“We are in between”

Securing effective rights for persons displaced in the context of climate change and natural hazard-related disasters

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To displaced people everywhere,
   May you be safe!
   May you be happy!
   May you be free!
Abbreviations

ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR – European Court of Human Rights
EDP – Environmentally displaced person
IASC – Inter-Agency Standing Committee
ICRC – International Committee for the Red Cross
IDMC – Internal Displacement Monitoring Centre
IDP – Internally displaced person
IPCC – Intergovernmental Panel on Climate Change
NRC – Norwegian Refugee Council
OCHA – Office for the Coordination of Humanitarian Affairs
RAED – Arab Network for Environment and Development
UNFCCC – United Nations Framework Convention on Climate Change
UNHCR – United Nations High Commissioner for Refugees
UNISDR – United Nations International Strategy for Disaster Reduction
Preface

Dear fellow migrants!

The latin *migrare* can mean “to move” and is also related to the word for “change.” In a sense we are all migrants. I have a particular migration history. My Kenyan-born mother came to Norway to climb the mountains and fell for my father. I have been cursed and blessed with an outsider perspective on many matters of society and law. I have visited and lived in several countries. I have also crossed the borders of many academic disciplines and fields of work. This inevitably colours my academic style and approach. In some ways, I too am “in between” as one of the interviewees in my research described himself. This inter-disciplinary project is certainly “in between”.

In 2007, I started working at the Norwegian Refugee Council (NRC) as a legal adviser. In the early months of 2008 I was asked to write a paper on the concept of “climate refugees.” Apparently, this was a group of people forcibly displaced rather than choosing to migrate. Furthermore, it was a group that was largely neglected and without much formal and effective protection. This engaged me. The paper turned into the report *Future floods of refugees*, which was well received both domestically and internationally. Soon I was working full-time on the topic.

I started a PhD in Law at the University of Oslo in 2010, but quit after few weeks. At the time, I preferred to work outside the university combining activism and normative development with research. It has been inspiring to see changes happening. Joint research, activism and other efforts have contributed to establishing processes and outcomes such as the Nansen Initiative, a state-driven consultation process to address the protection needs of those displaced. In 2012, someone suggested that I compile the peer-reviewed papers I had written, write a theoretical and methodological introduction, and apply for a Dr.philos. I have enjoyed this process.

The few weeks I spent at the Faculty of Law in Oslo resulted in lasting acquaintances, for which I am very grateful. Professors Kristian Andenæs, Inger Johanne Sand, Cecilia Bailliet and Mads Andenæs as well as other PhD students and staff have been
particularly supportive and generous in sharing their views, engaging me in academic
conversations and motivating me. I have also benefited from acquaintances in other
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Social Science and Psychology, University of Oslo.

Among current and previous NRC staff, I especially want to thank Pål Nesse for
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Tamer Afifi, and Professors Jane McAdam, Walter Kälin and Roger Zetter.

Without love little is possible. I believe love includes the will and effort to see and
nurture oneself and the other. For loving me and letting me love, a very special thanks
go to my parents, brother, husband and friends. Loving remains my most important
learning in life, the overall research and activist project.

My work on this topic, including the creation of this thesis, has been an intellectual,
emotional and spiritual journey. Hopefully, it can be an interesting journey for the
reader as well, contribute to social change, and ultimately, of course, serve love well.

Vikram Kolmannskog,
29th April 2013, Oslo.
Abstract in English

Every year millions are forced to flee their homes in the context of disasters associated with climate and natural hazards. The goal of this thesis is to contribute to securing effective rights for these persons. Theories relating to cosmopolitan legality, living law and legal pluralism are useful for this political and socio-legal project. In order to address the goal, I explore both the lives and rights of those displaced through empirical case studies and a doctrinal approach to law. I expose the space for personal and political considerations in the doctrinal approach – and employ a dynamic and context-oriented interpretation of law in order to exploit protection possibilities in existing law and suggest legal reform. The doctrinal papers are also informed by findings in the case studies.

Many displaced persons are internally displaced persons and the Guiding Principles on Internal Displacement apply to them. Typical rights violations and challenges involve a lack of state will and ability to protect. When we apply a dynamic and context-oriented interpretation, the 1951 Convention relating to the Status of Refugees and regional refugee instruments remain relevant for some of those who are cross-border displaced. An appreciation of the role of contextual vulnerability in disasters and multi-causality in displacement informs this interpretation. Case studies from the Horn of Africa in particular, show that the refugees might still face challenges including lack of access to protection due to visa regimes and closed borders, as well as issues involving shelter, training and livelihood, food security, health, safety and sexual violence, work, and freedom of movement. Finally, many will not be considered refugees by law. Human rights law may provide some protection for this group. A dynamic and context-oriented interpretation of human rights law calls for protection against forced return to the most extreme disaster situations. Persons are not necessarily granted a legal status with effective rights, however.

There is potential for developing existing and new domestic and regional human rights and refugee instruments. Another way forward that could draw on possibilities
and seek to remedy limitations of existing law, is the creation of a global but pluralistic, soft-law framework on environmental displacement.

The case studies show that social, economic, cultural, political, and other factors in different contexts influence the interpretation and application of law. They also show that in many cases the states and state laws have little impact while the international and local levels may be crucial, that is, international agencies and local systems and customary law. We need a strategic use of law, a sensitisation and mobilisation that is responsive to local contexts, and to address a series of extra-legal factors to secure effective rights for persons who are displaced in the context of climate change and natural hazard-related disasters.
Abstract in Norwegian


Det er et visst potensiale i å utvikle eksisterende og ny nasjonal og regional lovgivning. En annen mulig vei fremover er å utvikle globale men pluralistiske retningslinjer for miljørelatert fordrivelse.

