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ENVIRONMENTALLY DISPLACED PEOPLE
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ABBREVIATIONS

1. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – **CAT**.
2. European Convention on Human Rights – **ECHR**.
3. European Court of Human Rights – **ECtHR**.
4. Intergovernmental Panel on Climate Change – **IPCC**.
5. International Committee of the Red Cross – **ICRC**.
6. International Covenant on Civil and Political Rights – **ICCPR**.
7. International Organization for Migration – **IOM**.
8. United Nations Framework Convention on Climate Change – **UNFCCC**.
9. United Nations High Commissioner for Refugees – **UNHCR**.
10. United Nations Human Rights Committee – **HRC**.

INTRODUCTION

“Migration – both internal and cross-border – is one of the oldest strategies for dealing with a degradation of environmental conditions.”¹ Over the past two decades the number of recorded natural disasters has doubled from approximately 200 to over 400 per year and this has become “the new normal”.² Natural disasters leave people homeless, cause desertification, water and food shortage. In addition to that, the world has witnessed man-made disasters which caused severe adverse impacts to the environment and triggered enormous levels of pollution, which made water undrinkable, regions of disaster unsuitable for living. For example, Chernobyl and Fukushima disasters are considered as the most severe nuclear accidents which reached maximum level of severity under International Nuclear and Radiological Event Scale.³ After those nuclear disasters thousands of people were displaced since areas became unsuitable for habitation.⁴

Nevertheless, from the perspective of the people affected, there is no real difference if the disaster is natural or man-made one. The effects of both natural and man-made disasters are obvious: people become victims of changes in their environment. They are unable to sustain themselves, with examples such as living on the degraded and deforested land, which is often followed by droughts and desertification. As a consequence, two options are available for these people: they are either forced to migrate within their countries or to cross international borders and seek shelter in foreign states.

On the other hand, options may be limited as dire consequences of natural disasters are not treated equally in different states. State’s ability to react promptly to natural disasters mostly depends on its economic capacity to deal with the consequences of those disasters. It was indicated that vulnerability to disaster mainly depends on social, economic, institutional and ecological conditions in the countries. Conclusion of the research revealed that both Netherlands and Bangladesh are similarly affected by harsh environmental conditions. Nevertheless, people in Netherlands are less vulnerable to environmental disasters than people in Bangladesh.⁵

¹ Assembly debate on 30 January 2009 (9th Sitting) (Doc. 11785, report of the Committee on Migration, Refugees and Population, rapporteur: Mrs Acketoft; Doc. 11814, opinion of the Committee on the Environment, Agriculture and Local and Regional Affairs, rapporteur: Mr Ivanov). Text adopted by the Assembly on 30 January 2009 (9th Sitting). See also Recommendation 1862 (2009);

² John Holmes. Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Opening Remarks at the Dubai International Humanitarian Aid and Development Conference and Exhibition “DIHAD 2008 Conference”, available at www.dihad.org

³ Nuclear Energy Institute. *Fukushima, Chernobyl and the nuclear event scale*. 2011. Available at: <http://www.nei.org/News-Media/News/News-Archives/fukushima-chernobyl-and-the-nuclear-event-scale>

⁴ Constant, Amelie. *International Handbook on the Economics of Migration*. Cheltenham, UK: Edward Elgar Publishing, 2013. p. 311;

⁵ United Nations University Institute for Environment and Human Security. *World Risk Report 2012: Environmental degradation increases disaster risk worldwide*, p.18;

Consequently, it may seem that vulnerability of the state depends on its ability, mainly financial, to neutralize devastating effects of disaster, while the frequency of environmental disasters is a secondary factor. For example, In 2011 Tropical Cyclone Yasi devastated Australia. Many people were left homeless, their possessions were destroyed and damage done to the crops amounted to hundreds of millions Australian dollars. Australian Defense Force immediately launched Operation Yasi Assist. Under the terms of the operation engineers reconstructed damaged roads, personnel was sent to the most affected places etc. Therefore consequences of cyclone were swiftly eliminated. Nonetheless, things were different in 2010 when an earthquake hit Haiti. Almost three million people were affected, thousands died. Unfortunately, very poor government of Haiti was not able to react. Oppositely to the case of Australia, the government of Haiti was forced to rely solely on international support. Thus it is evident that environmental disasters in poor countries have more harsh effects on population.

Another issue is that the status of environmentally displaced people who fled their country of origin is unclear. There is no specific binding international law, which would regulate status of these people. Even the terms, such as “climate refugee”, “environmental refugee”, “ecological refugee”, are created to highlight devastating effects of environment but not to address specific status of those people. Furthermore, those definitions are legally meaningless since those terms are not employed by any international legal document under which those people may be granted certain legal status. Accordingly, people who are forced to migrate because of environmental disasters may expect to be granted international protection under existing legal regulations if they meet the established criteria.

Instrument, which is implemented most frequently, is 1951 Convention relating to the Status of Refugees (hereafter-1951 Geneva Convention). Under the 1951 Geneva Convention people, who left their country of origin because of well-founded fear of persecution because of race, religion, nationality, political opinion or membership to a particular social group and lack of protection of their country, are entitled to refugee status.⁶ Thus the application of the 1951 Geneva Convention is limited only to those who satisfy these criteria. What is more, United Nations High Commissioner for Refugees (hereafter-UNHCR) at numerous times expressed the view that people who are leaving their countries just because of environmental reasons are not entitled to refugee status.

People who do not satisfy criteria for refugee status might receive complementary forms of protection. Complementary protection is granted to people who fall outside from the refugee definition established by 1951 Geneva Convention, but nevertheless, are in need of international

⁶ United Nations General Assembly: *Convention Relating to the Status of Refugees*. United Nations, 28 July 1951, Treaty Series, vol. 189, p. 137. Available at: <http://www.refworld.org/docid/3be01b964.html>

protection. The most advanced legal document, providing protection to people who do not satisfy the criteria for refugee status, but need international protection, is the Qualification Directive of the European Union (Hereafter-Qualification directive).⁷ Unfortunately, there is no single binding universal legal instrument regulating complementary protection. Complementary protection stems from the principle of *non-refoulement* and many non-derogable human rights set in human rights instruments such as International Covenant on Civil and Political Rights⁸ (Hereafter-ICCPR), Convention against torture and other cruel, inhuman or degrading treatment or punishment⁹ (Hereafter-CAT), European Convention of Human Rights¹⁰ (Hereafter- ECHR), American Convention on Human Rights¹¹ (Hereafter-American convention), African Charter on Human and Peoples' Rights (Banjul Charter)¹² (Hereafter-Banjul Charter). The obligation of *non-refoulement* stands as a central criterion for the accordance of a complementary protection. While it would be self-evident that, for instance, the prohibition of torture, cruel, inhuman, degrading treatment and the right to life should be upheld at all times towards environmentally displaced people, the extent of other human rights, especially economic, social and cultural rights, is unclear.

Some national legal regulation regarding environmentally displaced people exists. For example, Sweden and Finland grant protection for environmentally displaced people. Under the Swedish Aliens Law someone who “*is unable to return to the country of origin because of an environmental disaster*”¹³ may be granted protection. Quite similarly under Finnish Aliens Act persons who cannot return “*because of an environmental disaster*”¹⁴ are entitled to protection.

For the purposes of this Thesis the term “environmentally displaced people” will be used to describe people who leave their countries of origin because of environmental disaster, which has a severe adverse effect to their lives or living conditions and they cannot avail

⁷ European Union, Council of the European Union: *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*. OJ L 337; December 2011, p. 9-26. Available at: <http://www.refworld.org/docid/4f197df02.html>

⁸ United Nations General Assembly: *International Covenant on Civil and Political Rights*. United Nations, Treaty Series, 16 December 1966, vol. 999, p. 171. Available at: <http://www.refworld.org/docid/3ae6b3aa0.html>

⁹ United Nations General Assembly: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. United Nations, 10 December 1984, Treaty Series, vol. 1465, p. 85. Available at: <http://www.refworld.org/docid/3ae6b3a94.html>

¹⁰ Council of Europe: *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4*. Council of Europe, November 1950, ETS 5. Available at: <http://www.refworld.org/docid/3ae6b3b04.html>

¹¹ Organization of American States (OAS): *American Convention on Human Rights*. Costa Rica, 22 November 1969. Available at: <http://www.refworld.org/docid/3ae6b36510.html>

¹² Organization of African Unity (OAU): *African Charter on Human and Peoples' Rights*. 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58. Available at: <http://www.refworld.org/docid/3ae6b3630.html>

¹³ Sweden: Aliens Act (2005:716). Publication date: 30 April 2010. Chapter 4, Section 2;

¹⁴ Finnish Aliens Act (449/2012) amending the Aliens' Act (301/2004). Section 88;

themselves to the protection of their country of origin because of its incapacity or unwillingness to protect those people from such effects of the environmental disaster. In this Thesis status of people, who are displaced internally due to environmental disasters, will not be analyzed, because the scope of this Thesis is international protection for environmentally displaced people who have left their country of origin. Accordingly, issue of international protection comes into play after person is unwilling or unable to use protection of his own state and is outside of his country of origin.

Thus the topic has significant importance in present society since more and more people are displaced not because of armed conflicts, aggressive acts of governments etc., but because of environmental events. Furthermore, the disparity of applicable legal instruments create a legal uncertainty, which leads to a situation where a group of vulnerable people, who cannot avail themselves to the protection of their country of origin, are accorded far less rights than other vulnerable groups, such as people fleeing armed conflicts.

The problems analyzed in this Thesis are: firstly, there is no specific international legal regulation regarding environmentally displaced people. Secondly, existing legal regulation of international protection usually does not include people leaving their homeland due to environmental events. Furthermore, it is analyzed if infringement of socio-economic rights may give rise to the obligation of *non-refoulement*.

The objective of this Thesis is to unfold the rights of environmentally displaced people under existing legal mechanisms. For the achievement of this objective, the Author set the following tasks:

1. To clarify the plurality of definitions, which are used to define people migrating because of environmental disaster.
2. To analyze different types of environmental disasters, which may cause displacement.
3. To analyze the application of the 1951 Geneva Convention towards environmentally displaced people.
4. To analyze and compare existing forms of complementary protection.
5. To analyze if infringement of socio-economic rights may be a ground for granting complementary form of protection.
6. To analyze if mass displacement of environmentally displaced people may influence adoption of a new legal regulation, which specifically provides protection for those people.

The novelty of the Thesis and overview of existing literature. The novelty of this Thesis is that problematic issues of environmentally displaced people are analyzed in multidimensional way. Firstly, relationship between refugee law and environmentally displaced

people, situations when environmentally displaced people might fall under the refugee definition are analyzed. What is more, it is examined if environmentally displaced people could benefit from regional, national asylum regimes and protection under human rights instruments. Last, but not least, the principle of *non-refoulement* is extensively analyzed to clarify whether violation of socio-economic rights in the country of origin could give rise to the obligation of *non-refoulement*.

In this Thesis works of many international scholars such as Jane McAdam¹⁵, Walter Kälin¹⁶, Roberta Cohen¹⁷, Michael Cooper¹⁸, Étienne Piguet, Antoine Pécoud¹⁹, Norman Mayers²⁰ will be analyzed along with the publications of the most authoritative international institutions in the field of asylum and migration, such as UNHCR, International Organization for Migration (Hereafter-IOM) and International Committee of the Red Cross.

Hypothesis:

1. Environmentally displaced people may not benefit from 1951 Geneva Convention if environmental impacts are the sole reason for migration and may be accorded refugee status only if they are persecuted in a country of origin because of Conventional reasons.
2. Environmentally displaced people should be accorded protection under the principle of *non-refoulement*.

The structure of the Thesis. The first chapter is dedicated to factual circumstances and therefore the content of the term “environmentally displaced people”, the effects of climate change on the state and people, and proposals to deal with this problem are analyzed. The position of environmentally displaced people within the framework of 1951 Geneva Convention is analyzed in the second chapter. Analysis of possible international protection for environmentally displaced people under human rights law is presented in the third chapter.

Methodology. In this Thesis the Author used analytical method for studying legal literature, case law and comparative method to compare the approach taken by scholars as well as for determining differences among positions of States and their practice. Historical method was used to give an overview of historical attempts to address the problem of environmental migration. The systemic and logical methods were used in assessing the legal status of

¹⁵ McAdam, Jane. *Climate change, forced migration, and international law*. Oxford: Oxford University Press, 2012.

¹⁶ Walter Kälin. *Climate change induced displacement-a challenge for international law*. Distinguished lecture series -3, March 2011, Mahanirban Calcutta Research Group, p. 5;

¹⁷ Cohen, Roberta, and Megan Bradley. *Disasters and displacement: gaps in protection*. 2010.

¹⁸ Migration and Disaster-Induced Displacement: European Policy, Practice, and Perspective - Working Paper 308. 2012.

¹⁹ Piguet, Etienne. *Migration and climate change*. Paris: UNESCO Pub. 2011.

²⁰ Norman Mayers, Jennifer Kent. *Environmental exodus. An emergent crisis in the global arena*. Washington DC: Project of Climate Institute. 1995.

environmentally displaced people. Sociological method was used to evaluate the actual approach of states towards environmentally displaced people. Lastly, the method of generalization was used for formulating conclusions.

ENVIRONMENTAL MIGRATION

*“The search for better land, milder climate and easier conditions of living starts many a movement of people which, in view of their purpose, necessarily leads them into an environment sharply contrasted to their original habitat”.*²¹ Geographer Ellen Churchill Semple made this remark in the early 20th century highlighting migration-environment nexus. Many years ago tribal people looked for areas where the most animals and water were. The most influential factor for food and water sources was the environment. Accordingly, people migrated to the environment most suitable for their habitation.²²

Despite all early insights, it was just recently that the nexus of migration and environment was taken into account.²³ Étienne Piguet and Antoine Pécoud believe that the lack of attention towards environmental migration was because it was assumed that due to technological progress the environment did not have a substantial effect on people. Furthermore, it was believed that people mainly migrate because of economic and political reasons.²⁴ However, everything changed when disturbing predictions about millions of people leaving their homelands because of environmental disasters were made. In 1985 El-Hinnawi, addressing the nexus of environment and migration, made an alarming prognosis that millions of people are going to be displaced because of environmental events.²⁵ Few years later the same conclusion was introduced by the Intergovernmental Panel on Climate Change (Hereafter-IPCC), highlighting that *“the gravest effects of climate change may be those on human migration as millions are uprooted by shoreline erosion, coastal flooding, and agricultural disruption”.*²⁶ Later Norman Mayers stated that numbers of “environmental refugees” in 2010 will reach 50 million and in 2050 there will be 150 million environmental migrants. Recently it was estimated that *“one out of every nine people on the planet would likely to be environmental migrant”.*²⁷

Although alarming, these estimations cannot be neither proven nor discarded due to the lack of statistical data. The alarming estimations were met with high criticism from other scholars.²⁸ Concerns were raised about the method, which was employed to reach such far

²¹ Semple, Ellen Churchill, and Friedrich Ratzel. *Influences of geographic environment, on the basis of Ratzel's system of anthropo-geography*. New York: H. Holt and Co., 1911, p.108;

²² Bailey, Rayna. *Immigration and migration*. New York: Facts On File, 2008, p. 10;

²³ Piguet, Etienne. *Migration and climate change*. Paris: UNESCO Pub. ;, 2011, p. 3;

²⁴ *Ibid*, p. 3-4;

²⁵ Hinnawi, Essam E.. *Environmental refugees*. Nairobi, Kenya: United Nations Environment Programme, 1985;

²⁶ Intergovernmental Panel on Climate Change. *Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I*. NY: Cambridge University Press, 1990;

²⁷ Kopnina, Helen. *Environmental anthropology: future directions*. London: Routledge, 2013, p. 190;

²⁸ Morrissey, J. *Environmental Change and Forced Migration: A State of the Art Review*. Oxford: Refugee Studies Centre, University of Oxford, p. 7;

fetching conclusions.²⁹ Yet due to the limited scope of this Thesis the Author will not analyze the credibility of predictions further.

Nevertheless, it must be taken into account that movement triggered by environmental events is happening. From a legal point of view environmental displacement could easily be described as a phenomenon. None of the applicable legal instruments were drafted to include environmental issues. But before turning to the legal regulation it is necessary to analyze the factual circumstances surrounding environmental displacement. Thus the first subchapter is dedicated to a lack of a common agreed definition. In the second subchapter overview on different types of disasters and the different amounts of damage they cause is provided. In the third subchapter it is analyzed if it is possible to determine whether a person is leaving his country of origin because of environmental disaster or are there more reasons, which may force this person to migrate. The attempts to solve the problem by combating pollution and proposals to extend the refugee definition of the 1951 Geneva Convention are analyzed in the third chapter.

1.1 Definition

In 1948 the term “ecological refugee” was mentioned for the first time.³⁰ William Vogt in his book “Road to survival” emphasized the importance of natural resources and that lack of them will create numerous ecological refugees. Since then numerous terms were employed to describe people who leave their homelands because of environmental disasters. For instance, in a 1985 report for the United Nations Environment Programme, El-Hinnawi had employed the term “environmental refugee” as a means of describing people who are *“forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life”*.³¹ Later Norman Myers defined environmental refugees as *“persons who can no longer gain a secure livelihood in their traditional homelands because of environmental factors of unusual scope, notably drought, desertification, deforestation, soil erosion, water shortages and climate change, also natural disasters such as cyclones, storm surges and floods. In face of these environmental threats, people feel they have no alternative but to seek sustenance elsewhere, whether within their own countries or beyond and weather on a semi-permanent of permanent basis”*.³²

²⁹ Black, R. *Environmental Refugees: Myth or Reality*. New issues in Refugee Research, Working Paper No. 34, 2001, p. 2;

³⁰ William Vogt, *Road to Survival*. William Sloane Associates, New York, 1948), p.15;

³¹ Hinnawi, Essam E.. *Environmental refugees*. Nairobi, Kenya: United Nations Environment Programme, 1985;

³² Norman Mayers, Jennifer Kent. *Environmental exodus. An emergent crisis in the global arena*. Project of Climate Institute, Washington DC, 1995, p. 3;

Though, these terms were never adopted and were heavily criticized. UNHCR stated that the usage of terms, such as climate or environmental refugees, should be avoided since they are misleading and inaccurate.³³ The problem with these terms is that legally they are deceptive since the term refugee is used to describe a person who satisfies criteria established by the 1951 Geneva Convention. Terms such as “climate refugee”, “environmental refugee” and definitions of those terms have no connection to 1951 Geneva Convention. Therefore in legal context usage of these terms is legally inaccurate because of incorrect application of legal term “refugee”.

