

# The Duty to Move People Out of Harm's Way in the Context of Climate Change and Disasters

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## ABSTRACT

Experience shows that both sudden- and slow-onset disasters can result in displacement. Indeed, disasters now account for the largest number of newly displaced people each year – more than violence or conflict. At times, areas of land may be rendered too unsafe for continued human habitation, requiring evacuations or planned relocations of affected people. In fact, several countries are already in the process of moving, or considering moving, people out of at-risk areas, either as a preventive measure before disaster strikes, or as a reactive response in the aftermath of a disaster triggered by natural hazards.

The present article examines whether human rights norms impose a duty on States to move people out of harm's way through (temporary) evacuations and/or (permanent) planned relocations, as measures to address and mitigate disaster risk and/or adapt to the negative consequences of climate change on human settlement, and, if so, what human rights law prescribes regarding the modalities of such measures.

**KEYWORDS:** disasters, climate change, displacement, planned relocation, evacuation, human rights law, international law, duty to cooperate, humanitarian assistance

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## 1. INTRODUCTION

Experience shows that both sudden- and slow-onset disasters can result in displacement. Indeed, disasters account for the largest number of newly internally displaced people each year – 18.8 million in 2017, compared to 11.8 million displaced by violence or conflict.<sup>1</sup> Disasters related to weather triggered the vast majority of all new displacement (almost 96 per cent),<sup>2</sup> and as climate change impacts on the frequency and/or intensity of extreme weather events and environmental degradation, the risk of displacement is expected to increase.<sup>3</sup> At times, areas of land may be rendered too unsafe for continued human habitation.<sup>4</sup> Natural hazards and environmental degradation may trigger evacuations or planned relocations of affected people. In fact, several countries are already in the process of moving, or considering moving, people out of at-risk areas, either as a preventive measure before disaster strikes, or as a reactive response in the aftermath of a disaster triggered by natural hazards.

There is increasing recognition by the international community that evacuations and planned relocations may be necessary to protect people from harm in the context of disasters and climate change. In the Global Compact for Safe, Orderly and Regular Migration, to be adopted in December 2018, States for the first time have committed to “[i]ntegrate displacement considerations into disaster preparedness strategies and promote cooperation with neighbouring and other relevant countries to prepare for early warning, contingency planning, stockpiling, coordination mechanisms, evacuation planning, reception and assistance arrangements, and public information”,<sup>5</sup> and to “[c]ooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin due to slow-onset natural disasters, the adverse effects of climate change [...] including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible”.<sup>6</sup> The Sendai Framework on Disaster Risk Reduction calls on States to “[s]trengthen the capacity of local authorities to evacuate persons living in

1 Internal Displacement Monitoring Centre (IDMC), *GRID 2018: Global Report on Internal Displacement*, Geneva, IDMC, Jun. 2018, 6–7, available at: <http://www.internal-displacement.org/global-report/grid2018/downloads/2018-GRID.pdf> (last visited 30 Aug. 2018). Interestingly, this figure includes a significant number of evacuations, which “illustrate the fact that displacement need not always be a negative outcome, in that pre-emptive evacuations save lives and are an effective resilience measure”: *ibid.*, 30. Figures are not available for those displaced across borders in the context of disasters.

2 *Ibid.*, 6.

3 IDMC, *GRID 2017: Global Report on Internal Displacement*, Gneeva, IDMC, Jun. 2017, 11.

4 For example, impacts of sea-level rise, such as flooding and inundation, saltwater intrusion into surface and groundwater, and sea-level extremes, may make areas of land unsafe. The typology developed by the Nansen Initiative is instructive: planned relocations may be relevant as a preventative measure to reduce the risk of future displacement, or as a lasting solution to enable people to rebuild their lives if they cannot return to their original homes. See The Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, Vol. 1, Geneva, Nansen Initiative, Dec. 2015, 38, available at: <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf> (last visited 15 Aug. 2018) (Nansen Initiative Protection Agenda).

5 Global Compact for Safe, Orderly and Regular Migration, Dec. 2018, para. 18(j).

6 *Ibid.*, para. 18(h). Although the Global Compact is not legally binding, these are important political commitments at the international level.

disaster-prone areas”<sup>7</sup> and, more particularly, to “[p]romote regular disaster preparedness, response and recovery exercises, including evacuation drills [...] with a view to ensuring rapid and effective response to disasters and related displacement”.<sup>8</sup> Evacuations are also addressed by the 2010 IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters,<sup>9</sup> among other instruments. With respect to relocations, the Sendai Framework calls on States to develop public policies to relocate “human settlements in disaster risk zones”<sup>10</sup> as well as to “[c]onsider the relocation of public facilities and infrastructures to areas outside the risk range, wherever possible, in the post-disaster reconstruction process [...]”.<sup>11</sup> Planned relocations are further addressed by the 2015 Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation and its related 2017 operational Toolbox.<sup>12</sup> The Sydney Declaration of Principles on the Protection of Persons Displaced in the context of Sea Level Rise, adopted by the International Law Association in 2018, provides guidance to States in averting, mitigating and addressing displacement in the context of sea-level rise, including through evacuations and planned relocations.<sup>13</sup>

More generally, arguments have been made that victims of disasters can claim a right to humanitarian assistance when in need, pursuant to extant human rights.<sup>14</sup> As far back as 1988, the UN General Assembly stated that “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity”.<sup>15</sup> There is growing recognition that there are duties inherent in existing human rights

7 Sendai Framework for Disaster Risk Reduction 2015–2030, adopted by the Third United Nations World Conference on Disaster Risk Reduction, and endorsed by the UN General Assembly in Res. 69/283. 3 Jun. 2015, Annex II, para. 33(m) (Sendai Framework).

8 *Ibid.*, para. 33(h).

9 Inter-Agency Standing Committee (IASC), *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, Brookings-Bern Project on Internal Displacement, Jan. 2011, available at: [http://www.ohchr.org/Documents/Issues/IDPersons/OperationalGuidelines\\_IDP.pdf](http://www.ohchr.org/Documents/Issues/IDPersons/OperationalGuidelines_IDP.pdf) (last visited 15 Aug. 2018) (IASC Guidelines).

10 Sendai Framework, para. 27(k).

11 *Ibid.*, para. 33(l).

12 Brookings Institution, Georgetown University & United Nations High Commissioner for Refugees (UNHCR), *Guidance on Protecting People from Disasters and Environmental Change Through Planned Relocation*, 7 Oct. 2015, available at: <https://georgetown.app.box.com/s/pe2txj1giauyvzebiw4fhzn-guzlld9e> (last visited 15 Aug. 2018) (*Guidance on Planned Relocation*); Georgetown University, UNHCR & International Organization for Migration (IOM), *A Toolbox: Planning Relocations to Protect People from Disasters and Environmental Change*, 2017, <https://georgetown.app.box.com/s/xzn8xdwvp1yh4ogf-ce7sbd8fxa4vn258> (last visited 15 Aug. 2018) (Toolbox on Planned Relocation).

13 International Law Association, *of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise*, Res. 6/2008, Aug. 2018, available at: [http://www.ila-hq.org/images/ILA/Resolutions/ILAResolution\\_6\\_2018\\_SeaLevelRise\\_SydneyDeclaration.pdf](http://www.ila-hq.org/images/ILA/Resolutions/ILAResolution_6_2018_SeaLevelRise_SydneyDeclaration.pdf) (last visited 31 Aug. 2018) (Sydney Declaration). See Principles 5 and 6, in particular.

14 Kälin has argued that a “right to humanitarian assistance can [...] be derived from the duty to protect life in situations where a State knows about a life-threatening lack of humanitarian goods and services and is able to provide them”: W. Kälin, “The Human Rights Dimension of Natural or Human-Made Disasters”, *German Yearbook of International Law*, 55, 2012, 141. See also W. Kälin, *Protection of and Assistance to Internally Displaced Persons: Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons*, UN Doc. A/65/282, 11 Aug. 2010, para. 57.

15 UN General Assembly (UNGA), Res. 43/131, 8 Dec. 1988, Preamble.

obligations that require States to address the adverse impacts of climate change. Various bodies are attempting to articulate and give meaning to the content of such duties.<sup>16</sup> In addition, two treaties explicitly address the need for disaster relief,<sup>17</sup> and there are also efforts to recognise a single, overarching right to a healthy environment.<sup>18</sup>

The present article examines whether, and to what extent, efforts to provide guidance with regard to evacuations and planned relocations as part of disaster risk response and climate change adaptation are underpinned by States' obligations under international human rights law. In other words, do human rights norms impose a duty on States to move people out of harm's way through (temporary) evacuations and/or (permanent) planned relocations, as measures to address and mitigate disaster risk and/or adapt to the negative consequences of climate change on human settlement? And, if so, what does human rights law prescribe regarding the modalities of such measures?

This analysis is based on a widely shared understanding that under international human rights law States have an obligation to respect, protect and fulfil<sup>19</sup> human rights to protect people from certain types of foreseeable risk, including in the context of climate change and disasters.<sup>20</sup> In particular, States' obligation to realise and protect the right to life may require certain positive steps to be taken where the risk of future harm to life as a consequence of natural hazards is (or should be) known.<sup>21</sup>

- 16 These aspects are also expected to be the subject of further research within this Committee. For this purpose, the following is likely to be of particular relevance: J. Knox, *Report of the Independent Expert on Issues of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean Healthy and Sustainable Environment: Preliminary Report*, UN Doc. A/HRC/22/43, 24 Dec. 2012; J. Knox, *Report of the Independent Expert on Issues of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean Healthy and Sustainable Environment: Mapping Report*, UN Doc. A/HRC/25/53, 30 Dec. 2013; UN Office of the High Commissioner for Human Rights (OHCHR), *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus Report on Human Rights and Climate Change*, Geneva, OHCHR, Jun. 2014; OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UN Doc. A/HRC/10/61, 15 Jan. 2009; J. McAdam & M. Limon, *Human Rights, Climate Change and Cross-Border Displacement: The Role of the International Human Rights Community in Contributing to Effective and Just Solutions*, Universal Rights Group, Policy Report, Aug. 2015.
- 17 Convention on the Rights of Persons with Disabilities (CRPD), 2515 UNTS 3, 13 Dec. 2006 (entry into force: 3 May 2008), Art. 11; African Charter on the Rights and Welfare of the Child, OAU Doc. CAB//LEG/24.9/49, 1990 (entry into force: 29 Nov. 1999), Arts. 23 and 25.
- 18 See e.g. J. Knox, *Report of the Independent Expert on Issues of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean Healthy and Sustainable Environment: Preliminary Report*, para. 51.
- 19 The "obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide": UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11)*, UN Doc. E/C.12/1999/5, 12 May 1999, para. 15., in relation to the International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, 1966 (entry into force: 3 January 1976).
- 20 Kälin, "The Human Rights Dimension of Natural or Human-Made Disasters", 128–129; W. Kälin & J. Künzli, *The Law of International Human Rights Protection*, Oxford, Oxford University Press, 2009, 96–113. See also CESCR, *General Comment No. 12*, para. 15. More generally, see the following resolutions of the UN Human Rights Council: UN Doc. A/HRC/35/20, 22 Jun. 2017; UN Doc. A/HRC/RES/32/33, 18 Jul. 2016; UN Doc. A/HRC/RES/29/15, 22 Jul. 2015; UN Doc. A/HRC/RES/26/27, 15 Jul. 2014; UN Doc. A/HRC/RES/18/22, 17 Oct. 2011; UN Doc. A/HRC/RES/10/04, 25 Mar. 2009.
- 21 New Zealand Immigration and Protection Tribunal (NZIPT), *AF (Kiribati)* [2013] NZIPT 800413, para. 63, referring to European Court of Human Rights (ECtHR), *Öneriyildiz v. Turkey*, Judgment, Grand