Kasusstudiene viser at sosiale, økonomiske, kulturelle, politiske og andre faktorer i forskjellige kontekster påvirker tolkningen og anvendelsen av loven. De viser også at
det i mange tilfeller er andre aktører enn staten og statlig lovgivning som er avgjørende, for eksempel internasjonale organisasjoner og lokale systemer og sedvanerett. Vi trenger en strategisk bruk av lov, en sensitivering og mobilisering som tar hensyn til lokale kontekster, og å forholde oss til en rekke ikke-juridiske faktorer for å sikre effektive rettigheter for de fordrevne personene.
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A boy shields his face and eyes from the dust in the Dadaab refugee camps, 2012. He is not among the interviewees for this research.
1. Introduction

1.1 Ahmed

The subject matter of this thesis is displacement in the context of climate change and natural hazard-related disasters, and relevant law and rights. The overall motivation and goal is to contribute to securing effective rights for the displaced persons. For this purpose, it is necessary to understand disasters and displacement in this context, explore how law and other factors affect those displaced, and explore how existing and new law can secure their rights. I draw on several disciplines and fields of law. The thesis grew out of a constant interaction between (mainly empirical) case studies and (mainly theoretical and doctrinal) legal studies. Inspired by a methodological approach in feminist jurisprudence (Dahl, 1986; Ikdahl, 2010) I will introduce some of the complexities and crucial themes involved by recounting one young man’s lived experience. Ahmed is among the interviewees informing one of the thesis papers (Kolmannskog, 2012b).

1.1.1 Famine

I met Ahmed in Cairo in June 2012. He was one of several young Somali men gathered around a table in the offices of the Arab Network for Environment and Development (RAED). We talked about the 2011 drought on the Horn of Africa and its consequences. “I saw a lot of misery. I felt depressed and was unable to speak,” he said. Ahmed had been a lorry driver transporting charcoal in South Central Somalia while his family background was agro-pastoralist as the great majority of the approximately 9 million inhabitants of Somalia. “My mother’s family lost their livestock. One of my uncles became sick and died,” he said – a pair of glasses unsuccessfully hiding his sad eyes. Eventually, Ahmed lost his own job as well. Most Somalis were affected by the drought one way or another.

Droughts have become normal over the last decades in Somalia. This is illustrative of a general, global trend of warmer temperatures and changes in natural hazards. While most East African countries were badly affected by drought in 2011, the situation was almost beyond imagination in Somalia with famine being declared in several regions. Vulnerability to natural hazards such as drought is determined by a series of factors, including livelihoods, poverty and conflict. It is the combination of hazard and
vulnerability that creates the disaster.

1.1.2 Forcibly displaced

Together with his family Ahmed went to a camp for internally displaced persons (IDPs) in Mogadishu in search of basic assistance. But for a long time international aid was not arriving, partly because armed groups did not give international agencies access. “Drought and civil war are twins that have come together to plague my country,” explained Ahmed. Hundreds of thousands left Somalia in 2011. “I was forced to leave,” Ahmed said. “I wanted to stay in my home country. I became desperate.”

A recurrent question when it comes to natural hazard-related disasters in general and slow-onset disasters such as drought in particular, is how we can determine that the movement is forced displacement rather than voluntary migration. This is an important issue since displacement calls for a particular kind of international attention and protection. Ahmed and others I interviewed had a subjective experience of being forcibly displaced. Furthermore, moving was a last resort, which indicates that it was forced. In the thesis papers, I furthermore suggest a concept of return, which involves that a person should be considered displaced and entitled to protection if he or she cannot or should not be forcibly returned to the country of origin due to the current circumstances; this stands in contrast to a focus on the causes of – and element of force in – the initial movement.

Most people displaced by conflicts and natural hazard-related disasters do not have the resources or networks to travel very far, and remain within their own country. They should be considered internally displaced persons according to international law. Internally displaced persons often face several challenges, often involving lack of state will and ability to assist and protect them. Often it is international agencies and local customary law and institutions that provide protection. For some there is also secondary, cross-border displacement, as was the case for Ahmed.
1.1.3 Travel to Egypt

While most of his compatriots travelled to the already crowded refugee camps in neighbouring Kenya – where they were formally considered refugees but faced a series of other challenges – Ahmed travelled all the way to Egypt. “I started in Ethiopia where I met some Oromo people. I went with them through Ethiopia and to Sudan. We travelled through Sudan for three months. I crossed the desert. I suffered. In Egypt the Oromo helped me and took me to the UNHCR office in Cairo. I told them how I lost family in the drought and fighting. I have now got the yellow card [as a registered asylum seeker] and am waiting.” At the time I met Ahmed, his status was uncertain.

The applicability of the refugee concept in cases such as Ahmed’s is controversial. Domestic, regional and global refugee definitions revolve around concepts such as persecution or generalised violence; the great majority does not explicitly mention natural hazard-related disasters. In this thesis, I explore some of the legal categories of protected people, including the refugee concept. I show that they may apply in some cases; for example, where conflict and drought coincide as in Somalia. Both Egypt and Kenya are parties to the same international and regional refugee treaties. While Kenya granted formal refugee status to all people from South Central Somalia, Egypt did not. Extra-legal factors play a role in the application of law and are also considered.

