to apply the Guiding Principles to environmental displacement.

Kolmannskog and Trebbi raise the concern that the non-binding nature of the Guiding Principles may be a significant weakness¹⁵⁹, implying that a legally binding convention might be a more powerful protection tool. This raises the question of legal means as a protection tool in general. Law is used to influence states and steer their behaviour. In the international sphere this can be achieved when states agree to compromise certain parts of their sovereignty by agreeing to commitments contained in a treaty. However, as discussed above, the means of law are not a guarantor for the behaviour agreed upon; what is crucial is the political will to agree upon a treaty, and to implement it. Kälin accepts the weakness of the non-binding character of the Guiding Principles, but emphasises that it

¹⁵⁷ N. Birkeland and E. Jennings (Eds.), *Internal Displacement: Global Overview of Trends and Developments in 2010* (IDMC 2011) at 96.

¹⁵⁸ R. Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 *Global Governance* 459 (2005) at 467.

¹⁵⁹ V. Kolmannskog and L. Trebbi, *Climate Change, Natural Disasters and Displacement*, in 92 *Int. Review of the Red Cross* 713 (2010) at 728.

is possible to invoke the hard law the Guiding Principles are based upon and argues that this weakness has at the same time been an advantage:

"...where the Guiding Principles were met with resistance, it was not because of their content but because of a suspicion that they might be binding regardless of all assertions to the contrary. The Representative's experience has shown that it is much easier to negotiate with governments if the questions of violations does not loom in the background but, instead, problems can be approached by looking at what kind of guidance is provided by international standards."¹⁶⁰.

In line with this argumentation Entwisle mentions that emphasis should be placed on fostering conditions for the creation of law rather than focusing attention on enacting a formally binding legal document¹⁶¹. The author agrees with McAdam who argues that it is important to view a treaty as one of a number of mechanisms that may be used in response to environmentally-induced displacement, rather than the only solution¹⁶². Furthermore, the development of legally-binding standards and thus law as a response to vulnerability should not be the main focus of action, but be regarded as one of many responses. Governments as the primarily responsible actor regarding the protection of environmentally displaced can also be supported and influenced through advice in policy decisions, which also bears the advantage to encourage a more immediate response.

It is thus concluded that even though a legally-binding treaty is desirable to complement the comprehensive protection of environmentally displaced, the application of the Guiding Principles on Internal Displacement offer a more immediate, practicable solution since state support for a convention is so far not in sight. The application of the Guiding Principles emphasises that the main problem is the implementation and policy gap¹⁶³ due to a lack of political will and ability to protect the environmentally displaced, and not the absence of legally-binding norms. Its existing standards and increasing acceptance can be used to promptly address the needs of the environmentally displaced. The author thus agrees with the former Special Representative of the Secretary-General on Internal Displacement, Walter Kälin, who states that the Guiding Principles "may provide a model on how to promote human rights standards at a time when all basic human rights have found a sound basis in international law and, at the same time, treaty making has become difficult"¹⁶⁴.

7. Conclusion and outlook

¹⁶⁰ W. Kälin, How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework, Presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, December 9 2001, at 7.

¹⁶¹ H. Entwisle, Tracing Cascades: The Normative Development of the Guiding Principles on Internal Displacement, 19 GILJ 369 (2005) at 386.

¹⁶² J. McAdam, Why a Climate Change Displacement Treaty is Not the Answer, 23 IJRL 2 (2011) at 8.

¹⁶³ C. Phuong, The International Protection of Internally Displaced Persons, Cambridge University Press (2004) at 52.

¹⁶⁴ W. Kälin, How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework, Presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, December 9 2001, at 7.

Given the large extent of environmentally-induced displacement that is currently taking place and is expected to even increase in future, the acceptance of environmental events as root causes for displacement is essential. The Guiding Principles explicitly mention “natural disasters” as a root cause of flight. In doing so, they accept those displaced by environmental events as part of the category of IDPs and include them in their protection mechanism. The implied acceptance of protection and assistance needs and inclusion in an already existing protection mechanism is an important step towards granting the necessary protection to those uprooted by natural disasters.

However, the applicability of the Guiding Principles to environmentally-induced displacement is not all that clear. A key issue is the establishment of criteria to distinguish voluntary from involuntary displacement in cases of slow-onset degradation, since such criteria is not defined by the Guiding Principles themselves. The author agrees with the criteria suggested by Kälin, but emphasises that the nature of departure should primarily be looked at and specifies the criteria by referring to human rights. Special attention needs to be given to the right to family life, meaning that families should not be expected to send one of their members to earn money in the city in order to prevent displacement of the entire family; such a possibility does not exclude involuntary displacement. Furthermore, the special needs and low adaptive capacity of vulnerable groups with a specific attachment to the land, which are more severely affected by environmental disasters, need to be taken into account. What is not mentioned in literature on this issue so far is the fact that the Guiding Principles include displacement which takes place in order to avoid the mentioned threats in the definition of IDP. Thus, the standard for involuntary displacement should not be too strict in order to accommodate for the inclusion of preventive migration, as long as the threat is realistic and imminent.