In this article, the term “evacuation” describes “the rapid physical movement of people away from [an] immediate threat or impact of a hazard to a safer place.” In a situation of imminent risk, the purpose is “to move people as quickly as possible to a place of safety and shelter”. Evacuations are “commonly characterized by a short timeframe (from hours to weeks) within which emergency procedures need to be enacted in order to save lives and minimize exposure to harm.” They may be “mandatory, advised, or spontaneous”.<sup>22</sup>

By contrast, the term “planned relocation” describes the act of moving people from one location to another when it is too dangerous or no longer possible for them to remain living in a particular location. A planned relocation may be either voluntary or forced, large-scale or small-scale.<sup>23</sup> Even though movement away from a hazardous area may begin as an evacuation, relocations are intended to be permanent.<sup>24</sup> Best practice relocations also involve a process of “resettlement” to assist relocated people to replace their housing, assets, livelihoods, land, access to resources and services; to maintain their communities; and to enhance, or at least restore, their living standards.<sup>25</sup> However, planned relocations are not a panacea and must be approached with considerable care and caution.<sup>26</sup> They entail risks for their intended beneficiaries, “including

- Chamber, Application No. 48939/99, 30 Nov. 2004; ECtHR, *Budayeva and Others v. Russia*, Judgment, Applications Nos. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02, 20 Mar. 2008; ECtHR, *M.S.S. v. Belgium and Greece*, Judgment, Grand Chamber, Application No. 30696/09, 21 Jan. 2011; CESCR, *General Comment No. 12*; CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN Doc. E/C12/2000, 11 Aug. 2000; Kälin, “The Human Rights Dimension of Natural or Human-Made Disasters”, 137. Likewise, States must not forcibly return people to life-threatening circumstances or a known risk of cruel, inhuman or degrading treatment: International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976), Arts. 6 and 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1465 UNTS 85, 10 Dec. 1984 (entry into force: 26 Jun. 1987), Art. 3; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR), as amended), ETS No. 005, 4 Nov. 1950 (entry into force: 3 Sep. 1953), Arts. 2 and 3.
- 22 UNHCR, Brookings Institution & Georgetown University, *Planned Relocation, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future*, Sanremo Consultation Report, Mar. 2014, 11–14, available at: <http://www.unhcr.org/54082cc69.pdf> (last visited 20 Aug. 2018), drawing on the Global Camp Coordination and Camp Management Cluster (CCCCM), *The MEND Guide: Comprehensive Guide for Planning Mass Evacuations in Natural Disasters: Pilot Document*, 2014, 17, available at: <http://www.globalccmcluster.org/tools-and-guidance/publications/mend-guide> (last visited 15 Aug. 2018).
- 23 E. Ferris, *Protection and Planned Relocations in the Context of Climate Change*, UNHCR Legal and Protection Policy Research Series, Aug. 2012, 11, available at: <http://www.unhcr.org/protection/globalconsult/5024d5169/27-protection-planned-relocations-context-climate-change-elizabeth-ferris.html> (last visited 15 Aug. 2018).
- 24 These kinds of movement are best understood as existing along a multi-dimensional continuum.
- 25 World Bank, *Operational Manual: OP 4.12 – Involuntary Resettlement*, Dec. 2001, revised Apr. 2013, available at: <https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f89db.pdf> (last visited 15 Aug. 2018); Asian Development Bank, *ADB Policy Paper: Safeguard Policy Statement*, June 2009, available at: <https://www.adb.org/documents/safeguard-policy-statement> (last visited 15 Aug. 2018). Note that the Asian Development Bank stipulates that the poor and vulnerable should be able to improve their living standards (not just restore them to pre-project vulnerability). See also CESCR, *General Comment No. 12*, para. 16.
- 26 See e.g., J. McAdam, “Relocation and Resettlement from Colonisation to Climate Change: The Perennial Solution to ‘Danger Zones’”, *London Review of International Law*, 3(1), 2015, 93–130; J. McAdam, “Historical Cross-Border Relocation in the Pacific: Lessons for Planned Relocations in the Context of

the disruption of livelihoods and loss of income, socioeconomic networks and cultural heritage”,<sup>27</sup> and in the context of development projects, have generally led to greater impoverishment and vulnerability.<sup>28</sup> They can also take years, even generations, to implement – “which can mean the involvement of successive governments, divergent political priorities, and, potentially, multiple changes in policy.”<sup>29</sup> For these and other reasons, they are generally considered an option of last resort.<sup>30</sup>

## 2. GENERAL OBLIGATIONS OF STATES TO PROTECT PEOPLE AGAINST FORESEEABLE NATURAL HAZARDS

While matters fundamental to human existence protected by human rights law, such life or health, may be affected by natural hazards, nature is of course not bound by human rights law and thus cannot commit human rights violations. Human rights law may, however, grant individuals claims *vis-à-vis* state actors to protect them against natural hazards such as windstorms, flooding, earthquakes, rising sea levels or drought. Thus, States bear the primary duty to protect and assist those within their territory and/or subject to their jurisdiction, including where natural hazards and ensuing disasters threaten life, health or security, or trigger displacement.

This has been particularly clearly recognised by the European Court of Human Rights. The Court has held that environmental damage can affect people's rights to life, property, home and private life,<sup>31</sup> and has stressed that States' obligation to protect the right to life may also include protection from disasters and environmental harm.<sup>32</sup> In *Budayeva v. Russia*, the Court explained that the right to life “does not solely concern deaths resulting from the use of force by agents of the State but also [...] lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction”, emphasising that “[t]his positive obligation entails above all a primary duty on the State to put in place a legislative and

Climate Change”, *Journal of Pacific History*, 49, 2014, 301; Nansen Initiative Protection Agenda, paras. 94–98 and 121–122.

27 Georgetown University, UNHCR & IOM, *Toolbox on Planned Relocation*, 3.

28 See e.g., M. Cernea & H. Mathur (eds.), *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investments and Benefit-Sharing*, New Delhi, Oxford University Press, 2008; A. Oliver-Smith (ed.), *Development and Dispossession: The Crisis of Forced Displacement and Resettlement*, Santa Fe, School for Advanced Research Press, 2009; O. Bennett & C. McDowell, *Displaced: The Human Cost of Development and Resettlement*, New York, Palgrave MacMillan, 2012; A. Oliver-Smith & A. Sherbinin, “Something Old and Something New: Resettlement in the Twenty-First Century”, in S. Martin, S. Weerasinghe & A. Taylor (eds.), *Humanitarian Crises and Migration: Causes, Consequences and Responses*, Abingdon, Routledge, 2014.

29 Georgetown University, UNHCR & IOM, *Toolbox on Planned Relocation*, 11.

30 Nansen Initiative on Disaster-Induced Cross-Border Displacement, *Human Mobility, Natural Disasters and Climate Change in the Pacific*, Report from the Nansen Initiative Regional Consultation in Rarotonga, May 2013, 4, 20 and 29, available at: [https://www.nanseninitiative.org/wp-content/uploads/2015/07/OR\\_Human\\_Mobility\\_Natural\\_Disasters\\_and\\_Climate\\_Change\\_in\\_the\\_Pacific.pdf](https://www.nanseninitiative.org/wp-content/uploads/2015/07/OR_Human_Mobility_Natural_Disasters_and_Climate_Change_in_the_Pacific.pdf) (last visited 15 Aug. 2018).

31 See cases cited in L. Loucaides, *The European Convention on Human Rights: Collected Essays*, Leiden, Boston, Martinus Nijhoff Publishers, 2007, Ch. 10 on “Environmental Protection through the Jurisprudence of the European Convention on Human Rights”, beginning with *Arrondelle v. United Kingdom* (1980) 19 DR 186: e.g., *Sergio Euben Lopez Burgos v. Uruguay*, Comm No. R.12/52, Supp No. 40, A/36/40 176, 29 July 1981; *Guerra v. Italy* (1998) 26 EHRR 357; ECtHR, *Fadeyeva v. Russia*, Judgment, Application No. 55723/00, 9 Jun. 2005.

32 See ECtHR, *Öneriyildiz v. Turkey*, paras. 71–72.

administrative framework designed to provide effective deterrence against threats to the right to life”.<sup>33</sup> Besides the duty to take *preventative action* (to avert potential violations), the duty to protect also entails obligations with regard to *remedial action* (to address the consequences of a violation), and requires operational, legislative and/or enforcement measures to be put in place.<sup>34</sup>

The obligation to protect arises where the authorities know – or ought to know, by exercising due diligence – about an actual or imminent danger arising from either “natural” or human-made circumstances, yet fail to take reasonable protective measures (given available resources<sup>35</sup>) that might reasonably be expected to avert the danger, or, after the incident, fail to redress the damage that has occurred.<sup>36</sup> More stringent standards may apply where those at risk are deemed to require special protection, for instance on account of their age or a disability.<sup>37</sup>

In terms of how foreseeable a hazard must be to attract state responsibility, the Court has referred to:

the imminence of a natural hazard that ha[s] been clearly identifiable, and especially where it concern[s] a recurring calamity affecting a distinct area developed for human habitation or use [. . .]. The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation.<sup>38</sup>

This means that any risk of harm must be more than speculative,<sup>39</sup> but it does not have to reach the level of absolute certainty. Risk must be assessed based on an area’s pre-existing hazard profile and the vulnerability of the particular community residing there (including any special needs that particular groups within that community might have).<sup>40</sup> This not only encapsulates groups such as the elderly or those with a disability, but also schools, hospitals and so on.<sup>41</sup> Disaster risk assessments, including

33 ECtHR, *Budayeva and Others v. Russia*, paras. 128–129.

34 See Kälin & Künzli, *The Law of International Human Rights Protection*, 96 and 106–107. Treaty monitoring bodies recognise that even human rights guarantees containing no explicit reference to a duty to protect may nevertheless entail such an obligation.

35 The extent of the State’s obligation will generally depend on its capacity, including the resources it has available to devote to the performance of its duty: *ibid.*, 96 and 112; ECtHR, *Budayeva and Others v. Russia*, para. 135.

