

Center for International Human Rights  
John Jay College of Criminal Justice  
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**Protection Gaps & Responses:  
Challenges & Opportunities**

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JOHN JAY COLLEGE  
THE CITY UNIVERSITY OF NEW YORK  
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## Protection Gaps and Responses: Challenges and Opportunities

Forced displacement, statelessness, and mixed migratory movements remain prominent global issues in terms of their magnitude and complexities. Conflict, violence, and persecution continue to cause displacement. At the same time, a variety of social, economic, political, and environmental factors, such as population growth, urbanization, climate change, water scarcity, and food and energy insecurity are exacerbating conflict and combining in other ways that oblige people to flee their countries. While the 1951 Refugee Convention, which is central to the protection regime, has proved flexible enough to accommodate certain new forms of persecution, the complexity of the current factors affecting cross-border displacement is resulting in gaps in the response to current protection challenges. As the Office of the United Nations High Commissioner for Refugees has noted, gaps in international protection occur primarily in three ways:

- \* through insufficient accessions to relevant instruments;
- \* through inadequate implementation of existing treaties; and
- \* through gaps in the existing international protection framework.

Statelessness is often referred to as the “forgotten problem,” despite the fact that citizenship is necessary for the full realization of one’s human rights. One of the key concerns is the limited accession to the 1961 Convention on the Reduction of Statelessness and related international treaties. However, there are also obstacles to the acquisition of nationality and even the size of the statelessness problem is not comprehensively mapped.

New responses are urgently needed to address the gaps and obstacles in the protection of the displaced and stateless. This publication hopes to provide some background to key aspects of the discussion surrounding gaps in the protection framework. In particular, it will offer some remarks on the relevant international legal instruments, address the prioritization of national security considerations over the protective responsibilities of member states (as exemplified by the primacy attached to the fight against terrorism over asylum and refugee protection), explore the emerging issue of environmental change and displacement, and assess the increasing use of Temporary Protected Status (TPS) as a mechanism to fill gaps in the protection regime.

### The International Legal Framework

Faced with the problem of displaced people after World War II, a special UN conference adopted on July 28, 1951, a Convention relating to the status of Refugees.<sup>1</sup> The Convention was the first international agreement covering almost all aspects of refugee life, such as defining who is a refugee, the protection and social rights she should receive, and the

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<sup>1</sup> UNHCR. *Convention and Protocol: Relating to the Status of Refugees*. Switzerland: Communications and Public Service Information, 2010.

obligations that the host government would have towards refugees.<sup>2</sup> The problem of refugees is huge. At the end of 2009, there were 43.3 million forcibly displaced people worldwide. Of these, 15.2 million were refugees;<sup>3</sup> 10.4 million are under the responsibility of UNHCR, while the remaining 4.8 million Palestinian refugees are under the mandate of UNRWA. The figure of 43.3 million also includes 983,000 asylum seekers and 27.1 million internally displaced people (IDPs).<sup>4</sup> While UNHCR's primary purpose is to "safeguard the rights and well-being of refugees" and, in this context, it provides relief and assistance to millions of displaced persons, its ultimate goal is to provide durable solutions; namely, voluntary repatriation, local integration, or resettlement to a third country, in situations where it is impossible for a person to go back to her/his country of origin, or remain in the host country.<sup>5</sup>

As of April 1, 2011, 144 states are parties to the Convention Relating to the Status of Refugees.<sup>6</sup> Many member states have made reservations to the convention, which is permitted under article 42. In total, there are about forty countries that have standing reservations.<sup>7</sup> Existing reservations primarily target articles 17, 24, and 26: article 17 concerns wage earnings and employment, article 24 outlines labor registration and social security, and article 26 is about freedom of movement. Each of these articles had reservations attached by approximately one-fourth or one-third of the countries that submitted reservations when signing the convention. These articles relate to two critical issue areas: resources to be devoted to or benefits that could accrue to refugees and national security considerations. While the issue of resources and benefits has been a long-standing concern, it is the latter issue which has become the dominant one in recent refugee crises for several reasons; prominent among them are: (1) the militarization of refugee camps, and (2) concerns over terrorist mobility.

In some cases, refugee crises have contributed to the spread of conflict across borders, especially in situations where refugee camps have functioned as bases for combatants to get food, medicine, and new recruits. This has occurred in several cases; some of the best known examples include the Rwandan refugee camps in Zaire (now DRC), and the Burundian refugee camps in Tanzania.<sup>8</sup>

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<sup>2</sup> *The 1951 Refugee Convention*. <http://www.unhcr.org/pages/49da0e466.html> (accessed April 13, 2011).

<sup>3</sup> UNHCR, *The UN Refugee Agency* (on file with the Center for International Human Rights).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> "States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol." *UNHCR, United Nations High Commissioner for Refugees*, 2011: 1-5. 142 states are parties to both the Convention and the 1967 Protocol.