Regarding the application of the Guiding Principles to internal environmentally-induced displacement, more qualitative research is needed to comprehensively assess existing threats to human rights encountered by environmental IDPs and establish protection needs. Only then can a conclusive assessment be conducted on whether the Guiding Principles meet the protection needs of those displaced by natural disasters, or whether they need to be amended in order to grant comprehensive protection from all human rights threats. Three problematic issues specific to the application of the Guiding Principles to environmental IDPs have been identified: regarding protection from displacement, Principle 5 emphasises obligations under national law in order to prevent conditions that might lead to displacement. It is argued that these include adaptation measures under the UNFCCC framework, which aim at avoiding displacement. However, this does not take into account the UNFCCC framework itself, which places the main responsibility regarding adaptation measures on developed states, since the Guiding Principles do not deal with the responsibility of third states. A key problem in the protection of environmentally-displaced persons during displacement is the lack of one clearly mandated, leading international organisation responsible for protection and humanitarian assistance. The shared

leadership under the Cluster Approach needs to be reviewed, ideally in order to create leadership of one specifically mandated organisation in order to ensure predictability and enable rapid responses to natural disasters. This is crucial since countries affected by climate change and respective increased environmentally-induced displacement are developing countries, which face huge challenges in assisting those displaced by natural disasters since they do not have the means to provide shelter, water, food and general protection to those uprooted. Furthermore, the establishment of a clearly mandated organisation could be a medium to enable developed states, as those primarily responsible for climate change and its effects, to accommodate their responsibility by providing funds and enabling humanitarian assistance and protection through this organisation. Finally, during the post-displacement stage, it was established that the obligation of national authorities to assist IDPs to claim compensation for loss of land during displacement cannot be extended to land lost or made uninhabitable by a natural disaster. This relates to a major problem which requires all international actors to provide assistance to national authorities of countries affected by natural disasters: the destruction of vast areas of land by natural disasters will put national authorities under enormous pressure to find durable solutions for those displaced. Given the often large extent of natural disasters and the fact that those affected by displacement often regard their land as a source of income as well as representing a way of life, international support is crucial to providing adequate assistance.

Even though it is generally accepted that climate change will increase the amount and intensity of sudden-onset disasters and slow-onset environmental degradation, the global response framework largely excludes displacement from its agenda. The invitation of the UNFCCC Conference of the Parties for states to adopt measures to enhance understanding, cooperation and coordination with regard to climate change-induced displacement is an initial step for the extension of the global response to the stage of displacement. However, this remains largely programmatic and does not contain concrete and legally-binding obligations, neither for developed nor for developing states, which are urgently needed to support those who have to carry the main burden of climate change and ensure adequate protection of environmental IDPs. As established above, those countries affected by climate change and large-scale displacement by natural disasters will hardly have the means to protect those displaced and provide for adequate humanitarian assistance and durable solutions. It is thus crucial to extend the responsibility of developing states to the third stage of displacement after mitigation and adaptation has failed, and develop their role of voluntarily supportive actors into responsible actors with binding obligations. This is not a task that can be achieved through the Guiding Principles, since they primarily aim at regulating the relationship between IDPs and the national authorities, and do not affect third states. However, such an extension of the UNFCCC framework is conceivable, even though this would depend on the highly controversial issue of causality between climate change and displacement and would require the respective political will.

However, the Guiding Principles fulfil the important task of spelling out human rights that IDPs have towards their own national authorities in order to ensure protection by them and avoid a worsening of their already difficult situation through human rights violations by government officials. In accepting the inherent limits of the Guiding Principles – the fact that they do not include obligations of third states and require transformation into national law to become legally binding- it can be concluded that they provide a useful tool for the protection of those displaced by environmental events. Embedding environmentally displaced persons in the already existing normative and –to a certain extent existing- institutional IDP protection framework has the decisive advantage of availability at a time where environmentally-induced displacement is already a current reality. It would certainly be desirable to establish a legally-binding convention which deals extensively with the protection of environmental IDPs on the basis of thorough research of their protection needs. The added value of such a convention would be its legally-binding character as well as the possibility to not only regulate the relationship between IDPs and the national authorities, but to include obligations of third states. However, this requires a respective political will and, if the latter option is to be included, the full acceptance of causality between climate change and displacement. Both are not in sight at this time given the generally hesitant attitude of states to take on further legally-binding obligations through treaties. What should be kept in mind is that further reception of the Guiding Principles can strengthen their legal status and even lead to the development of customary international law. Thus, the establishment of a new convention is not the only possibility to allow for the development of legally-binding obligations.

Looking ahead, what is crucial now for the implementation of the protection granted to environmentally-displaced persons by the Guiding Principles is their further promotion. Even though there has been a considerable reception of the Guiding Principles, this is by far not sufficient. More countries need to adopt national legislation which transposes the Guiding Principles into legally-binding national law. Furthermore, the implementation of national legislation needs to be promoted. This promotion needs to address that the definition of IDP includes those displaced by natural disasters in order to raise awareness of national authorities. The explicit acceptance of “natural disasters” as a root cause for displacement is an important step towards the granting of protection and assistance to those internally displaced by environmental events. National and international actors now need to show the necessary political will for implementation and cooperation in order to protect and assist those large numbers of persons uprooted by natural disasters.

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