1.1.4 “We are in between”

Ahmed, the other young Somali men and I talked about life in Egypt and hopes for the future. “I do anything. I clean. I do anything to survive. One of the main challenges is that all of us are very depressed. We are in between. A friend of mine tried crossing from Libya over to Italy and died in the Mediterranean. If we try to go to Europe, we die in the Mediterranean. In Somalia we die of conflict and drought. The solution is in the hands of Allah.”

Those who are displaced to Egypt have very limited rights, and it is uncertain whether they will ever get refugee status. Even with such status rights to work, health, education and residency are limited or non-existent. Some of the Somalis were hoping
to somehow reach European and other developed countries. European countries have elaborate legislation protecting refugees. In this thesis, I argue that people such as Ahmed could perhaps find formal protection through existing European law. In practice, however, many of the countries try – through visa regulations, interceptions and other measures – to make sure that as few asylum seekers as possible ever arrive in their countries to be able to enjoy the protection that exists on paper. New formal legislation may have mainly symbolic functions and not change how many and who get protection in Europe and elsewhere. In Kenya, there were also formal protection possibilities for the Somalis. The Kenyan state has closed the border to Somalia, but many still get in. In Kenya, however, many Somalis face a lack of effective rights. In different ways, Europe, Kenya, Egypt and other countries and regions show that a main challenge relates to effective – as opposed to formal – rights protection.

A complexity of factors, including the extra-legal, must be addressed if new state-created law and policy is to effectively enhance the rights of those displaced. An overall message of this thesis is that dynamic interpretations of existing law may serve to protect many people. While some legal reform is necessary, a main challenge is how law is applied and wider contextual factors.

1.2 Problem statement

Ahmed’s story illustrates some of the human consequences of natural hazard-related disasters. Already today climate change is increasing the frequency, severity, timing and/or spatial distribution of natural hazards such as storms, floods and droughts (IPCC, 2012). This trend is likely to continue in the near future. In addition to climate change influencing the hazards, factors such as population growth, poverty and conflict make people more vulnerable to these hazards. There is an emerging body of research indicating that disasters associated with these natural hazards influence human mobility, including forced displacement (IPCC, 2012). Every year millions of people are forced to flee their homes due to these disasters (IDMC, 2012). Their formal and effective legal status and rights are – at best – unclear.

For a long time most social and legal research within the field of human mobility was focused on economic, political, demographic and social factors. In recent years, there
has been more focus on climate and environmentally related movement, and the legal situation and rights of those displaced in this context. The thesis papers have formed part of this on-going attempt to fill the knowledge gap. Increased knowledge, combined with activism, also help put the spotlight on the issue and establish necessary processes to address the issue, such as the Nansen Initiative (Kälin, 2012). Increased knowledge about disasters, displacement and law is crucial for such and other processes to identify what are the best ways forward in terms of securing effective rights for those displaced.

1.3 Research questions and approach

Since I believe the research methodology and methods should follow the goal and questions, I introduce them together. The overall motivation behind – and goal of – this thesis is to contribute to securing effective rights for persons displaced in the context of climate change and natural hazard-related disasters. As in action research, I research and write mainly in order to improve practical and political action (Mathieson, 1971). The main research question can be formulated as follows:

1) How can we best secure effective rights for persons displaced in the context of climate change and natural hazard-related disasters?

In order to address this question fully, we need to explore a subset of questions related to its different aspects. We need to explore both the lives and the rights of those displaced. The question refers to “persons displaced in the context of climate change and natural hazard-related disasters”. An important sub-question becomes:

1A) How is displacement in the context of climate change and natural hazard-related disasters experienced and how is it best conceptualised?

While there is a growing body of research within the social sciences on climate change, natural hazard-related disasters and human mobility (see for example, EACHFOR, 2009), I still considered it necessary to further explore these dynamics, in particular some experiences and needs of people displaced, and seek to conceptualise the matter. This question is addressed through (mainly empirical) case studies and
through theoretical speculation and conceptualisation. In legal terms, one could say that this first question relates to clarifying “the facts” and how we can perceive and frame these in order to establish, through legal methodology, what the law is. The starting point for a legal problem is an actual situation, the facts. On the basis of these facts, the lawyer searches for a relevant rule, decides the content of the rule and applies it to the actual situation.

Another aspect of the main question relates to the words “secure” and “rights”, and a second sub-question can be formulated as follows:

1B) How, and to what extent, can those displaced find protection through existing law or legal reform?

This is a question that I primarily seek to answer theoretically by looking at existing law. The question includes exploring what protection possibilities exist, what the protection gaps are, and how to best address these. While following the traditional legal (doctrinal) methodology to answer what the law is, I also seek to expose a space in existing law for choices, for example between progressive and conservative interpretations. As will become clear, the description of law always involves normative elements and considerations. What is unusual in this thesis, is that I am explicit about it and my motivation. I want to contribute to securing the best possible rights for those displaced, and I do so through a particular (dynamic and context-oriented) interpretation of what the law is. I also refer to relevant empirical material from case studies to show how law can be applied in practice and its limitations.

Yet another important aspect of the main question is referred to in the words “secure” and “effective”. I am interested in rights in practice, not merely rights on paper. The related sub-question can be formulated as follows:

1C) How do law and other factors interact and affect the lives of those displaced?