36 Kälin & Künzli, *The Law of International Human Rights Protection*, 110. See also, *ibid.*, 96: “The obligation to protect arises only in so far as they State is aware, or could have been aware, if sufficient caution had been exercised of the violation or the threat thereof and has the practical and legal means to prevent it.”

37 *Ibid.*, 110.

38 ECtHR, *Budayeva and Others v. Russia*, para. 137. By contrast, “[o]nce a disaster is unfolding, the obligation of the State to protect life seems absolute” and must “do everything within its power to respond”: K. Lauta & J. Rytter, “A Landslide on a Mudslide? Natural Hazards and the Right to Life under the European Convention on Human Rights”, *Journal of Human Rights and the Environment*, 7(1), 2013, 113.

39 Lauta & Rytter, “A Landslide on a Mudslide?”, 117, referring to ECtHR, *Budayeva and Others v. Russia*, para. 137; ECtHR, *Kolyadenko v. Russia*, Judgment, Applications Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 Feb. 2012, paras. 151 and 156.

40 Lauta & Rytter, “A Landslide on a Mudslide?”, 117.

41 See e.g., Consortium for Disaster Education, Indonesia, *A Framework of School-Based Disaster Preparedness*, undated, 13, available at: [https://www.preventionweb.net/files/26013\\_26008aframeworkof](https://www.preventionweb.net/files/26013_26008aframeworkof)

risks identified in National Adaptation Plans in the context of climate change, will therefore be highly relevant.

The European Court of Human Rights' jurisprudence indicates that the right to life embodies both substantive and procedural aspects, "notably a positive obligation to take regulatory measures and to adequately inform the public about any life-threatening emergency and to ensure that any occasion of the death caused thereby would be followed by a judicial enquiry".<sup>42</sup> The obligation appears to be one of conduct rather than result, in that States must "take appropriate steps to safeguard the lives of those within their jurisdiction",<sup>43</sup> including by establishing "a legislative and administrative framework designed to provide effective deterrence against threats to the right to life".<sup>44</sup> In practice, this might mean that States must provide people with sufficient information, warnings, options to leave and safe areas to move to.

However, States retain some margin of appreciation,<sup>45</sup> dependent in part on the resources at their disposal, and in part on whether a hazard is natural or man-made. The Court has noted that:

an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, *in particular, to the operational choices* which they must make in terms of priorities and resources [...]. This consideration must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature.<sup>46</sup>

New Zealand jurisprudence has followed this basic approach. Dealing with a claim for protection based on the adverse impacts of sea-level rise and other hazards in Tuvalu, the Immigration and Protection Tribunal held that the Government of Tuvalu would be faced with "an impossible burden" were it required as a matter of law to mitigate the underlying drivers of sea-level rise and other naturally-occurring hazards in order to discharge its positive obligation to protect the right to life. This did not mean, however, that it had no obligations in respect of such hazards. The Tribunal stated:

this is not a case of a dangerous activity amenable to domestic regulation causing an environmental hazard due to poor regulation. The disasters that occur

schoolbaseddisaste.pdf (last visited 15 Aug. 2018); World Health Organization (WHO) (Europe), *Hospital Emergency Response Checklist: An All-Hazards Tool for Hospital Administrators and Emergency Managers*, Europe, WHO, 2011, 16, available at: [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0020/148214/e95978.pdf?ua=1](http://www.euro.who.int/__data/assets/pdf_file/0020/148214/e95978.pdf?ua=1) (last visited 15 Aug. 2018).

42 ECtHR, *Budayeva and Others v. Russia*, para. 131; see also ECtHR, *Öneryildiz v. Turkey*, paras. 89–118.

43 ECtHR, *Budayeva and Others v. Russia*, para. 128.

44 *Ibid.*, para. 129; ECtHR, *Öneryildiz v. Turkey*, para. 89. "Among these preventive measures, particular emphasis should be placed on the public's right to information": para. 90. See also ECtHR, *Kolyadenko v. Russia*, para. 159.

45 ECtHR, *Budayeva and Others v. Russia*, para. 134; ECtHR, *Kolyadenko v. Russia*, para. 160.

46 ECtHR, *Budayeva and Others v. Russia*, para. 135 (emphasis added). The distinction between "natural" and "man-made" hazards has been criticised in the literature and arguments instead made for an "all hazards approach". See e.g., Lauta & Rytter, "A Landslide on a Mudslide?".

in Tuvalu derive from vulnerability to natural hazards such as droughts and hurricanes, and inundation due to sea-level rise and storm surges. The content of Tuvalu's positive obligations to take steps to protect the life of persons within its jurisdiction from such hazards must necessarily be shaped by this reality. While the Government of Tuvalu certainly has both obligations and capacity to take steps to reduce the risks from known environmental hazards, for example by undertaking *ex-ante* disaster risk reduction measures or through *ex-post* operational responses, it is simply not within the power of the Government of Tuvalu to mitigate the underlying environmental drivers of these hazards. To equate such inability with a failure of state protection goes too far. It places an impossible burden on a state.<sup>47</sup>

This body of emerging jurisprudence should not be seen as giving rise to some sort of lesser obligation when a hazard is natural and not man-made. Rather, the differentiation speaks to the immediacy of obligation-based conduct, not the obligation's nature, and then only in relation to the hazard. Where a hazard is man-made, the State will typically possess a greater capability to address it through appropriate regulatory or legislative intervention or compliance action. Furthermore, this jurisprudence relates fundamentally to *ex-post* responses to *hazards*; it says nothing about *ex ante* steps in relation to the *exposure* and *vulnerability* dimensions of disasters which play a crucial role in determining who moves where, and when. Such margin of appreciation as may exist in relation to disaster relief operations may be far more limited when it comes to proactive disaster risk reduction and disaster risk management activities, particularly in the case of known and recurrent hazards, such as seasonal flooding. The more serious and imminent a threat to life is, the more the margin of appreciation shrinks as to the choice of means to save lives, and the less room remains for States to decide whether or not to take action.

Accordingly, in the context of disasters, the jurisprudence shows that the right to life obliges States to take all appropriate measures to provide the necessary protection and, in particular, to:

- enact, finance, and implement laws, regulations, and policies dealing with all relevant aspects of disaster risk reduction and mitigation, including by establishing the necessary mechanisms and procedures;
- take necessary administrative measures, including monitoring and supervising potentially dangerous situations and implementing technical measures to avert imminent danger;
- inform and prepare people about possible dangers and risks;
- alert people to imminent risks;
- where required, evacuate potentially affected populations from danger zones, forcibly if necessary, and prohibit their return as long as the danger lasts;

47 NZIPT, *AC (Tuvalu)* [2014] NZIPT 800517-520, para. 75. It is important to note that the Tribunal was dealing with Tuvalu, a country whose greenhouse gas emissions have had a negligible historical impact on the build-up of greenhouse gases contributing to climate change.

- conduct criminal investigations and prosecute those responsible for having neglected their duties in case of deaths caused by a disaster;
- compensate surviving relatives of anyone killed as a consequence of neglecting these duties; and
- provide affected persons with effective remedies.<sup>48</sup>

Preventive operational measures explicitly mentioned by the European Court of Human Rights include:

- information and warnings about risks;
- evacuation orders;
- early/emergency warning mechanisms;
- land planning policies;
- safety measures related to deterring hazards;
- emergency relief policies;
- assessment of potential risks;
- town planning restrictions;
- declaring flood zones and catastrophic flood zones;
- maintaining relevant infrastructure.<sup>49</sup>

Since the International Covenant on Civil and Political Rights (ICCPR) and regional human rights treaties contain the same obligation to protect life, and their respective supervisory/adjudicatory bodies base their case law on the same legal underpinnings,<sup>50</sup> the principles articulated above should be viewed as an approach likely to be followed by other human rights bodies in similar cases. Indeed, the UN Human Rights Committee's new draft General Comment on the right to life states that the duty to protect life "imposes on States parties a due diligence obligation to take long-term measures to address the general conditions in society that may eventually give rise to direct threats to life", and that States must "take adequate measures to protect the environment against life-threatening pollution, and work to mitigate other risks associated with natural catastrophes, such as droughts." It notes that States "should also develop contingency plans designed to increase preparedness for natural and man-made disasters, which may adversely affect enjoyment of the right to life, such as hurricanes, tsunamis, industrial pollution, radio-active accidents and cyber-attacks."<sup>51</sup>

The standards set by the European Court of Human Rights were developed with regard to life-threatening sudden-onset disasters. They are also appropriate when slow-onset environmental changes reach a threshold that transforms them into hazards that could be deadly, such as when drought turns into famine or the effects of sea-level rise, including king tides, make survival on low-lying atoll islands a

48 Drawn from Kälin, "The Human Rights Dimension of Natural or Human-Made Disasters", 139.

49 See e.g., ECtHR, *Budayeva and Others v. Russia*, paras. 137–160; ECtHR, *Kolyadenko v. Russia*, paras. 162–187.

50 See Kälin & Künzli, *The Law of International Human Rights Protection*, 103–111.

51 UN Human Rights Committee (HRC), *Draft General Comment No. 36: Article 6: Right to Life*, UN Doc. CCPR/C/GC/R.36/Rev.2, 2 Sep. 2015, para. 28 (internal notes omitted).

challenge. However, the impacts of climate change may also have devastating effects that do not amount to threats to life. In such cases, one could build on propositions that the right to life not only includes the right to biological life, but also to minimum socio-economic conditions. For example, the Inter-American Court of Human Rights has held that:

One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.<sup>52</sup>

However, it is doubtful whether this approach would prevail in other regions or at the international level. Such a wide understanding, grounded in a right to “a decent life”, would not only render other, more specific human rights guarantees superfluous, but would also overstretch the non-derogable character of the right to life<sup>53</sup> (by extending non-derogability to areas of human rights law where derogations of specific guarantees are, in fact, permissible).

Nevertheless, regional human rights courts and the UN treaty bodies recognise positive duties as an inherent part of a wide range of human rights beyond the right to life, including the right to protection of the family and private life, the right to security of the person, the right to property, as well as the rights to adequate food, housing and education.<sup>54</sup> In particular, the right to protection from torture and other cruel, inhuman or degrading treatment provides a robust footing for identifying States’ positive obligations in the context of disasters.<sup>55</sup> Although this protection does not encompass a general duty to protect people from socio-economic deprivation per se, destitution or dire humanitarian conditions may amount to relevant ill-treatment where the State can be held accountable for particular acts or omissions.<sup>56</sup> Indeed, the prohibition on cruel, inhuman or degrading treatment is an essential

52 IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Judgment, Series C No. 125, 17 Jun. 2005, para. 162, referring to IACtHR, *Case of the “Juvenile Reeducation Institute”*, Judgment, Series C No. 112, 2 Sep. 2004, para. 159.

53 According to ICCPR, Art. 4, ECHR, Art. 15 and the American Convention on Human Rights ((ACHR), 144 UNTS 123, 1969 (entry into force: 18 Jul. 1978)) Art. 27, derogations from the right to life are not permitted.

54 See the overview in Kälin & Künzli, *The Law of International Human Rights Protection*, 106–108. See on positive obligations inherent in civil and political rights in general, HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 6–8.

