

## COMMENT

### THE STATE RESPONSIBILITY IN THE FACE OF ENVIRONMENTALLY DISPLACED PERSONS

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#### I. INTRODUCTION

In 1951, a diplomatic conference in Geneva adopted and ratified the Convention Relating to the Status of Refugees (“Refugee Convention”), which was later amended by the 1967 Protocol Relating to the Status of Refugees.<sup>1</sup> Article 1 of the Refugee Convention protects individuals who are unwilling or unable to avail themselves of the protection of their country of nationality because of a “well-founded fear” based upon race, religion, nationality, political opinion, or membership in a particular social group.<sup>2</sup> While the drafters of the Refugee Convention added the expansive “membership of a particular social group”<sup>3</sup> language, the ultimate grounds for refugee protection still remain quite narrow.<sup>4</sup> This narrow definition is due in part to the concern regarding the rising number of asylum seekers, but the definition essentially survives because states insist refugee status be based on one of the five grounds.<sup>5</sup> As a result, many individuals displaced by

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1. Convention Relating to the Status of Refugees, Apr. 22, 1954, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention], *available at* <http://www.unhcr.org/3b66c2aa10.html>; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, *available at* <http://www.unhcr.org/3b66c2aa10.html>.

2. Refugee Convention, *supra* note 1, at art. 1(A)(2).

3. *Id.*

4. T. Alexander Aleinikoff, *The Meaning of ‘Persecution’ in United States Asylum Law*, 3 INT’L J. REFUGEE L. 5, 5 (1991).

5. *Id.*

climate change are not entitled to a protected status under the Refugee Convention despite being labeled as “climate change refugees.”<sup>6</sup>

Because trans-boundary, environmentally displaced persons (“TEDP”) fail to meet the requirements of the Refugee Convention, scholars agree that there is a “protection gap” for those environmentally displaced across borders.<sup>7</sup> In contrast, individuals internally displaced by environmental causes are entitled to protection under the Guiding Principles on Internal Displacement.<sup>8</sup> Thus, environmentally displaced persons face a significant difference in protection and treatment, depending on the extent of their displacement. This discrepancy creates a heavy burden on the international community, specifically those host states that receive TEDP. Host states have extremely limited guidance regarding the protection to offer TEDP. The main form of protection comes from international human rights law,<sup>9</sup> which has its own set of drawbacks.<sup>10</sup> Therefore, the lack of an internationally recognized form of protection for TEDP and the inconsistent forms of protection for those internally displaced by environmental causes only add to the confusion in determining the appropriate measure of state responsibility.

This Comment highlights the discrepancies in international law regarding environmentally displaced persons and discusses the implications of such discrepancies on state

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6. JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 41, 44 (2012). *See generally* U.N. High Comm’r for Refugees, *Rep. on the Relationship Between Climate Change and Human Rights*, UN Doc. A/HRC/10/61 (Jan. 15, 2009) (explaining the role of human rights law as it relates to displaced persons due to climate change). Common reasons for excluding environmentally displaced people from refugee status include failure to satisfy the persecution requirement, the harm is not directly caused by a State, and a hesitance to expand refugee protection. *See id.*

7. ROGER ZETTER, PROTECTING ENVIRONMENTALLY DISPLACED PEOPLE: DEVELOPING THE CAPACITY OF LEGAL AND NORMATIVE FRAMEWORK 15 (2011); *cf.* Alexander Betts, *Towards a ‘Soft Law’ Framework for the Protection of Vulnerable Irregular Migrants*, 22 INT’L J. REFUGEE L. 209, 214 (2010) (explaining that states have also “expressed broad consensus on the need for [the U.N. High Commissioner for Refugees] to highlight and advise on existing protection gaps in the context of migration”).

8. Representative of the Secretary-General, *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add. 2 (Feb. 11, 1998).