The application of law depends on the local context. Case studies are carried out that explore the lives of some of the people displaced in places such as Somalia, Kenya,
Egypt and Burundi, including responses from state and non-state actors to their displacement. Question 1C is related to question 1A. While 1A focuses on experiences of disasters and displacement in general and how to conceptualise these, question 1C focuses on the application of law. In addition to gaining some knowledge about how to understand displacement in the context of climate change and what law and rights may be relevant and needed, the case studies explore what the main protection challenges are, how relevant law is (not) applied, the limits of law and what factors interact with law. As in the other questions, this too is guided by the overall motivation to contribute to securing better effective rights.

Breadth has been chosen partly because I believe it was needed in this rather new and underdeveloped research area. While it is unusual to combine law and social science in this manner, it is not unheard of. (For another recent doctoral thesis in Norway combining law and social science, see Lile, 2011.) While the research questions have been presented neatly in numbers and letters above, I readily admit that my phenomenological reality is that the questions have been fluid and intrinsically linked. My motivation to contribute to securing effective rights for displaced persons has influenced the whole project. For example, when I explore the lives of those displaced, I may discover certain crucial issues that influence how I later interpret what the relevant law is in order to address these. The doctrinal part is not a conventional, “clean” doctrinal piece of research since I expose the politics of the doctrinal methodology and employ a politically motivated interpretation as well as insights from empirical studies. One could call this thesis a bastard – or holistic. In any case, we are “in between.” I return to some of these issues in chapter 4 on research methodology and methods.

1.4 Research context(s) and institutional affiliations
At this point it should come as no surprise that I see myself as a researcher-activist. Furthermore, most of the thesis papers were written as part of projects I did together with the Norwegian Refugee Council (NRC). According to their website (NRC, 2012), “[t]he Norwegian Refugee Council (NRC) is an independent, humanitarian, non-profit, non-governmental organisation which provides assistance, protection and durable solutions to refugees and internally displaced persons worldwide.” I was the
organisation’s first legal adviser on climate change and displacement and established research and advocacy within this field as part of the organisation’s purpose and activity.

The NRC climate project has been continuously funded by the Norwegian Ministry of Foreign Affairs. To a large extent the Ministry relied on the research we produced when deciding what position and steps to take. Rather than working for a new climate change displacement treaty or amendments to the 1951 Convention relating to the Status of Refugees – as suggested by some advocates and politicians – Norway eventually launched the Nansen Initiative together with Switzerland, an initiative that seeks to build consensus on some key principles (Kälin, 2012). To some extent the issue has involved conflicts between the Ministry and the Ministry of Justice, which deals with domestic asylum policy and law. The inter-ministerial tension and joint wish to focus on developing countries rather than Norway’s protection responsibilities shows some of the actual challenges (and hypocrisy perhaps) in will and law related to displacement. Regardless, I chose to include a study of European asylum law, including Norwegian, as well as law and practice in other countries and regions (Kolmannskog and Myrstad, 2009).

NRC and I participated in the Inter-Agency Standing Committee (IASC) Task Force on Climate Change, in climate change negotiations and cooperated closely with UNHCR, the International Organisation for Migration (IOM), the Special Rapporteur on the Human Rights of IDPs, OCHA, and the United Nations University in Bonn. The research has informed, as well as been driven by, advocacy, policy and organisational concerns. While much of the thesis is based on work carried out while I was institutionally linked to NRC, it reflects my personal opinions only.

To the extent that the thesis seeks to explore the rights of persons displaced in the context of climate change and natural hazard-related disasters in general, one could say that the overall context is the world at large and international law relevant to displacement. People all over the world are experiencing climate change and natural hazard-related disasters. Chapter 2 describes further the links between climate change, natural hazard-related disasters and displacement.
While climate change and displacement are global phenomena, the manifestations are local and vary with legal and other contexts. Therefore, a few concrete and specific case studies were carried out. Somalia, Kenya and Burundi were chosen partly to ensure that the advocacy and research were based on NRC field presence, which is an important pillar in all NRC advocacy and research. This was an organisational concern. However, the NRC presence also helped facilitate the studies and enabled the gathering of rich data in a short span of time. The link to NRC involves methodological and ethical challenges. For example, NRC is one of the service providers in the refugee camps in Kenya. Such issues are further discussed in chapter 4 on methodology and methods. Another study focuses on internal displacement and is mainly based on written documents. The case studies involved concern the 26 December 2004 tsunami in Asia and Hurricane Katrina in the USA. I describe the selection of cases further in section 4.4.2 and in the thesis papers.

As mentioned, I also include a study on protection possibilities for cross-border displaced persons in Europe. Europe was chosen partly because the continent has highly developed, and to some extent integrated and uniform law on refugees and displaced persons. It is also a desired destination for some of the people displaced in Africa and elsewhere. This study is mainly based on written documents and a doctrinal approach. Several papers emphasise that lack of access to the formal protection remains a major obstacle to effective protection.

In sum, several countries and regions are explored as well as global data. Again, breadth has been chosen partly because it was seen as needed in this rather new and underdeveloped research area.