<sup>7</sup> "Treaty Collection. Convention Relating to the Status of Refugees" *United Nations*. (accessed April 12, 2011). The number was larger before many countries began withdrawing their reservations. For example, the following countries have withdrawn their reservations: Australia, Denmark, Finland, Greece, Italy, Norway, Portugal, Sweden, and Switzerland.

<sup>8</sup> Sarah Kenyon Lischer. *Dangerous Sanctuaries: Refugee Camps, Civil War, And the Dilemmas of Humanitarian Aid*. New York: Cornell University Press, 2005: 73-117.

In addition, freedom of movement might be controlled due to increased consideration and awareness of terrorist mobility during the last decade.<sup>9</sup> Countries, which traditionally have always hosted large numbers of refugees, now adopt new and more restrictive policies.<sup>10</sup> This problem is compounded by the lack of a universally accepted definition of terrorism, which allows countries to adopt restrictive policies on the basis of their own very broadly worded definitions of terrorism. Many refugees might be labeled as terrorists, which limits their movement and can be used to remove them from the country of intended asylum, thus rendering them stateless people (more on this later).<sup>11</sup>

| 1951 Convention Relating to the Status of Refugees                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Countries which made reservations, as of April 2011                                                                                                                                                         |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>Article 17: <u>Wage-Earning Employment</u></b><br/>           “The Contracting States shall accord to refugees lawfully staying in their territory the most favorable treatment . . . shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programs of labor recruitment or under immigration schemes. . . .”<sup>12</sup></p> | Angola, Austria, Botswana, Chile, Denmark, Ethiopia, Honduras, Iran, Ireland, Jamaica, Latvia, Malawi, Mexico, Mozambique, Moldova, Norway, Papua New Guinea, Sierra-Leone, Zambia, Zimbabwe. <sup>13</sup> |
| <p><b>Article 24: <u>Labor Legislation and Social Security</u></b><br/>           “The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters; remuneration, social security, maintenance of acquired rights, public funds, etc. . . .”<sup>14</sup></p>                                                                                                                                           | Canada, Egypt, Estonia, Honduras, Iran, Jamaica, Latvia, Malawi, Monaco, Moldova, New Zealand, Poland, Timor-Leste, United Kingdom of Great Britain and Northern Ireland, Zimbabwe. <sup>15</sup>           |
| <p><b>Article 26: <u>Freedom of Movement</u></b><br/>           “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.”<sup>16</sup></p>                                                                                                                                                                         | Angola, Botswana, Honduras, Iran, Latvia, Malawi, Mexico, Mozambique, Namibia, Netherlands, Papua New Guinea, Rwanda, Sudan, Zambia, Zimbabwe. <sup>17</sup>                                                |

<sup>9</sup> António Guterres. *2010 Dialogue on Protection Gaps and Responses*. Speech of High Commissioner for Refugees António Guterres, Palais des Nations, Geneva: UN High Commissioner for Refugees, 2010: 1-10.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> “Convention Relating to the Status of Refugees,” <http://www2.ohchr.org/english/law/refugees.htm>, (accessed April 22, 2011); (hereinafter “Convention Relating to the Status of Refugees”)

<sup>13</sup> United Nations Treaty Convention. “Convention Relating to the Status of Refugees.” [http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg\\_no=V%7E2&chapter=5&Temp=mtdsg2&lang=en](http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V%7E2&chapter=5&Temp=mtdsg2&lang=en) (accessed April 22, 2011); (hereinafter referred to as “Convention Relating to the Status of Refugees”).

<sup>14</sup> “Convention Relating to the Status of Refugees:” supra note 12.

<sup>15</sup> “Convention Relating to the Status of Refugees:” supra note 13.

<sup>16</sup> “Convention Relating to the Status of Refugees:” supra note 12.

<sup>17</sup> “Convention Relating to the Status of Refugees:” supra note 13.

Another major problem relates to statelessness, which is addressed in two conventions; the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961).<sup>18</sup>

There are an estimated 12 million stateless people worldwide; of them, 6.6 million are registered by UNHCR.<sup>19</sup> States are the entities responsible for granting nationality and are the ones who need to be at the forefront of efforts to reduce it. As of April 20, 2011, only thirty-seven states had ratified the 1961 Convention, and many of them have attached declarations; only two have attached reservations.<sup>20</sup> The two countries which made them, Niger and Tunisia, have attached reservations to article 11, concerning the establishment of a body responsible for assisting in the presentation of claims to obtain nationality to the appropriate authorities, and article 14, dealing with the settlement of disputes of interpretation and application by submitting them to the International Court of Justice.<sup>21</sup> In addition, Niger has attached reservations to article 15 which provides for the application of the Convention to “all non-self-governing, trust, colonial and other nonmetropolitan territories for the international relations of which any Contracting State is responsible.” Nevertheless, the key priority here is for more states to sign and ratify the convention in order to buttress the international legal framework and reduce the problem of statelessness.

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<sup>18</sup> United Nations. *Convention on the Reduction of Statelessness: 1961*. Treaty Series, New York: United Nations Publication, 1961.