9. ZETTER, *supra* note 7, at 5.

10. For instance, one drawback of international rights law is whether or not the treaty is self-executing. For a qualitative analysis of the effectiveness of human rights law, see Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

responsibility. Part II explores the current protection system under international law for TEDP and examines state responsibilities toward TEDP. Part III describes the extent of protection to which states are required to offer to internally displaced persons, focusing on the standards set forth in the Guiding Principles on Internal Displacement. Part III also examines the degree of state responsibility for both the environmentally distressed state and the surrounding states. Part IV analyzes the problems and confusions this fractional system creates, specifically in terms of state responsibility and obligations towards environmentally displaced persons. Part V concludes with recommendations for streamlining international law with the creation of a convention granting special protections to all environmentally displaced persons.

## II. INTERNATIONALLY DISPLACED PERSONS

Most TEDP fall into a “protection gap” because those individuals are neither refugees nor are they internally displaced persons.<sup>11</sup> Instead, the only forms of protection for TEDP are the conventions against statelessness<sup>12</sup> or complementary or temporary protection.<sup>13</sup> Ratified in 1954, the Convention Relating to the Status of Stateless Persons sets forth the legal framework for stateless persons who are not classified as refugees to be granted protection.<sup>14</sup> In order for the conventions against statelessness to apply, the origin state of the TEDP must be a party to one of the conventions, and the origin state must have become “extinct.”<sup>15</sup> If the origin state’s territory has been entirely submerged or completely destroyed, then the origin state has lost its defined territory and subsequently loses one of the four criteria for statehood under the Montevideo Convention on the Rights and

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11. ZETTER, *supra* note 7, at 4–5.

12. *See generally* Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175; Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117.

13. ZETTER, *supra* note 7, at 9.

14. *Objectives and Key Provisions of the 1954 Convention Relating to the Status of Stateless Persons*, U.N. HIGH COMM’R FOR REFUGEES, (Oct. 1, 2001), <http://www.unhcr.org/3bd7d3394.html>.

15. Shaina Stahl, Note, *Unprotected Ground: The Plight of Vanishing Island Nations*, 23 N.Y. INT’L L. REV. 1, 19 (2010) (citing Convention on the Reduction of Statelessness, *supra* note 12, at art. 7).

Duties of States (“Montevideo Convention”),<sup>16</sup> which is recognized as customary international law.<sup>17</sup> Because the Montevideo criteria are intimately linked, several scholars argue that a failure to satisfy one criterion usually results in a failure to satisfy a majority of the Montevideo criteria.<sup>18</sup> If the international community decides to extinguish the origin state’s statehood, the international community would then consider all those TEDP stateless because they cease to have a nationality.<sup>19</sup>

The origin state, however, has the opportunity to ratify one of the two statelessness conventions in order to ensure that those TEDP retain a nationality and the accompanying protections.<sup>20</sup> Under the Convention Relating to the Status of Stateless Persons, there are several provisions outlining the protections granted to stateless persons and the responsibilities and obligations for the host state.<sup>21</sup> The convention defines a stateless person as “a person who is not considered as a national by any state under the operation of its law.”<sup>22</sup> While it requires stateless persons to conform to the laws of and maintain order in the host state,<sup>23</sup> the convention also places requirements on the host state. Under Article 3, the host state must apply the provisions of the convention without discrimination with regards to race, religion, or country of origin.<sup>24</sup> The convention affords stateless persons the same treatment as aliens generally in the same circumstances,<sup>25</sup> access to the host state’s courts,<sup>26</sup> the right to wage-earning

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16. Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S.  
19. The three other criteria of the Montevideo Convention include a permanent population, a government, and the capacity to enter into relations with other states. *Id.*

17. Jane McAdam, *‘Disappearing States’, Statelessness and the Boundaries of International Law* (Univ. of New South Wales Law Research Paper No. 2010-2, 2010); Rosemary Rayfuse & Emily Crawford, *Climate Change, Sovereignty and Statehood* (Univ. of Sydney Law Sch. Legal Studies Research Paper No. 11/59, 2011).

18. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 70 (7th ed. 2008); NII LANTE WALLACE-BRUCE, *CLAIMS TO STATEHOOD IN INTERNATIONAL LAW* 53 (1994); Thomas Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 418 (1998).

19. Stahl, *supra* note 15, at 19.

20. *Id.*

21. Convention Relating to the Status of Stateless Persons, *supra* note 12.

22. *Id.* at art. 1.

23. *Id.* at art. 2.

24. *Id.* at art. 3.