1.5 Outline of the thesis
This chapter has provided an introduction to, and justification of, this thesis, in particular the research goal and questions, and the research approach. Chapter 2 describes further the topic of climate change, natural hazard-related disasters and displacement. It addresses some basic questions such as how people are displaced, how many and where. Chapter 3 presents the theoretical orientation and central concepts. It explores how one can understand climate change and natural hazard-
related disasters through concepts such as contextual vulnerability, and displacement through concepts such as multi-causality. It presents a typology of climate change effects, some of the central definitions in refugee law and human rights law such as refugee and internally displaced person, and concepts such as cosmopolitan legality, living law and legal pluralism. Chapter 4 discusses the research methodology and method. It describes how I take a holistic, activist and reflexive approach and my understanding of socio-legal studies and the case study approach as well as doctrinal methodology and dynamic, context-oriented interpretation of law. Chapter 5 presents the thesis papers chronologically, including how they are linked, how each addresses the research goal and questions, their contexts, methodologies and methods, how they relate to the typology of climate change effects, and main findings and conclusions. The chapter closes with some final remarks and thoughts on ways forward. Finally, with the kind permission of the relevant journals and editors as well as NRC, the thesis papers are included as Annexes.
An older lady shows us the drinking water in her village, Somaliland, 2009. The woman is not among the interviewees for this research.
2. Climate change, disasters and displacement

2.1 An emerging field of research and activism

This thesis is based on the contact of at least two discourses, that of climate change and that of displacement. Climate change has long been a subject of concern, particularly for environmentalists and natural scientists. With a general acceptance of the severe impacts on the environment and human lives worldwide (IPCC, 2007), a much broader spectrum of professionals and actors are now involved. On the displacement side, most research and activism has historically been focused on economic, social, demographic and political factors in human mobility (Foresight, 2011). In recent years, there has been more focus on climate and environmentally related movement.

I will mention a few key elements of this development, in which NRC and I took part. Members of the IASC Task Force on Climate Change submitted documents to, and participated in, climate change negotiations through the 1992 United Nations Framework Convention on Climate Change (UNFCCC) since 2008, seeking recognition and understanding for displacement in this context (see in particular IASC, 2008). NRC’s Internal Displacement Monitoring Centre (IDMC) which is an authority in monitoring conflict-related internal displacement, started monitoring and publishing data on disaster-related displacement in 2009 (IDMC, 2012). In 2011, the Norwegian government, in cooperation with NRC and the environmental research institution Cicero, hosted the Nansen Conference on Climate Change and Displacement (Wahlström, 2011). This was the first major conference that brought together representatives from states, UN agencies, humanitarian and environmental NGOs, academia and the media to explore the topic, and it resulted in the ten Nansen Principles, which provide guidance on how to approach the issue (Wahlström, 2011). Soon afterwards Norway and Switzerland gave state pledges at a UNHCR Ministerial Meeting that eventually led to the establishment of the Nansen Initiative (Kälin, 2012). The Nansen Initiative seeks to build consensus among states and other actors on key principles of how to address displaced persons and their rights in the context of climate change and natural hazard-related disasters. These and other efforts have moved the issue higher up on the political and academic agendas.
2.2 The new normal of natural hazard-related disasters

Already the First Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) noted that the greatest single impact of climate change might be on human mobility (IPCC, 1990). Then there was a long silence, however. While recognising that people move for a complex set of reasons, there is today an increasing understanding of the importance of climate change as a risk multiplier (Kolmannskog, 2008; EACH-FOR, 2009; Foresight, 2011; IPCC, 2012).

One relevant effect of climate change is a change in certain natural hazards. Hazards combined with human vulnerability and insufficient coping capacity can result in disasters (UNISDR, 2007). An IPCC special report on managing the risks of extreme events and disasters describes how a changing climate is influencing certain hazards such as storms, floods and droughts in terms of frequency, severity, timing and/or spatial distribution (IPCC, 2012). The report also states that there is “medium agreement” and “medium evidence” for the statement “disasters associated with climate extremes influence population mobility and relocation, affecting host and origin communities” (IPCC 2012, p. 8).

All natural hazard-related disasters – both climate-related and those that are not considered influenced by the climate, such as earthquakes – can have effects on human mobility, with some people voluntarily migrating, others being forcibly displaced, a third group choosing to stay, and a fourth group being “trapped” and forced to remain and suffer (Foresight, 2011). Many of those left behind during a disaster may have very serious protection concerns and there is a need for an inclusive approach to all affected (Kolmannskog 2009b; Kolmannskog 2010; Foresight, 2011). At the same time, displacement will result in particular needs and these are the focus of the thesis.

2.3 “Environmental conflicts”

The links between climate change and conflict are unclear and contentious. The two main schools of thought in environmental conflict research are the Neo-Malthusians and the Cornucopians (Gleditsch, 2003). The Neo-Malthusians – among them we find Homer-Dixon – claim that population growth and resource scarcities due to for
example drought result in violent competition. The Cornucopians, on the other hand, emphasise the role of human ingenuity and cooperation in overcoming scarcity and resolving conflict. Some researchers, among them Gleditsch (1998), claim that it is abundance rather than scarcity of resources that often leads to conflict, with armed groups drawing funding from the exploitation of natural resources, or the conflict itself being about the control of these resources. Furthermore, disasters often highlight existing domestic problems, revealing weaknesses of the government in power and may thereby exacerbate conflict. A much-cited example is the separation of Bangladesh from Pakistan after the devastating cyclone of 1970 (Kolmannskog, 2008). Violent conflict related to environmental factors may in turn trigger displacement.

In another conflict constellation, the environmental factor (for example drought) first triggers displacement (as described in section 2.2), which in turn triggers conflict. Mass population movement may be blamed rightly or wrongly for reducing availability of already scarce resources in the place of transit or destination; and, with the entry of humanitarian agencies and provision of aid to displaced persons, the host population may have a sense of unjust discrimination and competition (Kolmannskog, 2012b). On returning home, disputes of ownership or rights of use can also lead to conflict.

There is general agreement that conflict potential normally depends on a range of socio-economic and political factors, and that governance and the role of the state are often crucial factors. Talking of “environmental conflict” may therefore be misleading as it suggests a simplistic, mono-causal relationship. In the following, I refer to violent conflict, generalised violence or similar terms.