<sup>19</sup> UNHCR. *The UN Refugee Agency*, supra note 3.

<sup>20</sup> Convention on the Reduction of Statelessness. August 30, 1961: 1-5 (accessed April 20, 2011).

<sup>21</sup> Ibid.

| 1961 Convention on the Reduction of Statelessness                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Countries with reservations, as of April 2011                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>Article 11</b></p> <p>The Contracting States shall promote the establishment within the framework of the United Nations, as soon as may be after the deposit of the sixth instrument of ratification or accession, of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.<sup>22</sup></p> <p>And</p> <p><b>Article 14</b></p> <p>Any dispute between Contracting States concerning the interpretation or application of this Convention which cannot be settled by other means shall be submitted to the International Court of Justice at the request of any one of the parties to the dispute.<sup>23</sup></p> | <p>Niger has attached reservations to articles 11 and 14.<sup>24</sup></p> <p>Tunisia: [The Government of Tunisia] declares that it does not consider itself bound by the provisions of article 11 concerning the establishment of a body responsible for assisting in the presentation of claims to obtain nationality to the appropriate authorities, or of article 14, which provides for the competence of the International Court of Justice to rule on disputes concerning the interpretation or application of the Convention.<sup>25</sup></p> |
| <p><b>Article 15 (excerpt)</b></p> <p>This Convention shall apply in all non-self-governing, trust, colonial and other nonmetropolitan territories for the international relations of which any Contracting State is responsible; the Contracting State concerned shall, subject to the provisions of paragraph 2 of this article, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which the Convention shall apply ipso facto as a result of such signature, ratification or accession.<sup>26</sup></p>                                                                                                                                                                            | <p>Niger has attached reservations to article 15.<sup>27</sup></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

<sup>22</sup> UNHCR, "Convention on the Reduction of Statelessness." <http://www.unhcr.org/3bbb286d8.html> (accessed April 22, 2011); (hereinafter referred to as "Convention on the Reduction of Statelessness")

<sup>23</sup> "Convention on the Reduction of Statelessness." Ibid.

<sup>24</sup> United Nations Treaty Convention. "Refugees and Stateless Persons." [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-4&chapter=5&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en) (accessed April 22, 2011).

<sup>25</sup> Ibid.

<sup>26</sup> "Convention on the Reduction of Statelessness." supra note 22.

<sup>27</sup> "Refugees and Stateless Persons," supra, note 24.

## Asylum and Refugee Protection in the Context of Counter-Terrorism

The global campaign against terrorism has impacted the institution of asylum and refugee protection. Measures adopted by states either on their own initiative, at the regional level, or in response to the requirements of United Nations Security Council Resolution (UNSCR) 1373,<sup>28</sup> as well as those of subsequent resolutions, have generated serious concerns about the intersections between the protection regime and counter-terrorist policies and practices. While UNSCR 1373 called upon member states to take into consideration international human rights standards when adopting counter-terrorist measures, it also called upon them to ensure “that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts.”<sup>29</sup> To be sure, there was nothing legally questionable about such a call since all member states have an obligation (1) to ensure that their actions are consistent with the principles and purposes of the organization (United Nations), which include adherence to human rights; (2) to guarantee that humanitarian institutions such as that of asylum are not abused; and (3) to protect those individuals who are forced to leave their countries for reasons of persecution and other forms of violence, that often include situations resulting from acts of terrorism. The problem was that many states placed emphasis on the latter (potential abuse of asylum) at the expense of the former (adherence to human rights standards) through the prism of questionable legislative and administrative initiatives.

What has contributed to this development (though by no means the only factor involved here) is the lack of consensus on a definition of terrorism. This lack has allowed states to provide their own definitions of terrorism and engage in practices which often violate fundamental tenets, as well as basic procedural guarantees, of human rights law and criminal law. For example, definitions that associate terrorism with “any use of force or violence or any threat or intimidation to which the perpetrator resorts in order to ... prevent or impede the public authorities in the performance of their work” are so broad that they can include legitimate demonstrations and other forms of protest.<sup>30</sup> In this context, concerns about the dangers posed by terrorist mobility and the exigencies of offering protection to those fleeing for reasons of persecution intersect in complex and often subversive, of international protection standards, ways.

UNHCR has expressed its concerns over these developments. While recognizing that “international terrorism poses unprecedented threats and challenges” and indicating its full support for “all legitimate efforts to secure national security and the safety of all,” it has stressed the importance of the affirmation and valorization of the asylum and refugee protection system, even when the aforementioned efforts “receive the priority they call

<sup>28</sup> United Nations Security Council Resolution 1373, S/RES/2001, 28 September 2001, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

<sup>29</sup> *Ibid*, para. 3(g).