25. *Id.* at art. 7, 13.

26. *Id.* at art. 16.

employment,<sup>27</sup> and access to welfare through rationing and public education.<sup>28</sup> These provisions of the convention further the goal of aiding in the assimilation of stateless persons.<sup>29</sup>

The United Nations Convention on the Reduction of Statelessness also focuses on the avoidance of statelessness.<sup>30</sup> This convention allows for the acquisition of nationality for stateless persons who have a link with the host state through birth or descent and addresses the mechanisms for nationality retention and transfer of territory.<sup>31</sup> It prohibits a state from depriving “a person of his nationality if such deprivation would render him stateless.”<sup>32</sup> Articles 1 to 4 delineate the circumstances under which the host state has an obligation to grant nationality at birth,<sup>33</sup> and Articles 8 and 9 govern when the host state is prohibited from depriving an individual of its nationality.<sup>34</sup> Specifically, Article 8 explicitly forbids a host state from depriving “a person of its nationality if such deprivation would render him stateless” subject to extenuating circumstances.<sup>35</sup> Further, Article 9 restricts host states from depriving an individual of nationality on racial, ethnic, religious, or political grounds, thereby placing an obligation on the host state.<sup>36</sup>

However, only seventy-nine states are parties to the Convention Relating to the Status of Stateless Persons and fifty-five states are parties to the Convention on the Reduction of Statelessness.<sup>37</sup> This means that relatively few states have ensured protection for their nationals and that most individuals facing

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27. *Id.* at art. 17.

28. *Id.* at art. 20–24.

29. *Objectives and Key Provisions of the 1954 Convention Relating to the Status of Stateless Persons*, *supra* note 14.

30. *Objectives and Key Provisions of the 1961 Convention on the Reduction of Statelessness*, UNHCR, U.N. HIGH COMM’R FOR REFUGEES, (Oct. 1, 2001), <http://www.unhcr.org/3bd7d3914.html>.

31. *Id.*

32. Stahl, *supra* note 15, at 19 (citing Convention on the Reduction of Statelessness, *supra* note 12, at art. 7).

33. Convention on the Reduction of Statelessness, *supra* note 12, at art. 1–4.

34. *Id.* at art. 8–9.

35. *Id.* at art. 8. These circumstances include the loss of nationality resulting from residence abroad for a term greater than seven years and instances where the nationality has been acquired through misrepresentation or fraud. *Id.*

36. *Id.* at art. 9.

37. *UN Conventions on Statelessness: Key for Protecting the Stateless*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/pages/4a2535c3d.html> (last visited Feb. 28, 2014).

trans-boundary environmental displacement will not be entitled to the protections offered by the statelessness conventions. As a result, a majority of TEDP must find security through complementary or temporary protection.<sup>38</sup>

Complementary protection is granted to individuals who fall outside of the definition of refugee set by the Refugee Convention and its accompanying Protocol.<sup>39</sup> This form of protection is based on an “expanded” view of the principle of non-refoulement and, therefore, prohibits host states from returning individuals to their homeland if they face a foreseeable risk of harm.<sup>40</sup> Courts have determined foreseeable harm to include torture and cruel, inhuman, and degrading treatment or punishment.<sup>41</sup> However, in order to succeed, the TEDP must prove that there are substantial grounds of a real risk based on reasonable and objective evidence.<sup>42</sup> Courts have used Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”)<sup>43</sup> and Articles 6 and 7 of the International Covenant on Civil and Political Rights (“ICCPR”)<sup>44</sup> to determine if the appropriate level of harm necessary to invoke the principle of non-refoulement has been met.<sup>45</sup> Therefore, if the court determines that the level of harm is substantial, non-refoulement is upheld.<sup>46</sup>

For instance, in *Soering v. United Kingdom*,<sup>47</sup> the European Court of Human Rights determined that extraditing a German national suspected of killing a Virginia resident to the United

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38. See ZETTER, *supra* note 7, at 19, 22.

39. *Id.* at 19.

40. *Id.*

41. *Id.* at 19–20.

42. *Agiza v. Sweden*, Decision Communication No. 233/2003, at 30, 34, U.N. Doc. CAT/C/34/D/233/2003 (2005).

43. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

44. International Covenant on Civil and Political Rights, art. 6–7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

45. ZETTER, *supra* note 7, at 20; see also *Hirsi Jamaa v. Italy*, App. No. 27765/09 Eur. Ct. H.R. (2012), available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4f4507942&skip=0&query=Hirsi%20jamaa;Soering v. United Kingdom>, 11 Eur. Ct. H.R. (ser. A) (1989), available at <http://www.unhcr.org/refworld/docid/3ae6b6fec.html>.

46. *Agiza*, Decision Communication No. 233/2003, *supra* note 42, at 36.

47. *Soering*, 11 Eur. Ct. H.R. at 439.

States, where the national would face capital punishment, violated Article 3 of the Torture Convention,<sup>48</sup> which states that “No State Party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>49</sup> The court found that sending an individual to face a highly probable death row sentence would produce the death row phenomenon—an intense emotional distress felt by death row inmates.<sup>50</sup> The *Soering* court looked at several factors to determine whether the death row phenomenon violated Article 3 of the Torture Convention. These factors included the length of detention prior to execution, conditions on death row, Soering’s age and mental condition, and the possibility of Soering’s extradition to his native Germany.<sup>51</sup> Ultimately, the court held that Soering faced a “real risk” of treatment violating the threshold set by Article 3 of the Torture Convention.<sup>52</sup>

Because it only ensures that the host state will not transfer displaced persons to a place where they face a foreseeable risk, complementary protection can only provide an extremely limited amount of protection to TEDP. It fails to provide TEDP with additional rights inside the host country,<sup>53</sup> and it only places one obligation on the host—to not send displaced persons to locations where they will likely be subjected to persecution or cruel and inhuman treatment.<sup>54</sup> Therefore, while customary international law and treaty law require states to grant complementary protection,<sup>55</sup> complementary protection ultimately places little burden and responsibility on the host state to care for TEDP.

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48. *Id.* at 478.

49. Torture Convention, *supra* note 43, at art. 3.

50. *Soering*, 11 Eur. Ct. H.R. at 478.

51. *Id.*

52. *Id.*

53. Although there are no specialized rights within the host State for displaced persons, under international human rights law, individuals are guaranteed basic, fundamental rights regardless of their status. ZETTER, *supra* note 7. However, some of these rights can be derogated in times of emergency and several rights outlined in the International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993, U.N.T.S. 3 [hereinafter ICESCR], are merely aspirational. *Id.*

54. U.N. Executive Committee High Comm’r for Refugees, *Providing International Protection Including Through Complementary Forms of Protection*, EC/55/SC/CRP.16 (June 2, 2005).

55. *Id.*

Similar to complementary protection, temporary protection is also given to those individuals who fall outside the parameters of the 1951 Refugee Convention and its corresponding 1967 Protocol.<sup>56</sup> Specifically, temporary protection is given as an administrative measure of the host state until an individual examination is carried out to determine whether certain persons meet the host state's immigration requirements or until the state recognizes the group as a whole as a class of refugees.<sup>57</sup> Further, temporary protection differs from complementary protection in that it is a precursor to protection under the Refugee Convention and Protocol, not an alternative.<sup>58</sup> While states have the discretion to create the appropriate level of protection that they see fit for such situations, states are still bound by the standards of the Refugee Convention and Protocol and cannot contract away other human rights obligations.<sup>59</sup>

There are several examples of states creating regional temporary protection schemes that expand the definition of refugee for that specific state or region. These include the Organization of African Unity,<sup>60</sup> several countries in Central America,<sup>61</sup> the European Union,<sup>62</sup> Sweden, Finland,<sup>63</sup> and the United States.<sup>64</sup> In the Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Refugee Convention"), Article 1 expands the definition of refugee to include:

[E]very person who, owing to external aggression, occupation, foreign domination or *events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek

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56. ZETTER, *supra* note 7, at 19.

57. *Temporary Protection*, REFUGEE LAW READER, (Feb. 2, 2012), [http://www.en.refugelawreader.org/index.php?option=com\\_content&view=article&id=178&Itemid=149](http://www.en.refugelawreader.org/index.php?option=com_content&view=article&id=178&Itemid=149).