On the other hand, terms, which are neutral and describe factual situation of people forced to leave their countries because of environmental disasters, are more suitable. United Nations University’s Institute for Environment and Human Security put yet another term of a “forced environmental migrant” and defined it as somebody “*who has to leave his/her place of normal residence because of an environmental stress. As opposed to an environmentally motivated migrant who is a person who ‘may’ decide to move because of an environmental stressor*”.³⁴ IOM employed another definition: “*persons or groups of persons who, for reasons of sudden or progressive change 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*”.³⁵ IOM proposed this term as an alternative to “environmental refugees”, a term that, as UNHCR has stressed, has no legal grounding in international refugee law. According to IOM, this definition of this term acknowledges that environmentally motivated movement or displacement can be either internal or international; moreover, such definition further recognizes that environmentally induced migration can be either short-term or long-term.³⁶ Furthermore, the IOM noted that this working definition “*encompasses people who are displaced by natural disasters as well as those who choose to move because of deteriorating conditions*”.³⁷ While limiting its scope primarily to natural disasters, the working definition set by the IOM, by this date, is the most comprehensive definition, even though it has never been adopted by any other international actor, except for IOM itself.

Nonetheless, the Author of this Thesis notes that the definition employed by the IOM is a factual one. It is not tied to any legal regulation due to its broad scope as people who are in no

³³ United Nations High Commissioner for Refugees. *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*. 23 October 2008, p. 7, available at: <http://www.refworld.org/docid/492bb6b92.html>

³⁴ Renaud Fabrice. Environmental degradation and migration, <http://www.rsc.ox.ac.uk/publications/policy-briefings/RSCPBI-Environment.pdf>

³⁵ Refugee Studies Centre. *Protecting environmentally displaced people: Developing the capacity of legal and normative frameworks*. February 2011, available at: <http://www.refworld.org/docid/4da579792.html>

³⁶ International Organization for Migration. *Discussion note: Migration and environment*. 2007 November 1 available at: http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/94/MC_INF_288.pdf

³⁷ *Ibid.*

need of protection are automatically included. For example, if an Australian citizen after a disaster resettles in another part of Australia, according to IOM, such a person is an environmentally displaced person. Furthermore, people who leave their place of residence because of man-made environmental disaster would not fall under the IOM definition.

The Author of this Thesis rejects the definition of IOM for the assessment of international protection due to its detachment from any legal regulation. Moreover, IOM explained that people who migrate because of “*natural disasters as well as those who choose to move because of deteriorating conditions*” fall under the definition employed by IOM. It does not seem that people who migrate because of man-made environmental disasters are included. Another important aspect is that people may be granted international protection only in case if state of origin is not capable or unwilling to protect people within its jurisdiction, which is not highlighted in IOM definition. Author of this Thesis contends that role of the state should be stressed. If protection of state is left beside in the definition, it may not be used for evaluating the need of international protection. The reason for that is that environmental events occur all over the world but most of the states are capable to mitigate the damage, which was caused. In case if a state is not capable or unwilling to protect person from adverse effects, which were caused by environmental event, person may need some form of international protection. Therefore the mere fact that environmental event occurred in person’s country of origin does not entitle him to international protection.

Thus given the lack of common agreed legal definition for environmentally displaced people, the Author of this Thesis proposes the following definition of environmentally displaced people: “People who leave their countries of origin because of environmental disaster, which has a severe adverse effect to their lives or living conditions, and they cannot avail themselves to the protection of their country of origin because of its incapacity or unwillingness to protect those people from such effects of the environmental disaster”. The sole aim of this definition is to tie the factual circumstances of environmentally displaced people to the well-established rules of human rights, such as right to life, prohibition of cruel, inhuman and degrading treatment, which serves as a basis for complementary protection in the majority of states. Therefore four major adjustments were integrated into the IOM definition: firstly, the requirement of state’s incapacity or unwillingness to protect; secondly, severity of adverse effects, which would amount to the infringement of basic human rights; thirdly, the requirement that person would be outside his country of origin was included; fourthly, under this definition there is no difference if person leaves his country of origin because of natural or man-made disaster.

1.2 Environmental disasters causing movement

Most of the literature on environmental disasters classifies them into sudden-onset and slow-onset disasters. Disasters differ from each other by their nature and consequences. For instance, hurricanes start very suddenly and it is nearly impossible to know in advance when it will strike. On the other hand, in case of droughts people start noticing that rain occurs less often, land starts getting dry, vegetables and crops stop growing. It may take weeks, months or even years till drought will cause such adverse effects as starvation, while in case of hurricanes it may take just a few minutes to destroy everything in its path, starting with crops and ending with houses. Accordingly, it is obvious that there is a difference between those two types of disasters.

To start with, droughts, climate change, rising sea levels, environmental degradation and desertification are considered as slow-onset disasters. *“While they may be distinct from rapid-onset extreme weather events, slow-onset disasters can cause catastrophic disruption to society, the economy and the environment of one or more countries”*.³⁸ Slow-onset disasters mainly cause loss of harvest, shortage of water, which may result in starvation, diseases. *“Many famines in pre-20th-century Africa, Asia and Europe were triggered by natural disasters-drought, extreme cold, pests and diseases-that devastated crops and livestock.”*³⁹ Unfortunately, for present times it is a relevant problem as well. United Nations Development Programme estimated that drought affected lands in sub-Saharan Africa may expand by 60-90 million hectares by 2060.⁴⁰

Slow-onset disasters may be developing for days, weeks, months or even years until they result into dire consequences.⁴¹ In ancient times people used to look for other, more suitable areas to live, after noticing that, for example, drought is coming. Nowadays it may be more complicated because of foreign immigration laws. Accordingly, people have few options: firstly, they may stay in their place of residence; secondly, people can move across the border of a neighboring state and undergo complicated procedures in order to obtain permission to live in a foreign state; finally, they may move illegally and become irregular migrant.

Usually slow-onset disasters affect just a particular region of a state, thus on some occasions internal relocation or state's assistance is a viable alternative. However, a situation when the whole state is affected by a slow-onset environmental disaster must be considered. The

³⁸ UN High Commissioner for Refugees (UNHCR), *Summary of Deliberations on Climate Change and Displacement*, April 2011, paragraph 33, available at: <http://www.refworld.org/docid/4d9f22b32.html>

³⁹ Mannava VK Sivakumar, Raymond P. Motha, Haripada P. Das. *Natural Disasters and Extreme Events in Agriculture- Impacts and Mitigation*. Springer, New York, 2005, p. 6;

⁴⁰ United Nations: *Human Development Report: 2007/2008*, p. 9;

⁴¹ Madan Kumar Jha. *Natural and Anthropogenic Disasters- Vulnerability, Preparedness and Mitigation*. Springer, New York, 2010, p. 4;

best example of such situation is sinking islands. “*Sinking islands phenomenon raise many problems such as extinction of state, relocation of all population.*”⁴² In a conference on climate change, organized by UNHCR, scholars emphasized that movement from “sinking islands” is likely to be slow.⁴³ In 2007 World Bank study revealed that if the sea levels would rise about one meter, that may result in a displacement of about 56 million people.⁴⁴

While the main feature of slow-onset disasters is that they start very slowly and tend to get more severe as time goes by, sudden-onset disasters strike suddenly and destroy everything around in a very short period of time. Earthquakes, tsunamis, cyclones, tornadoes are examples of sudden-onset disasters. They start suddenly, prior notification is non-existent or people become aware of a coming disaster few minutes in advance at best. Damage is done in hours or in a few days.⁴⁵ The affected area, just like in a case of slow-onset disaster, most of the time tends to be regional, but may as well be state-wide.

The Author of this Thesis notes, that while it is easy to assess the damage of sudden onset disasters, the damage done by slow-onset disasters would be dependent solely on the assessment of future prospects. For instance, at the beginning of droughts they may not be severe enough to pose a threat to life, yet at some point in time, if they continue, starvation becomes unavoidable. Thus at the beginning it is impossible objectively assess whether it will reach the point where it will be life-threatening.

1.3 Plurality of reasons to migrate

Environmental disaster, which devastated particular region or country, may seem as a clear and straightforward motive to leave that place. On the other hand, it may be more complicated than it seems from the first sight since the true reason to flee may not be because of a single fact that a particular disaster has struck, but because of the effects of the disaster. Furthermore, it may be that environmental disaster is just one of the reasons, which may influence someone’s decision to migrate. Other factors, such as general situation in a country, unemployment etc. may be influential factors as well.

A comparison, which can help to reveal multiple reasons for migration, can be made with people who are fleeing war. There is never only one reason to leave in such case. A Somali

⁴² John Campbell. *Climate Change and Small Island States– Power, Knowledge and the South Pacific*. Earthscan, London, 2010, p. 75;

⁴³ UN High Commissioner for Refugees (UNHCR), *Summary of Deliberations on Climate Change and Displacement*, April 2011, paragraph 30, available at: <http://www.refworld.org/docid/4d9f22b32.html>

⁴⁴ The World Bank. *The impact of sea level rise on developing countries: a comparative analysis*. World Bank Policy Research Working Paper 4136, February 2007;

⁴⁵ Bimal Kanti Paul. *Environmental Hazards and Disasters– Contexts, Perspectives and Management*. John Wiley and sons, Oxford, 2011, p. 31;

farmer in a Ugandan refugee camp has said that: "since there was the war, we did not receive any support from the government. Therefore, there are combined factors that made us suffer: droughts and war. If war did not exist, then we might have been able to stay, but now that the land is looted, there is no way for us to claim it".⁴⁶ This can be compared with another story, this time from a person who left the sinking nation of Kiribati. In 2013 an interview was made with an asylum-seeker from Kiribati. It was stated in the article that sea walls in Kiribati are broken, there is no sewerage system, villages are overcrowded, water is undrinkable and there is no ground in Kiribati where it would be possible to escape the knee-deep water.⁴⁷ An important point must be made, that despite inhuman conditions of living, some people highlight that they do not want to be granted international protection since word "refugee" is humiliating. For example, Kiribati's President Anote Tong told to Australia's ABC Radio that the people of Kiribati do not want to leave as refugees and prefer to migrate as skilled migrants.⁴⁸ Similarly, Ursula Rakova from the Carteret Islands has stated: "Our plan is one in which we remain as independent and self-sufficient as possible. We wish to maintain our cultural identity and live sustainably wherever we are".⁴⁹

Professor Walter Kälin emphasizes that climate change as such does not cause displacement but effects of it do.⁵⁰ Studies revealed that climate change is not the only reason why people take decision to migrate. It was concluded that decisions to move or to stay are influenced by the overall socio-economic situation of those concerned.⁵¹ According to UNHCR, it is getting more difficult to categorize displaced people because of combination of multiple factors.⁵² The degree to which it can be said that an "increasing number of people are displaced as a direct result of climate change" is therefore controversial.⁵³

It is true that environmental disasters cause such adverse effects as poverty, limited access to basic necessities as health care, damaged infrastructure. Here lies a danger, that if those

⁴⁶ United Nations University Institute for Environment and Human Security. *Climate change, vulnerability and human mobility: perspectives of refugees from the east and horn of Africa*. 2012 June, available at: <http://www.ehs.unu.edu/article/read/climate-change-vulnerability-and-human-mobility>

⁴⁷ News article in news.com.au. 'Climate refugee' from Kiribati says rising sea levels make it too dangerous to return; fights to stay in NZ. 2013, available at: <http://www.news.com.au/world/climate-refugee-from-kiribati-says-rising-sea-levels-make-it-too-dangerous-to-return-fights-to-stay-in-nz/story-fndir2ev-1226731215591>

⁴⁸ Farbotko, C. & Lazrus, H. *The first climate refugees? Contesting global narratives of climate change in Tuvalu*. *Global Environmental Change*. Global Environmental Change Journal, Volume 22, Issue 2, May 2012, p. 382-390

⁴⁹ 2009•06•16 Ursula Rakova Tulele Peisa, Luis Patron and Citty Williams <http://ourworld.unu.edu/en/how-to-guide-for-environmental-refugees/>

⁵⁰ Walter Kälin. *Climate change induced displacement-a challenge for international law*. Distinguished lecture series -3, March 2011, Mahanirban Calcutta Research Group, p. 5;

⁵¹ Ruth Haug. *Forced Migration, Processes of Return and Livelihood Construction among Pastoralists in Northern Sudan*. Disasters, Volume 26 Issue 1, 2002 p. 70;

⁵² Guterres Antonio. *Conflicts fuelled by climate change causing new refugee crisis, warns UN*, The Guardian, June 2008;

⁵³ Williams, Angela. *Turning the Tide: Recognizing Climate Change Refugees in International Law*. Law & Policy Journal, Vol. 30, No 4, October 2008, p. 502-529;

circumstances would be assessed formally and superficially, then there would be very little to separate environmentally displaced people from economic migrants. Economic migrants as well may be forced to leave their countries of origin because of lack of the same basic necessities such as access to medical facilities, education, impossibility to find a job and accordingly, to provide for the family.⁵⁴ For better understanding of this problem a comparison between environmentally displaced people and economic migrants must be made.

Australia and New Zealand are two countries, which faced tremendous challenge to evaluate if people leaving their homelands because of negative environmental impacts may be entitled to international protection. Most of the claims were made by asylum seekers from Kiribati and Tuvalu islands. Despite of the fact that some cases were decided 10 years from each other similarities are self-evident. All Applicants claimed that rising sea levels are making life impossible on the islands.⁵⁵ The main issues raised were that the islands are overpopulated, the rising sea levels result into shortage of fresh water and the land is no longer suitable for growing vegetables. As a consequence, people were no longer capable to sustain themselves. Applicants highlighted that the number of people living on the islands increased, but because of rising sea levels traditional activities, which used to be means of existence, are no longer viable. Accordingly, people suffer severe socio-economic hardships, such as lack of food, water, unemployment, limited access to education and medical facilities.

On the other hand, economic migrants are described as people who decide to leave their countries of origin purely because of economic reasons. Unemployment, lack of social security, poverty is considered as indicator that person left his country of origin because of economic reasons. For example, Lesotho is a least developed state in Africa. People living in Lesotho face poverty, unemployment, illiteracy, do not have access to sanitary facilities.⁵⁶

Therefore similarities between two cases are undeniable. Both environmentally displaced people and economic migrants may face similar problems. Yet those similarities may be found mostly in cases where slow-onset disaster is a reason for migration. As it was noted before, slow-onset disasters influence lack of food and water, poverty etc. Another problem is that while the case of sinking island shows a guaranteed gradual deterioration of living conditions, it is impossible to foresee any turn of events in other types of slow onset disasters,

⁵⁴ United Nations High Commissioner for Refugees: *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para 62. Available at: <http://www.refworld.org/docid/3ae6b3314.html>

⁵⁵ See N96/10806 [1996] RRTA 3195 (7 November 1996); 0907346 [2009] RRTA 1168 (10 December 2009); AF (Kiribati) [2013] NZIPT 800413 (25 June 2013); N95/09386 [1996] RRTA 3191 (7 November 1996); 1004726 [2010] RRTA 845 (30 September 2010); N99/30231 [2000] RRTA 17 (10 January 2000);

⁵⁶ Kingdom of Lesotho. *Poverty Reduction Strategy Paper - Joint Staff Advisory Note*. International Monetary Fund Country Report No. 12/331, 2012, available at: <https://www.imf.org/external/pubs/ft/scr/2012/cr12331.pdf>

such as droughts. Notwithstanding, in the third chapter The Author of this Thesis is arguing that core criterion in assessing the need for international protection lies in the state's incapacity to deal with consequences of the disaster, which is followed by economic failure of the state.

1.4 Proposals for protection to environmentally displaced people

At first environmental migration was understood as a consequence of a widespread pollution and numbers of environmental migrants were used as frightening prognosis to highlight effects of negligence towards environment. Norman Mayers suggested that people should fight pollution and stop harming environment. He believed that the best strategy to cope with adverse environmental impacts is to recognize the problem and “*respond by tackling sources of the problem rather than waiting and paying a higher price through reacting to symptoms of the same problem*“. His main idea was that international community should start dealing with negative environmental impacts immediately because in the future the consequences may be much more severe. By his estimations in 2010 number of environmental refugees should have increased by 25 million. However, Mayers emphasized that those numbers may be much bigger if states do not take any measures to fight adverse effects.⁵⁷ While the accuracy of such prognosis could be contested due to the lack of any statistical data, it became obvious that international community is not willing to do much to stop pollution. Accordingly, it was understood that flows of environmentally displaced people will continue and even grow.

For this reason, some scholars suggested that the most logical option would be to grant protection to environmentally displaced people. The most viable solution for them seemed to modify the sole universal treaty regarding international protection. It was proposed to amend 1951 Geneva Convention and include environmentally displaced people into refugee definition.⁵⁸ However, this proposal was widely criticized. The main argument for that was that states try to avoid responsibilities under 1951 Geneva Convention as they are now, therefore expansion of refugee definition would undermine existing protection because of big flows of environmentally displaced people.⁵⁹ What is more, existing refugee regime is not suitable for environmentally displaced people. Refugee determination procedure is based on individual circumstances of the applicant while in the context of environmental displacement relocation would be *en masse* and environmentally displaced people would not fall under the refugee definition.⁶⁰ The Author of

⁵⁷ Norman Mayers, Jennifer Kent. *Environmental exodus. An emergent crisis in the global arena*. Washington DC: Project of Climate Institute. 1995, p. 3;

⁵⁸ Piguet, Etienne. *Migration and climate change*. Paris: UNESCO Pub. ;, 2011, p. 103;

⁵⁹ Williams, Angela. *Turning the Tide: Recognizing Climate Change Refugees in International Law*. Law & Policy Journal, Vol. 30, No 4, October 2008, p. 505;

⁶⁰ Islam, M. Rafiqul. *An introduction to international refugee law*. Koninklijke Brill, p. 229;

this Thesis notes that it is stated in the paragraph 44 of Handbook on procedures and criteria for determining refugee status under 1951 Geneva Convention and the 1967 Protocol relating to the status of refugees (Hereafter-Handbook) that on some occasions refugee status may be granted to a particular group of people and individual assessment of every single case is not necessary. Though, it may happen just in very unique circumstances when there are big flows of people and situation occurs in “*which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees.*”⁶¹ Therefore in this regard there are exceptions and the notion that refugee determination procedure is based on individual circumstances is by no means absolute. On the other hand, in case of environmental displacement it is clear that these people do not meet criteria established in 1951 Geneva Convention thus they could not be granted refugee status neither individually nor *en masse*.