<sup>30</sup> George Andreopoulos, “United Nations Counterterrorist Strategies and Human Rights,” in George Andreopoulos, Rosemary Barberet and James Levine (eds.), *International Criminal Justice. Critical Perspectives and New Challenges*. Springer, 2010: 157.

for.”<sup>31</sup> This concern has been reinforced by the Special Rapporteur (SR) on the promotion and protection of human rights and fundamental freedoms while countering terrorism in a report which addressed the challenges that are posed to refugee protection by counter-terrorism measures.<sup>32</sup> In that report, the SR identified some of the key issue areas in which counter-terrorism measures may adversely impact on the international protection regime, as well as on the right to seek and receive asylum. These include: pre-entry apprehension and screening measures; application of the principle of non-refoulement; detention of asylum seekers and immigrants; repatriation or resettlement of detainees in terrorism-related cases; and the global responsibility for the international protection regime.<sup>33</sup>

While this is a complex issue, it is imperative to emphasize here certain important points which are reflective of states’ obligations under international law, and in particular under international human rights law, international humanitarian law and refugee law (needless to say, the list is by no means exhaustive): (1) the need to stem the tendency to stereotype and stigmatize refugees as security risks (presumption of guilt and guilt by association violate fundamental precepts of international human rights law and criminal law, including, first and foremost, the presumption of innocence); (2) the need to acknowledge that there are already available instruments within the refugee regime, which “can yield strong dividends for national safety and security, including in the context of counter terrorism.”<sup>34</sup> These are: (a) refugee status determination; (b) the principle of exclusion from refugee status; and (c) a comprehensive system of refugee management;<sup>35</sup> and (3) and related to the previous one, the need to respect asylum seekers’ access to the territory in which they seek asylum, and permit them access to all the rights that they are entitled to “in the determination and disposal of their claims to refugee status.”<sup>36</sup>

Last, but not least, it is instructive to recall that all states have an obligation under the United Nations Charter “to take joint and separate action in cooperation with the Organization”<sup>37</sup> for the achievement of the organization’s purposes which includes “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>38</sup>

## **Climate/ Environmental Change and Displacement**

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<sup>31</sup> George Okoth-Obbo, “Preserving the Institution of Asylum and Refugee Protection in the context of Counter-Terrorism: the Problem of Terrorist Mobility,” Keynote Speech at the 5<sup>th</sup> Special Meeting of the United Nations Counter Terrorism Committee with International, Regional and Sub Regional Organizations, Nairobi, Kenya, 28-31 October 2007 (on file with the Center for International Human Rights).

<sup>32</sup> United Nations General Assembly. Protection of human rights and fundamental freedoms while countering terrorism, A/62/263, 15 August 2007.

<sup>33</sup> Ibid.

<sup>34</sup> Okoth-Obbo, supra note 31.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Article 56 of the United Nations Charter.

<sup>38</sup> Article 55 of the United Nations Charter.

One of the main protection gaps relates to addressing the needs of populations displaced as a result of climate change and environmental impacts. The Refugee Convention does not include any provisions for such factors; yet, such displacement is increasingly acknowledged as a critical issue area that will need to be addressed because of the proliferation of phenomena associated with the slow on-set effects of climate change.

There is no commonly agreed upon definition for people who are displaced because of climate or environmental change. A key reason for this is that “there is no monocausal relationship between climate change and displacement.”<sup>39</sup> According to one analyst who surveyed the relevant literature, “environmental factors rarely act alone and they cannot be easily disentangled from the rest of the factors and processes leading to migration.”<sup>40</sup> Another reason focuses on a continuum of processes, related to environmental factors, that involves both voluntary and forced movement; such a continuum complicates the task of defining those in need of protection.<sup>41</sup> While aware of these constraints, the International Organization for Migration (IOM) has proposed a working definition that could form the basis for an ongoing discussion of the challenges posed by such displacement:

- \*persons or groups of persons who, predominantly for reasons of sudden or
- \*progressive changes in the environment that adversely affects their lives or living
- \*conditions, are obliged to leave their habitual homes, or choose to do so, either
- \*temporarily or permanently, and who move either within their country or abroad.<sup>42</sup>

Understanding the link between climate change and how it can force migration is paramount. On its first Assessment Report in 1990, the Inter-Governmental Panel on Climate Change (the scientific body of the United Nations Environment Program) stated that perhaps “the greatest effect of climate change on society could be human migration.”<sup>43</sup>

The International Organization on Migration points out that the estimated number of environmental migrants by 2050 could be as high as 200 million people. For densely populated countries, such as Bangladesh, this is a growing threat. Mass migration for some

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<sup>39</sup> Office of the United Nations High Commissioner for Refugees, “Forced Displacement in the Context of Climate Change: Challenges for States Under International Law;” Paper submitted to the 6<sup>th</sup> session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA 6) from 1 until 12 June in Bonn. 20 May 2009 (hereinafter, Forced Displacement in the Context of Climate Change).

<sup>40</sup> Susana B. Adamo, “Environmentally Induced Population Displacements,” <http://www.ciesin.columbia.edu/documents/envirioninduced-s.adamo-IHDPupdate-2009.pdf>.