58. *Id.*

59. *Id.*

60. *See, e.g.*, Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter OAU Refugee Convention].

61. *See, e.g.*, Cartagena Declaration on Refugees, adopted by Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 22, 1984 [hereinafter Cartagena Declaration].

62. Stahl, *supra* note 15, at 26–27.

63. ZETTER, *supra* note 7, at 22.

64. MCADAM, *supra* note 6, at 104–05.

refuge in another place outside his country of origin or nationality.<sup>65</sup>

Central America has also adopted broad language in its definition of refugees to include “persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflict, massive violations of human rights, or other circumstances which have seriously disturbed public order.”<sup>66</sup> While this broad language does help make temporary protection more inclusive, other states and regions are taking their temporary protection scheme one step further and specifically providing protection and asylum for those displaced because of environmental causes. The European Union extended its protection to environmentally displaced people with the implementation of two directives,<sup>67</sup> and Sweden and Finland have adopted similar national protection measures.<sup>68</sup> Lastly, the United States in its Immigration Act of 1990 added temporary protection status to those TEDP.<sup>69</sup>

The United Nations High Commissioner for Refugees (“UNHCR”) discusses temporary protection in terms of statelessness and state responsibility, but the UNHCR executive committee mainly frames temporary protection as a vehicle for full protection under the Refugee Convention.<sup>70</sup> While the best situation would allow TEDP to qualify as refugees under international law, this is not always the case, and the executive committee report only encourages states to create a temporary protection scheme as an afterthought.<sup>71</sup> In subsections (e) and (f), the executive committee calls on states to apply the Refugee and Statelessness Conventions in good faith and to maximize the

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65. OAU Refugee Convention, *supra* note 60, at art. 1(2) (emphasis added).

66. Cartagena Declaration, *supra* note 61, at art. III(3).

67. See Council Directive 2001/55, 2001 O.J. (L 212) (EC) (discussing the temporary protection directive); Council Directive 2004/83, 2004 O.J. (EC).

68. ZETTER, *supra* note 7, at 22. The Swedish Aliens Act 2005 gives temporary protection to any “individual who is unable to return to the country of origin because of an environmental disaster.” *Id.* (quoting Swedish Aliens Act 2005 ([SFS] 2005:716)).

69. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

70. U.N. Exec. Comm. High Comm’r for Refugees, *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, No. 103 (LVI) 2005 (Oct. 7, 2005).

71. *Id.*

protection granted under these instruments.<sup>72</sup> This policy should be encouraged, but these pleas appear misplaced in a report primarily on protection “Through Complementary Forms.”<sup>73</sup> Only in subsection (g) and below does the executive committee first promote the use of complementary protection, calling complementary protection a “positive way of responding pragmatically to certain international protection needs.”<sup>74</sup> The executive committee does request states to create temporary protection schemes that provide a high degree of stability and certainty to ensure human rights.<sup>75</sup> The report ends with a reminder to states that temporary protection should help fill the “protection gaps” in which many displaced persons fall.<sup>76</sup>

TEDP are also entitled to protection under international human rights law, because everyone, regardless of refugee status, is entitled to fundamental human rights.<sup>77</sup> Under international law, aliens are afforded a minimum standard of treatment,<sup>78</sup> and the International Court of Justice (“ICJ”) found that the prevention of inhuman and degrading treatment constitutes a principle of customary international law.<sup>79</sup> Moreover, the ICJ noted that a prohibition on such treatment is binding on states under all circumstances.<sup>80</sup> Thus, while states have the sovereign right to control who enters their territory, they cannot invoke national law as an excuse for deviations from international treaty standards.<sup>81</sup> In particular, the basic human rights include the right to life, health, food, shelter, and movement.<sup>82</sup>

In international human rights law, the three main conventions are the 1948 Universal Declaration of Human

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. ZETTER, *supra* note 7, at 16.

78. See Report of the Int’l Law Comm’n, Draft Articles on the Expulsion of Aliens, July 5, 2012, U.N. Doc. A/67/10; GAOR, 67th Sess., Supp. No. 10. (2012) [hereinafter Draft Articles on Expulsion]. Broad interpretations contend that there exists an international minimum standard of treatment for aliens while narrow interpretations argue that the minimum standard prevents misconduct of the State’s treatment of aliens.

79. Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem Rep. Congo), 2010 I.C.J. 639 (Nov. 30).

80. *Id.*

81. Draft Articles on Expulsion, *supra* note 78.

82. ZETTER, *supra* note 7, at 16.

Rights,<sup>83</sup> the ICCPR,<sup>84</sup> and the 1966 International Covenant on Economic, Social and Cultural Rights (“ICESCR”),<sup>85</sup> which are known collectively as the international bill of rights.<sup>86</sup> Within these documents, the right to life reigns supreme and requires “a risk that is actual or imminent.”<sup>87</sup> Articles 3 and 25 of the Universal Declaration of Human Rights and Article 6 of the ICCPR both proclaim that everyone is entitled to the right to life and an adequate standard of living.<sup>88</sup> However, an adequate standard of living is subject to a state’s available resources and takes into account biological and socio-economic preconditions, which can allow a host State to provide poor standards of living to TEDP without repercussions.<sup>89</sup> Another right espoused in the international bill of rights is the right to work.<sup>90</sup>

However, the problems with the ICCPR and the ICESCR include whether the host state has ratified the convention, the lack of enforcement mechanisms, and specifically with the ICESCR, its aspirational character. If the convention has not been ratified, then the United Nations or other states cannot hold the state to those rights.<sup>91</sup> Therefore, if the host state violates one of the rights in the ICCPR or the ICESCR, the origin state cannot bring a claim against the host state for any human rights violations suffered by the TEDP. This plight is also interconnected with the problem regarding enforcement mechanisms for human rights violations. Human rights law continually faces an enforcement problem. The main enforcement mechanism comes in the form of reciprocity, but this is not always successful. Thus, even if the origin state wants to bring suit against the host state for a human rights violation at

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83. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1<sup>st</sup> plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

84. ICCPR, *supra* note 44.

85. ICESCR, *supra* note 53, at art. 6–7.

86. Derrick Howard, *Twenty-First Century Slavery: Reconciling Diplomatic Immunity and the Rule of Law in the Obama Era*, 3 ALA. C.R. & C.L. L. REV. 121, 131 (2012).

87. Justice Susan Glazebrook, *Human Rights and the Environment*, 40 VICTORIA U. WELLINGTON L. REV. 293, 314 (2009); *see also* ZETTER, *supra* note 7, at 17.

88. Universal Declaration of Human Rights, *supra* note 83, at art. 3 (“Everyone has the right to life, liberty and security of person.”); *id.* at art. 25 (“Everyone has the right to a standard of living adequate for the health and well-being of himself . . . .”); ICCPR, *supra* note 44, at art. 6 (“Every human being has the inherent right to life.”).

89. U.N. Comm. on Econ. Soc. & Cultural Rights, *CESCR General Comment No. 14*, Aug. 11, 2000, U.N. Doc. E/C.12/2000/4; GAOR, 22d Sess. (2000).

90. ICESCR, *supra* note 53.

91. ZETTER, *supra* note 7, at 4–5.

the ICJ, the court has no enforcement mechanism to ensure that its judgment is enforced. The last problem facing TEDP is the aspiration quality of the ICESCR, meaning that those rights are not fully guaranteed in every circumstance. While these human rights instruments help ensure some form of protection for TEDP, these shortcomings illustrate the “protection gap” facing many TEDP who seek asylum in a host state that has not ratified the ICCPR and the ICESCR.

### III. INTERNALLY DISPLACED PEOPLE

Most people displaced because of environmental causes will relocate within their country of origin.<sup>92</sup> Therefore, the Guiding Principles are an invaluable set of international legal norms, instructing states on the appropriate level of protection to offer its internally displaced citizens.<sup>93</sup> In 1998, Francis Deng, the Representative to the UN Secretary-General on internally displaced persons, presented the Guiding Principles to the Commission on Human Rights.<sup>94</sup> The Guiding Principles are based on international human rights law, international humanitarian law, and international refugee law,<sup>95</sup> but they go beyond a restatement of the law by providing “a fully-fledged framework for identifying protection needs and for planning, implementing and monitoring protection activities.”<sup>96</sup>

The Guiding Principles define internally displaced people as “persons or groups of persons who have been forced or obliged to flee or leave their homes or habitual places of residence, in particular as a result of or in order to avoid the effects of . . . natural or human-made disasters.”<sup>97</sup> The rights and protections in the Guiding Principles include dignity, the right to participate in the decision regarding displacement, the right to

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92. *Id.* at 21.