When attempts to modify 1951 Geneva Convention failed, it was suggested that a new universal treaty should be adopted. Till now the most comprehensive draft of a new convention was prepared by international environmental law specialists at the University of Limoges.⁶² Professors proposed that every person who is forced to leave his country of origin because of environmental disaster must be granted status and accordingly, such rights as right to health care, housing, right to assistance.⁶³

Finally, it was suggested to protect environmentally displaced people through environmental law. It was proposed to amend United Nations Framework Convention on Climate Change (Hereafter-UNFCCC) and include clauses under which protection to environmentally displaced people may be granted. Frank Biermann and Ingrid Boas suggested the most comprehensive idea on protection under UNFCCC. They argued that Protocol on recognition, protection and resettlement of climate refugees to the UNFCCC should be adopted. The reasoning behind that is that this protocol would be interlinked with general measures to mitigate effects of climate change. Furthermore, scholars suggested that a separate fund for „climate refugees” should be established. According to them, UNFCCC sets a duty for member states to assist countries vulnerable to climate change and „*that suggests applying the principle of reimbursement of full incremental costs also to the protection and resettlement of climate refugees at least to those situations where a causal link with climate change is undisputed, namely sea level rise. For other situations in which climate change is only one causal factor to*

⁶¹ United Nations High Commissioner for Refugees: *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para 44. Available at: <http://www.refworld.org/docid/3ae6b3314.html>

⁶² Piguet, Etienne. *Migration and climate change*. Paris: UNESCO Pub. ;, 2011., p. 375;

⁶³ Draft Convention on the international status of environmentally-displaced person. Second version, 2010 May. Articles 11, 13, available at: www.cidce.org

*account for environmental degradation—for example in the case of water scarcity—the principal of additional funding instead of full reimbursement is probably more appropriate”.*⁶⁴

However, authors did not set any criteria, which would determine if environmental events are caused by climate change. Furthermore, the issue of protection was dealt within the framework of UNFCCC, thus issues not related to climate change were not considered. Accordingly, people who flee environmental disaster unrelated to climate change, i.e., such as volcanic eruption, are not included as beneficiaries of international protection. Finally, it is obvious that UNFCCC is not implemented in scrupulous manner even now thus new obligations arising out of this treaty would not be duly implemented as well.

Despite those attempts to redefine protection granted to those in need, most of the scholars still rely on traditional forms of protection and argue that environmentally displaced people may benefit from them. It will be argued in the second chapter that environmentally displaced people may get protection under refugee law in case if they satisfy all criteria for refugee status, while in the third chapter it will be analyzed other possible protection alternatives for environmentally displaced people.

⁶⁴ Frank Biermann, Ingrid Boas. *Preparing for a warmer world. Towards a global governance system to protect climate refugees*. Global Governance Working Paper No 33, 2007, p. 25-30;

ENVIRONMENTAL DISPLACEMENT WITHIN THE FRAMEWORK OF 1951 GENEVA CONVENTION

Recently low lying island states in the Pacific region became a symbol of damaging effects of climate change. The reason is that scientists announced frightening prognosis that due to the rising sea levels those islands will be permanently submerged.

The most important issue arising out of this prognosis is displacement of the whole population. Therefore politicians, scholars started negotiations on mass displacement and various adaptation schemes. However, cases of individual migration were not considered an issue till recent claims of Kiribati and Tuvalu nationals, which challenged the whole international refugee law.

It was the start of a new millennium when a family from Tuvalu approached New Zealand migration authorities with a claim that they are persecuted by none the other but climate change itself.⁶⁵ While New Zealand needed to decide if climate change may be regarded as persecutor within traditional refugee law, Australians began a none the less challenging investigation regarding a claim that industrialized states are persecutors. Individual from Kiribati argued that big developed countries, such as Australia, are persecuting people living in small island states.⁶⁶ The reasoning for this was that industrialized states emit huge amounts of greenhouse gases, which cause adverse environmental impacts, and people living in small island states are mostly affected by those effects.

These claims raised many discussions on the possibility to grant refugee status for environmentally displaced people. Some politicians and lobbyists argued that refugee status must be accorded to environmentally displaced people, while most of the scholars had an opposite opinion. The biggest issue in this debate is that the only binding document on international protection is 1951 Geneva Convention and it is not clear if environmentally displaced people under any circumstances may be entitled to refugee status. The following chapters will address this issue in detail. First of all, Author of this Thesis briefly presents historical context of adoption of 1951 Geneva Convention. Then Author analyzes cases when refugee definition, which was established by 1951 Geneva Convention, was extended and presents example of states' efforts to limit the scope of 1951 Geneva Convention. Furthermore, Author analyzes refugee-like situations, which according to the scholars, may be described as cases of environmental displacement. Lastly, unique idea that climate change and industrialized states may be persecutors is analyzed.

⁶⁵ Refugee appeal No. 72189/2000; Refugee appeal no. 72190/2000; Refugee appeal no. 72191/2000; Refugee appeal no. 72192/2000; Refugee appeal no. 72193/2000; Refugee appeal no. 72194/2000; Refugee appeal no. 72195/2000;

⁶⁶ Refugee appeal No. 0907346 [2009] RRTA 1168 (10 December 2009);

2.1 The law: Convention relating to the Status of Refugees

1951 Geneva Convention is the only worldwide binding instrument on international protection, which was originally drafted to protect Europeans forced to leave their countries of origin after World War II.⁶⁷ Under 1951 Geneva Convention, if a state is failing to protect or respect human rights, those actions may constitute persecution. Yet, refugee claim may not succeed even though asylum seeker will be able to establish that he has a well-founded fear of persecution in his country of origin. Refugee law requires that persecution would have a discriminatory element. It is established in article 1 A of 1951 Geneva Convention that person must be persecuted “*for reasons of race, religion, nationality, membership of a particular social group or political opinion*”.⁶⁸

Accordingly, a refugee claim made by an environmentally displaced person usually will not succeed since environmental impacts are not discriminatory. Professor Jane McAdam, one of the most prominent scholars in the field of environmental displacement, noted that refugee claim based just on environmental effects will not succeed and that “*there must be a differential impact as against the rest of society at large*”.⁶⁹ Hence it must be seen that human rights were not respected or infringed because of political opinion, religion, nationality, race or membership of a particular social group.

Nevertheless, at the time when 1951 Geneva Convention was drafted “*neither short term ecological disasters nor long-term ecological changes were perceived as specific causes of displacement that should give rise to refugee status*”.⁷⁰ At numerous times scientists highlighted that numbers of environmental disasters have recently increased.⁷¹ Climate change and the significant increase of environmental disasters is therefore a phenomenon of the 21st century. Thus the question, which was raised by numerous scholars⁷² and politicians⁷³, is why the 1951 Geneva Convention cannot be amended to reflect the present situation, including

⁶⁷ Hathaway, James C. *The law of refugee status*. Toronto: Butterworths, 1991, p. 6-7;

⁶⁸ United Nations General Assembly: *Convention Relating to the Status of Refugees*. United Nations, 28 July 1951, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

⁶⁹ Jane McAdam. *Climate Change, Forced Migration, and International Law*. Oxford University Press, 2012, p. 45;

⁷⁰ Andreas Zimmermann. *The 1951 convention relating to the status of refugees and its 1967 protocol. A Commentary*. Oxford commentaries on international law, Oxford, 2011, para 560;

⁷¹ Kirill Ya Kondratyev, Vladimir F. Krapivin, Costas A. Varostos. *Natural Disasters as Interactive Components of Global-Ecodynamics*, Springer, Athens, p. 176;

⁷² Frank Biermann and Ingrid Boas. *Protecting Climate Refugees: The Case for a Global Protocol*, available at <http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>

⁷³ Ibid; Republic of the Maldives Ministry of Environment Energy and Water: *Report on the First Meeting on Protocol on Environmental Refugees: Recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*. Male, Maldives, 14–15 August 2006;

environmentally displaced people. UNHCR responded that there is no reason to amend Convention and include environmentally displaced people. Firstly, it may undermine protection for conventional refugees and secondly, it is very doubtful if states would assume such obligations.⁷⁴

These concerns expressed by UNHCR go to the very core of international refugee law. The question is what obligations states are willing and are able to assume. A simple matter that a state is a party to the 1951 Geneva Convention does not automatically imply that it is all the extent of the obligations it is willing to take responsibility for. Almost every region in the world has its own refugee law instrument even though most of the countries have ratified 1951 Geneva Convention. Africa⁷⁵, American countries⁷⁶, Asia⁷⁷, Europe⁷⁸ adopted legal instruments regulating refugee situations in their countries. Most notably of all of those, Europe is the only region, which did not extend refugee definition, and grants refugee status only to asylum seekers who satisfy criteria established in 1951 Geneva Convention.⁷⁹ The reason for this is quite simple. In 62 years since the adoption 1951 Geneva Convention has seen very little progressive development in terms of refugee protection. A possible explanation lies in the drafting circumstances of 1951 Geneva Convention, as it was drafted during the post-World War II refugee crisis and as such this was the primary concern the drafters focused upon.

However, the drafters of the 1951 Geneva Convention hoped that this document will be amended and in its Final act included Recommendation E, in which the Conference of Plenipotentiaries “*Expresses the hope that the Convention Relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides*”.⁸⁰ Hopes expressed during drafting process were fulfilled, since quite soon it was understood that refugee flows did

⁷⁴ United Nations High Commissioner for Refugees. *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*. 23 October 2008, p. 7, available at: <http://www.refworld.org/docid/492bb6b92.html>

⁷⁵ Organization of African Unity (OAU): *African Charter on Human and Peoples' Rights*. 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58. Available at: <http://www.refworld.org/docid/3ae6b3630.html>

⁷⁶ Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: *Cartagena Declaration on Refugees*, 22 November 1984, available at: <http://www.refworld.org/docid/3ae6b36ec.html>

⁷⁷ Asian-African Legal Consultative Organization: *Bangkok Principles on the Status and Treatment of Refugees*, 31 December 1966, available at: <http://www.refworld.org/docid/3de5f2d52.html>

⁷⁸ European Union, Council of the European Union: *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*. OJ L 337; December 2011, p. 9-26. Available at: <http://www.refworld.org/docid/4f197df02.html>

⁷⁹ *Ibid*, Article 2(d).

⁸⁰ Weis Paul. *The Refugee Convention, 1951 : The Travaux Préparatoires Analysed with a Commentary*. Cambridge University Press, 1995, p. 4;

not stop with the end of World War II in Europe. Therefore in 1967 the Protocol Relating to the Status of Refugees (hereafter – 1967 Protocol) was adopted.

1967 Protocol removed geographical and temporal limitations and 1951 Geneva Convention became applicable to everyone who has a “*well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it*”.⁸¹

For this reason the 1967 Protocol is an example of state approach to the extent of obligations. Even though Recommendation E expressed the intention that 1951 Geneva Convention would have value exceeding its contractual scope, the 1967 Protocol, as the only universal extension of obligations to this day, draws a clear line on obligations the majority of the states are willing to assume towards asylum-seekers. On the other hand, it will be demonstrated in the next subchapter that some regions extended refugee definition. Thus Author of this Thesis will analyze its possible application towards environmentally displaced people. The following part in contrast will move on to demonstrate state efforts to limit the scope of 1951 Geneva Convention by analyzing example of internal protection alternative and its impact on environmentally displaced people.

2.1.1 Attempts to extend the refugee definition

Convention Governing the Specific Aspects of Refugee Problems in Africa (hereafter-OAU Convention), adopted by Organization of African Unity, is a good example of efforts to extend the traditional refugee definition of 1951 Geneva Convention. For clarity reasons a comparison must be made of the two definitions: while Article 1A of Geneva Convention defines a refugee as someone who had to leave his country of origin because he is persecuted because of reasons of race, religion, nationality, political opinion or membership of a particular social group and is unable or unwilling to use protection of his country of origin, the OAU Convention sets a much broader definition of someone “*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*

⁸¹ United Nations General Assembly: *Protocol Relating to the Status of Refugees*. United Nations, 31 January 1967, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>

*residence in order to seek refuge in another place outside his country of origin or nationality*⁸². Many scholars argued that such extended refugee definition may encompass environmentally displaced people. For example, Walter Kälin, Roberta Cohen and Megan Bradley⁸³ argue that natural disasters very often trigger conflicts, violence among people. Thus environmental disaster may account as an event seriously disturbing public order. Despite of that, currently state practice in Africa does not fully support this notion. For example, even though Congolese people were given asylum in Rwanda after eruption of Mount Nyiragongo, Rwanda did not proclaim that it acts in accordance with obligations arising out of OAU Convention. Also, these people were granted humanitarian protection instead of refugee status.⁸⁴ Therefore Alice Edwards notes that state practice providing shelter for environmentally displaced people “*may be seen as contributing to the development of a right of temporary protection on humanitarian grounds under customary international law, rather than under treaty*”.⁸⁵

Similarly American states broadened refugee definition in the 1984 Cartagena Declaration on Refugees (hereafter - Cartagena declaration) which “*includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order*”.⁸⁶ Oppositely to OAU Convention, Cartagena declaration was not adopted by international organization but was drafted by *ad hoc* group of experts. Although it is not legally binding,⁸⁷ Organization of American states has at numerous times acknowledged the Cartagena declaration.⁸⁸

Scholars quite similarly argue that environmentally displaced people may benefit from Cartagena declaration. Unfortunately, International Conference on Central American Refugees distinguishes between “*victims of natural disasters*” and other events “*seriously disturbing the public order*” and observes the position that victims of environmental disasters do not qualify as

⁸² Organization of African Unity (OAU): *African Charter on Human and Peoples' Rights*. 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, Available at: <http://www.refworld.org/docid/3ae6b3630.html>

⁸³ Disasters Bradley, Megan. *Disasters And Displacement: Gaps In Protection*. Journal of International Humanitarian Legal Studies, vol. 1, 2010, p. 95-142;

⁸⁴ Alice Edwards. *Refugee Status Determination in Africa*. African Journal of International and Comparative Law 14, 2006, p. 227;

⁸⁵ *Ibid.*

⁸⁶ Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: *Cartagena Declaration on Refugees*, 22 November 1984, available at: <http://www.refworld.org/docid/3ae6b36ec.html> Article 3

⁸⁷ Guy Goodwin-Gill and Jane McAdam. *The Refugee in International Law*. Third Edition, Oxford University Press, p. 38;

⁸⁸ Organization of American States (OAS): *Legal Situation of Refugees, Repatriated, and Displaced Persons in the American Hemisphere*, AG/RES. 1103 (XXI-O/91), available at: <http://www.refworld.org/docid/4f3d16e22.html>

refugees.⁸⁹ Therefore it may be assumed that environmentally displaced people would not be granted refugee status under Cartagena declaration.

The 1966 Bangkok Principles on the Status and Treatment of Refugees (hereafter – Bangkok principles), adopted for refugee protection in Asian and African countries, are yet another example of extended refugee definition. Article 2 of Bangkok principles stipulates that refugee status may be granted for person who leaves his country of origin because of “*events seriously disturbing public order*”.⁹⁰ Nevertheless, it must be emphasized that these principles are non-binding and it is not clear if “*events seriously disturbing public order*” may be applicable to environmental disasters, given the similar wording in Cartagena declaration and OAU Convention.

Thus while there are strong examples of extending the refugee definition set in 1951 Geneva Convention, yet to this day environmentally displaced people fall out of the scope and do not benefit from extended protection regime.

2.1.2 Internal flight alternative and the attempt to limit the refugee definition

While the OAU Convention, Cartagena declaration and Bangkok principles provide a good example of state efforts to extend the refugee definition, state practice to limit the refugee definition is far greater and poses more challenges to environmentally displaced people. One of the examples is application of internal flight alternative.

Internal flight alternative was not applied by states till the middle of 1980’s. Some argue that approach changed because of growing numbers of asylum seekers.⁹¹ Accordingly, by now almost every state party of 1951 Geneva Convention investigates internal flight alternative while determining if a person is entitled to refugee status.⁹² Application of internal protection alternative was justified by explanation that person does not need international protection if he may be protected in other region of his country of origin. In leading case Canada (Attorney General) v. Ward it was stated that international protection granted under 1951 Geneva Convention was meant to be a “surrogate” for protection from states authorities.⁹³ Professor

⁸⁹ Aurelie Lopez. *The Protection of Environmentally-Displaced Persons in International Law*. Issue 2, Volume 37, October 11, 2007, p. 12;

⁹⁰ Asian-African Legal Consultative Organization: *Bangkok Principles on the Status and Treatment of Refugees*, 31 December 1966, Article 2, available at: <http://www.refworld.org/docid/3de5f2d52.html>

⁹¹ United Nations High Commissioner for Refugees: *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, p. 362, available at: <http://www.refworld.org/docid/4bed15822.html>

⁹² Zimmermann Andreas, assistant editor Jonas Dörschner, and assistant editor Felix Machts. *The 1951 convention relating to the status of refugees and its 1967 protocol. A commentary, Oxford commentaries on international law*, Oxford, 2011, para 601, p. 445;

⁹³ Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, available at: <http://www.refworld.org/docid/3ae6b673c.html>

James C. Hathaway, one of the most prominent scholars of international refugee law, further elaborated that “if international refugee law is surrogate protection, and if national protection can (given the regionalized nature of many refugee-producing phenomena) be delivered in some, but not all, parts of the state of origin, then it follows logically that refugee law should be applied in a way that recognizes the extant realities and possibilities for individuals and groups to benefit from the protection of their own country, but which does not compromise access to asylum for those not in a position to avail themselves of national protection”.⁹⁴

An interesting detail of this concept is that the notion of internal protection alternative developed through national jurisprudence and academic works⁹⁵, as 1951 Geneva Convention itself is silent about any such requirement directly.⁹⁶ James C. Hathaway and Michelle Foster noted that paragraph 91 of the Handbook is the “most often referred” source of internal flight alternative.⁹⁷ Paragraph 91 stipulates that fear of persecution is not always extended to entire territory of a state. Jurisprudence of national courts reveals that this was interpreted as requirement that fear of persecution would exist in a whole state. Germany was the first state party of 1951 Geneva Convention, which applied internal protection alternative.⁹⁸ Position of German national courts was that person is not in need of international protection if he may benefit from protection in other region of his country. Same approach was followed by almost every state party of 1951 Geneva Convention. Thus by now Australia, New Zealand, Canada, United States of America, European countries examine if internal flight alternative is available for asylum seeker.