55 ICCPR, Art. 7; CAT, Art. 3; ECHR, Art. 3; ACHR, Art. 5; African Charter on Human and Peoples’ Rights, 1520 UNTS 217, 27 Jun. 1981 (entry into force: 21 Oct. 1986) Art. 5.

56 Kälin & Künzli, *The Law of International Human Rights Protection*, 324; NZIPT, *BG (Fiji)* [2012] NZIPT 800091, paras. 136–157; ECtHR, *M.S.S. v. Belgium and Greece*, para. 249; ECtHR, *Sufi and Elmi v. United Kingdom*, Judgment, Application Nos. 8319/07 and 11449/07, 28 Jun. 2011.

consideration in whether it is lawful to return people to countries affected by a disaster, including where there is an “absence of adequate provision of protection and assistance by their home country”.<sup>57</sup> A specific example relevant to the context of disasters may include the discriminatory denial of available humanitarian relief.<sup>58</sup>

The role of human rights law in protecting people from the negative impacts of disasters and climate change context has gained traction in recent years, especially with respect to particular groups. Article 11 of the 2006 Convention on the Rights of Persons with Disabilities explicitly obliges States to take “all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including [...] the occurrence of natural disasters”. The UN Committee on the Rights of Persons with Disabilities regularly urges States to integrate persons with disabilities explicitly into disaster management and disaster risk reduction strategies.<sup>59</sup>

The UN Committee on Economic, Social and Cultural Rights has urged States to take “appropriate measures to address the adverse effect of climate change” on the land and resources of indigenous peoples.<sup>60</sup> As the Guiding Principles on Internal Displacement make clear, States have a particular obligation to protect against the displacement of “indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands”,<sup>61</sup> which may mean that more onerous duties and safeguards apply.

More generally, normative developments by the Committee on the concept of a “minimum core obligation” may also be relevant to States’ general obligation to protect in the context of disasters. These give rise to a duty to “ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”.<sup>62</sup> A minimum core obligation describes “what things [States] must do to immediately realise the right”.<sup>63</sup> In subsequent General Comments, the Committee has given greater specificity to the substantive content of rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR), including by reference to people affected by disasters. Addressing the right to adequate housing, the Committee has identified a number of its attributes, including “availability” of facilities essential for health,

57 W. Kälin & N. Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, UNHCR Legal and Protection Policy Research Series, Feb. 2012, 66; Nansen Initiative Protection Agenda, para. 39; J. McAdam, *Climate Change, Forced Migration, and International Law*, Oxford, Oxford University Press, 2012, 63–79.

58 NZIPT, *AC (Tuvalu)*, para. 84.

59 See e.g., UN Committee on the Rights of Persons with Disabilities (CRPD), *Concluding Observations on the Czech Republic*, UN Doc. CRPD/C/CZE/CO/1, 2015, para. 21; CRPD, *Concluding Observations on Mauritius*, UN Doc. CRPD/C/MUS/CO/1, 2015, para. 20; CRPD, *Concluding Observations on Qatar*, UN Doc. CRPD/C/QAT/CO/1, 2015, para. 11.

60 CESCR, *Concluding Observations on Finland*, UN Doc. E/C.12/FIN/CO/6, 2014. See also CESCR, *Concluding Observations on Australia*, UN Doc. E/C.12/AUS/CO/4, 2009, para. 27.

61 Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2, 11 Feb. 1998, Principle 9. See also Brookings Institution, Georgetown University & UNHCR, *Guidance on Protecting People from Disasters and Environmental Change Through Planned Relocation*, para. 11.

62 CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, UN Doc. E/1991/23, 14 December 1990, para. 10.

63 A. Chapman & S. Russell, “Introduction”, in A. Chapman & S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, London, Intersentia, 2002, 9. See generally B. Saul, D. Kinley & J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*, Oxford, Oxford University Press, 2014, Ch. 3.

“habitability” and “accessibility”.<sup>64</sup> Significantly, when discussing accessibility the Committee has expressly referred to “victims of natural disasters” and “persons living in disaster-prone areas” as people who “must be accorded full and sustainable access to adequate housing resources” and be “ensured some degree of priority consideration in the housing sphere.”<sup>65</sup> Similar observations on “accessibility” and the need for the priority consideration of disaster-affected persons are set out in the Committee’s General Comment on the right to adequate food.<sup>66</sup> Likewise, its General Comment relating to the right to water provides that States should take steps to ensure that “victims of natural disasters” and “persons living in disaster-prone areas” are provided with “safe and sufficient water”.<sup>67</sup>

The existence of a duty to move people out of harm’s way, whether through a temporary evacuation or permanent planned relocation, is consistent with ensuring *continued accessibility* to adequate housing, food and water. The requirement to give special attention or priority consideration to people in hazard-prone areas necessarily imports an obligation to take steps to ensure that people are moved, if, by contrast, remaining in situ would result in interrupted accessibility owing to the impacts of an imminent hazard.

The UN Committee on the Elimination of Discrimination against Women (CEDAW) has called on States to ensure the representation of women “in decision-making processes [. . .], including with regard to policies concerning disaster risk reduction, post-disaster management and climate change”,<sup>68</sup> and to strengthen “a gender-sensitive approach to [. . .] disaster risk reduction, preparedness and response, and the mitigation of the negative impacts of climate change”.<sup>69</sup> Similar recommendations have been made by the UN Committee on the Rights of the Child.<sup>70</sup> CEDAW’s call for women to be represented in relevant decision-making processes is relevant to *all* affected individuals and communities whose voices are commonly marginalised. As da Costa and Pospieszna rightly point out, a human rights-based approach to disaster management and disaster risk reduction requires that right-holders

64 CESCR, *General Comment No. 4: The Right to Adequate Housing (Art 11(1) of the Covenant)*, UN Doc. E/1992/23, 13 Dec. 1991, paras. 8(b), 8(d) and 8(e) respectively. See generally R. Barber, “Protecting the Right to Housing in the Aftermath of Natural Disaster: Standards in International Human Rights Law”, *International Journal of Refugee Law*, 20(3), 2008, 460–464.

65 CESCR, *General Comment No. 4*, para. 8(e).

66 CESCR, *General Comment No. 12*, para. 13.

67 CESCR, *General Comment No. 15: The Right to Water (Arts 11 and 12 of the Covenant)*, UN Doc. E/C.12/2002/11, 20 Jan. 2003, para. 16(h).

68 UN Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Observations on Argentina*, UN Doc. CEDAW/C/ARG/CO/7, 2016, para. 39(d). See also CEDAW, *Concluding Observations on Honduras*, UN Doc. CEDAW/C/HND/CO/7-8, 2016, para. 43(a).

69 CEDAW, *Concluding Observations on the Philippines*, UN Doc. CEDAW/C/PHL/CO/7-8, 2016, para. 9. See also para. 48 (a), recommending to “consistently prioritize the protection of women’s rights, in particular protection from gender-based violence, in situation analyses, needs assessments and interventions relating to disaster risk reduction, preparedness and response to natural disasters, as well as in the mitigation of the negative impacts of climate change.”

70 See e.g., UN Committee on the Rights of the Child (CRC), *Concluding Observations on Kenya*, UN Doc. CRC/C/KEN/CO/3-5, 2016, para. 56(f).

are empowered to claim their rights from duty bearers, and information and participation are essential components of such empowerment.<sup>71</sup>

Detailed guidance on the scope and content of States' duties in disasters are also contained in the International Law Commission's (ILC's) Draft Articles on the Protection of Persons in the Event of Disasters.<sup>72</sup> Although not formally binding, they derive their authority from the fact that they codify and progressively develop existing international law.<sup>73</sup> The Draft Articles set out States' responsibilities in disasters (whether sudden- or slower-onset in nature), both with respect to preventive actions required beforehand and remedial actions needed afterwards.<sup>74</sup> They articulate that States have an obligation, derived from widespread state practice,<sup>75</sup> to reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.<sup>76</sup> The duty is one of conduct and not result, namely to reduce the risk of harm potentially caused by disasters, rather than to completely prevent or mitigate them. The Draft Articles provide a non-exhaustive list of "appropriate measures" that States can take to comply with their duties, such as conducting risk assessments and installing early warning systems.<sup>77</sup> Finally, and importantly, the Draft Articles are underpinned by

71 K. da Costa & P. Pospieszna, "The Relationship between Human Rights and Disaster Risk Reduction Revisited: Bringing the Legal Perspective into Discussion", *Journal of International Humanitarian Legal Studies*, 6(1), 2015, 68–74.

72 International Law Commission (ILC), *Protection of Persons in the Event of Disasters, Draft Articles and Commentary*, UN Doc. A/71/10, 2016, Ch. IV (ILC Draft Articles and Commentary).

73 See Charter of the United Nations (UN Charter), 1 UNTS XVI, 26 Jun. 1945 (entry into force: 24 Oct. 1945) Art. 13(1)(a), which provides the normative basis for the work of the ILC.

74 See ILC Draft Articles and Commentary, commentary to draft Art. 3, para. 4. The ILC Draft Articles extend to "those likely to be affected by a future disaster, a determination to be made at the national level based on an evaluation of the persons' exposure and vulnerability": commentary to draft Art. 2, para. 7. For the purposes of the ILC Draft Articles, a "disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society": draft Art. 3(a). Note that the ILC Draft Articles do not apply in situations where responses are governed by international humanitarian law: draft Art. 18(2).

75 See e.g., *ibid.*, commentary to draft Art. 9, paras. 5–6, which references a significant number of international and national laws on disaster risk reduction.

76 *Ibid.*, Art. 9(1). Note also the Chair's Summary at Fourth Global Platform for Disaster Risk Reduction in 2013, which drew attention to the "growing recognition that the prevention and reduction of disaster risk is a legal obligation, encompassing risk assessments, the establishment of early warning systems, and the right to access risk information": Global Platform for Disaster Risk Reduction, *Chair's Summary: Resilient People, Resilient Planet*, Fourth Session of the Global Platform for Disaster Risk Reduction in Geneva, May 2013, available at: [http://www.preventionweb.net/files/33306\\_finalchairsummaryoffourthsessio.pdf](http://www.preventionweb.net/files/33306_finalchairsummaryoffourthsessio.pdf) (last visited 15 Aug. 2018). See also J. Carmalt & C. Dale, "Human Rights and Disaster", in B. Wisner, J.C. Gaillard, & I. Kelman (eds.), *The Routledge Handbook of Hazards and Disaster Risk Reduction*, Oxford, Routledge, 2012, 66–67.