<sup>41</sup> *Protecting environmentally displaced people. Developing the capacity of legal and normative frameworks.* Research report. Refugee Studies Centre. University of Oxford. February 2011: 11.

<sup>42</sup> International Organization for Migration (IOM). “Migration, Climate Change and the Environment”. Policy Brief (2009), 1-9, Note # 2, <http://www.iom.int/jahia/Jahia/policy-research/migration-policy/policy-briefs/cache/offonce/>. (accessed April 18, 2011) (hereinafter, I.O.M, Policy Brief, 2009).

<sup>43</sup> Ibid.

countries will be inevitable.<sup>44</sup> Below is an estimate that includes some key countries and areas:

| REGION                              | PEOPLE (million) |
|-------------------------------------|------------------|
| China                               | 30               |
| India                               | 30               |
| Bangladesh                          | 15               |
| Egypt                               | 14               |
| Other delta areas and coastal zones | 10               |
| Island states                       | 1                |
| Agriculturally dislocated areas     | 50               |
| <b>Total</b>                        | <b>150</b>       |

<sup>45</sup>

A key contributing factor in environmentally induced migration is land degradation. The long-term deterioration of land occurs due to various factors, including: “extreme weather conditions particularly drought, and human activities that pollute or degrade the quality of soils and land utility negatively affecting food production, livelihoods and the production and provision of other ecosystem goods and services.”<sup>46</sup> “Degradation caused by overcultivation, overgrazing, deforestation and inefficient irrigation affects an estimated 20% of the world’s dry lands, an area as large as China.”<sup>47</sup>

Desertification is one result of land degradation in arid, semi-arid and dry sub-humid areas. “Each year 12 million hectares are lost to deserts.”<sup>48</sup> Some of the effects are irreversible since desertification leads to completely unproductive regions. A study published in 2010 suggested that 38% percent of the world’s arid regions are vulnerable to desertification. The scientific methodology used in this study is called Life Cycle Assessment (LCA) which “analyses the environmental impact of human activities and which now includes indicators on desertification.” Among the main causes for human-induced soil degradation the study

<sup>44</sup> Ibid.

<sup>45</sup> Norman Myers, “Environmental Refugees in a globally warmed world.” American Institute of Biological Sciences. *Bioscience*, v. 43 (11), 1993: 1-11.

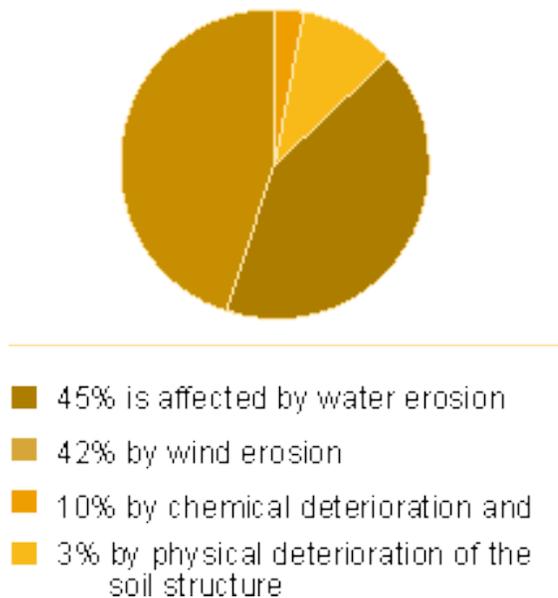
<sup>46</sup> World Health Organization (W.H.O.). “Land degradation and desertification: Climate Change and Human Health.” (Last Updated: 2011). <http://www.who.int/globalchange/ecosystems/desert/en/index.html>. (accessed April 16, 2011). (Note #4: hereinafter: WHO, “Land degradation and desertification.”)

<sup>47</sup> GEF-IFAD Partnership. “Tackling Land Degradation and Desertification.” (2002): 1-9. [http://www.ifad.org/events/wssd/gef/gef\\_ifad.htm#1](http://www.ifad.org/events/wssd/gef/gef_ifad.htm#1) (accessed April 16, 2011).

<sup>48</sup> Ibid.

considers are: water erosion, unsustainable land use, chemical deterioration and physical deterioration of the soil structure.<sup>49</sup>

The International Fund for Agricultural Development estimates that approximately 1,035 million hectares are affected by human activity. The following pie chart illustrates what forms of degradation will affect these hectares:<sup>50</sup>



<sup>49</sup> Núñez et al. "Assessing potential desertification environmental impact in life cycle assessment: Part 1: Methodological aspects," *The International Journal of Life Cycle Assessment*, 2010; 15(1): 67 DOI, <http://www.springerlink.com/content/u7mj4x087324t7p6/>. (accessed April 18, 2011).

<sup>50</sup> Tackling Land Degradation and Desertification; supra note 47.