It was noted in Handbook that person may not be granted refugee status if it would have been reasonable to expect him to avail himself to the protection of authorities in another part of the country.⁹⁹ Handbook did not clarify on the essence of “reasonable”. Later it was elaborated that internal flight is not possible if fundamental human rights are not respected in a particular

⁹⁴ United Nations High Commissioner for Refugees: *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. P. 360, available at: <http://www.refworld.org/docid/4bed15822.html>

⁹⁵ Marx, R. *The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures*. International Journal of Refugee Law, April 2002, Vol. 14 Issue 2/3, p. 179;

⁹⁶ United Nations High Commissioner for Refugees: *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*. HCR/GIP/03/04, available at: <http://www.refworld.org/docid/3f2791a44.html>

⁹⁷ United Nations High Commissioner for Refugees: *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. P. 361, available at: <http://www.refworld.org/docid/4bed15822.html>

⁹⁸ Marx, R. *The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures*. International Journal of Refugee Law, April 2002, Vol. 14 Issue 2/3, p. 181;

⁹⁹ United Nations High Commissioner for Refugees: *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para 91. Available at: <http://www.refworld.org/docid/3ae6b3314.html>

territory.¹⁰⁰ Furthermore, it was claimed that economic situation is relevant as well. The area should not be considered as internal flight alternative if a person in that territory is unable to earn for a living, does not have access to accommodation, health care etc.¹⁰¹ Jurisprudence of various national courts follows this approach. For example, in Januzi case it was asserted that internal flight should not be considered as alternative when asylum seeker “cannot live a relatively normal life according to the standards of his country” and “traumatic changes of life style, for instance from a city to a desert, or into slum conditions, should not be forced on the asylum seeker”.¹⁰² ECtHR on few occasions decided that internal relocation would be unreasonable because of widespread infringements of human rights in a country of origin.¹⁰³ Unfortunately ECtHR in those cases did not analyze internal flight alternative in a very detailed manner thus criteria for internal flight alternative was unclear. On the other hand, ECtHR approach changed and in the case Salah Sheekh v. Netherlands it was ruled that internal relocation is a viable option when Applicant may “be able to travel to the area concerned, gain admittance and settle there”.¹⁰⁴ Those criteria are the most comprehensive test for the determination of internal flight alternative, which were later incorporated into Qualification Directive.

Environmentally displaced people are leaving their destroyed homes, devastated environment. In most of the cases all their fortune is lost because of environmental disaster. It is true that majority of natural disasters are very localized and not country wide. Therefore from the first sight, it may be concluded that internal flight may be seen as viable alternative for environmentally displaced people. However, it must be taken into account that even though environmental disasters are usually not country wide, not all states are capable to deal with consequences and assist people. For example, in 2003 almost at the same time two different countries were hit by earthquakes measuring 6.5 and 6.6 on the Richter scale. Both countries suffered dire consequences. First country lost two people and 40 more were injured while in second country 40000 people were killed. First earthquake occurred in the United States of

¹⁰⁰ United Nations High Commissioner for Refugees: *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*. HCR/GIP/03/04, available at: <http://www.refworld.org/docid/3f2791a44.html> Para 29 p. 882;

¹⁰¹ *Ibid*, Para 30 p. 882-883;

¹⁰² Januzi (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Hamid (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Gaafar (FC) (Appellant) v. Secretary of State for the Home Department (Respondent); Mohammed (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) (Consolidated Appeals), [2006] UKHL 5, United Kingdom: House of Lords (Judicial Committee), 15 February 2006, available at: <http://www.refworld.org/docid/43f5907a4.html> Para 67;

¹⁰³ Chahal v. The United Kingdom, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at: <http://www.refworld.org/docid/3ae6b69920.html> Para 104; Hilal v. The United Kingdom, 45276/99, Council of Europe: European Court of Human Rights, 6 June 2001, available at: <http://www.refworld.org/docid/3deb99dfa.html> Para 68;

¹⁰⁴ Salah Sheekh v. The Netherlands, Application no. 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007, available at: <http://www.refworld.org/docid/45cb3dfd2.html> Para 141;

America, second-in Islamic Republic of Iran. It is seen from the example that very similar disasters might induce completely different consequences and usually it depends on state's preparation for disaster.

Thus it must be taken into account that environmental disasters have the most devastating effects on poorest countries of the world, where state's authorities are not capable or sometimes even not willing to provide adequate assistance. It is evidenced by Myanmar's response to cyclone Nargis. Myanmar Government's response to this disaster was shocking even to Myanmar communities, which were used to junta's negligence towards people needs. Junta was known for its violations of human rights and when time came to deal with natural disaster junta continued its routine practice. Myanmar's junta failed to inform people about cyclone, did not provide assistance to victims and even precluded Burmese people, international organizations to provide aid to the victims. What is more, there were reports about numerous cases of forced relocations, use of child labor for reparation works, as well as about military personnel selling relief goods provided by international organizations.¹⁰⁵ Therefore in this case it would not be reasonable to expect person to use internal flight alternative. In this case internal flight would lead to harsh living conditions, lack of minimum support from the state authorities and questionable possibility to earn for a living.

Thus formally internal flight alternative is another obstacle for granting refugee status to environmentally displaced people, however, it must be concluded, following the reasoning stated in UNHCR guidelines and Salah Sheekh case, that environmentally displaced people should not be forced to use internal flight alternative if that would result into intolerable living conditions and if environmentally displaced person would not be able to settle in a territory in question.

2.2 Application of 1951 Geneva Convention to environmentally displaced people

Despite limited application of 1951 Geneva Convention, there were plenty of attempts to argue that environmentally displaced people may benefit from 1951 Geneva Convention. Individuals claiming to be refugees have taken up very innovative and unexpected ways of reasoning and claimed that even environmental impacts or polluting states may persecute them within the meaning of refugee definition. They argued that climate change causes such adverse effects that it may be considered as persecution. Furthermore, some Applicants tried to convince migration authorities that industrialized states are persecuting small island states by emitting greenhouse gases.

¹⁰⁵ Tripartite Core Group. *Post-Nargis Joint Assessment*. 2008, p. 17-21;

Scholars took more moderate position comparing to individuals claiming to be refugees and stated that generally environmentally displaced people are not refugees. However, scholars asserted that under some rare circumstances even environmentally displaced people may be granted refugee status. Firstly, there may be people who flee their countries because governments did not provide or precluded assistance for them “*in order to punish or marginalize them on one of the five grounds set out in the refugee definition*”.¹⁰⁶ Secondly, policy of the government may be directed against people who rely on agriculture when environmental events threaten those people. Thirdly, government induces famine, pollutes land or water, fourthly, government fails to establish effective measures for disaster prevention.¹⁰⁷ What is more, it is suggested that armed conflicts may be caused by disputes arising from environmental events.¹⁰⁸ Furthermore, it is claimed that quite often countries are environmentally devastated by permitted or promoted activities by the states in question concluding beneficial agreements with corporations that lead people to refugee-like situations.¹⁰⁹ Those arguments will be analyzed in a more detailed manner in the following subchapters.

2.2.1 Government’s failure to protect people during environmental disaster

Under international law states have an obligation to protect people within their jurisdiction. Environmental disasters are not an exception. Thus on some occasions people who suffer because of state’s failure to protect them during environmental disaster may be entitled to refugee status. Though, the problem is that it is unclear what specific obligations states have towards people within their jurisdiction when an environmental disaster strikes. Furthermore, failure of the state to follow these obligations must be for conventional reasons in order to get into the scope of refugee law.

Most of the documents on the issue of protection of people during environmental disasters support human rights based approach. For example, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief (hereafter–IDRL) and Initial Recovery Assistance¹¹⁰ repeat wording of basic human rights instruments in almost every article.

¹⁰⁶ Lyra Jakulevičienė. *Is there a need for an extension of subsidiary protection in the European Union qualification directive?*, Jurisprudencija, 2010, p. 227;

¹⁰⁷ McAdam Jane. *Climate change, forced migration, and international law*. Oxford, Oxford University Press, 2012, p. 48-49;

¹⁰⁸ United Nations High Commissioner for Refugees: *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*. February 2012, PPLA/2012/01, p. 26-27 available at: <http://www.refworld.org/docid/4f38a9422.html>

¹⁰⁹ Westra, Laura. *Environmental justice and the rights of ecological refugees*. London: Earthscan, 2009, p. 183;

¹¹⁰ International Federation of Red Cross and Red Crescent Societies: *Introduction to the Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance*. 2011, available at: <http://www.refworld.org/docid/5242cf5e4.html>

The second example of efforts to set obligations for states during disasters is the work of International Law Commission, United Nations body of legal experts elected by states to promote the “*progressive development of international law and its codification*”.¹¹¹ In 2007 International Law Commission began the work on the topic “Draft Articles on the Protection of Persons in the Event of Disasters”.¹¹²

Unfortunately, it is clear that both documents are non-binding. IDRL guidelines *expressis verbis* stipulate that guidelines are non-binding.¹¹³ Furthermore, data provided by ICRC demonstrates that only twelve countries adopted single provisions of guidelines.¹¹⁴ Thus it is clear that states are not willing to assume more obligations in the field of people protection during environmental disasters. Furthermore, International Law Commission based its findings on legally non-binding documents, thus it represents progressive development instead of codification of customary international law.¹¹⁵

Another issue is that even though human rights instruments do not expressly regulate states’ duties during environmental disaster, it does not mean that when disaster strikes human rights law stops functioning. Universal and regional human rights instruments stipulate that state must protect people within its jurisdiction. For instance, ICCPR, the most widely ratified instrument on human rights, stipulates that every state party has an obligation “*to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized*” in ICCPR “*without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”.¹¹⁶ The same is repeated in regional instruments such as ECHR¹¹⁷, American Convention¹¹⁸, Banjul Charter¹¹⁹.

¹¹¹ Statute of the International Law Commission, article 1 para 1 General Assembly resolution 174 (II) of 21 November 1947 (Establishment of an International Law Commission);

¹¹² International Law Commission: *Draft Articles on the Protection of Persons in the Event of Disasters*;

¹¹³ International Federation of Red Cross and Red Crescent Societies: *Introduction to the Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance*. 2011, Article 1 available at: <http://www.refworld.org/docid/5242cf5e4.html>

¹¹⁴ The International Federation of Red Cross and Red Crescent Societies: *Adopted legislation and rules*. Available at: <http://www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/new-legislation-adopted-on-idrl/>

¹¹⁵ International Law Commission, Sixty-third session, Geneva, 26 April-3 June and 4 July-12 August 2011, A/CN.4/643, Para 46;

¹¹⁶ United Nations General Assembly: *International Covenant on Civil and Political Rights*. United Nations, Treaty Series, 16 December 1966, vol. 999, p. 171, Article 2 para 2;

¹¹⁷ Council of Europe: *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4*. Council of Europe, November 1950, ETS 5, Article 1;

¹¹⁸ Organization of American States (OAS): *American Convention on Human Rights*. Costa Rica, 22 November 1969, Article 1;

¹¹⁹ Organization of African Unity (OAU): *African Charter on Human and Peoples' Rights*. 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, Article 1;

European Court of Human Rights (hereafter – ECtHR) has recently passed two judgments, *Budayeva and others v. Russia*¹²⁰ and *Kolyadenko and others v. Russia*¹²¹, ruling that Russia failed to follow its obligations during disasters. In *Budayeva* case Applicants claimed that Russian authorities failed to heed warnings about the likelihood of a large-scale mudslide devastating Tyrnauz in July 2000, to warn the local population, to implement evacuation and emergency relief policies or, after the disaster, to carry out a judicial enquiry, while in *Kolyadenko* case Applicants stated that the authorities were responsible for the flood and that there had been no adequate judicial response to it. In both cases ECtHR emphasized that every state has a positive obligation „to take appropriate steps to safeguard the lives of those within their jurisdiction“ and „that this positive obligation entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life“. ¹²² Despite of the fact that ECtHR in both cases stated that states might choose the means how to protect rights listed in the Convention, it specified that in cases of natural disasters states should „establish a clear legislative and administrative framework“, set up emergency warning system and organize rescue operation.

Unfortunately, Human rights Committee (Hereafter-HRC), Inter-American Court on Human Rights and African Commission on Human and Peoples' Rights did not pass any judgments regarding people protection during environmental disasters. On the other hand, provisions of all those documents are very alike, monitoring bodies quite often rely on decisions of other bodies.¹²³ Thus it is quite plausible that cases of state's failure to take adequate measures to protect people during environmental disasters would bring the same or very similar consequences as in the cases of *Budayeva and others v. Russia* and *Kolyadenko and others v. Russia*.

To sum up, it is clear that every state has positive obligation to protect people during and after environmental disaster. Obligations of states derive from multilateral and regional

¹²⁰ *Budayeva and others v. Russia*. Council of Europe: European Court of Human Rights, App. Nr. 15339/02; 11673/02; 15343/02; 20058/02; 21166/02, 20/03/2008;

¹²¹ *Kolyadenko and others v. Russia*. Council of Europe: European Court of Human Rights, App. Nr. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, 35673/05, 28-02-2012;

¹²² *Budayeva and others v. Russia* para 128; *Kolyadenko and others v. Russia* para 151;

¹²³ See for example: *Stoll v. Switzerland*, 2007, § 39; Dissenting opinion in *Anguelova v. Bulgaria*, 2002a, § 11; Judge Bonello of the European Court, *Maya indigenous communities of the Toledo district v. Belize* (Inter-American Commission on Human Rights, 2004, § 149) and *Ecuador v. Colombia* (Inter-American Commission on Human Rights, 2010, § 117), *Mamatkulov and Askarov v. Turkey* (European Court of Human Rights, 2005a), *Akdivar and others v. Turkey* (European Court of Human Rights, 1996), *Öcalan v. Turkey* (European Court of Human Rights, 2005c), *Kurt v. Turkey* (European Court of Human Rights, 1998c), *Varnava and others v. Turkey* (European Court of Human Rights, 2009a), *Ergin v. Turkey (no 6)* (European Court of Human Rights, 2006), *Šilih v. Slovenia* (European Court of Human Rights, 2009b) , *Stoll v. Switzerland* (European Court of Human Rights, 2007) , *Zolotukhin v. Russia* (European Court of Human Rights, 2009c), *Opuz v. Turkey* (European Court of Human Rights, 2009d) , *Lexa v. Slovakia* (European Court of Human Rights, 2008);

human rights treaties. What is more, jurisprudence of judicial institutions reveals that states must take effective measures in order to protect people during environmental disasters. Furthermore, it is clear that state's intentional failure to protect someone because of his race, religion, nationality, political opinion or membership to particular social group may give rise to the application of 1951 Geneva Convention.

2.2.2 Prohibition to assist the victims of the disaster

Usually state initiates rescue operations, provide assistance to the victims when environmental disaster strikes. If state is not in a good economic situation, then international community may be willing to assist. Notwithstanding, situations may arise when state is not willing to assist victims of disaster and even may not let international organizations or even any individuals to help the victims.

As evidenced from the decision of New Zealand Refugee Status Appeals¹²⁴, state's prohibition to assist victims of the disaster may constitute persecution. This case originated from the event, which was called the "*worst response ever to a disaster*".¹²⁵ It all started in 2008 when Cyclone Nargis devastated Burma. Humanitarian works coordinated by various non-governmental organizations started their operations immediately. Government's response to humanitarian works was shocking not just to Burmese people but to all international community as well. Benjamin Zawacki, Amnesty International's Myanmar specialist noted that "*at the same time as relief efforts have moved forward, the Myanmar government has penalized people for assisting*."¹²⁶

Burma's ruling junta was known for constant infringements of human rights. As Human Rights Watch noted, Burma's already dismal human rights record worsened following the devastation of cyclone Nargis in early May 2008. It is known that ruling junta in Burma "*systematically denies citizens basic freedoms, including freedom of expression, association, and assembly*" and "*regularly imprisons political activists and human rights defenders*".¹²⁷

The Applicant before New Zealand's authority in this case was one of the people who assisted victims of Cyclone Nargis. Furthermore, the Applicant explained that she is generally

¹²⁴ Refugee Appeal No. 76374, No. 76374, New Zealand: Refugee Status Appeals Authority, 28 October 2009, available at: <http://www.refworld.org/docid/4afc31da2.html>

¹²⁵ Asian human rights commission: *BURMA: Worst response ever to a disaster*. May 16, 2008, available at: <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-137-2008>

¹²⁶ Amnesty International: *Cyclone Nargis: One year on*. 2009 May 4, available at: <http://www.amnesty.org/en/for-media/press-releases/cyclone-nargis-one-year-21-people-imprisoned-helping-victims-20090504>

¹²⁷ Human Rights Watch: *Human Rights Watch World Report 2009 – Burma*, p. 223-9 available at: http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf

against regime and she constantly worked with Burmese dissidents.¹²⁸ Authority decided that “*although sparked by an entirely non-political naturally occurring event - a tropical cyclone - the disaster relief effort in response became highly politicized*”, which, “*combined with the international and domestic criticism of the lack of an effective response by the regime to the natural disaster, means the regime will in all probability impute a negative political opinion to the appellant for her independent facilitation of disaster-relief activity as it has done with others*” . Thus conclusion was made that Applicant had a well-founded fear of persecution because of political reasons. Even though refugee claim originated from events directly related to environmental disaster, it is very doubtful if it can be claimed that refugee status was granted for environmental reasons.

One of the most prominent scholars of international refugee law Professor Guy Goodwin-Gill explains that person who is persecuted for his political opinion is usually “*pursued by the government of a State or other entity on account of his or her opinions, which are an actual or perceived threat to that government or its institutions or to the political agenda and aspirations of the entity in question*”.¹²⁹ Therefore in this case junta’s oppression was directed against political opponents and efforts to assist victims of the disaster were considered as an act against regime. Thus this scenario is traditional refugee-like situation and environmental reasons are irrelevant when migration authorities are evaluating if person is entitled to refugee status.

2.2.3 Intentional destruction of natural resources by the government

Another scenario, which was attributed to situations when environmentally displaced people may be granted refugee status, is when state intentionally destroys some natural resources in order to marginalize particular group of people. The most notable example is persecution of Marsh Arabs in Iraq.

Marsh Arabs suffered persecution in Iraq for decades since they are Shi’a Muslims. However, the situation got worse after Gulf war in 1991, because opponents of the regime started hiding in secluded marshlands. Government of Iraq was determined to find political opponents and for that purpose started the draining of marshlands. As a consequence, people were deprived of water, significant decrease was noticed in fish supplies, agriculture production and animal

¹²⁸ *Ibid.*

¹²⁹ Guy Goodwin-Gill and Jane McAdam. *The Refugee in International Law*. Third Edition, Oxford University Press, ISBN-10: 0199207631, p. 87;

husbandry.¹³⁰ Scholars argue that displacement resulting from such kind of actions constitutes environmental displacement.¹³¹

Nevertheless, scholars fail to address that government's actions destroying environment is a part of systematic persecution. In case of Marsh Arabs, as Human Rights Watch noted, measures such as "*mass arrests, enforced disappearances, torture and execution of political opponents [...] accompanied by ecologically catastrophic drainage of the marshlands and the large-scale and systematic forcible transfer of part of the local population*"¹³² were directed against Marsh Arabs. Accordingly, environmental devastation of their land was just one of many ways to persecute Marsh Arabs. Therefore people such as Marsh Arabs should not be considered as environmentally displaced since they are victims of systematic persecution perpetrated by the government.