2.4 Displacement now and in the future

According to IDMC (2012), millions of people are forced to flee every year due to sudden-onset disasters such as floods and storms. The numbers vary greatly from year to year depending on the occurrence of certain mega-disasters that cause a high proportion of the total displacement. In addition, hundreds of thousands flee due to slow-onset disasters such as the drought that developed into a famine on the Horn of Africa in 2011. (So far IDMC does not monitor displacement in the context of slow-
onset disasters). Developing countries are most affected, and there is general agreement that most displacement remains within the countries.

The estimates for people displaced in the future vary wildly. Morrisey (2009) has introduced the notions of maximalist and minimalist schools of thought. The maximalists see an almost direct relationship between the degree of global warming and the magnitude of people affected, and operate with estimates of hundreds of millions of people. The minimalists stress that displacement is triggered by complex and multiple causes; some emphasise that climate change effects may just as well result in people having less resources and thus lowered mobility.

According to Foresight (2011), an authoritative and recent study, the impact of environmental change on displacement will increase in the future. In particular, the changes in natural hazards are expected to continue or even intensify in the near future. Most likely developing countries in lower latitudes will continue to be the most affected, at least in the near future (Thow and de Blois, 2008). Most displacement is likely to remain internal and regional in these countries, and much will be rural-urban movement (Hugo, 1996; Brown, 2008; IASC, 2008; Foresight, 2011). Today, we see that much displacement is temporary, and some is more permanent. While some areas may become increasingly difficult to return to, this overall pattern is not likely to change in the near future. In fact, Foresight (2011) and others emphasise that many people will hardly be able to move at all.

While the industrialised countries bear the main historical responsibility for climate change, one can hardly portray the dynamics of climate change and displacement as a threat image of masses of refugees flooding over western borders (Kolmannskog, 2008). The sad truth is that there will be many more real floods, and if nothing changes, many of the affected will have little choice but to stay and suffer, return home or go to other near-by areas where they risk more floods or other disasters.
Women collecting firewood outside the refugee camps in Dadaab, Kenya, 2009. The women are not among the interviewees for this research.
3. Theoretical orientation and central concepts

3.1 Introduction
This thesis is interdisciplinary and has a research topic which up until recently was poorly understood. This calls for creativity and flexibility in terms of finding, combining and constructing theories. This process has occurred before, during and after the case studies and other studies were undertaken. As already mentioned, the research cannot be described as mainly theory-driven or theory-building. For practical and pedagogical purposes, however, the chapter is placed here at the beginning of the thesis. Chapter 2 introduced some of the links of climate change and displacement. This chapter looks more into some understandings of climate change and natural hazard-related disasters, and displacement linked to these. Furthermore, the chapter describes an understanding of law that is appropriate to the research goal and question, and includes the introduction of a particular typology, some of the important legal definitions of displaced persons (and migrants), and concepts such as cosmopolitan legality, living law and legal pluralism.

3.2 Understanding (un)natural disasters and adaptation
A disaster can be defined as “[a] serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources” (UNISDR, 2007). The thesis papers employ the term “natural hazard-related disasters” as well as the shorter and more common – but imprecise – “natural disasters”. Natural hazards include hydro-meteorological and climatological hazards such as storms and floods as well as geophysical hazards such as earthquakes. While the first can be influenced by climate change, the latter are not.

The IPPC, which is considered the leading body for the assessment of research on climate change, defines climate change as,

“A change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer. Climate change may be due to natural internal processes or external forcings, or to
persistent anthropogenic changes in the composition of the atmosphere or in land use.” (IPCC 2012, p. 3).

They note that this definition differs from the one in UNFCCC article 1 (2) where climate change refers to a change, which is attributed directly or indirectly to human activity (anthropogenic). This thesis does not enter into the scientific debate regarding the human contribution to climate change. Therefore, the first and broadest definition is most appropriate. In several cases, however, the thesis refers to the scientific consensus, and issues of responsibility and funding are raised. In these cases, climate change can be understood in the narrower, second sense.

A new perception of disasters as not merely “natural” is building. First, there is growing agreement that there is a human factor in creating climate change and thereby natural hazards. Second, there are human factors involved in all disasters – including those not related to climate change – as the degree of disaster depends on human vulnerability and the (lack of) action from governments and others before, during and after a natural hazard (UNISDR, 2007). The first human factor is relevant for prevention of disasters and displacement and establishing some responsibility and funding through for example the climate change negotiations and agreements (Kolmannskog, 2009a; Kolmannskog and Trebbi, 2010). The second set of human factors may be particularly relevant for refugee law and human rights law as rights violations may influence people’s vulnerability to the hazard in the first place, and marginalisation, discrimination and persecution often occur during and after natural hazards making people more vulnerable to the current as well as future disasters. “Natural” disasters can be understood as social disasters.

There are several definitions of vulnerability. O’Brien et al. (2007) discuss two definitions, conceptualised as “outcome vulnerability” and “contextual vulnerability”, and how they are linked respectively to a scientific framing and a human-security framing which prioritise the production of different types of knowledge and emphasise different types of policy responses. Outcome vulnerability is considered “a linear result of the projected impacts of climate change on a particular exposure unit (which can be either biophysical or social), offset by adaptation measures” (O’Brien
et al. 2007, p. 75). The authors admit that “[t]here is little doubt that technological adaptations such as irrigation schemes, drought tolerant seed varieties, raised bridges, structural improvements in housing and so forth can decrease vulnerability to climate change in many countries” (O’Brien et al. 2007, p. 84). However, they stress that technological adaptations to climate change represent only one of many options – and in some cases a problematic one.