77 ILC Draft Articles and Commentary, draft Art. 9(2). Moving people out of harm's way is not specifically mentioned in either the Draft Articles or the Commentary, but it may arguably be an "appropriate measure" in a particular situation. See *ibid.*, commentary to draft Art. 9, para. 11: It must be a "specific and concrete" measure "aimed at prevention, mitigation and preparation for disasters", "evaluated within the broader context of the existing capacity and availability of resources of the State in question". Further, "[t]he fundamental requirement of due diligence is inherent in the concept of 'appropriate.'" Commentary to draft Art. 9, para. 18, notes that there are innumerable measures that might be adopted, which depend on "social, environmental, financial, cultural and other relevant circumstances".

certain general principles of international law, including respect for human dignity,<sup>78</sup> human rights,<sup>79</sup> the principles of humanity, neutrality, impartiality and non-discrimination,<sup>80</sup> and the duty to cooperate.<sup>81</sup>

### 3. EVACUATIONS

#### 3.1. The duty to evacuate

The duty to protect lives and prevent harm in the context of disasters and the adverse effects of climate change can, as highlighted by Lauterbach and Rytter, involve two very different strategies: “escape” or “defence”. The former entails the provision of appropriate and timely information about the hazard so that people can choose to move away or be evacuated, whereas the latter encompasses physical protection measures, such as the construction of sea walls, the implementation of better building codes and so on.<sup>82</sup> This raises the question as to when and how human rights law *obliges* States to facilitate or order evacuations, and when forced evacuations would *violate* human rights standards.

It is widely recognised that under certain circumstances, States have an obligation to facilitate – or even order – the evacuation of people at risk.<sup>83</sup> In the *Budayeva* case, the European Court of Human Rights applied the duty to protect life to a situation in which an evacuation order had not been properly implemented and, as a result, people were killed by a mudslide. In the particular case, the Court found a violation of the right to life<sup>84</sup> because the local authorities had: (a) failed to monitor the area for recurrent mudslides during heavy rains, and thus were unable to properly inform and warn affected persons; (b) ordered evacuations only once a first and non-deadly mudslide reached the town; and (c) failed to stop people from returning to their homes the following day, when some were killed by a second, bigger mudslide.<sup>85</sup> The Court also criticised the authorities for failing to take preventive disaster risk reduction measures such as repairing a mud-protection dam that had been

78 *Ibid.*, draft Art. 4.

79 *Ibid.*, draft Art. 5.

80 *Ibid.*, draft Art. 6.

81 *Ibid.*, draft Art. 7.

82 Lauterbach & Rytter, “A Landslide on a Mudslide?”, 127–130.

83 Guiding Principles on Internal Displacement, Principle 6(2)(d). See also W. Kälin, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons: Protection of Internally Displaced Persons in Situations of Natural Disasters*, UN Doc. A/HRC/10/13/Add.1, 5 Mar. 2009, para. 42: “The duty to protect the life and security of persons entails, in particular, an obligation to evacuate persons from zones where they face imminent dangers for life and limb caused by a disaster. A failure to assist persons who cannot leave such zones on their own may amount to a human rights violation if competent authorities knew or should have known the danger and would have had the capacity to act.” See also Barber, “Protecting the Right to Housing in the Aftermath of Natural Disaster”, 462: “In the aftermath of natural disasters, evictions are often necessary and justifiable (in the aftermaths of the tsunami and earthquake disasters of 2004 and 2005, for example, evictions were often justified by the need to move inhabitants to safer land). Evictions are permissible in such circumstances – insofar as they are solely for the purpose of promoting the general welfare in a public society.”

84 ECtHR, *Budayeva and Others v. Russia*, para. 159.

85 *Ibid.*, paras. 152 and 153.

destroyed by a previous mudslide, or installing an early warning system to allow for timely evacuations.<sup>86</sup>

The judgment makes clear that while States have a margin of appreciation regarding the means they use to mitigate the foreseeable impacts of a disaster,<sup>87</sup> the relevant authorities have an obligation to:

- take measures enabling them to monitor known hazard situations;<sup>88</sup>
- inform, on the basis of such monitoring, people potentially at risk and plan for emergency evacuations;<sup>89</sup>
- order people whose lives are threatened by an imminent risk of a natural hazard to evacuate; and
- ensure that evacuation orders are enforced until the risk has passed.<sup>90</sup>

Depending on the circumstances, such activities may need to be “supplemented by measures enabling affected citizens to escape the hazard”, which could include “overseeing or even implementing evacuation orders, or establishing the necessary infrastructure, for example safe roads or other means of transportation, enabling citizens to avoid the hazard to their lives”.<sup>91</sup> Furthermore, the relevant authorities should identify and assist vulnerable individuals to leave at-risk areas, such as people with disabilities, the injured, the elderly, and those without family support.<sup>92</sup> People must be evacuated in a non-discriminatory manner which fully respects their rights to life, dignity, liberty, and security.<sup>93</sup> In the case of Hurricane Katrina, for instance, the UN Human Rights Committee invoked the prohibition on discrimination when

86 *Ibid.*, paras. 148.

87 *Ibid.*, paras. 135 and 156.

88 *Ibid.*, para. 154.

89 *Ibid.*, para. 152. According to the IASC Guidelines, at A.1.1, this may include information for “affected persons, in a language they understand, about expected risks, proposed precautions and facilities such as safe escape routes and emergency shelters in their neighbourhood.”

90 ECtHR, *Budayeva and Others v. Russia*, para. 153.

91 *Lauta & Rytter, “A Landslide on a Mudslide?”*, 128, referring to ECtHR, *Öneryildiz v. Turkey*, para. 108, where the Court noted that “in the absence of more practical measures to avoid the risks to the lives of the inhabitants of the Ümraniye slums, even the fact of having respected the right to information would not have been sufficient to absolve the State of its responsibilities.”

92 IASC Guidelines, at A.1.3. “Measures should be implemented to ensure that the particular needs of particularly vulnerable persons such as individuals with disabilities or older persons without family support will be addressed in the evacuation process. Protection of property left behind and security of land tenure are among the issues that need to be considered in evacuation planning”: Kálin, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons: Protection of Internally Displaced Persons in Situations of Natural Disasters*, para. 44.

93 IASC Guidelines, at A.1.5; Guiding Principles on Internal Displacement, Principle 8. See also ILC, *Protection of Persons in the Event of Disasters: Texts and Titles of the Draft Articles Adopted by the Drafting Committee on First Reading*, UN Doc. A/CN.4/L.831, 15 May 2014, draft Arts. 5–8. On non-discrimination, see E. Sommaro, “Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters”, in A. de Guttry, M. Gestri & G. Venturini (eds.), *International Disaster Response Law*, the Hague, T.M.C. Asser Press, 2012, 337. For an example of discrimination in an evacuation, see J. Ginnetti & N. Schrepfer, “Predicting Disasters and Protecting Rights”, *Forced Migration Review*, 41, 2012, 13: “the evacuation plans in place for Hurricane Katrina in 2005 relied on the availability of private means of transport, which discriminated against poorer sections of the population who did not own a car – and who also lived in the most exposed areas of New Orleans.”

expressing its concerns “about information that the poor, and in particular African-Americans, were disadvantaged by the rescue and evacuation plans”<sup>94</sup> which did not provide for transportation for poor or elderly people without cars, since those plans were based on the assumption that people would leave New Orleans in their own vehicles.<sup>95</sup>

The Guiding Principles on Internal Displacement provide further guidance on how evacuations should be carried out. First, the authorities must ensure, “to the greatest practicable extent”, that people are provided with “proper accommodation”; that movement is effected “in satisfactory conditions of safety, nutrition, health and hygiene”;<sup>96</sup> that family members are not separated;<sup>97</sup> and that measures to mitigate any identified risks are taken.<sup>98</sup>

### 3.2. Limitations

To date, no regional court or international treaty-monitoring body has had the opportunity to examine the tension between the State’s duty to protect life, on the one hand, and the individual’s right to liberty of movement and freedom to choose one’s residence<sup>99</sup> (which also encompasses the right to stay<sup>100</sup>), on the other. While this is not an issue where authorities simply inform people about possible hazards, and those at risk decide freely whether or not to move temporarily to safe locations, a dilemma arises where the authorities consider that evacuation is necessary to protect lives, but those affected refuse to leave (or want to return, notwithstanding a continuing risk).<sup>101</sup> This might arise, for instance, where people do not want to abandon livestock, fear that their property might be pillaged, or are concerned that their land taken away by authorities under the pretext of an impending disaster.<sup>102</sup>

Freedom of movement is not an absolute right. Under international law, the authorities may order evacuations, and even forcibly evacuate people and temporarily

94 HRC, *Concluding Observations on the United States of America*, UN Doc. CCPR/C/USA/CO/3, 2006, para. 26.

95 IASC Guidelines, at A.1.3.

96 Guiding Principles on Internal Displacement, Principle 7(2).

97 *Ibid.* According to IASC Guidelines, at A.2.1, measures to ensure that families are not separated during evacuations or can reunited without undue delay include giving, to the extent possible, priority to evacuating children together with a parent or close relative, “using identification tags or bracelets for children” and registering them as well as the location to which they are brought.

98 IASC Guidelines, at A.1.1-A.1.7 (summarised). See also Sydney Declaration, Principle 5.

99 ICCPR, Art. 12; Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the the Convention and in the First Protocol Thereto (Protocol 4 to ECHR), ETS No. 046, 1963 (entry into force: 2 May 1968) Art. 2; Universal Declaration of Human Rights (UDHR), UNGA Res. 217A(III), 10 Dec. 1948, Art. 13.

100 HRC, *General Comment No. 27: Freedom of Movement (Art. 12)*, UN Doc. CCPR/C/21/Rev.1/Add.9, 1 Nov. 1999, para. 7: “Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one’s choice within the territory includes protection against all forms of forced internal displacement.”

101 See C. Barrs, “To Prevent or Pursue Displacement?”, *Forced Migration Review*, 41, 2008, 8–9; Kälén, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons: Protection of Internally Displaced Persons in Situations of Natural Disasters*, para. 43; IASC Guidelines, at D.2.4 also discuss permanent prohibitions on return. The right to return may be viewed as part of the right to freedom of movement, which can be curtailed in the limited circumstances described here.

102 See Kälén, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons: Protection of Internally Displaced Persons in Situations of Natural Disasters*, para. 43.

prohibit return, provided that such measures are “necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others”, and any restrictions on rights are “provided by law” and “consistent with other” human rights.<sup>103</sup>

States may also derogate from certain human rights obligations in a proclaimed “public emergency which threatens the life of the nation”.<sup>104</sup> This is based on the magnitude of the emergency and its effect on both the affected population and the maintenance of state institutions, rather than on the emergency’s nature or origin.<sup>105</sup> However, such an emergency demands a very high threshold,<sup>106</sup> which is unlikely to be met by most disasters at the present time.<sup>107</sup> Sommario, however, argues that this is relative:

The more unprepared and ill-equipped States are to deal with the consequences of a disaster, the easier it will be for them to claim that the “life of the nation” is actually imperiled. This implies that the very same phenomenon can trigger a public emergency and justify derogation by States whose territory presents a high level of vulnerability, while not by others which have adopted preventive measures limiting the negative impact of such calamities.<sup>108</sup>

Since disasters are inherently dynamic, however, the measures adopted to deal with them must be reviewed and adjusted over time.<sup>109</sup> Given any derogation measures

103 ICCPR, Art. 12(3); Protocol 4 to ECHR, Art. 2; UDHR, Art. 13. The IASC Guidelines, 5, note that since freedom of movement is not an absolute right, forced evacuations or relocations are permissible in exceptional cases. D.2 notes that the right to freedom of movement “should be understood as including the right to freely decide whether to remain in or to leave an endangered zone”, but may be subject to restrictions that are: “(i) provided for by law, (ii) serve exclusively the purpose of protecting the safety of the persons concerned, and (iii) are used only when there are no other less intrusive measures” (*ibid.*, at D.2.1). Derogations under ICCPR, Art. 4, are linked to the magnitude and effect of an emergency, rather than its nature or origin: Sommario, “Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters”, 328; see examples of derogations in times of disasters at 329. See generally J. McAdam, “The Right to Leave Any Country: An Intellectual History of Freedom of Movement in International Law”, *Melbourne Journal of International Law*, 12, 2011, 27–56.