2.2.4 State's failure to protect people from private companies

Furthermore, some examples demonstrate that authorities of the state give permission for private entities to develop certain activities, which may result in significant damage to the environment. Laura Westra stated that quite often refugee-like situations are created by permitted or promoted activities of the states, which conclude beneficial agreements with corporations.¹³³

For example, Nigeria has consented and even promoted activities of oil companies in Niger Delta for years, in order to get financial advantage. Ogoni people, indigenous inhabitants in southeast Nigeria, brought a suit against Nigeria before African Commission on Human and People's rights, claiming that Nigeria has been directly involved "*in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People*".¹³⁴ Commission found that Nigeria gave permission for private oil companies to develop oil industry in Ogoni lands, which resulted in environmental degradation and destruction of Ogoni lands and farms.

¹³⁰ Aaron Schwabach. *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts*. Colorado Journal of International Environmental Law & Policy Vol. 27, p. 3-4;

¹³¹ Ole Kristian Fauchald. David Hunter, Wang Xi. Yearbook of international environmental law 2008, volume 19, p.72;

¹³² Human Rights Watch. *The Iraqi Government Assault on the Marsh Arabs*. Briefing Paper, January 2003, available at: <http://www.europarl.europa.eu/meetdocs/committees/afet/20040405/hrw%20marshlands.pdf>

¹³³ Westra, Laura. *Environmental justice and the rights of ecological refugees*. London: Earthscan, 2009, p. 137;

¹³⁴ SERAC and CESR v Nigeria, Decision regarding Communication No 155/96, ACHPR/COMM/A044/1, 15th Annual Activity Report of African Commission on Human and Peoples' Rights (7 May 2002), annex V, para 1-2;

It is clear in this case that Nigeria failed to protect Ogoni people from serious harm inflicted by private companies. It is well accepted under international law that every state has a positive obligation to protect people within its jurisdiction. Therefore state's failure to protect people from serious harm inflicted by non-state actors may amount to persecution if failure to protect is for the reason listed in the 1951 Geneva Convention. Thus in present situation the crucial element is not environmental degradation but lack of state's protection. Hence, it can be described as traditional refugee law situation since people are deprived of state protection because of their religion.

2.2.5 Armed conflict triggered by environmental events

Another scenario, which, according to scholars, may lead to refugee-like situation is an armed conflict. Professor Walter Kälin argues that people leaving their countries because of armed conflict might be considered as environmentally displaced.¹³⁵ He explains that decrease in natural resources, harsh environmental conditions might cause armed conflict and people will be forced to migrate. Such an observation prompts a conclusion that environmental events may trigger armed conflict, which leads to environmental displacement. Yet, such a conclusion completely disregards other relevant factors, coinciding with, but not necessarily conditioned by environmental events, which may also cause armed conflicts and migration.

For the assessment nexus between environmental conditions and armed conflict must be analyzed. There are two main schools of thought on environmental conflict. The first one is based on idea of environmental security, which was mainly developed by Homer-Dixon, Bächler and Spillmann. The essence of this theory is that environmental events can lead to an armed conflict. This school highlighted that conflicts must be analyzed in four levels: firstly, damage to the ecosystem must be analyzed; secondly, harmful socio-economic events resulting from damage to the ecosystem should be addressed; thirdly, other economic and social factors, which may trigger a conflict are evaluated. Scholars suggested that the last element level is armed conflict itself, which is a consequence of previous three levels.¹³⁶ Second school of thought was developed by Elinor Ostrom who made an assumption that armed conflicts start because of institutional failure to manage problems.¹³⁷

¹³⁵ Walter Kälin. *Climate change induced displacement-a challenge for international law*. Distinguished lecture series -3, March 2011, Mahanirban Calcutta Research Group, p. 13, 21;

¹³⁶ Dixon, Thomas F. *Environment, scarcity, and violence*. Princeton, N.J.: Princeton University Press, 1999. Print. p. 178;

¹³⁷ Ostrom, Elinor. *Governing the commons: the evolution of institutions for collective action*. Cambridge: Cambridge University Press, 1990. Print. p. 185;

Therefore scholars representing both theories make a conclusion that armed conflicts are not directly triggered by environmental events. Armed conflicts are more likely provoked by numerous factors, such as institutional failure, social segmentation, migration, decrease in economic productivity etc. Consequently, environmental event may be one of the causes for armed conflict, but in no way it could be regarded as a sole cause.

Armed conflicts in Darfur and region of Lake Chad are quite often cited as examples of armed conflict triggered by environmental impacts.¹³⁸ However, factors such as general poverty in those states, lack of stable governance are not fully addressed. Therefore conclusion made by Walter Kälin that people leaving their home because of armed conflict may be considered environmentally displaced, is not accurate. Firstly, it is not clear what impact environmental degradation has on armed conflict. Secondly, it is understood that environmental migration is happening when environmental event is the primary cause for migration. Thus in this case environmental disaster would be a side factor and accordingly, those people should not be considered as environmentally displaced.

2.2.6 Are environmentally displaced people refugees?

In previous subchapters proposals that environmentally displaced people may benefit from 1951 Geneva Convention were analyzed. Nevertheless, analysis of all those situations reveals that those scenarios are rather traditional refugee situations. Apparently all those situations share common feature-lack of state's protection. Under 1951 Geneva Convention a person, who does not enjoy state's protection, may be granted refugee status if there exists discriminatory element. Therefore it is rather clear that people in mentioned situations may satisfy criteria for refugee status because of lack of protection conditioned by a Conventional reason. It should be noted that for determining that person is entitled to refugee status it must be established that he is persecuted and that it is done because of reason listed in 1951 Geneva Convention. Indeed, other circumstances, such as place of residence, Applicant's education, job, family relations, events during which person was persecuted etc., should be evaluated in order to have a full picture of a situation. On the other hand, if those circumstances are not related to suffered harm, persecutor or reason for persecution, they are extraneous and not essential for granting international protection. Therefore if Applicant asks for asylum because, for example, he was not protected during environmental disaster, reason why he did not receive any protection and harm suffered is relevant for the determination if person is a refugee. Accordingly,

¹³⁸ Organisation for Economic Co-operation and Development. *Conflict over resources and terrorism: two facets of insecurity*. OECD West African Studies, April 2013, p. 68;

environmental disaster is just an event, during which agent of persecution caused harm for Applicant. Therefore Applicant should be granted refugee status because of lack of protection for Conventional reason, but not because environmental disaster hit his country of origin.

2.3 Environmentally displaced people and new forms of persecution

It is seen from previous subchapters that environmentally displaced people usually will not benefit from 1951 Geneva Convention because of non-discriminatory harm, which is caused by environmental disasters. Despite of that, some environmentally displaced people tried to argue that environmental impacts caused such adverse effects that they may constitute persecution or, alternatively, that they are persecuted by industrialized states, which emit big amounts of greenhouse gas emissions. Thus in following chapters it will be analyzed if industrialized states and climate may be considered as persecutors and, in any event, if those devastating effects caused by environmental events are triggered for Conventional reason.

2.3.1 Industrialized states as persecutors

In 2002 small island state Tuvalu declared about its intention to launch a lawsuit in International Court of Justice against Australia and United States of America. Tuvalu stated that big developed states, such USA and Australia, are major contributors to climate change, which cause rising sea levels and accordingly, threatens the existence of small island states.¹³⁹ However, till now Tuvalu did not launch any lawsuit. Another notable example is petition to the Inter American Commission on Human Rights against United States of America, which was brought by Inuits. They stated that violations resulting from global warming caused by acts and omissions of the United States of America infringe their rights to life, health, physical integrity, security, property, movement, residence, enjoyment of their culture.¹⁴⁰ Quite recently almost identical claim was made by Arctic Athabaskan people. They claimed that Canada is producing big amounts of greenhouse gas emissions, which in turn influence Arctic melting.¹⁴¹

¹³⁹ Rebecca Elizabeth Jacobs. *Treading Deep Waters: Substantive Law Issues In Tuvalu's Threat To Sue The United States In The International Court Of Justice*. Pacific Rim Law & Policy Journal Association, 2005, available at: <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/662/14PacRimLPolyJ103.pdf?sequence=1>

¹⁴⁰ Petition to the Inter American Commission on Human Rights seeking relief from violations resulting from global warming caused by acts and omissions of the United States, December 7, 2005, available at : http://earthjustice.org/sites/default/files/library/legal_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf

¹⁴¹ Petition to the Inter American Commission on Human Rights seeking relief from violations of the rights of Arctic Athabaskan Peoples resulting from rapid arctic warming and melting caused by emissions of black carbon by Canada, p. 6 available at: http://www.ecojustice.ca/files/aac-petition-april-2013/at_download/file

It is not surprising that small states and nations located in regions mostly affected by adverse effects of climate change blame industrialized countries. It is widely acknowledged that greenhouse gas emissions are one of the main factors causing adverse effects of climate change.¹⁴² IPCC concluded that climate change triggers rising sea levels, temperature changes, extreme environmental events, precipitation changes.¹⁴³ Furthermore, IPCC highlighted that greenhouse gas emissions are consequence of human activity such as industry, transport, energy supply etc.¹⁴⁴ Thus it means that industrialized countries are the biggest emitters of greenhouse gas. On the contrary, amount of greenhouse gas emissions produced by states mostly affected by those affects is so insignificant that it is even worthless to estimate its contribution to climate change. Therefore it is only natural that those affected states blame industrialized countries for rising sea levels, extreme environmental events etc.

Till now there have been few cases where states suffering from climate change effects threatened to or actually filed a complaint accusing industrialized countries of inflicting climate change. Furthermore, while assessing asylum claims few individuals stated that industrialized countries might be considered as persecutors within the meaning of 1951 Geneva Convention. Those claims imply that by producing greenhouse gas emissions industrialized countries cause adverse effects amounting to the infringement of human rights in a manner defined by refugee law.

Claim made by asylum seeker from Kiribati is the most notable example of refugee claim based on assertion that industrialized states are persecuting people from sinking islands.¹⁴⁵ Applicant stated that industrialized countries, such as Australia, contribute to global warming, which negatively affects small island states. What is more, Applicant tried to argue that persecution was based on a conventional ground, namely membership to a particular social group. Applicant tried to argue that he may *“be considered a member of a potential range of social groups, including those from Kiribati, or those from Kiribati who have lost the ability to earn a livelihood or those fleeing their homes for environmental reasons”* However, Tribunal noted that *“countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases”*, do not have any motivation to cause damage for people living in low-lying countries for reasons of race, religion, nationality, political opinion or membership of

¹⁴² Ibrahim Dincer, Adnan Midilli, Arif Hepbasli, T. Hikmet Karakoc. *Global warming-engineering solutions*, Springer, 2009, p. 197;

¹⁴³ Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change Core Writing Team, Pachauri, R.K. and Reisinger, A. (Eds.) IPCC, Geneva, Switzerland. available at: https://www.ipcc.ch/publications_and_data/ar4/syr/en/spms3.html

¹⁴⁴ Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change Core Writing Team, Pachauri, R.K. and Reisinger, A. (Eds.) IPCC, Geneva, Switzerland. available at: https://www.ipcc.ch/publications_and_data/ar4/syr/en/spms2.html

¹⁴⁵ 0907346 [2009] RRTA 1168 (10 December 2009);

any particular social group. „Those who continue to contribute to global warming may be accused of having an indifference to the plight of those affected by it once the consequences of their actions are known, but this does not overcome the problem that there exists no evidence that any harms which flow is motivated by one of more of the Convention grounds”. Thus Applicant was denied a refugee status.

The problem with this kind of claims is that it is impossible to establish that polluting states have incentive to persecute anyone. States, which are historically known as biggest polluters, simply are developing their economy and are negligent towards effects, which may be caused by carbon emissions. Furthermore, by emitting greenhouse gas developed states cause internal damage as well, so it is impossible to assert that industrialized states have motivation to cause harm for other states. What is more, 1951 Geneva Convention was originally drafted to protect people who are fleeing their countries of origin because of persecution there. Thus situation when person is seeking asylum in a country, which is persecuting him is nontraditional to say the least. Accordingly, an asylum claim based on assertion that industrialized states may be considered as persecutors just because they emit greenhouse gas, will not succeed since it is impossible to establish that those states have a motivation to persecute, while the notion of seeking asylum in the country, which, in this particular case, is the persecutor, does not have any basis in refugee law.

2.3.2 Climate change as persecutor

Many environmentally displaced people willing to get a refugee status claimed that climate change might be recognized as persecutor since it causes adverse effects and people are forced to migrate. Nevertheless, this implication is supported neither by scholars nor by judicial practice. It is agreed that persecution presupposes violation of human rights committed by state, either perpetrated or tolerated by state officials.¹⁴⁶ Thus scholars usually even do not elaborate on this notion because of its complete lack of support in traditional refugee law. On the other hand, asylum seekers, usually those from so called “sinking islands”, are willing to establish that climate change might be considered as a persecutor. For example, Applicant from Kiribati tried to establish that notion of “being persecuted” does not require human agency and that the word “refugee” is capable of encompassing persons having to flee irrespective of the cause. In support, counsel cited the Latin etymology of the word „*persecute*” which, he submits, has a “passive

¹⁴⁶ Zimmermann, Andreas. *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*. Oxford: Oxford University Press, 2010, para 568;

voice of fleeing from something or an active quality of following somebody".¹⁴⁷ Accordingly, he claimed that climate change may be considered as persecutor within the meaning of 1951 Geneva Convention. Tribunal rejected applicant's claim.

Another difficulty in establishing, whether people displaced due to the climate change may be granted refugee status, is absence of conventional grounds. This is evidenced by New Zealand's Refugee status appeals authority decision. Case was brought by a family unit comprising of the parents and their five children from Tuvalu. Applicants stated that they were persecuted because of their membership in a particular social group in Tuvalu. They submitted that they are from a lower socio-economic group, which, in their opinion, constitutes a social group within the meaning of 1951 Geneva Convention. Furthermore, the Applicants stated that only those closely connected to authorities enjoy better living, while people from lower socio-economic layer are neglected and that constitutes persecution. Appeals authority was not convinced by arguments and ruled that "*all Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family property being partially submerged at high tide*". Appeals Authority stated that even though lower socio economic layer might be a statistical group it cannot be recognized as particular social group "*in respect of which its members can be said to be persecuted in terms of the Refugee Convention*".¹⁴⁸

The findings of Appeals Authority are not unequivocal. As it is established in a Handbook, "*A particular social group*" normally comprises persons of similar background, habits or social status."¹⁴⁹ For example, Qualification directive stipulates that a group may be considered as a particular social group when "*members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society*".¹⁵⁰ Canadian Supreme Court decided that there are

¹⁴⁷ AF (Kiribati) [2013] NZIPT 800413 (25 June 2013) para 51;

¹⁴⁸ New Zealand case law: Refugee Appeal No. 72719/2001, RSAA (17 September 2001); Refugee Appeal No.72313/2000, RSAA (19 October 2000); Refugee Appeal No. 72314/2000, RSAA (19 October 2000); Refugee Appeal No. 72315/2000, RSAA (19 October 2000) (Tuvalu); Refugee Appeal No. 72316/2000, RSAA (19 October 2000) (Tuvalu); Refugee Appeal Nos 72179–72181/2000, RSAA (31 August 2000); Refugee Appeal No. 72189–72195/2000, RSAA (17 August 2000); Refugee Appeal No. 72185/2000, RSAA (10 August 2000); Refugee Appeal No. 72186/2000, RSAA (10 August 2000);

¹⁴⁹ United Nations High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/IP/4/ENG/REV. para 77;

¹⁵⁰ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as*

three possible categories of social group: people defined by innate or unchangeable characteristics, people who voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to renounce it, people associated by former voluntary status, which is unalterable because of its historical permanence.¹⁵¹ What is more, it was highlighted that persecution itself does not create social group.¹⁵² Some may argue that poverty may be regarded as a ground for a social group. Professor James Hathaway stated that poverty may be a ground for a refugee status when it is so severe that it causes threat to basic human rights.¹⁵³ Furthermore, discriminatory element must exist. Thus it must be established that poverty is a result of government's policy or that people are not protected or persecuted because they are poor. For example, Dalits, Madhibans and Tamils were recognized as members of a particular social group since governments in their countries of origin intentionally precluded them from improving their life conditions by limiting access to labor market, social services, they were denied state's protection etc.¹⁵⁴ If those conditions are not met Applicants cannot be granted refugee status. In present case Applicants claim that government of Tuvalu failed to protect them since they are from lower socio-economic layer. Conversely, it is known that poverty in Tuvalu is widespread, access to social and medical facilities is limited to all inhabitants. Therefore their unfavorable situation is not because they are poor but because general state in Tuvalu is harsh. Hence poor people in Tuvalu cannot be regarded as a social group since poverty is not a result of governments' policy, poor people are not treated less favorably in Tuvalu.

beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L 337; December 2011, pp 9-26, article 10, para d;

¹⁵¹ Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, available at: <http://www.refworld.org/docid/3ae6b673c.html>

¹⁵² A and Another v Minister for Immigration and Ethnic Affairs and Another, [1997], Australia: High Court, 24 February 1997, para 242, 341, available at: <http://www.refworld.org/docid/3ae6b7180.html>

¹⁵³ Hathaway, James C. *The law of refugee status*. Toronto: Butterworths, 1991, p. 166;

¹⁵⁴ Zimmermann, Andreas. *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*. Oxford: Oxford University Press, 2010. Print. para 420 p. 398;

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As it is seen from previous chapter, environmentally displaced people may not be granted refugee status if environmental disaster is the sole reason for migration and criteria established by 1951 Geneva Convention are not satisfied. Nevertheless, refugee status is not the only form of protection. Human rights law has expanded states' obligations beyond that of 1951 Geneva Convention. Accordingly, most of the states grant complementary forms of protection to those who are not entitled to refugee status under 1951 Geneva Convention but are in need of international protection. Some states even specifically addressed the issue of environmental displacement and included provisions into their national legislation, under which asylum may be granted to people who leave their countries of origin because of environmental disasters.