While there are no international instruments dealing specifically with the rights of persons displaced by climatic or environmental factors, there are some international hard, as well as soft, law instruments which can offer guidance in addressing protection gaps. However, even in the case of hard law instruments, there are two caveats to be borne in mind: (1) not all countries have signed and ratified these instruments which means that, unless they have become part of customary international law, they are not binding on those who have not adopted them; and (2) even in situations where these instruments are applicable, their implementation leaves a lot to be desired.

Despite these qualifications, there are several sources which could be of assistance here. These would include: (1) the Universal Declaration of Human Rights and the core international human rights treaties; (2) regional human rights treaties; (3) instruments relating to indigenous peoples' rights; and (4) the Guiding Principles on Internal Displacement.

- Universal Human Rights instruments are relevant because they affirm that, irrespective of status, all people are entitled to certain fundamental rights that include the right to life and security of person, movement, food, shelter, and health. The Universal Declaration of Human Rights (1948), the Convention on the Elimination of all Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1981), and the Convention on the Rights of the Child (1989) reaffirm these rights. If, for example, environmental conditions place the right to life or to adequate housing at risk (actual or imminent), then international human rights law could constitute the basis for protection claims.<sup>51</sup>
- Regional human rights instruments are also important here, especially as a result of the evolving case law of their monitoring organs. For example, the European Court of Human Rights, in the *Budayeva and others v. Russia* case, ruled that the Russian authorities, by not implementing land-planning and emergency relief policies against the likelihood of a large scale mudslide in the hazardous area of Tyrnauz, have failed to provide effective deterrence against a threat to the right to life; as a result, the said authorities violated article 2 of the European Convention on Human Rights and Fundamental Freedoms.<sup>52</sup> In another case relating to the impact of the activities of the Nigerian National Petroleum Company operating in Ogoniland (in a consortium with Shell Petroleum Development Corporation), the African Commission on Human and Peoples' Rights found the Federal Republic of Nigeria in violation of, among other provisions, article 24 of the African Charter on Human and Peoples' Rights. Article 24 refers to the peoples' right to a "general

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<sup>51</sup> *Protecting environmentally displaced people*, supra note 41, at 17.

<sup>52</sup> European Court of Human Rights, *Budayeva and others v. Russia*, Judgment of March 20, 2008; <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/e4ca7ef017f8c045c1256849004787f5/9d5b59904fdc5060c125740f00366820?OpenDocument>; and *ibid*, at 17.

satisfactory environment favorable to their development.” In its ruling, the African Commission issued a direct appeal to the government of the Federal Republic of Nigeria “to ensure protection of the environment, health and livelihood of the people of Ogoniland.”<sup>53</sup>

- On the issue of indigenous peoples’ rights, some assistance might be provided by the International Labour Organization’s Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, and the 2007 UN Declaration on the Rights of Indigenous Peoples. None of these instruments (the former is a hard law, while the latter is a soft law instrument) directly addresses protection in cases of displacement.<sup>54</sup> However, the ILO Convention provides that member states shall adopt special measures “as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.”<sup>55</sup> In addition, the 2007 Declaration provides that indigenous peoples have “the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”<sup>56</sup> If these rights are violated and those affected cannot seek redress in their home country, then their protection could become a legitimate issue of international concern.
- Last, but not least, the Guiding Principles on Internal Displacement can offer protection for environmentally displaced persons. Though a soft law instrument, the Guiding Principles are drawn from international human rights, international humanitarian law and refugee law instruments. The Guiding Principles are designed to offer protection to all “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”<sup>57</sup>

In conclusion, while there are many hard and soft law sources that can offer guidance both in legitimizing international concern for the plight of environmentally displaced persons, and in addressing its consequences, there is a need for a comprehensive normative framework to fill the existing protection gap.

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<sup>53</sup> African Commission on Human and Peoples’ Rights, Communication 155/96. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria*; 30th Ordinary Session, 13<sup>th</sup> to 27<sup>th</sup> October 2001.

<sup>54</sup> *Protecting environmentally displaced people*, supra note 41, at 18.

<sup>55</sup> Article 4 (1), Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169); <http://www1.umn.edu/humanrts/instree/r1c1tp.htm> (accessed April 22, 2011); and *ibid.*

<sup>56</sup> Article 29 (1), United Nations Declaration on the Rights of Indigenous Peoples; <http://www.un.org/esa/socdev/unpfii/en/drip.html> (accessed April 22, 2011); and *Protecting environmentally displaced people*, supra note 41, at 18.

<sup>57</sup> Guiding Principles on Internal Displacement; <http://reliefweb.int/sites/reliefweb.int/files/resources/AB752ABEA5C1EFFCC1256C33002A8510-idp.html> (accessed April 22, 2011); and *ibid.*, at 21.