104 ICCPR, Art. 4(1); ECHR, Art. 15; ACHR, Art. 27.

105 Sommario, “Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters”, 328 and 333.

106 See ECtHR, *A v. United Kingdom*, Judgment, Grand Chamber, Application No. 3455/05, 19 Feb. 2009; Kälin & Künzli, *The Law of International Human Rights Protection*, 143–148; UN Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc. E/CN.4/1985/4, 28 Sep. 1984.

107 Kälin, “The Human Rights Dimension of Natural or Human-Made Disasters”, 128–131. As noted at 129: “Except in the case of large-scale disasters hitting very small countries it is not easy to imagine a situation where a disaster threatens ‘the life of the nation’ – a notion clearly addressing situations of armed conflict, revolutions and similar circumstances of widespread violence directed against the State and its institutions.”

108 Sommario, “Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters”, 333, referring also to F. Kalshoven, “Assistance to the Victims of Armed Conflicts and Other Disasters”, in F. Kalshoven (ed.), *Assisting the Victims of Armed Conflict and Other Disasters*, Dordrecht, Martinus Nijhoff Publishers, 1989, 17.

109 Sommario, “Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters”, 337, referring also to J. Oraà, *Human Rights in States of Emergency in International Law*, Oxford, Clarendon Press, 1992, 142.

employed must be strictly required by the exigencies of the situation,<sup>110</sup> where vulnerability arises due the failure of the State to review and adjust as required, this may be a factor to be weighed in the assessment of whether the derogation is “strictly” required.

An evacuation in the context of a disaster is only permitted if “the safety and health of those affected” requires it<sup>111</sup> and it is for the shortest period possible.<sup>112</sup> Where these conditions are not fulfilled, forced evacuations amount to prohibited “arbitrary” displacement.<sup>113</sup> For this reason, the relevant authorities must “ensure that all feasible alternatives are explored in order to avoid displacement altogether” before they take “any decision requiring the displacement of persons”.<sup>114</sup> This is grounded in the principle of proportionality which must be respected under international human rights law.<sup>115</sup> In this regard, limitations placed on the individual’s right to choose his or her place of residence and to remain in his or her home<sup>116</sup> are only permissible if they are “necessary” to achieve a “legitimate” goal, a condition that is not met where alternatives to displacement exist or where a less severe interference with such rights is possible.<sup>117</sup> This means that “any measure designed to protect public safety or to uphold the right to life must be proportional to the consequences to enjoyment of the right to remain”,<sup>118</sup> both in terms of degree and duration.<sup>119</sup>

Another dilemma arises when authorities order an evacuation but people refuse to follow the order. Does the State have an obligation to protect life even against the will of an affected individual? Can the State submit an individual to coercive measures, such as temporary deprivation of liberty to remove him or her from a danger zone, if this is the only way to save his or her life? While there is no international jurisprudence on this issue, the European Court of Human Rights has nonetheless

110 ECtHR, *Aksoy v. Turkey*, Judgment, Application No. 100/1995/606/694, 18 Dec. 1996.

111 Guiding Principles on Internal Displacement, Principle 6(2)(d); African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 23 Oct. 2009 (entry into force: 6 Dec. 2012) Art. 4(4)(f). See also CCCM, *The MEND Guide*, 27 and 28.

112 United Nations Guiding Principles on Internal Displacement, Principle 6(3).

113 *Ibid.*, Principle 6(1); Kampala Convention, Arts. 3(1)(a) and 4(1); Protocol on the Protection and Assistance to Internally Displaced Persons to the Pact on Security, Stability, and Development in the Great Lakes Region, 15 Dec. 2006 (entry into force Jun. 2008) Art. 3(1).

114 United Nations Guiding Principles on Internal Displacement, Principle 7(1).

115 See further HRC, *General Comment No. 27*, paras. 15 and 16; HCR, *General Comment No. 23: Rights of Minorities* (Art. 27), UN Doc. CCPR/C/21/Rev.1/Add.5, 26 Apr. 1994, para. 7.

116 E.g., ICCPR, Art. 12; ICESCR, Art. 11.

117 In situations of armed conflict, see e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 Jun. 1977 (entry into force: 7 Dec. 1978) Art. 17.

118 R. McDermott & P. Gibbons, “Human Rights and Proactive Displacement: Determining the Appropriate Balance between the Duty to Protect and the Right to Remain”, *Disasters*, 41(3), 2017, 594. For analysis of its application in the context of preventing the return of people evacuated from Mount Merapi in Indonesia and relocating them elsewhere, see *ibid.*, 599–601.

119 See J. Hartman, “Derogation from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and the Court of Human Rights and the Human Rights Committee of the United Nations”, *Harvard International Law Journal*, 22, 1981, 17. Some scholars regard temporariness as an autonomous element: e.g., Oraà, *Human Rights in States of Emergency in International Law*, 417.

recognised that “even where the conduct poses a danger to health, or arguably, where it is of a life-threatening nature”, the State must not infringe on a mentally competent adult’s right to a private life, which entails a right to self-determination and personal autonomy.<sup>120</sup> In the medical context, while there is no “right to die” with the assistance of the State or third parties,<sup>121</sup> a patient may nonetheless choose “to die by declining to consent to treatment which might have the effect of prolonging his life”.<sup>122</sup> By analogy, a mentally competent individual may have a right to refuse evacuation even if this may result in his or her death, provided, however, that he or she has been provided with full information about the threats emanating from the natural hazard, freely decides to stay (rather than being pressured by family or community members), and evacuation routes out of the danger zone are significantly safer than the area where the individual’s home is located.

#### 4. PLANNED RELOCATION

Does the duty to move people out of harm’s way extend to a duty to relocate people *permanently*? As discussed in the context of temporary evacuations above, while international law prohibits arbitrary displacement,<sup>123</sup> moving people permanently may be justified in exceptional circumstances, provided it proportionate, necessary and for a legitimate purpose – to protect people’s life, or their safety and health.<sup>124</sup> Thus, permanent relocations may be necessary if areas of land are too dangerous or unfit for human habitation, but they should be considered a matter of last resort given their significant ramifications on well-being, culture, livelihoods and security. They should only be used in very exceptional cases in which the area of return is indeed one with high and persistent risks to life or security, the remaining resources are inadequate for people’s survival, the enjoyment of basic human rights cannot be guaranteed, and all other available adaptation measures have been exhausted.<sup>125</sup>

Whereas many States already have domestic laws authorising police or other authorities to forcibly evacuate people in emergencies, such as imminent disasters,<sup>126</sup> very few have developed laws or policies relating specifically to relocations made

120 ECtHR, *Pretty v. United Kingdom*, Judgment, Application No. 2346/02, 29 Apr. 2002, paras. 61–62.

121 *Ibid.*, para. 40 on the prohibition of assisted suicide.

122 *Ibid.*, para. 63.

123 Guiding Principles on Internal Displacement, Principle 6; Kampala Convention, Arts. 3(1)(a), 4(1) and 4(4).

124 Guiding Principles on Internal Displacement, Principle 6(2)(d); Kampala Convention, Art. 4(4)(f). For example, Guiding Principle 6(2)(c) permits such movement where it is unavoidable to implement development projects that are justified by compelling and overriding public interests, which could be analogised to the climate change context. See also Sydney Declaration, Principle 6.

125 Indeed, as the Chairperson’s Summary of the Nansen Conference on Climate Change and Displacement noted, “moving communities in anticipation of climate-related hazards may precipitate vulnerability rather than avoiding it, and should only be considered when adequate alternatives that enable people to rebuild their lives is available”: M. Wahlström, “Chairperson’s Summary”, in *The Nansen Conference: Climate Change and Displacement in the 21<sup>st</sup> Century*, Jun. 2011, para. 12, available at: <http://www.unhcr.org/4ea969729.pdf> (last accessed 15 Aug. 2018), drawing heavily on J. Barnett & M. Webber, “Migration as Adaptation: Opportunities and Limits”, in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*, Oxford and Portland, Hart Publishing, 2010, 53.

126 See e.g., A. Fairchild, J. Colgrove & M. Jones, “The Challenge of Mandatory Evacuation: Providing for and Deciding for”, *Health Affairs*, 25(4), 2006, 958.

necessary by longer-term impacts, including those related to climate change.<sup>127</sup> Existing laws and policies on development-forced displacement and resettlement may provide some general guidance, as may national policies on eminent domain and evictions.<sup>128</sup> Decision-making structures may differ depending on whether a movement is conceived of as a temporary “evacuation” or a permanent “relocation”. For example, police and emergency services may have extensive powers during sudden-onset events and be active in evacuating people, but they are not the appropriate actors to make decisions about permanent relocations.<sup>129</sup>

Beyond the elements identified above for evacuations, relocations require even further safeguards that anticipate needs and rights over the long-term. Principle 7(3) of the Guiding Principles on Internal Displacement reflects a number of relevant treaty and soft law norms, stating that where movement occurs *outside* an emergency situation, then a decision to relocate must be: taken by an authority empowered by law to order such a measure; those to be moved must be given “full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation”; people’s free and informed consent must be sought; all those affected should be involved in the planning and management; any law enforcement measures must be executed by competent legal authorities; and the right to an effective remedy (including judicial review) must be respected.<sup>130</sup>

- 127 See e.g., R. Monson & D. Fitzpatrick, “Negotiating Relocation in a Weak State: Land Tenure and Adaptation to Sea-Level Rise in Solomon Islands”, in S. Price & J. Singer (eds.), *Global Implications of Development, Disasters and Climate Change: Responses to Displacement from Asia Pacific*, London and New York, Routledge, 2015, 240–255; UNHCR, Brookings Institution & Georgetown University, *Planned Relocation, Disasters and Climate Change*; Georgetown University, UNHCR & IOM, *Toolbox on Planned Relocation*.
- 128 See International Federation of Red Cross and Red Crescent Societies (IFRC), *Disaster Law Database*, available at: <http://www.ifrc.org/en/publications/disaster-law-database/> (last visited 15 Aug. 2018).
- 129 See J. McAdam & E. Ferris, “Planned Relocations in the Context of Climate Change: Unpacking the Legal and Conceptual Issues”, *Cambridge Journal of International and Comparative Law*, 4(1), 2015, 161.
- 130 These duties derive *inter alia* from ICESCR, Arts. 4 and 11; ICCPR, Arts. 2(3) 12(3), and 25(a); Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 1989 (entry into force: 5 Sep. 1991) Art. 16; UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/61/L.67, Annex, 7 Sep. 2007, Art. 10. See also *Basic Principles and Guidelines on Development Based Evictions and Displacement: Annex 1 of the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, UN Doc. A/HRC/4/18, 5 Feb. 2007, para. 37: “Urban or rural planning and development processes should involve all those likely to be affected and should include the following elements: (a) appropriate notice to all potentially affected persons that eviction is being considered and that there will be public hearings on the proposed plans and alternatives; (b) effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups; (c) a reasonable time period for public review of, comment on, and/or objection to the proposed plan; (d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and (e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities.” See also World Bank, *Operational Manual: OP 4.12 – Involuntary Resettlement*, para. 6(a); African Development Bank & African Development Fund, *Involuntary Resettlement Policy*, Nov. 2003, available at: <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000009-EN-BANK-GROUP-INVOLUNTARY-RESETTLEMENT-POLICY.PDF> (last visited 15 Aug. 2018); Asian Development Bank, *ADB Policy Paper: Safeguard Policy Statement*.