Cyprus¹⁵⁵, Italy¹⁵⁶, Finland¹⁵⁷, Sweden¹⁵⁸, United States of America¹⁵⁹, Argentina¹⁶⁰ are examples of such states. Yet, one could only qualify these provisions as “early efforts” to address the problem of environmental displacement. While in theory these laws may seem to address the problem, analysis reveal that they are not so favorable for environmentally displaced people. In Cyprus environmental issues are taken into account only in cases when person may be granted refugee status or subsidiary protection, while environmental disasters in country of origin may be regarded just as an additional element for granting asylum. Quite similarly in the United States of America temporary protection is granted under request of affected state to people who already are in the territory of United States.¹⁶¹ Therefore people cannot flee their country of origin because of environmental disaster and ask for temporary protection in United States of America. *Travaux preparatoires* of Swedish Aliens acts reveal that provision regarding environmental displacement is limited to people leaving their countries because of sudden environmental disasters and protection would not be granted to people leaving their countries of origin because of slow-onset disasters.¹⁶² Finally, under the decisions of their governments, Finland and Italy

¹⁵⁵ *Refugee Law of 2000 (last amended 2007)* [Cyprus], No. 6(I) of 2000, 2000, available at: <http://www.refworld.org/docid/4a71aac22.html> [accessed 1 March 2014], article 29 (4);

¹⁵⁶ Decreto Legislativo 25.7.1998, n. 286 recante “Testo Unico delle Disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero”, Article 20;

¹⁵⁷ Finnish Aliens Act (449/2012) amending the Aliens' Act (301/2004). Section 109(1);

¹⁵⁸ Sweden: Aliens Act (2005:716). Publication date: 30 April 2010. Section 2(3);

¹⁵⁹ U.S. Code § 1254a (June 25, 1948, ch. 646, 62 Stat. 928; Pub. L. 100–352, § 2(a), (b), June 27, 1988, 102 Stat. 662.);

¹⁶⁰ Decree No. 616/2010: Implementing regulations for Migration Act No. 25.871;

¹⁶¹ Roberta Cohen and Megan Bradley. *Disasters and Displacement: Gaps in Protection*. Journal of International Humanitarian Legal Studies, vol. 1, 2010, p. 12;

¹⁶² Vikram Kolmannskog and Finn Myrstad. *Environmental displacement in European asylum law*. The Norwegian Refugee Council, p. 9;

may grant temporary protection for environmentally displaced people. Nonetheless, most of these provisions have never been applied, therefore scope of their application is not clear yet. Hence it may be concluded that environmentally displaced people may be granted protection under these provisions just on very rare occasions. First of all, some states take into account environmental factors just like additional circumstances or grant protection just to those who were in the country before environmental disaster hit country of origin. Secondly, most of these provisions have never been applied, thus the manner in which these provisions would be applied, is not clear.

It should be noted that all these legal regulations are limited to sudden-onset disaster. Furthermore, protection may be only temporal. The problem is that in case of slow-onset disasters, such as droughts, people may need permanent protection since in their countries of origin possibility to sustain livelihood may be impossible.

In addition, it was stated that Kingdom of Belgium, Republic of Bulgaria, Ireland, Republic of Lithuania, Republic of Latvia, Republic of Malta, Slovak Republic also included provisions in their legal regulations, which may be interpreted as possible protection options for environmentally displaced people.¹⁶³ None of those states include environmentally displaced people directly as beneficiaries of protection. However, according to the authors, it may be read that provisions in migration laws can be interpreted in such a manner that protection would be granted to environmentally displaced people. For example, Lithuania extended grounds set by Qualification directive on which subsidiary protection is granted including provision that “*there is a threat that his human rights and fundamental freedoms will be violated*”.¹⁶⁴ Furthermore, according to the Law on the Legal Status of Aliens, person may be granted temporary residence permit if it is impossible to remove him from Lithuania. This provision may be quite similar to that of United States of America. In both cases residence permit is granted just because person cannot be deported to his country of origin. On the other hand, those provisions are very vague and are not specifically applied for environmentally displaced people, thus it’s not clear whether such people may benefit from those provisions. Therefore if environmentally displaced people would ask for asylum in Lithuania, it would mainly depend on how responsible authorities interpret these provisions.

While it seems like there is no single approach to the legal position of environmentally displaced people, it is not completely true. It is clear that people leaving their countries because

¹⁶³ Directorate General for internal policies. *Policy Department C: Citizens' rights and constitutional affairs civil liberties, justice and home affairs, “Climate refugees” legal and policy responses to environmentally induced migration. A Study*, p. 57-59, available at: <http://www.statewatch.org/news/2011/dec/ep-climate-change-refugees-study.pdf>

¹⁶⁴ Lithuania Law No. IX-2206 of 2004 on the Legal Status of Aliens, Article 87;

of environmental disasters will be forced to relocate since they will not have enough food, water and other means to sustain themselves. From the first sight those rights are sometimes forgotten socio-economic rights. If the violation of these rights is severe – the person has no access to water and food, or is forced to live in inhumane conditions, in such a case we potentially have a transformation from socio-economic rights to core human rights – right to life and prohibition of cruel, inhuman and degrading treatment. Following this logic, if we conclude that lack of water and food in the country of origin would amount to a violation of either right to life or prohibition of cruel, inhuman and degrading treatment, then another well-established principle of human rights comes in to play – the principle of *non-refoulement*. Author of this Thesis submit that environmentally displaced people who leave their countries of origin because socio-economic rights became non-existent there should be granted some form of international protection. Thus in the following subchapters Author of this Thesis analyzes if infringement of socio-economic rights may give rise to the application of principle of *non-refoulement*. Furthermore, it is argued that people from environmentally displaced people should be granted some form of international protection since these states may not be capable to ensure existence of socio-economic rights. This Thesis is concluded by the remark that usually international community address issues after fundamental events and accordingly, that environmental displacement will not be regulated in international arena till mass displacement will occur.

3.1 Socio-economic rights and the plurality of approaches to the application of non-refoulement

It is a well-established principle under human rights law that no-one can be returned to a place where his life may be threatened or he may be subjected to cruel, inhuman and degrading treatment.¹⁶⁵ It means that if a person establishes that his life may be in danger or he may be subjected to cruel, inhuman and degrading treatment in his country of origin, state cannot deport that person there.

Even though just CAT *expressis verbis* contains provision of *non-refoulement*¹⁶⁶, monitoring bodies of other human rights treaties have recognized the principle of *non-refoulement* as well. HRC in its General Comment 31 expressed that ICCPR “*entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory*” to a

¹⁶⁵ United Nations High Commissioner for Refugees: *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. P. 475, available at: <http://www.refworld.org/docid/4bed15822.html>

¹⁶⁶ United Nations General Assembly: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. United Nations, 10 December 1984, Treaty Series, vol. 1465, p. 85, Article 3. Available at: <http://www.refworld.org/docid/3ae6b3a94.html>

country where individual may face threat to his life or be subjected to cruel, inhuman and degrading treatment.¹⁶⁷

ECtHR¹⁶⁸, Inter-American Court of Human Rights¹⁶⁹, African Commission on Human and Peoples' rights¹⁷⁰ in their decisions acknowledged that ECHR, American Convention, Banjul Charter encompass *non-refoulement* obligation.

Scholars also claim that obligation of *non-refoulement* exists under customary international law.¹⁷¹ Accordingly, even states, which did not ratify any human rights instruments, are bound not to send people where their life may be threatened or they may be subjected to cruel, inhuman and degrading treatment. It is interesting that despite customary nature of this obligation, still not all states are willing to assume responsibility for the implementation of this principle. For instance, United States of America grant protection just to people who may be tortured in a country of origin.¹⁷² Hence people who can be subjected to cruel, inhuman and degrading treatment may be given no protection status. In 2006 HRC in its concluding remarks on United States of America highlighted that state party should take into account HRC General comment No. 20 and General Comment No. 31, where it is *expressis verbis* stated that article 7 prohibiting cruel, inhuman and degrading treatment entails *non-refoulement* obligation. United States of America responded that opinions of HRC have no legal basis.¹⁷³ Although this example is alarming, the *non-refoulement* obligation is plagued by other, less obvious issues in its content.

While it is clear that under *non-refoulement* obligation person cannot be sent to a country where his life may be at risk or he may be subjected to cruel, inhuman and degrading treatment, the problem is that distinction between 'right to life' and 'cruel, inhuman and degrading treatment' is not always so clear. Judicial institutions quite differently interpret those concepts. As a consequence, identical situations may be qualified as infringement of right to life by one judicial institution while the other judicial institution would conclude that it is

¹⁶⁷ Human Rights Committee: General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant : . 2004.05.26. CCPR/C/21/Rev.1/Add.13, para 12;

¹⁶⁸ Soering v. The United Kingdom, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, available at: <http://www.refworld.org/docid/3ae6b6fec.html>

¹⁶⁹ Rumaldo Juan Pacheco Osco et al. v. Bolivia, Case 301/02, Report No. 53/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 156 (2004);

¹⁷⁰ John K. Modise v. Botswana, African Commission on Human and Peoples' Rights Communication No. 97/93, Tenth Annual Activity Report 1996-1997, Annex X;

¹⁷¹ For example, Sir Elihu Lauterpacht and Daniel Benthlemen in Refugee Protection in International Law– United Nations High Commissioner for Refugees: Refugee Protection in International Law: UNHCR's Global Consultations on International Protection. p. 150, available at: <http://www.refworld.org/docid/4bed15822.html>

¹⁷² Alice Edwards,Carla Ferstman. *Human Security and Non-Citizens– Law, Policy and International Affairs*. Cambridge university press, Cambridge 2010, p. 545;

¹⁷³ Helen Keller,Geir Ulfstein. *UN Human Rights Treaty Bodies– Law and Legitimacy*, Cambridge University Press, Cambridge, 2012, p. 397;

infringement of prohibition of cruel, inhuman and degrading treatment. Moreover, when we add socio-economic rights to this equation, clarity of the concept becomes an issue.

The relation of socio economic rights to other human rights is best described by the statement of United Nations Office of the High Commissioner for Human Rights (hereafter-OHCHR) that “*Human rights are interdependent, indivisible and interrelated. This means that violating the right to food may impair the enjoyment of other human rights, such as the right to health, education or life, and vice versa*”.¹⁷⁴ In another report the OHCHR stated the same about the right to water, namely that: “*Access to safe drinking water is a fundamental precondition for the enjoyment of several human rights, including the rights to education, housing, health, life, work and protection against cruel, inhuman or degrading treatment or punishment*”.¹⁷⁵ In the same scenario, where a person would be denied water, at the first glance both right to life and prohibition of cruel, inhuman and degrading treatment are violated. The first - right to life – is violated as the necessary mean of survival is taken away, which would inevitably result in the person’s death. The second - prohibition of cruel, inhuman and degrading treatment – is violated because the act of taking away access to water from a person is an abuse, which would by all means reach the necessary level of severity. Where these rights do differ is the content, the first one is all about the result – loss of life and the other is all about the act – a severe abuse. As it will be demonstrated, various international bodies apply these provisions differently without providing a much needed reasoning behind the distinction.

Author of this Thesis contends that during environmental disasters socio-economic rights are the ones, which are neglected the most. If country is not able to cope with devastating effects of environmental disaster, situation when socio-economic rights are not implemented may last. Therefore in the following subchapter Author of this Thesis argues that on some occasions breach of socio-economic rights may amount to the infringement of right to life and prohibition of cruel, inhuman and degrading treatment. Following this logic states should not deport people to countries devastated by environmental disasters.

3.1.1 Socio-economic rights and the violation of right to life

Nexus between socio-economic rights and basic human rights is well established by the jurisprudence of various judicial institutions. HRC has expressed that “*the right to life has been too often narrowly interpreted*” since “*expression inherent right to life cannot properly be*

¹⁷⁴ United Nations Office of the High Commissioner for Human Rights: *Fact Sheet No. 34, The Right to Adequate Food*, April 2010, No. 34, available at: <http://www.refworld.org/docid/4ca460b02.html>

¹⁷⁵ United Nations Office of the High Commissioner for Human Rights: *Fact Sheet No. 35, The Right to Water, August 2010*, No.35, available at: <http://www.refworld.org/docid/4ca45fed2.html>

understood in a restrictive manner, and the protection of this right requires that States adopt positive measures". Therefore states should *"take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics"*¹⁷⁶. Thus it is clear that HRC highlighted nexus between socio-economic rights and the right to life. That is evidenced from the jurisprudence of HRC. For example, in case EHP v. Canada HRC stated that situation where people are forced to live next to disposed nuclear waste *"raises serious issues, with regard to the obligation of States parties to protect human life"*¹⁷⁷.

Regional human rights treaty bodies had possibility to rule on a relationship between socio-economic rights and right to life as well. ECtHR, Inter-American Court of Human Rights and African Commission on Human and Peoples Rights decided on cases related to deprivation of food, water and their connection to the right to life.

Inter-American Court of Human Rights and African Commission on Human and Peoples' Rights made almost identical decisions. The Inter-American Court of Human Rights needed to decide if relocation of indigenous community from their ancestral lands may amount to the infringement of right to life. The case concerned indigenous community of Sawhoyamaxa, which historically lived in Paraguay. In early 90's government of Paraguay decided to confiscate lands of Sawhoyamaxa community. As a consequence, community was relocated; they were denied access to medical facilities, schools and were not able to perform their traditional means of livelihood, such as fisheries and hunting.¹⁷⁸ The African Commission on Human and Peoples' Rights had to decide if treatment of Ogoni community can be regarded as infringement of right to life. The case concerned government of Nigeria, which made an infamous contract with oil company to extract oil from lands where Ogoni community was living. According to the Applicant, Ogoni lands were environmentally devastated, the military of Nigeria was constantly harassing Ogoni people, their houses were burned. Consequently, Ogoni people were deprived of their lands and farms, which were the only mean of their livelihood.

Inter-American Court of Human Rights decided that by denying indigenous communities access to their ancestral lands Paraguay infringed right to life, since they *"are directly related to their survival capacity"*.¹⁷⁹ African Commission on Human and Peoples' Rights ruled that suffering caused by Nigeria's brutality toward the Ogoni people resulted into

¹⁷⁶ Human Rights Committee: General Comment No. 06: The right to life (art. 6), 1982.04.30. CCPR General Comment No. 6. (General Comments), para 5;

¹⁷⁷ E.H.P. v. Canada (communication No. 67/1980), adopted on 27 October 1982, para 8;

¹⁷⁸ Inter-American Court of Human Rights, Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006 (Merits, Reparations and Costs);

¹⁷⁹ *Ibid*, para 164;

infringement of their right to life and highlighted that lands and farms were the means of livelihood for Ogoni people.¹⁸⁰

Both decisions comply with HRC view expressed in General comment, namely that right to life should not be interpreted too narrowly. In both decisions judicial institutions interpreted right to life not just as actual loss of life but highlighted nexus between right to life and other socio-economic rights. It was recognized that right to life is inseparable from right to food, right to health and stressed that right to life comprises right not to be deprived of the only mean of livelihood. Unfortunately, position of those monitoring bodies in the context of *non-refoulement* is not clear because of lack of jurisprudence. Hence it is not clear if the same broad interpretation would be applicable in *non-refoulement* cases.

On the other hand, ECtHR decided abundant cases regarding *non-refoulement*. However, practice regarding obligation of *non-refoulement* and potential infringement of right to life is quite limited, to say the least. In case Bader and Kanbor v. Sweden ECtHR explained that “*the Court has not in earlier cases excluded the possibility that a Contracting State's responsibility might be engaged under Article 2 of the Convention*”.¹⁸¹ In that case ECtHR decided that Applicant cannot be sent to his country of origin because it would amount to the infringement of Article 2 in conjunction with Article 3 of the ECHR. That is the sole case in which ECtHR decided that threat to life may be a ground for *non-refoulement*.

Furthermore, in case D. v. United Kingdom¹⁸² claim was admissible under articles 2 and 3. ECtHR in this case needed to evaluate if deportation to a country, where person would not have access to medical facilities, would amount to the infringement of right to life or prohibition of cruel, inhuman and degrading treatment. Conversely, ECtHR analyzed situation just in the light of article 3. That is quite ambiguous approach since it was previously decided in Cyprus v. Turkey that infringement of right to life may be related to denial of health services.¹⁸³ Even though in this particular case ECtHR decided that Respondent State did not infringe right to life. ECtHR further explained that Turkish authorities precluded access to medical facilities on the occupied territory of Cyprus, “*however, it has not been established that the lives of any patients were put in danger on account of delay in individual cases*”.¹⁸⁴ In Kolyadenko and others v. Russia ECtHR noted that article 2 “*read as a whole, covers not only situations where certain action or omission on the part of the State led to a death complained of, but also situations*

¹⁸⁰ The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96, 2001, para 67;

¹⁸¹ Case of Bader and Kanbor v. Sweden, Application no. 13284/04, 2005-11-08, para 42;

¹⁸² D. v. United Kingdom, Council of Europe: European Court of Human Rights, App. No 146/1996/767/964, 2 May 1997, para 37, available at: <http://www.refworld.org/docid/46deb3452.html>

¹⁸³ Cyprus v. Turkey, 25781/94, Council of Europe: European Court of Human Rights, 10 May 2001, para 219;

¹⁸⁴ *Ibid.*

where, although an applicant survived, there clearly existed a risk to his or her life". In this particular case Applicants claimed that government of Russia was responsible for the flood. It was submitted that during the flood streets and their apartments were flooded. It was established that level of water reached from 120 centimeters to 150 centimeters in apartments of Applicants' while level of water in the streets reached 200 centimeters. ECtHR decided that there was a risk to Applicants' lives and accordingly, their right to life was infringed.¹⁸⁵ Hence ECtHR determined that on some occasions actual loss of life is not necessary condition for the establishment that right to life was infringed. The only criterion set by ECtHR is that appealed treatment or threat to life must have been substantial in order to qualify it as an infringement of right to life.¹⁸⁶ On the other hand, this approach lacks consistency. In previously mentioned case *D. v. United Kingdom* ECtHR itself recognized that expectancy of Applicant's life would be significantly reduced, should the person be deprived of treatment in case of removal. Yet in *D. v. United Kingdom* these circumstances were not assessed in the light of article 2. Therefore the practice regarding assessment of article 2 is unclear, as on one hand a case with an undefined and hypothetical risk to life is assessed in light of article 2, while on the other hand cases with clearly defined impact on life are assessed only in light of article 3.

Practice of ECtHR demonstrates that infringement of right to life may be declared in case of arbitrary deprivation of life, when state fails to adopt measures for protection of human life and on very rare occasions ECtHR may constitute that even risk to life may be declared as infringement of right to life, while Inter-American Court of Human Rights and African Commission of Human and Peoples Rights are willing to interpret right to life more broadly and encompass "*the right that he will not be prevented from having access to the conditions that guarantee a dignified existence*".¹⁸⁷ Therefore it may be concluded that identical situations in different regions may be interpreted differently. Inter-American Court of Human Rights and African Commission on Human and Peoples Rights may be willing to rule that infringement of socio-economic rights may amount to infringement of right to life, while it is seen from following subchapters that ECtHR on some occasions may conclude that it amounts to cruel, inhuman and degrading treatment.