## Temporary Protected Status (TPS)

In the 1990s, Temporary Protection Status (TPS) emerged as a new legal mechanism to fill some of the protection gaps under international law. It has provided a safe haven for those who have not been given protection under the 1951 Convention Relating to the Status of Refugees. Specifically, TPS has helped “. . . persons fleeing, or unable to return to, countries affected by disasters.”<sup>58</sup> UNHCR has acknowledged, however, that the 1951 Convention can still provide the legal framework for protection responses in such situations where individualized asylum mechanisms may not be appropriate; and that, over time, persons initially granted temporary protection must not be denied access to asylum procedures during the post-emergency phase. Since the ratification of the 1951 Convention, some regional mechanisms have been developed which expand on the protections offered to refugees. For example, the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration in Latin America offer more comprehensive definitions of the term refugee.<sup>59</sup> Under the OAU Convention the term refugee applies “to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country or origin or nationality”.<sup>60</sup> Those people that fall under these conventions may be offered more formal protection even though they may not meet the definition of refugee under the 1951 Convention.

UNHCR has identified temporary protection as a short-term emergency response to situations that fall outside the refugee regime (i.e. persons fleeing a natural disaster).<sup>61</sup> It has also called on governments to offer temporary protection on a case-by-case basis depending on the nature of the situation at hand and the response capacity of states. Today, the practice of TPS by States has been used to good effect for victims of environmental disasters. With rising displacement associated with environmental stress factors, TPS has served as a means to provide international protection across borders. The responsibility of neighboring and more distant States to receive the displaced has been reflected in state practice of temporary relief models for addressing the protection needs of displaced persons.<sup>62</sup>

Among the few State practice models that reflect such thinking of protection are the *U.S.* and *Nordic Models*. Despite the differences in forms of governance that these

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<sup>58</sup> Forced Displacement in the Context of Climate Change, supra note 39.

<sup>59</sup> “Convention governing the Specific Aspects of Refugee Problems in Africa,” [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Refugee\\_Convention.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf) (accessed April 14, 2011).

“Cartagena Declaration on Refugees, Colloquium of the International Protection of Refugees in Central America, Mexico and Panama,” (accessed April 14, 2011).

<sup>60</sup> Ibid.

<sup>61</sup> Forced Displacement in the Context of Climate Change, supra note 39.

<sup>62</sup> Ibid.

models originate from, both examples serve to provide some form of protection based on human rights law. The *U.S. Model* of temporary protection first designates a country TPS before an individual is allowed to receive TPS status. The U.S. Secretary of Homeland Security may designate a country TPS under the following conditions: (1) ongoing armed conflict (civil war); (2) environmental disaster; and (3) other extraordinary conditions.<sup>63</sup> If a state becomes a designated country, an individual can be granted TPS status under the following conditions: (1) s/he is eligible for employment authorization document (EAD) to work in the U.S.; (2) s/he cannot be detained by department of homeland security; (3) s/he is not removable from the U.S.; and (4) s/he can apply for travel authorization.<sup>64</sup> TPS can be issued for 6-18 months; however, a TPS recipient can apply to extend their time for TPS, if conditions do not change in the designated country. An alternative to TPS recipients having to return home on their own after TPS expires is to utilize voluntary repatriation assistance from international organizations, such as UNHCR.<sup>65</sup> UNHCR has coordinated repatriation assistance for Cambodians, Afghans, and other nationalities. Other international organizations that have programs on repatriation assistance are: the US Agency for International Development—which provides support for infrastructure and development projects for non-governmental organizations, and the International Organization for Migration (IOM).<sup>66</sup>

The current U.S. system of TPS designation raises the following concern: What are the criteria used to determine a designated country? The U.S. Immigration and Nationality Act establishes criteria for granting TPS to individuals, but not specific criteria to decide what countries qualify and should receive TPS. There have been several countries that seem to qualify for TPS under the standards set by the Immigration and Nationality Act, but have not been put on the list of designated countries. Two examples are Burundi and Angola for political and ethnic violence; in 1993, between October and November, 50,000 Burundians were killed and about one million were uprooted from their homes; in Angola, 100,000 people died since civil war broke out in October 1992 between the government and UNITA.<sup>67</sup> Other countries, not designated for TPS that have experienced widespread and/or systematic human rights violations, include Haiti and Guatemala during the 1980s.

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<sup>63</sup> “Temporary Protected Status,” last modified February 24, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=848f7f2ef0745210VgnVCM100000082ca60aRCRD&vgnnextchannel=848f7f2ef0745210VgnVCM100000082ca60aRCRD> (hereinafter “Temporary Protected Status”).

<sup>64</sup> “Temporary Protected Status:” Ibid.

<sup>65</sup> “Voluntary Repatriation: International Protection,” UNHCR, <http://www.unhcr.org/publ/PUBL/3bfe68d32.pdf> (accessed April 14, 2011).

<sup>66</sup> Bill Frelick and Barbara Kohnen, “Fill the Gap: Temporary Protection Status,” *Journal of Refugee Studies*, Vol. 8, No. 4 (1995): 354.