93. *Id.*

94. *Global Database: Guiding Principles on Internal Displacement*, BROOKINGS-BERN PROJECT ON INTERNAL DISPLACEMENT, <http://www.idpguidingprinciples.org> (last visited Feb. 28, 2014).

95. ZETTER, *supra* note 7, at 21; Walter Kälin, *The Role of the Guiding Principles on Internal Displacement*, FORCED MIGRATION REVIEW 8, 8 (2005); *Guiding Principles on Internal Displacement*, BROOKINGS-LSE PROJECT ON INTERNAL DISPLACEMENT, <http://www.idpguidingprinciples.org> (last visited Feb. 28, 2014).

96. Kälin, *supra* note 95.

97. *Guiding Principles on Internal Displacement*, *supra* note 8, at 5.

remain together as a family, and the fundamental human rights.<sup>98</sup> One example of the Guiding Principles in action is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“Kampala Convention”), which defines an internally displaced person 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 generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.<sup>99</sup>

The Kampala Convention ensures that state parties will uphold the human rights of the displaced individuals,<sup>100</sup> provide protection to displaced persons,<sup>101</sup> and even institute an early warning system and proactive measures.<sup>102</sup>

However, the Guiding Principles are not binding unless the state has incorporated them domestically.<sup>103</sup> Without the Guiding Principles, the states have no special responsibility to its displaced persons, which has resulted in protection “driven more by personalities and the convictions of individuals on the ground than by an institutional system-wide agenda.”<sup>104</sup> Many countries are either unwilling to protect the rights of its internally displaced people or lack the resources to do so.<sup>105</sup> This is the first burden placed on states. Adding new legislation can be time consuming, and governments have oftentimes adopted the Guiding Principles without fully considering the extent of these legal obligations.<sup>106</sup>

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98. ZETTER, *supra* note 7, at 21. Others, however, believe that the Guiding Principles should provide protection of property and the participation in elections. Kālin, *supra* note 95.

99. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa art. 1, Oct. 23, 2009, 49 I.L.M. 86 (2010).

100. *Id.* at art. 3.

101. *Id.* at art. 5.

102. *Id.* at art. 4.

103. ZETTER, *supra* note 7, at 21.

104. Kālin, *supra* note 95.

105. *Id.*

106. *See id.*

Even after the government decides to add the Guiding Principles to its legislation, the Guiding Principles are written in general language, which can create uncertainty in terms of how those rights should be upheld.<sup>107</sup> The burden on states is still quite new, so the full extent of the responsibilities placed on states remains uncertain.<sup>108</sup>

#### IV. PROBLEMS AND CONFUSIONS

Because the standards for TEDP and internally displaced people are inconsistent, states are forced to carry most of the weight in terms of responsibility and problem solving. The first issue accompanying the inconsistent standards is the creation of the incentive to stay within the country. While most environmentally displaced people will relocate within their origin state,<sup>109</sup> others who are faced with the prospect of trans-boundary migration will most likely chose to remain in the country of origin as long as possible in order to retain rights and protections ensured by the origin state. Because internally displaced people have an internationally agreed upon standard in the form of the Guiding Principles, internally displaced people have more protections that specifically apply to those displaced because of environmental causes.<sup>110</sup> If an origin state domestically incorporates these principles, internally displaced persons can claim and be granted protection under the same base standard. However, if an origin state is faced with trans-boundary migration, then that state must consider the statelessness conventions and the host state must take responsibility for upholding the principle of non-refoulement, the prospect of establishing complementary or temporary protection, and, finally, the protection of TEDP's human rights. Further, TEDP face a more precarious situation since the extent of their protection depends on which conventions the host state has ratified or signed. As a result, internally displaced people are protected by a consistent base standard, likely providing people facing a large-scale environmental disaster

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107. *Id.* at 8–9.