¹⁸⁵ *Kolyadenko and others v. Russia*. Council of Europe: European Court of Human Rights, App. Nr. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, 35673/05, 28-02-2012, at 153, 154, 187;

¹⁸⁶ *Tekin v. Turkey*, Application No. 22496/93, Judgement of 9 June 1998;

¹⁸⁷ *Inter-American Court of Human Rights, "Street Children" (Villagrán-Morales et-al.) v. Guatemala*, November 19, 1999, para 144;

3.1.2 Socio-economic rights and the violation of prohibition of cruel, inhuman and degrading treatment

Regarding definition of cruel, inhuman and treatment, HRC expressed that “*Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied*”.¹⁸⁸

Regional courts adopted quite a similar approach. For instance, African Commission on Human and Peoples’ Rights in case of *Media Rights Agenda v. Nigeria* stated that cruel, inhuman, degrading treatment or punishment should be “*interpreted so as to extend to the widest possible protection against abuses, whether physical or mental*”.¹⁸⁹ While analyzing the concept of cruel, inhuman and degrading treatment, Inter-American Court of Human Rights adopted the view expressed by International Criminal Tribunal for former Yugoslavia, which defined cruel, inhuman and degrading treatment as “*an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity*”.¹⁹⁰

ECtHR has never adopted any definition of cruel, inhuman and degrading treatment but in all its decisions emphasizes that it should encompass minimum level of severity.¹⁹¹ ECtHR further noticed that “*all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim*”¹⁹² should be taken into account. Yet, it is clearly seen that those criteria are too vague and may be interpreted very broadly, as it will be seen from following subchapter.

Even though none of the judicial institutions have specific definition, descriptions for cruel, inhuman and degrading treatment, certain situations are treated alike by all institutions. For instance, it is well established that bad detention conditions, beatings while in detention, inappropriate conduct of police officers, corporal punishments, *incommunicado* detention etc. amount to cruel, inhuman and degrading treatment. Even so, in the context of environmental displacement those situations are not relevant. The most relevant rights for environmentally

¹⁸⁸ Human Rights Committee. General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para 4;

¹⁸⁹ Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*, para 71;

¹⁹⁰ *Caesar V. Trinidad and Tobago*, Judgment of March 11, 2005, Inter-Am Ct. H.R., (Ser. C) No. 123 (2005), para 68;

¹⁹¹ For example, *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977;

¹⁹² *Selmouni v. France*, European Court of Human Rights, App. No. 25803/94 Judgment of 28 July 1999, para 100;

displaced people are rights stipulated in International Covenant on Economic, Social and Cultural rights such as right to adequate standard of living, right to health.¹⁹³ Those rights have tremendous effects on people living in countries devastated by environmental disasters, since environmental events result into lack of housing, medical facilities, damage of infrastructure, shortage of water and food.¹⁹⁴ However, International covenant on economic, social and cultural rights does not entail *non-refoulement* obligation.¹⁹⁵ Thus from the first sight environmentally displaced people cannot benefit from this treaty.

Notwithstanding, there is another possibility. It may be argued that infringement of socio-economic rights may amount to cruel, inhuman and degrading treatment.¹⁹⁶ It may seem that such a claim would succeed in regional judicial institutions. As it was mentioned above, Inter-American Court of Human Rights, African Commission on Human and People's Rights interpret cruel, inhuman and degrading treatment quite broadly. ECtHR *expressis verbis* admitted in Airey v. Ireland and Sidabras and Dziautas v. Lithuania “*that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention*”.¹⁹⁷ Thus from the first sight it may seem that on some occasions infringement of socio-economic rights may amount to the infringement of civil and political rights. ECtHR had possibility to decide if deportation to a country, where person would be deprived of basic necessities and health services, may amount to cruel, inhuman and degrading treatment.

The Author of this Thesis is going to analyze the case law where claims were made that general economic, social situation in the country amounts to cruel, inhuman and degrading treatment, then further analyze case law where Applicants claimed that insufficient health care in country of origin amounted to cruel, inhuman and degrading treatment.

¹⁹³ United Nations General Assembly. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3;

¹⁹⁴ Verschuuren, Jonathan. *Research handbook on climate change adaptation law*. Cheltenham, UK: Edward Elgar, 2013, p. 95;

¹⁹⁵ Committee on Economic, Social and Cultural Rights: General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003);

¹⁹⁶ McAdam, Jane. *Complementary protection in international refugee law*. Oxford: Oxford University Press, 2007, p. 166;

¹⁹⁷ Case of Airey v. Ireland, European Court of Human Rights, App. No. 6289/73, 09/10/1979; Sidabras and Dziautas v Lithuania, European Court of Human Rights App. No. 55480/00 and 593300/00, para 47;

3.1.2.1 General situation and cruel, inhuman and degrading treatment

The most relevant circumstances for environmentally displaced people are those when general situation in a country is so deplorable that it would no longer be reasonable to expect a person to settle there. In worst case scenario people from “sinking islands” or countries devastated by droughts etc. would be deprived of food, water and basic necessities, such as medical facilities, in their country of origin. Thus almost all socio-economic rights would become nonexistent. This situation is the best and most clear example that infringement of socio-economic rights may amount to cruel, inhuman and degrading treatment.

Quite recently ECtHR ruled on two occasions that people could not be deported because in a country of destination socio-economic rights could not be ensured for Applicants and it would amount to cruel, inhuman and degrading treatment. Case *M. S. S. v. Belgium* concerned deportation of asylum seeker to Greece in accordance with European Union Dublin II Regulation.¹⁹⁸ Applicant requested asylum in Belgium but under Dublin II Regulation Greece was responsible for examination of his asylum claim. Therefore Applicant was sent to Greece, where he immediately was detained. After Applicant was issued asylum seeker’s card and released from detention he started living in the street. ECtHR decided that “*the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs*”.¹⁹⁹

The second case regarding deprivation of socio-economic rights in a country of destination was *Sufi and Elmi v. United Kingdom*. In this case Applicants were Somali nationals who asked for asylum in United Kingdom. Though their asylum claim was rejected because of lack of credibility, ECtHR needed to decide if their removal to their country of origin would amount to cruel, inhuman and degrading treatment. ECtHR ruled that Applicants would be forced to live in a refugee camp and “*that the conditions both in the Afgooye Corridor and in the Dadaab camps are sufficiently dire to amount to treatment reaching the threshold of Article 3 of the Convention. IDPs in the Afgooye Corridor have very limited access to food and water, and shelter appears to be an emerging problem as landlords seek to exploit their predicament for profit. Although humanitarian assistance is available in the Dadaab camps, due to extreme*

¹⁹⁸ European Union: Council of the European Union. *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*. 18 February 2003, OJ L. 50/1-50/10; 25.2.2003, (EC)No 343/2003, available at: <http://www.refworld.org/docid/3e5cf1c24.html>

¹⁹⁹ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para 263;

overcrowding access to shelter, water and sanitation facilities is extremely limited. The inhabitants of both camps are vulnerable to violent crime, exploitation, abuse and forcible recruitment.”²⁰⁰

In both cases ECtHR decided that Applicants were/would be subjected to cruel, inhuman and degrading treatment because of lack of shelter, food, water, means to sustain themselves. Those socio-economic rights are not stipulated in ECHR and it is considered that they do not entail *non-refoulement* obligation. Still it seems that ECtHR followed its approach adopted in *Airey v. Ireland*, *Sidabras and Dziautas v. Lithuania*²⁰¹ and decided that existence of multitude infringements of socio-economic rights may be equal to cruel, inhuman and degrading treatment. On the other hand, in *M.S.S.* case ECtHR emphasized that Applicant was dependent on Respondent’s Government support, while in *Sufi and Elmi* case dire socio-economic conditions were coupled with violence in refugee camps. Thus in case of environmental displacement the view adopted by ECtHR may be relevant just in the worst case scenario and people living in environmentally devastated countries, where situation is not so severe, would not benefit from *non-refoulement* obligation. The Author of this Thesis emphasizes that the case law does not set any guidelines on the assessment of general conditions and, given the multitude of factors when assessing the general situation in a particular country, there seems to be an apparent lack of legal clarity. The reason for that is that there are no criteria or guidelines for the application of notions “severe” or “dire”. Accordingly, similar situations may be interpreted differently.

3.1.2.2 Health and cruel, inhuman and degrading treatment

Health care is a more specific scenario, which, differently from general situation, is based on a single socio-economic right—right to healthcare. HRC and ECtHR both had to assess if poor medical care may amount to cruel, inhuman and degrading treatment.

In *C. v. Australia* HRC needed to decide if deportation of person who previously was granted refugee status and had mental disease may amount to cruel, inhuman and degrading treatment. HRC noted “*that the AAT, whose decision was upheld on appeal, accepted that it was unlikely that the only effective medication (Clozaril) and back-up treatment would be available in Iran, and found the author "blameless for his mental illness" which "was first triggered while in Australia". In circumstances where the State party has recognized a protection obligation*

²⁰⁰ *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011, para 291;

²⁰¹ *Case of Airey v. Ireland*, European Court of Human Rights, App. No. 6289/73, 09/10/1979; *Sidabras and Dziautas v Lithuania*, European Court of Human Rights App. No. 55480/00 and 593300/00, para 47;

towards the author, the Committee considers that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of article 7 of the Covenant".²⁰² Nonetheless, it must be mentioned that in this case it was established that Applicant's mental condition was a result of prolonged detention in Australia. Therefore HRC highlighted that Australia was partly responsible for Applicant's illness.

ECtHR in *Pretty v. United Kingdom* admitted that *"the suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible"*.²⁰³ Furthermore, ECtHR recognized that bad medical care in a country of origin would amount to cruel, inhuman and degrading treatment and accordingly, may give rise to the obligation of *non-refoulement*. In *D. v. United Kingdom* ECtHR decided that *„in view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3 (art. 3). The Court also notes in this respect that the respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate."*²⁰⁴ In *B.B. v. France* ECtHR did not have a possibility to assert if deportation would amount to cruel, inhuman and degrading treatment since France granted permission for the Applicant to stay in France and case was removed from the list. However, in the same case Commission expressed that deportation would amount to cruel, inhuman and degrading treatment.²⁰⁵

Plenty of similar or even identical claims were made after decision in *D. v. United Kingdom*. Even so, none of them were successful. ECtHR rejected all claims because of three reasons. Firstly, ECtHR ruled that circumstances differ from those in *D. v. United Kingdom* and *B. B. v. France*. Secondly, ECtHR ruled that in all other cases medical facilities, though at very low level, are available in the country of origin. Lastly, ECtHR as well relied on the reasoning

²⁰² C. v. Australia, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, para 8.5;

²⁰³ *Pretty v. United Kingdom*, App. No. 2346/02, Council of Europe: European Court of Human Rights, 29 April 2002, para 52;

²⁰⁴ *D. v. United Kingdom*, Council of Europe: European Court of Human Rights App. No. 30240/96, 1997-05-02, para 53;

²⁰⁵ *B.B. v. France*, Council of Europe: European Court of Human Rights, App. No. 47/1998/950/11657, 1998, para 33;

that Applicants may benefit from their relatives.²⁰⁶ Furthermore, ECtHR stated that “*aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant’s circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3.*”²⁰⁷

The problem is that since condition of HIV/AIDS patient mainly depends on the medical treatment they receive, medicine can improve life quality and usually prolongs life expectancy. Hence it is almost impossible to establish that at the time of proceedings i.e. when person still benefits from medical treatment granted in the Respondent state, his health condition is so bad that he is close to death. Nevertheless, after deportation medical treatment is terminated and person’s condition becomes critical in a very short period of time.²⁰⁸

What is more, in cases *D. v. United Kingdom* and *N. v. United Kingdom* ECtHR used the same argument, but with different outcome since in the first case it was decided that deportation would amount to cruel, inhuman and degrading treatment while in the second case it was decided oppositely. In the first case ECtHR emphasized that United Kingdom guaranteed treatment for the Applicant for few years thus he became reliant on the medicine available for him in United Kingdom²⁰⁹, while in *N. v. United Kingdom* ECtHR stated even though United Kingdom continuously treated Applicant, Respondent state is not obliged to continue treatment.²¹⁰ Accordingly, ECtHR decided that in one case previous treatment in United Kingdom served as a circumstance precluding removal while in other case it was decided that previous treatment does not preclude deportation of the Applicant.

²⁰⁶ *Karara v. Finland*, Council of Europe: European Court of Human Rights, App. No. 40900/98, 1998-05-29, S.C.C. v. Sweden, Council of Europe: European Court of Human Rights, Appl. No. 46553/99, 15 February 2000, *Amegnigan v. The Netherlands*, Council of Europe: European Court of Human Rights, App. No. 25629/04, 25 November 2004, *N. v. The United Kingdom*, Council of Europe: European Court of Human Rights, Appl. No. 26565/05, 27 May 2008; *Meho and Others v. Netherlands*, Council of Europe: European Court of Human Rights, App. No. 76749/01, 20 January 2004; *Arcila Henao v. The Netherlands*, Council of Europe: European Court of Human Rights, App. No. 13669/03, 24 June 2003;

²⁰⁷ *N. v. The United Kingdom*, Council of Europe: European Court of Human Rights, Appl. No. 26565/05, 27 May 2008, para 42;

²⁰⁸ Michelle Foster. *Non-Refoulement on the basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law*, p. 294, *New Zealand Law Review*, Part II, 2009;

²⁰⁹ *D. v. United Kingdom*, Council of Europe: European Court of Human Rights, App. No 146/1996/767/964, 2 May 1997, para 53;

²¹⁰ *N. v. The United Kingdom*, Council of Europe: European Court of Human Rights, Appl. No. 26565/05, 27 May 2008, para 49;

Furthermore, in *D. v. United Kingdom* it was concluded that Applicant had relative in his country of origin but it is not clear if he would be able to take care of Applicant.²¹¹ Oppositely in *N. v. United Kingdom* ECtHR decided not to rely on identical argument made by the Applicant even though Applicant claimed that her relatives would not be capable to take care of her since their financial situation is very bad and most of them have already died of AIDS.²¹²

What is even more shocking, judges Tulkens, Bonello, Spielman in their dissenting opinion emphasized that ECtHR employed policy argument. Judges highlighted that ECtHR was concerned that “*if the applicant were allowed to remain in the United Kingdom to benefit from the care that her survival requires, then the resources of the State would be overstretched*”.²¹³ In the opinion of the judges, decision of the ECtHR contradicts absolute nature of *non-refoulement*. It may seem that on the one hand, ECtHR claims that prohibition of cruel, inhuman and degrading treatment is absolute and derogations are not allowed, while on the other hand, ECtHR is concerned about financial losses, which European countries would suffer if it would take responsibility to treat non-nationals. It follows that in this particular case ECtHR decided that it is too big a burden for states to provide assistance to third countries’ nationals, even though denial of assistance would result into Applicant’s exposure to inhumane and degrading conditions.

The case law analyzed demonstrates that judicial bodies interpret access to medical facilities quite differently. Furthermore, on some occasions even the same judicial institution delivered opposite rulings in almost identical cases. Author of this Thesis contends that this situation is linked to the fact that judicial institutions haven’t adopted any criteria for determination of cruel, inhuman and degrading treatment. As it was previously mentioned, ECtHR employed requirement of “minimum level of severity” in order to determine if person were/may be subjected to cruel, inhuman and degrading treatment. As seen from cases *D. v. United Kingdom* and *N. v. United Kingdom*, this requirement does not set any specific test and leads to different interpretation of similar situations. Thus even when the scope of evaluation is narrower than that of assessing the general situation, lack of clarity on this matter is doomed to be entrenched within the case law of human rights bodies for as long as the ambiguous interpretation of the prohibition of cruel, inhuman and degrading treatment prevails.

²¹¹ *D. v. United Kingdom*, Council of Europe: European Court of Human Rights, App. No 146/1996/767/964, 2 May 1997, para 52;

²¹² *N. v. The United Kingdom*, Council of Europe: European Court of Human Rights, Appl. No. 26565/05, 27 May 2008, para 48;

²¹³ *Ibid*, Joint Dissenting Opinion of Judges Tulkens, Bonello And Spielmann;

3.2 The economic failure of a state as an indicator for the need of international protection

As it is seen from previous analysis, environmentally displaced people may benefit from possible protection under the principle of *non-refoulement* just in the most severe cases because of very narrow interpretation of this concept. Alongside there is also the issue of visibility of such a group in general. From the first sight environmentally displaced people are quite similar to economic migrants. Economic migrants may be forced to leave their countries of origin because of lack of basic necessities, such as access to medical facilities, education and impossibility to find a job and, accordingly, provide for the family.²¹⁴ But that is only the first impression. The difference is that some of the environmentally displaced people would come from the countries, which are not capable of performing any economic activity. Thus the Author of this Thesis contends that some environmentally devastated states should be considered as economically failed. Accordingly, that kind of states would not be able to provide protection for people within its jurisdictions and for that reason these people may need international support. Author of this Thesis argue that complete economic failure of environmentally devastated state should be taken into account when states is determining if person may benefit from *non-refoulement* obligation.

Dwelling deeper into the issue it is seen that in case of economic migration people migrate because they seek better living conditions even though they still enjoy their state's protection, their state is still functioning. While in case of environmental displacement people are forced to leave their countries of origin because their country is not capable to ensure normal economic activity anymore and, accordingly, labor market becomes non-existing, infrastructure collapses, access to main facilities such as hospitals, schools etc. becomes impossible. Therefore the main difference is that in case of environmental displacement country of origin starts failing and is incapable to ensure socio-economic rights, while in case of economic migration state is functioning subject of international community. Apparently this distinction is completely dependent on the state's performance. That state could simply be in a crisis from which it will eventually recover. In that case, while socio-economic rights may be hindered, the effects are temporary, and, in most of the cases, not severe enough. But if an environmental disaster strikes, its effects may last a lifetime or even be permanent, making it impossible for the state to recover. Thus it is only a question of time when all socio-economic guarantees will become non-existent. In that case a method of identifying such a state is needed.