These elements have been supplemented extensively by expert guidance setting out the principles that apply to planned relocations in the context of disasters and environmental change, and an accompanying operational toolbox for implementation.<sup>131</sup> The expert guidance recommends that planned relocations only be carried out pursuant to a comprehensive legal and policy framework consistent with international law,<sup>132</sup> which should:

- a. provide a legal basis, in national law, for undertaking Planned Relocation;
- b. articulate a national policy for undertaking Planned Relocation;
- c. establish an institutional framework for undertaking Planned Relocation;
- d. identify, define, and authorize roles and responsibilities at each relevant level of government, including at the national, sub-national and local levels;
- e. provide accountability mechanisms for Planned Relocation, acknowledging that ultimate responsibility and accountability for a Planned Relocation should rest with designated and competent State authorities;
- f. identify and explain the criteria for making decisions throughout a Planned Relocation, including the foundational decision to initiate a Planned Relocation;
- g. identify actions that persons or groups of persons should take to initiate a Planned Relocation and receive technical assistance from the State;
- h. provide Relocated Persons and Other Affected Persons access to impartial and equitable grievance, review, conflict resolution, and redress mechanisms throughout a Planned Relocation;
- i. provide for timely, sufficient, and sustainable funding for Planned Relocation; and
- j. ensure Planned Relocation is incorporated into other intersecting and crosscutting issues and activities, including development and land-use frameworks.<sup>133</sup>

As McAdam and Ferris note, relocated communities are more likely to regard their move as

“‘successful’ when they are well-informed, able to participate in all stages of the decision-making process, given adequate compensation (in the form of assets, incomes and economic opportunities), and have a sense of control over the choice of destination and the process of movement”.<sup>134</sup>

131 Brookings Institution, Georgetown University & UNHCR, *Guidance on Planned Relocation*; Georgetown University, UNHCR & IOM, *Toolbox on Planned Relocation*. The latter notes that all planned relocations should: establish and comply with an appropriate legal framework; understand and address the needs and impacts of relocation on affected populations; provide information to, consult with and ensure the participation of affected populations; understand and address complexities related to land issues; and undertake monitoring and evaluation and ensure accountability.

132 Brookings Institution, Georgetown University & UNHCR, *Guidance on Planned Relocation*, para. 19.

133 *Ibid.*, para. 21. See Georgetown University, UNHCR & IOM, *Toolbox on Planned Relocation*, Part II and Part III for operational guidance on implementation. See also Nansen Initiative Protection Agenda, para. 95.

134 McAdam & Ferris, “Planned Relocations in the Context of Climate Change”, 144 (internal notes omitted).

In the absence of the above, moving people out of harm's way could constitute a forced eviction, contrary to the prohibition on "arbitrary or unlawful interference" with one's home.<sup>135</sup> The UN Committee on Economic, Social and Cultural Rights uses the term "forced eviction" to describe "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection", conveying "a sense of arbitrariness and of illegality".<sup>136</sup> However, "evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights" will not meet this threshold (thus recognising that in certain circumstances, forced movement will be lawful).<sup>137</sup> As in the case of evacuations or relocations, lawful evictions must strictly comply with the relevant provisions of international human rights law and general principles of reasonableness and proportionality.<sup>138</sup> Furthermore, procedural protections and due process require:

(a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.<sup>139</sup>

- 135 ICCPR, Art. 17; ICESCR, Art. 11; CESCR, *General Comment No. 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions*, UN Doc. E/1998/22, 20 May 1997.
- 136 CESCR, *General Comment No. 7*, para. 3. The *Basic Principles and Guidelines on Development Based Evictions and Displacement* applies the term to "acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection": para. 4.
- 137 CESCR, *General Comment No. 7*, para. 3.
- 138 *Ibid.*, para. 14; see also HRC, *General Comment No. 16: Article 17 (The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation)*, UN Doc. HRI/GEN/1/Rev.9, Vol. I, 8 Apr. 1988, paras. 3, 4 and 8.
- 139 CESCR, *General Comment No. 7*, para. 15. These are largely replicated in the IASC Guidelines, at C.2.4, which include an additional element: "The proper identification and registration of all persons being evicted". See also *ibid.*, para. 13, noting that States must explore "all feasible alternatives [...] in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force", and provide *legal remedies* to those affected by eviction orders. Individuals should have a right to adequate compensation for any real or personal property that is affected.

## 5. THE DUTY TO COOPERATE

The challenges presented by the adverse impacts of disasters and climate change may make it difficult for some States to discharge their human rights obligations on their own. This is likely to worsen over time as such impacts are felt in more and more areas, undermining the governance capacities of even the most highly-developed States. However, it is poorer States that will be disproportionately affected, with their responsive capacity already hampered by insufficient resources, limited technical and institutional support, and other stressors such as population growth, few educational opportunities, and weak human rights protection. Conflict can also play a part in some disaster-affected countries, as in the case of Somalia.<sup>140</sup>

Affected States will require support – technical, financial and operational – to assist and protect their own populations and to respect, protect and fulfil their human rights obligations. These aspects are already envisioned by the UN Framework Convention on Climate Change (UNFCCC) and associated instruments which are based on the need for the international community to take collective responsibility for a problem of its own making.<sup>141</sup>

The duty to cooperate is a fundamental principle of international law. It is listed in the UN Charter as one of the core objectives of the UN,<sup>142</sup> and forms part of multiple environmental law agreements and a number of human rights instruments, including the ICESCR.<sup>143</sup> Generally speaking, it refers to two or more States working together towards a common goal.<sup>144</sup>

In the context of climate change and human rights, the duty to cooperate has been described as “not only expedient but also a human rights obligation”, whose “central objective is the realization of human rights”.<sup>145</sup> Indeed, Limon argues that this specific link between the duty to cooperate and the realisation of human rights in the context of climate change suggests that:

all states that are party to the ICESCR have a legal obligation through international cooperation (i.e., the UNFCCC process) to reduce emissions to levels consistent with the full enjoyment of human rights (i.e., safe levels) in all other

140 See e.g., International Crisis Group, *Instruments of Pain (III): Conflict and Famine in Somalia*, Crisis Group Africa Briefing No. 125, 9 May 2017, available at: <https://www.crisisgroup.org/africa/horn-africa/somalia/b125-instruments-pain-iii-conflict-and-famine-somalia> (last visited 15 Aug. 2018).

141 See e.g., United Nations Framework Convention on Climate Change (UNFCCC), 1771 UNTS 107, 9 May 1992 (entry into force: 21 Mar. 1994); Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), 2303 UNTS 148, 11 Dec. 1997 (entry into force: 16 Feb. 2005); Paris Agreement, FCCC/CP/2015/10/Add.1, 2015 (entry into force: 4 Nov. 2016).

142 See UN Charter, Arts. 1(3), 55 and 56; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 24 Oct. 1970, Art. 1.

143 ICESCR, Arts. 2(1), 11, 15, 22 and 23. For other instruments, see McAdam, *Climate Change, Forced Migration, and International Law*, 257, note 132.

144 According to Wolfrum, international cooperation is “the voluntary coordinated action of two or more States which takes place under a legal régime and serves a specific objective”: R. Wolfrum, “International Law of Cooperation”, in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 2, 1995, 1242.

145 OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, para. 99.

countries (especially vulnerable countries), to fund adaptation measures in vulnerable countries (depending on the availability of resources), and to ensure that the international climate change agreement [...] is consistent with those human rights obligations and, at the very least, does not adversely impact human rights.<sup>146</sup>

A number of developed States would resist that interpretation, just as they rejected the Office of the High Commissioner for Human Rights' characterisation of international cooperation as a human rights obligation, instead accepting only that it was "important".<sup>147</sup>

Nevertheless, under the ICESCR, each State party

undertakes to take steps, individually *and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>148</sup>

Commenting on this provision, the UN Committee on Economic, Social and Cultural Rights has stated the phrase "to the maximum of its available resources":

was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11 [adequate standard of living], 15 [cultural life], 22 and 23.<sup>149</sup>

While this reference primarily addresses the obligation of States to turn to the international community for support – which, in the present context, would arise if they were unable to address the needs of evacuated or relocated people – the Committee has further emphasised "that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain

146 M. Limon, "Human Rights and Climate Change: Constructing a Case for Political Action", *Harvard Environmental Law Review*, 33, 2009, 455 (internal notes omitted).

147 M. Limon, "Human Rights Obligations and Accountability in the Face of Climate Change", *Georgia Journal of International and Comparative Law*, 38, 2010, 565–566, referring to UN Doc. A/HRC/RES/10/04, 25 Mar. 2009. preambular para: "Recognizing also that climate change is a global problem requiring a global solution, and that effective international cooperation to enable the full, effective and sustained implementation of the United Nations Framework Convention on Climate Change in accordance with the provisions and principles of the Convention is important in order to support national efforts for the realization of human rights implicated by climate change-related impacts".

148 ICESCR, Art. 2(1) (emphasis added).

149 CESCR, *General Comment No. 3*, para. 13.

an unfulfilled aspiration in many countries”.<sup>150</sup> Importantly, the Committee has never stated that international law imposes enforceable obligations on individual States to provide support to specific States that require it<sup>151</sup> – and nor would the text or drafting history of the ICESCR permit it to do so. As Alston and Quinn note, it is “difficult, if not impossible” to characterise States’ commitment to international cooperation in the ICESCR as “a legally binding obligation upon any particular state to provide any particular form of assistance”.<sup>152</sup> Thus, for example, in the context of Article 14 (on access to primary education), the Committee has explained that “[w]here a State party is clearly lacking in the financial resources and/or expertise required to ‘work out and adopt’ a detailed plan, the international community has a clear obligation to assist”.<sup>153</sup> The international community fulfils this duty in multiple ways, including through the UN humanitarian and development agencies, the funding mechanisms for humanitarian action, the development banks and the “Green Climate Fund” (supporting States to adapt to the effects of climate change). Such cooperative efforts must be distinguished from actions by individual States to support humanitarian and development action through multilateral or bilateral measures.