<sup>67</sup> Ibid: 345.

| <b>Current U.S. TPS Designated Countries:</b> | <b>Expiration Date:</b> |
|-----------------------------------------------|-------------------------|
| 1. Haiti                                      | July 22, 2011           |
| 2. Sudan                                      | November 2, 2011        |
| 3. Honduras                                   | January 5, 2012         |
| 4. Nicaragua                                  | January 5, 2012         |
| 5. Somalia                                    | September 17, 2012      |
| 6. El Salvador                                | March 9, 2012           |

Source: U.S Citizenship and Immigration Services (USCIS), 2011<sup>68</sup>

The *Nordic Model*--which refers to the socioeconomic paradigms of the Nordic countries (Denmark, Greenland, Iceland, Norway, Sweden, and Finland), offers protection to foreign nationals who cannot return safely to their home country. The Swedish Aliens Acts [Chapter 4, Section 2] states that "an individual who is unable to return to the country of origin because of an environmental disaster" is a person in need of protection.<sup>69</sup> Similarly, Finland extends protection to foreign nationals who cannot return safely to their homeland because of environmental disasters. The emphasis of the Finnish Aliens Act is on ensuring internal relocation and international humanitarian aid to environmental calamity victims, while Denmark has granted asylum to single women and families with young children where living conditions are difficult due to famine and drought.<sup>70</sup> Norway has proposed a new Aliens Act to recognize the need for granting temporary residence permits to stateless refugees affected by natural disaster.<sup>71</sup>

Given the existing gaps in refugee law, the latter practical models serve as a possible tool to enhance protection. Although not every government has a "specific model" towards ensuring protection, effective implementation of protection is an international obligation. The EU, for example, launched appropriate burden-sharing initiatives during the wars in the former Yugoslavia in the 1990's. During that crisis, Bosnians remained the largest population of temporarily protected people in Europe; Germany held most of the population of Bosnians compared to all other EU member states at that time.<sup>72</sup> This crisis led to new regimes of temporary protection being developed in host States and related government legislation.

The EU's most recent initiative of the European asylum system is known as the

<sup>68</sup> "Temporary Protected Status," supra note 63.

<sup>69</sup> "Aliens Act," last modified April 30, 2010, <http://www.sweden.gov.se/sb/d/5805/a/66122>.

<sup>70</sup> "Aliens Act", <http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf> (accessed March 10, 2011).

<sup>71</sup> Forced Displacement in the Context of Climate Change, supra note 39.

<sup>72</sup> Richard Black, Khalid Koser and Martha Walsh, "Temporary Protection and the Assisted Return of Refugees from the European Union." *International Journal of Refugee Law*, Vol. 10, No. 4 (1998): 447.

*Temporary Protection Directive*.<sup>73</sup> UNHCR has welcomed this new major step towards the treatment of refugees arriving in mass influx and in need of protection.<sup>74</sup> It also welcomes the incorporation of a number of basic protection principles in the Directive, such as the reunification of separated family members.<sup>75</sup> More importantly, this initiative provides basic standards of protection and serves to affirm the essential role of Member States in addressing the problems posed by mass influx situations.

It is important to understand that the temporary regime, despite all legislative initiatives adopted by Member States, deviates from the stated goal of providing durable solutions for displaced persons. The obvious question here is “what happens next?” Former High Commissioner for Refugees, Mrs. Sadako Ogata, has stated “. . . the termination of temporary protection arrangements or the prospect of it should be combined with flexible and humanitarian return arrangements and the availability of at least provisional, adequate accommodation upon return”.<sup>76</sup> While temporary solutions do provide a certain relief, effective protection can only be guaranteed through long-term/sustainable solutions.

## Conclusion

The commemoration of the 60<sup>th</sup> anniversary of the Refugee Convention and the 50<sup>th</sup> anniversary of the Convention on the Reduction of Statelessness offers a unique opportunity to renew the international community’s commitment to the protection needs of displaced people. As this brief and rather selective survey indicates, such a commitment has to confront a plethora of ongoing, as well as new challenges. As the High Commissioner for Refugees has noted, what is urgently needed in this context is a reaffirmation of the core principles of international protection, as well as the forging of a new protection dynamic.<sup>77</sup>

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<sup>73</sup> “UNHCR Annotated Comments on Council Directive 2001/55/EC of July 20, 2001,” <http://www.unhcr.org/refworld/docid/3ecdeebc4.html> (accessed March 10, 2011).

<sup>74</sup> “UNHCR Welcomes EU Agreement on Temporary Protection”, UNHCR, June 1, 2001, [http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b17a0b24&query=UNHCR welcomes EU agreement on temporary protection](http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b17a0b24&query=UNHCR%20welcomes%20EU%20agreement%20on%20temporary%20protection) (accessed March 12, 2011).

<sup>75</sup> Ibid.

<sup>76</sup> “Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, at the Humanitarian Issues Working Group of the International Conference on former Yugoslavia,” UNHCR, January 16, 1996, <http://www.unhcr.org/print/3ae68fbb8.html> (accessed March 10, 2011).

<sup>77</sup> Speech of the High Commissioner for Refugees Antonio Guterres. *2010 Dialogue on Protection Gaps and Responses*. Palais des Nations, Geneva, 8 December 2010.

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