²¹⁴ United Nations High Commissioner for Refugees: *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para 62. Available at: <http://www.refworld.org/docid/3ae6b3314.html>, para 62;

To start with, “failed state” is rather a political term to describe “*states in which institutions and law and order have totally or partially collapsed under the pressure and amidst the confusion of erupting violence, yet which subsist as a ghostly presence on the world map*”.²¹⁵

Every year environmental disasters cause significant financial loss. World Bank conducted research and concluded that in the period between 1990 and 2000 environmental disasters caused damage resulting in the loss of 2-15 percent GDP.²¹⁶ Environmental disasters may devastate infrastructure and, for a period of time, make state incapable to perform economic activities.²¹⁷ Therefore that may result in unemployment, lack of the most important facilities. Another serious issue is potential environmental devastation in a country where slow-onset disaster occurs. For example, small island states in the Pacific region are mainly dependent on fisheries, tourism. However, due to the rising sea levels those islands attract fewer tourists, catch less fish and the main problem is that every year everything gets worse. Thus there is no prospect of enhancement. Therefore inhabitants are subjected to poverty and life without any prospects of improvement. And at some point in time it is easily predictable that means to sustain the people will disappear completely. This would be a policy argument, but still - would there be any ground to deny protection to people who are in poverty, starving, and there are no prospects of state recovery and starvation will be their reality in the nearest future. Another point must be made that predicting such event and acting beforehand may help control the flows of people from devastated countries. This way states may share the burden of protection more equally.

Under traditional concept of failed state that kind of state would not be considered as failed. Each year the Fund for Peace evaluates, which states may be considered as failed, taking into account social, economic and political factors. Nonetheless, in most of the literature the primary aspect analyzed is political. Under traditional understanding a state is failed first of all when government is incapable to perform its main functions, which are law and order. As a consequence, state suffers from violence, collapse of legal rule, governance of state is fragmented and divided between localized organs. Somalia is a text book example of a failed state. There is no effective central government, security is not ensured, crime is not controlled and even basic human rights are not ensured. Turning back to the environmentally devastated countries it is quite clear that those states will not satisfy criteria of a failed state as it is understood now. First of all, environmentally devastated countries still have governments, which are functioning. Secondly, those states are incapable to deal with severe environmental impacts,

²¹⁵ Harris, D. J.. *Cases and materials on international law*. 6th ed. London: Sweet & Maxwell, 2004, p. 101;

²¹⁶ Sapir, Debarati. *The economic impacts of natural disasters*. Oxford: Oxford University Press, 2013, p. 31;

²¹⁷ Bukovac, Matthew. *Failed states: unstable countries in the 21st century*. New York, NY: Rosen Pub., 2011, p. 4;

which result into economic failure of a state. Thus just one criterion, namely economic, out of three is satisfied.

On the other hand, in the context of changing realities it is necessary to apply new concepts. In this case it is crucial to highlight that environmentally devastated states are not capable to perform their economic activities and accordingly, ensure implementation of basic socio-economic rights to their citizens. As a consequence, people are subjected to poverty and there would not be prospects of improvement. Thus usage of term economically failed state may be important for highlighting state's incapacity to protect people and thus necessity of international protection for those people.

3.3 Environmental migration as a trigger for a Grotian moment

Dame Rosalyn Higgins, former president of International Court of Justice, stated that international law is a “*normative system*” and “*organized groups and structures require a system of normative conduct*”.²¹⁸ It is true that international law is a system of rules, which consists of customs, treaties, principles and other non-binding international legal instruments. Those rules are necessary to regulate relations between states. As Dame Rosalyn Higgins explained, without international law it would be impossible to agree and perform daily activities, such as travelling to foreign countries, regulation of flights. Thus it is clearly seen that international norms are made when there is a need. For example, it is in the interest of every state that navigation, exploration in the seas would be performed in a particular manner. Accordingly, United Nations Convention on the law of the seas²¹⁹ was signed by almost every state in the world. Furthermore, it may happen that international community witnesses some kind of event, which has never been regulated by international law. Therefore after that event international community may decide that regulations are needed. For instance, there were no universal human rights instruments before the Universal Declaration of Human Rights. It is known that this declaration was adopted after World War II. During the war humanity witnessed inconceivable treatment of human beings. What is more, Convention on the prevention and punishment of the crime of genocide was also adopted after Holocaust. Flows of refugees were regulated after specific events, such as genocide in Armenia, ruling of Bolsheviks in Soviet Russia and mass flows of people after World War II. Thus it seems that international community is willing to adopt new legal regulation when there is need for that or when some event, which has never been regulated before, occurs.

²¹⁸ Higgins, Rosalyn. *Problems and process: international law and how we use it*. Oxford: Clarendon Press, 1994, p. 1;

²¹⁹ United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 3; 21 ILM 1261 (1982);

On the other hand, some scholars suggested that “*when there is a fundamental change to the international system, a new principle of customary international law might arise with exceptional velocity*”.²²⁰ This concept is called Grotian moment, which is used by some international scholars to explain very sudden formation of customary norm. Under customary law custom has two elements-states practice and *opinio juris*. In Asylum case International Court of Justice stated that customary law must be “*in accordance with a constant and uniform usage practiced by the state in question*”²²¹, while *opinio juris* means that “*states concerned would act with the belief that their practice related to a matter governed by international law and that their practice was consistent with that they believed that international law should be*”.²²² Nevertheless, under the concept of Grotian moment constant and uniform practice is not necessary. It is stated that Peace of Westphalia, establishment of Nurnberg tribunal, rules regulating exploration of outer-space, usage of self-defense against non-state actors after 9/11 constitute Grotian moments. For instance, under international law, prior to Nurnberg tribunal, responsibility of states was the only form of international responsibility. However, World War II and incomprehensible crimes committed during those years implicated that new legal order is necessary. As a consequence, for the first time in history international tribunal, investigating actions of people who were in authority during Nazi ruling, was established. Tribunal convicted nineteen defendants. Soon after General Assembly passed a resolution recognizing principles established during Nurnberg process.²²³ Some argue that it is a clear evidence of customary international law.²²⁴ It is not surprising, since it is widely recognized that General Assembly resolutions may be evidence of customary international law. International Court of Justice in Military and Paramilitary Activities in and against Nicaragua²²⁵, Legality of the Threat or Use of Nuclear Weapons²²⁶, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory²²⁷, Gabcikovo-Nagymaros Project²²⁸, Armed Activities on the Territory of

²²⁰ Scharf, Michael P.. *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*. : Cornell International Law Journal, 2010, p. 439;

²²¹ Asylum Case (Colombia v. Peru), International Court of Justice (ICJ), 20 November 1950, available at: <http://www.refworld.org/docid/3ae6b6f8c.html>

²²² Lowe, A. V.. *International law*. Oxford: Oxford University Press, 2007, p. 39;

²²³ General Assembly resolution 95: (I) Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal General Assembly resolution 95 (I) York, 11 December 1946;

²²⁴ Scharf, Michael P.. *Customary international law in times of fundamental change: recognizing Grotian moments*. Cambridge: Cambridge University Press, 2013, p. 74;

²²⁵ International Court of Justice in Military and Paramilitary Activities in and against Nicaragua, 1984, I.C.J. Reports 1986, p. 14; General List No. 70, para 188;

²²⁶ International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996, p. 226, para 70;

²²⁷ Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, General List No. 131, para 129;

²²⁸ International Court of Justice, Gabcikovo-Nagymaros Project, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88, (1998) 37 ILM 162, ICGJ 66 (ICJ 1997), 25th September 1997, para 46;

the Congo²²⁹, Application of the Convention on the Prevention and Punishment of the Crime of Genocide²³⁰ concluded that General Assembly resolutions may account as evidence of customary rule. Thus it may seem that international community sometimes recognizes existence of customary rule even though state practice is not widespread. The rationale behind that is that some events in international arena are so fundamental that legal regulation is needed immediately, thus it is not necessary to establish constant and uniform usage.

Scientists suggest that in approximately 2050 small island states will be submerged. It is stated that in the future there will be more environmental disasters such as droughts, tsunamis, hurricanes, which will make big parts of Africa, Asia unsuitable for habitation. International community expressed concerns about possible solutions regarding this issue numerous times. There were proposals to grant land in other countries for inhabitants of small island states, to create new treaty protecting environmentally displaced people, some countries also offered *ad hoc* protection schemes. However, consensus was not reached and people are still left without protection. Therefore the question is what would happen if those prognoses come to the existence while international community still does not have any solution. Massive flows of displaced people would force international community to find an alternative protection.

The issue of climate change and its adverse effects to people was highlighted many times, for example it is *expressis verbis* stated in UNFCCC that States commit to take into account '*the specific needs and special circumstances*' of states parties, which '*are particularly vulnerable to the adverse effects of climate change*'.²³¹ Those provisions were numerous times confirmed by General Assembly, which stated that "*the provisions of the United Nations Framework Convention on Climate Change including the acknowledgement that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions*"²³². Currently there are 195 states parties to UNFCCC, General Assembly resolutions confirming provisions of UNFCCC were adopted unanimously. Therefore it is quite clear that almost all states of the world expressed their consent to

²²⁹ International Court of Justice, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), International Court of Justice (ICJ), 18 September 2002, General List No. 126, para 116;

²³⁰ International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 2007, Judgment, ICJ General List No. 91, p. 108, para 436;

²³¹ United Nations Framework Convention on Climate Change (New York, May 9, 1992), 1771 UNTS 107, arts. 4.8.a, 4.8.b, 4.8.d;

²³² United Nations. A/RES/63/32. General Assembly. Distr.: General. 28 January 2009. Sixty-third session. Agenda item 49 (d); United Nations. A/RES/63/281. General Assembly. Distr.: General. 11 June 2009. Sixty-third session. Agenda item 107. 08-48765;

mitigate adverse effects of climate change and to take into account needs of states parties, which are the most vulnerable to the climate change. What is more, in 2009 General Assembly unanimously adopted resolution A/63/L.8/Rev.1, through which it was concluded that climate change is critical issue.²³³

Therefore in theory it is possible to make a conclusion that climate change, adverse effects of it, increasing numbers of environmental disasters may be considered such a fundamental change, which may give rise to a Grotian moment. Conversely, the problem is that all events, which theoretically are considered as Grotian moments, were very different from those caused by environmental disasters. First of all, granting protection to all environmentally displaced people would require substantial contribution of not-affected states. Secondly, Grotian moments, such as exploration of outer-space, establishment of Nurnberg tribunal etc., concerned rights of the states rather than significant obligations, such as providing protection to environmentally displaced people. It may be assumed that states are willing to modify existing international law when their rights are at stake, while not so eager to assume new obligations, which would be a great additional burden. This situation is perfectly illustrated by statement of Professor Lassa Oppenheim who argued that “*without the conviction of the Governments and of public opinion of the civilized States that there ought to be legally binding rules for international conduct, on the one hand, and, on the other hand, without the pressure exercised upon the States by their interests and the necessity for the growth of such rules, the latter would never have grown up*”.²³⁴ Furthermore, as it was previously noted, international community usually adopts new legal regulation after some shocking event, such as Holocaust. After that kind of events international community starts adopting numerous international treaties, which are designed to regulate similar events in the future. Thus it may be concluded that issue of environmental displacement will not be addressed till environmental displacement becomes mass phenomenon causing severe effects on human population.

²³³ United Nations. A/63/L.8/Rev.1. General Assembly. Distr.: Limited. 18 May 2009. Original: English. 09-34221 (E) 200509. *0934221*. Sixty-third session;

²³⁴ Lassa Oppenheim. *International law. A treatise*. Longmans, Green and Co, London, 1905, p. 17.

CONCLUSIONS

1. For the assessment of international protection all proposed definitions regarding environmental displacement are inadequate. All proposed definitions neglect the factor of state's capacity to mitigate the effects of environmental disaster. State's capacity to mitigate the effects of environmental disaster plays a crucial role in determining if a person is in need of international protection. For this reason the Author of this Thesis proposes the following new definition: "People who leave their countries of origin because of environmental disaster, which has a severe adverse effect to their lives or living conditions, and they cannot avail themselves to the protection of their country of origin because of its incapacity or unwillingness to protect those people from such effects of the environmental disaster".
2. The legal justification that climate change and industrialized states may be persecutors within the meaning of 1951 Convention relating to the Status of Refugees to this day is not established. The few cases of state practice regarding this matter rejected the notion completely. The reason is that the harm caused by climate change and polluting states is indiscriminate, contrary to the well-established requirement of marginalization in 1951 Convention relating to the Status of Refugees.
3. Some scholars argue that environmentally displaced people may benefit from 1951 Convention relating to the Status of Refugees. People are forced to migrate because of multiple reasons and sometimes environmental reasons may be interlinked with those established in 1951 Convention relating to the Status of Refugees. Nevertheless, refugee status may be granted just for people who are persecuted because of Conventional reason and as state practice evidences environmental triggers for migration is not decisive factor for granting refugee status.
4. All regional judicial institutions have recognized that infringement of socio-economic rights may amount to the infringement of right to life or amount to cruel, inhuman and degrading treatment. Nonetheless, the approach towards socio-economic rights is diverse and some courts lack consistency in their decisions. Strengthening the guarantees for socio-economic rights and their place within the human rights system would offer greater protection to environmentally displaced people with regard to the application of the principle of *non-refoulement* since most of them will leave their countries of origin because of devastating socio-economic rights there.

5. At present day environmentally displaced people are not entitled to any specific protection under international law. They either fall within the existing refugee or complementary protection or are left without any protection at all. Some scientists claim that in the future environmental displacement will cause mass displacement. It is seen from the practice of states that on some occasions legal issues are addressed only when a fundamental event in international arena occurs. Thus it may be claimed that issue of environmental displacement will not be properly addressed until an environmental disaster strikes and mass displacement of an unprecedented scale occurs.

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SUMMARY

The Thesis begins with an analysis of the effects of environmental disasters and various approaches of states to mitigate them. The results of this analysis evidence that while some effects of environmental disasters are more visible and easier to evaluate, as in the case of sudden onset disasters, others are less visible and grow more deadly over time, as in the case of slow onset disasters. Moreover, the effects of environmental disasters on people depend heavily on the state's capacity to mitigate such effects. Then Author of the Thesis turns to the existing definitions for environmentally displaced people and as all existing definitions do not take into account the level of state protection available, a new definition is proposed. The new definition limits the scope to people seeking international protection due to environmental events, for which their country of origin does not offer any protection.

It is analyzed in the second part of this Thesis the application of 1951 Geneva Convention to environmentally displaced people. Based on the assessment of state practice and the works of the most prominent scholars it is showed that environmentally displaced people may in fact be refugees, however, in a very small number of scenarios. The problem is that all of those scenarios are traditional refugee situations and environmental factors are not decisive circumstances when migration authorities determine if person is entitled to refugee status.

Socio-economic rights within the context of environmental disasters and their connection to the well-established principle of *non-refoulement* are analyzed in the third part of this Thesis. The analysis shows that if a violation of socio-economic rights is severe – it may lead to a violation of right to life or prohibition of cruel, inhuman and degrading treatment, and in turn – to the principle of *non-refoulement*. However, there is no uniform approach as identical situations in different regions have been interpreted differently. Inter-American Court of Human Rights and African Commission on Human and Peoples Rights may be willing to rule that infringement of socio-economic rights can amount to infringement of right to life while the European Court of Human Rights on some occasions may conclude that it would rather amount to cruel, inhuman and degrading treatment. The interpretation of cruel, inhuman and degrading treatment is of particular concern in regard to socio-economic rights as the analysis of European Court of Human Rights case law shows plurality of approaches and a lack of consistency. Lastly, the Author of this Thesis contends that, the primary reason why the issue of environmental displacement is not addressed in international arena, despite many proposals, is because it is not yet a high profile issue. It is evidenced from the practice of the states that many issues have been addressed after a fundamental event occurs, which has previously never been regulated by international law.

SANTRAUKA

Magistro baigiamasis darbas pradedamas gamtinių nelaimių sukeliamų padarinių ir valstybių veiksmų siekiant sumažinti jų padarinius analize. Analizė rodo, kad kai kurios gamtinės nelaimės gali būti lengviau pastebimos, tokios kaip staigios gamtinės nelaimės, o kitos sunkiau pastebimos ir įvertinimo, tokios kaip iš lėto besivystančios gamtinės nelaimės. Be to, gamtinių nelaimių padarinių sunkumas priklauso nuo to ar valstybė yra pajėgi sumažinti padarinius. Tuomet Magistro baigiamajame darbe yra analizuojami esami dėl gamtos nelaimių migruojančių asmenų apibrėžimai ir atsižvelgiant į tai, kad visi esami apibrėžimai nevertina kilmės valstybės teikiamos apsaugos, yra siūlomas naujas apibrėžimas. Šis apibrėžimas yra apribotas žmonėmis, siekiančiais tarptautinės apsaugos dėl gamtinių nelaimių, kurie negali pasinaudoti kilmės valstybės apsauga.

Antrojoje šio Magistro baigiamojo darbo dalyje analizuojamas 1951 m. Ženevos Konvencijos „Dėl pabėgėlių statuso“ taikymas dėl gamtinių nelaimių migruojantiems asmenims. Atliktas valstybių praktikos ir doktrinos tyrimas atskleidė, kad dėl gamtinių nelaimių migruojantys asmenys gali būti pabėgėliais, tačiau tik išskirtiniais atvejais. Be to, visais šiais atvejais paskatos palikti savo šalį dėl gamtinės nelaimės, nėra lemiantys faktoriai suteikti pabėgėlio statusą.

Trečiojoje dalyje yra analizuojamas ryšys tarp socialinių, ekonominių teisių, *non-refoulement* principo ir gamtinių nelaimių. Analizė atskleidė, kad rimti socialinių, ekonominių teisių pažeidimai gali būti prilyginami teisės į gyvybę pažeidimui ar žiauraus, nežmoniško ir žeminančio elgesio draudimo pažeidimui. To pasekoje gali būti pažeidžiamas *non-refoulement* principas. Vieningos metodikos šiai problemai spręsti nėra, nes skirtingose regionuose šios nuostatos yra interpretuojamos skirtingai. Amerikos Žmogaus Teisių Teismas ir Afrikos Žmogaus ir Tautų teisių komisija laikytų, kad socialinių ir ekonominių teisių pažeidimas galėtų prilygti teisės į gyvybę pažeidimui. Tuo tarpu Europos Žmogaus Teisių Teismas nuspręstų, jog tai yra žiauraus, nežmoniško ir žeminančio elgesio pažeidimas. Europos Žmogaus Teisių teismo praktikos analizė žiauraus, nežmoniško ir žeminančio elgesio bylose, kuriose buvo analizuojamos socialinės ir ekonominės teisės, rodo šios nuostatos interpretavimo nuoseklumo trūkumą. Pabaigoje Magistro baigiamajame darbe autorė įrodinėja, kad pagrindinė priežastis, kodėl persikėlimo dėl gamtinių nelaimių problema nepaisant daugybės pasiūlymų tarptautinėje teisėje nėra sprendžiama, yra todėl, kad tai nėra rezonansinis klausimas. Valstybių praktika rodo, jog daugelis problemų buvo sprendžiama tik po ypatingos reikšmės įvykių, kurie prieš tai nebuvo reguliuojami tarptautinės teisės normų.