108. *Id.*

109. ZETTER, *supra* note 7, at 21.

110. *See Guiding Principles on Internal Displacement, supra* note 8.

an incentive to remain within the origin state in order to receive more protection.

This line of action also poses problems of its own. Because the inconsistent standards create an incentive to stay within the origin state, the origin state then becomes burdened by the possibility of accommodating displaced individuals while simultaneously dealing with a large-scale environmental disaster. Thus, rights provided for under the Guiding Principles might become compromised due to the emergency situation of the origin state. Several countries now face overcrowding because people want to remain in their country of origin for as long as possible, and as a result, those states are encountering food, water, and housing shortages, placing the state under stress on two fronts.<sup>111</sup> Further, international law has recognized that during times of emergency states are held to a less severe standard regarding rights violations.<sup>112</sup> Ultimately, the inconsistent standards places a larger burden on the state, but less responsibility and accountability in terms of protecting the rights of internally displaced people.

As addressed above, TEDP are placed in an uncertain situation because their level of protection depends on which conventions the host state has ratified.<sup>113</sup> The inconsistent standards between TEDP and internally displaced people produce protections on a situational basis, and this system can become burdensome because this problem faces several countries in the future. For instance, if an origin state is not completely submerged but is technically uninhabitable due to increased water salinization, would it be a violation of the principle of non-refoulement to send TEDP back to that island? If so, what rights are guaranteed to those individuals by the host state? Further, has the origin state signed the statelessness convention and what is the present condition of the host state—economic difficulty, political stability? All of these questions come into play in order to determine whether the host State is upholding its international responsibilities and obligations to TEDP, making it difficult and time consuming to determine whether there has been a violation.

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111. *See, e.g.*, A. v. Australia, Human Rights Committee, No. 560/1993 ¶ 9.4, U.N. Doc. CCPR/C/59/D/560/1993 (1997).

112. M.S.S. v. Belgium and Greece, 2011 Eur. Ct. H.R. (2011).

113. This also determines the host state's level of responsibility.

This extensive analysis only seems more daunting when confronted with the fact that over the next decades, several countries will face this problem. The most notable group of countries facing trans-boundary displacement are those island nations threatened by rising sea levels, and there are several examples of sinking islands facing a large TEDP rate including the Maldives, the Marshall Islands, Tuvalu, and Kiribati.<sup>114</sup> Because the number of TEDP from sinking islands is upwards of 450,000,<sup>115</sup> the current system for guaranteeing rights for TEDP is not, and will not be, an efficient method in the coming decades.

#### V. CONCLUSION

The two standards create confusion and inconsistent treatment for essentially the same type of person—environmentally displaced individuals. Because there is an arbitrary distinction in place, states are faced with a different array of responsibilities; the extent of responsibility is determined on a case-by-case basis. Therefore, in order to avoid this confusion, there should be an international convention combining the rights and responsibilities from the Guiding Principles and applying them to TEDP. In eliminating the trans-boundary requirement, the international community can streamline its responsibilities to apply whenever there are environmentally displaced persons regardless of the extent of the displacement. Once states agree on an international standard, it will be easier and more efficient for states to determine what level of protection their displaced people are entitled to from the host state. In addition, if there is an accusation of a state violating this convention, there will be a clear standard for the ICJ or any other court to take into account. Finally, creating this convention at the earliest possible moment will also be beneficial since many countries face the prospect of internal and trans-boundary displacement. In so doing, the international community can take a proactive approach to this impending crisis, instead of “crossing that bridge when they come

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114. Marcus Stephen, *On Nauru, A Sinking Feeling*, N.Y. TIMES, July. 18, 2011, [http://www.nytimes.com/2011/07/19/opinion/19stephen.html?\\_r=0](http://www.nytimes.com/2011/07/19/opinion/19stephen.html?_r=0).

115. See *Population, Total*, WORLD BANK, <http://www.data.worldbank.org/indicator/SP.POP.TOTL> (last visited Feb 28, 2014).

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to it,” because that bridge might be submerged by the time they do.