Contextual vulnerability, in contrast, is considered to be influenced “not only by changing biophysical conditions, but by dynamic social, economic, political, institutional and technological structures and processes; i.e. contextual conditions” (O’Brien et al. 2007, p. 76). From this latter perspective, reducing vulnerability would include securing effective rights as is clear from the link the authors make with human security which they define as occurring “when and where individuals and communities have the options necessary to end, mitigate or adapt to risks to their human, environmental and social rights, and have the capacity and freedom to exercise these options” (O’Brien et al. 2007, p. 76). This understanding of contextual vulnerability as being a crucial component of disasters (and indirectly displacement) is also important because only some (social, political etc.) causes of displacement are recognised by law. Furthermore, it implies that an exploration and promotion of rights can be seen as part of reducing vulnerability to climate change and hazards.

Adaptation to climate change has received particular attention in recent years, as it has become clearer that some degree of climate change is inevitable regardless of efforts to cut greenhouse gases (mitigation). The IPCC explains adaptation in the following way:

“In human systems, the process of adjustment to actual or expected climate and its effects, in order to moderate harm or exploit beneficial opportunities. In natural systems, the process of adjustment to actual climate and its effects; human intervention may facilitate adjustment to expected climate.” (IPCC 2012, p. 3)

While disaster risk reduction and management addresses all types of disasters, adaptation often has a longer-term perspective and focuses on those disasters that are
climate-related. However, the two overlap to the extent that both address climate-related disasters and risks (IPCC, 2012).

There have been suggestions that migration should be recognised as an adaptation to climate change. According to Foresight (2011), many of the most vulnerable communities may be the least able to move and facilitating their migration may be needed to improve their conditions and avoid effects such as eventual displacement. The authors of the report emphasise potential migration benefits for migrants, communities that remain and communities at the destination. While migration may indeed be beneficial, defining migration as adaptation is not unproblematic. There is always a risk of the facilitation of voluntary migration becoming the forced movement of people away from their homes. For example, Tuvalu feared that industrialised countries may simply think that they can solve problems like rising sea levels by relocating affected populations rather than reducing greenhouse gas emissions (Kolmannskog, 2012a; see O’Brien et al., 2008 for other examples). In cases where the movement is forced it cannot be seen as adaptation but rather “a loss of culture, livelihood, place and right to a home” (O’Brien et al. 2008, p. 24). I believe we can speak of maladaptation in cases of displacement.

The idea of displacement as maladaptation does not mean that actions to address the displacement should be seen as maladaptation. Since we know that disaster risk reduction and in situ adaptation is not always successful or sufficient, and people are regularly forced to move, adaptation must address such movement as one of the indirect effects of climate change. For this reason, the sub-group of the IASC worked together with interested states to get recognition for migration and displacement issues during the climate change negotiations (Kolmannskog, 2009a). Paragraph 14(f) of the Cancun Agreements now invites parties to enhance adaptation by undertaking “[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels” (UNFCCC, 2011).

Benefits and limitations of this reference are discussed in thesis papers (Kolmannskog and Trebbi, 2010). Suffice to say here that within the UNFCCC, actions related to displacement have been conceptualised as adaptation.
3.3 The multi-causality of human mobility

Foresight (2012) offers a conceptual framework to understand human mobility in the context of environmental change. The work was lead by Professor Richard Black who is a distinguished researcher within migration studies. As is normal in social science, the report uses the term “migration” in a broad sense to refer to all movement as well as in a narrow sense to refer to voluntary migration as opposed to forced displacement. I have chosen to use “human mobility” or “movement” as the overarching terms to avoid confusion. I use the terms “displacement” to refer to forced movement and “migration” to refer to voluntary movement. This is also related to my legal background. (As will become clear, the element of force in the movement is crucial in law).

The framework groups human mobility drivers into five main categories – economic, social, political, demographic, and environmental – and reviews some of the main theories and models. Imbalances in labour markets and wage differentials at the macro level, and individual cost–benefit analysis of expected wages at the micro level, have been presented as two economic models of migration. Social models emphasise access to family or other networks as facilitating migration, that there is a tendency to migrate in certain families and communities and a “culture of migration”, and that access to education generally increases the ability and aspiration to migrate and many migrate specifically in pursuit of education. Political drivers such as persecution or violent conflict, can trigger displacement, while in some circumstances, these same phenomena can prevent people from moving. Public policies may also seek to increase or limit migration. Many demographic models are based on the Malthusian idea of “population pressures”: As populations grow there is pressure on resources and some people leave. Among environmental factors, the occurrence of natural hazards such as floods and earthquakes may trigger displacement. Furthermore, many people’s livelihoods are directly dependent on the land, forest and sea and vulnerable to changes in these. This last factor may be seen as either economic or environmental, and shows how the two can be inter-linked.
In each case, the authors explain, it is the actual or perceived difference between the source and destination which influences human mobility. (This relates to the idea of “push” and “pull” factors in other migration literature. I am opposed to such language, which underestimates and undermines the role of agency. Even the term “drivers” is slightly reductionistic in my view.) Furthermore, whether movement occurs or not in any particular place also depends on a series of intervening or institutional factors, such as border controls and the cost of moving. Individual and household characteristics such as age, sex, wealth and levels of education also play a role. Four possible outcomes are listed in the conceptual framework: people choose to leave (voluntary migration), are forced to leave (displacement), choose to stay (immobile) or are forced to stay (trapped).