The commentary to the ILC Draft Articles on the Protection of Persons in the Event of Disasters describes the duty to cooperate as “indispensable” in protecting victims of disasters.<sup>154</sup> The Draft Articles require States to cooperate “among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors”,<sup>155</sup> which may *inter alia* take the form of “humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources”.<sup>156</sup> They also provide that “[c]onsent to external assistance shall not be withheld arbitrarily”,<sup>157</sup> since to do so could violate the right to life, among other obligations.<sup>158</sup> Indeed, a number of UN resolutions call on States to facilitate the work of humanitarian agencies and grant them access to affected populations.<sup>159</sup> The Code of Conduct for the International Red Cross and

150 *Ibid.*, para. 14.

151 On this issue, see Saul, Kinley & Mowbray, *The International Covenant on Economic, Social and Cultural Rights*, 138–140.

152 P. Alston & G. Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights”, *Human Rights Quarterly*, 9, 1987, 191.

153 CESCR, *General Comment No. 11: Plans of Action for Primary Education (Article 14 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/1999/4, 10 May 1999, para. 9.

154 ILC Draft Articles and Commentary, commentary to draft Art. 7, para. 1.

155 *Ibid.*, draft Art. 7.

156 *Ibid.*, draft Art. 8. The Commentary to draft Art. 8, para. 4, makes clear that this list is illustrative, not exhaustive.

157 *Ibid.*, draft Art. 13(2). In the context of armed conflict, United Nations Security Council (UNSC) Res. 2139 of 2014 on Syria recalled that arbitrary denial of humanitarian access amounts to a violation of international humanitarian law: preambular para. 10.

158 See ILC Draft Articles and Commentary, commentary to draft Art. 13, paras. 4–5; see also Guiding Principles on Internal Displacement, Principle 25(2).

159 See e.g., the first UNGA Resolution on Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations of 1999 (UN Doc. A/RES/46/182, 1999, para. 6) and subsequent resolutions, available at: <http://www.unocha.org/cerf/about-us/who-we-are/general-assembly-resolutions-0> (last visited 15 Aug. 2018). See also, relevant UNSC Resolutions on the Protection of Civilians, and in particular,

Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief provides that: “The right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries.”<sup>160</sup> In conflict situations, “[o]nce relief actions are accepted in principle, the authorities are under an obligation to co-operate, in particular by facilitating the rapid transit of relief consignments and by ensuring the safety of convoys.”<sup>161</sup>

The Sendai Framework on Disaster Risk Reduction reiterates the general principle that “[e]ach State has the primary obligation to prevent and reduce disaster risk”, but – significantly – it goes on to state that this *includes* “through international, regional, subregional, transboundary and bilateral cooperation”.<sup>162</sup> In other words, it locates the duty to cooperate on disaster risk reduction as an *inherent component* of the State’s own duty to prevent and reduce the risks of disasters. It also notes the fundamental importance of international cooperation in strengthening disaster risk governance “to foster more efficient planning, create common information systems and exchange good practices and programmes for cooperation and capacity development”,<sup>163</sup> and to “enable policy and planning for the implementation of ecosystem-based approaches with regard to shared resources [...] to build resilience and reduce disaster risk, including epidemic and displacement risk”.<sup>164</sup> The particular vulnerabilities of “the least developed countries, small island developing States, landlocked developing countries and African countries, as well as middle-income countries facing specific challenges [...] requires the urgent strengthening of international cooperation and ensuring genuine and durable partnerships at the regional and international levels.”<sup>165</sup>

The types of concrete cooperative measures cited include:

- “enhanced provision of coordinated, sustained and adequate international support for disaster risk reduction”;<sup>166</sup>
- “enhanced technical and financial support and technology transfer”;<sup>167</sup>

UNSC Res. 1265, 17 Sep. 1999; UNSC Res. 1296, 19 Apr. 2000; UNSC Res. 1502, 26 Aug. 2003; UNSC Res. 1674, 28 Apr. 2006; UNSC Res. 1894, 11 Nov. 2009; UNSC Res. 2175, 29 Aug. 2014; and UNSC Res. 2286, 3 May 2016. See also, UNGA Res. 45/100, 1990, para. 4; UNGA Res. 43/131, 1988, para. 4.

160 IFRC and Red Crescent Societies & International Committee of the Red Cross, *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief*, Principle 1, available at: <https://www.icrc.org/eng/assets/files/publications/icrc-002-1067.pdf> (last visited 15 Aug. 2018).

161 Y. Sandoz, C. Swinarski & B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, International Committee of the Red Cross, 1987, para. 4888.

162 Sendai Framework, para. 19(a).

163 *Ibid.*, para. 28(a).

164 *Ibid.*, para. 28(d).

165 *Ibid.*, para. 41. Implicitly referencing the impacts of sea-level rise, the provision goes on to note: “Similar attention and appropriate assistance should also be extended to other disaster-prone countries with specific characteristics, such as archipelagic countries, as well as countries with extensive coastlines.”

166 *Ibid.*, para. 47(a).

167 *Ibid.*, para. 47(a).

- “enhance[d] access [. . .] to finance, environmentally sound technology, science and inclusive innovation, as well as knowledge and information-sharing”;<sup>168</sup>
- “global technology pools and global systems to share know-how, innovation and research and ensure access to technology and information on disaster risk reduction”;<sup>169</sup>
- “incorporat[ing] disaster risk reduction measures into multilateral and bilateral development assistance programmes within and across all sectors, as appropriate, related to poverty reduction, sustainable development, natural resource management, the environment, urban development and adaptation to climate change”;<sup>170</sup> and
- “enhance[d] technology transfer, involving a process of enabling and facilitating flows of skill, knowledge, ideas, know-how and technology from developed to developing countries”.<sup>171</sup>

There is no mention of States being required to provide assistance by identifying land suitable for relocation, or in otherwise actively assisting with relocation, although a number of the measures cited above could be relevant to the process of a State assessing the suitability of internal evacuation and/or relocation sites.<sup>172</sup> Furthermore, it might be argued that “humanitarian assistance”, included in the non-exhaustive list of cooperative response measures in draft Article 8 of the ILC Draft Articles, could be interpreted to encompass assistance with evacuation or relocation, although it would be difficult to interpret it as a *requirement* of such assistance.<sup>173</sup>

Regardless of the relative normative strength of the duty to cooperate in disasters, in practice States *do* cooperate pursuant to agreed frameworks. For instance, under the FRANZ Arrangement, France, Australia, and New Zealand agree to coordinate disaster reconnaissance and relief assistance in the Pacific when so requested by partner countries.<sup>174</sup> The ASEAN Agreement on Disaster Management and Emergency Response is likewise premised on the principle of cooperation.<sup>175</sup> Other regions have

168 *Ibid.*, para. 47(b).

169 *Ibid.*, para. 47(c).

170 *Ibid.*, para. 47(d).

171 *Ibid.*, para. 40.

172 See CCCM, *The MEND Guide*; Brookings Institution, Georgetown University & UNHCR, *Guidance on Planned Relocation*; Georgetown University, UNHCR & IOM, *Toolbox on Planned Relocation*.

173 ILC Draft Articles and Commentary, commentary to draft Art. 8, para. 4, notes that requirements must be assessed “according to the circumstances”. Paragraph 6 provides: “The forms that cooperation may take will necessarily depend upon a range of factors, including, *inter alia*, the nature of the disaster, the needs of the affected persons and the capacities of the affected State and other assisting actors involved.” However, paragraph 5 states: “As draft article 8 is illustrative of possible forms of cooperation, it is not intended to create additional legal obligations for either affected States or other assisting actors to engage in certain activities.”

174 Adopted 22 Dec. 1992.

175 Adopted 2005 (entry into force: Dec. 2009), see especially Arts. 2, 3(3), 4(a) and 20. See also ASEAN Vision 2025 on Disaster Management, available at: [http://www.asean.org/wp-content/uploads/2012/05/fa-220416\\_DM2025\\_email.pdf](http://www.asean.org/wp-content/uploads/2012/05/fa-220416_DM2025_email.pdf) (last visited 15 Aug. 2018).

similar frameworks.<sup>176</sup> Bilateral agreements on cooperation and assistance in disaster situations also exist.<sup>177</sup>

Given the lack of precision in general international law, multilateral and bilateral agreements are a more appropriate way to give precise legal content to the duty to cooperate in the context of disasters and climate change, and their use in this regard should be encouraged, including in relation to evacuations and planned relocations. Taking into account the legal principle of cooperation between States as enshrined in the UN Charter and the ICESCR, one could even argue that States approached by other countries in need of international support are, to quote the International Court of Justice, “under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation”, and thus “are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it”.<sup>178</sup>

## 6. CONCLUSION

This article has demonstrated that under international human rights law, States have an obligation to respond to threats to life and limb emanating from natural hazards, including from the adverse effects of disasters and climate change. This may include a duty to evacuate people at risk and to assist them according to their needs. Under certain stringent conditions, such evacuations may even be forced.

Where it is unsafe or impossible for people to return to their homes in the aftermath of a disaster,<sup>179</sup> or if there is good evidence that areas of land will become uninhabitable in the foreseeable future, then planned relocations may be justified. While these should always be a measure of last resort, they may provide a remedy when undertaken in full accordance with human rights standards.

By the time a disaster occurs, it is often too late to properly protect people. Preparation must therefore go beyond contingency planning alone, to create a legal and institutional environment that allows for effective disaster risk reduction and climate change adaptation measures, as well as laws and strategies on evacuations and permanent relocations that are shaped by a rights-based approach. These are necessary preconditions for States to respond to the challenges of global warming. Finally, elementary considerations of humanity and the closely connected concept of human dignity may provide overarching normative concepts to guide the development of such responses. By placing the needs and rights of affected individuals front and centre, they ensure that legal and policy responses remain human rights-focused.

176 See e.g., European Union Civil Protection Mechanism, available at: [http://ec.europa.eu/echo/what/civil-protection\\_en](http://ec.europa.eu/echo/what/civil-protection_en) (last visited 15 Aug. 2018); see more generally, American Protocol on Disaster Risk Management; African Regional Strategy for Disaster Risk Reduction.

177 See e.g., various bilateral agreements listed in the IFRC, *Disaster Law Database*, including Agreement between the Swiss Federal Council and the Government of the Republic of the Philippines on Cooperation in the event of Natural Disaster or Major Emergencies (2001).

178 International Court of Justice (ICJ), *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* [1969] ICJ Rep. 3, para. 85.

179 For instance, areas of origin may have disappeared through coastal erosion or be at a heightened risk of further disasters.