At several points the authors of the report – in line with most other researchers within the field – emphasise that drivers interact and that human mobility is multi-causal. For example, there is a strong political economy of conflict, with economic factors influencing the course of conflict, and patterns of movement responding as much to the economic destruction that is often wreaked by conflict as to the conflict itself. We see this clearly in case studies from Somalia (Kolmannskog, 2010; Kolmannskog, 2012b). In the context of natural hazard-related disasters, determining who leaves, who returns and when they return depends not only on the environmental factor but also on social, economic, political and demographic circumstances. The environment affects movement in combination with the other four drivers. Finally, I believe the agency of those affected must be acknowledged in all circumstances; even where we speak of forced movement there is a certain element of choice and creativity.

This conceptual framework allows a secondary, but crucial, question to be posed: whether climate change and other environmental change over a certain time period is likely to alter the effect of these drivers. The authors believe all drivers can be influenced, but the influence is most pronounced for the environmental drivers.
3.4 Understanding law and protection

3.4.1 Social complexity and continuum vs legal categories

There are several possible responses to disasters, and displacement is usually the option of last resort (Foresight, 2012; Kolmannskog, 2012b). There is perhaps always a choice of how to respond to circumstances, and conceptualising force as a continuum may be most appropriate. Conceptualising movement along the voluntary-forced continuum is common. For example, de Sousa Santos (2002) uses an analytical framework based on the degree of autonomy and the level of risk involved in moving.

Despite this appreciation of a continuum, legal and policy considerations have required a clearer division and definitions of categories. Those defined as forcibly displaced for certain reasons are often considered more worthy or in need of special protection and assistance (Castles, 2006; Kolmannskog, 2008; Foresight, 2012). Typically, those seen as moving for economic reasons are seen as voluntary migrants while those moving for political reasons may be seen as forcibly displaced persons. Castles writes,

“Complex human situations are arbitrarily divided up into categories to meet legal and political goals. Such categories carry entitlements to differing types of protection and assistance, and are thus important for administrative purposes, but people often do not fit readily into them. Governments particularly want to make clear distinctions between refugees and economic migrants, but many people forced to flee by conflict are also motivated by the desire to rebuild the livelihoods of their families – in other words they have ‘mixed motivations’. We sometimes use the term ‘the migration-asylum nexus’ to refer to the blurring of the distinction between economic and forced migration.” (Castles 2006, p. 7)

Legal regulation is a form of translation of different fields of social reality (Sand, 2008; see also de Sousa Santos, 2002, on cartography of law). It will always be an extreme and contingent reduction of the complexity of the relevant social field. While social reality is highly complex and a continuum of force better captures this reality, law remains binary with distinctions such as legal/illega, guilty/not guilty (Luhmann, 2004). It is necessary to define criteria relevant for distinguishing between displaced/not displaced. This distinction is well established in policy and law and is
reflected in the existence of separate policy organisations and legal regimes dealing with each phenomenon.

In human mobility influenced by environmental change, “voluntary” and “involuntary” responses to environmental change have also been conceptualised as existing at opposite ends of a continuum (Hugo, 1996; Suhrke, 1994, and Bates, 2002 cited in Foresight, 2012). While movement during sudden-onset disasters such as storms and floods is more easily conceptualised as displacement, slow-onset disasters such as drought pose challenges. At what stage in the gradual process of a drought does a small-scale farmer’s movement away from his farm become forced rather than voluntary?

While some thesis papers enter into considerations of migration more broadly, most focus on displacement. I suggest how to distinguish between the two forms of movement in this context of climate change and natural hazard-related disasters. In the thesis papers I show that a human rights-inspired approach is relevant both in sudden-onset disasters and slow-onset disasters. This approach focuses on return and current needs rather than initial cause and force of movement. It offers some solution to the challenge of determining what is displacement in slow-onset disasters but has its limits. The focus is not so much why someone left initially but rather whether the gradual deterioration has reached a critical point and they cannot return now. If forced return would breach human rights such as the ban on inhuman treatment or “softer” humanitarian considerations, the person should be considered displaced and afforded a status with rights (Kolmannskog, 2008; Kolmannskog 2009b; Kolmannskog and Trebbi, 2010; Kolmannskog, 2012b; Kälin and Schrepfer, 2012).

3.4.2 A typology of climate change, displacement and protection
While appreciating contextual vulnerability, multi-causality and the forced-voluntary continuum, many of the thesis papers develop and depart from a typology of climate change, disasters, displacement and protection. This is an attempt to conceptualise climate change-related displacement in order to better explore the relevant socio-legal issues. The four scenarios identify drivers of human mobility (1,2,3,4); how climate
change interacts with the driver (a); the character of movement (forced or voluntary; internal or cross-border) (b); and assess whether, and to what extent, international law provides adequate protection and assistance (c). The applicability of the different protection instruments is only hinted at; the typology serves merely as a starting point for more in-depth exploration. I emphasise that the displacement situations may have more than one cause and that there are situations where several of the scenarios may overlap. The typology is developed throughout the thesis papers. It particularly builds on Kolmannskog (2008), IASC (2008) and Kälin (2010).

1) Scenario 1: The occurrence of sudden-onset natural hazard-related disasters.
   a. Climate change influences the frequency, severity, timing and/or spatial distribution of certain sudden-onset disasters. While we can speak of climate-related disasters, it is not possible to link a particular incident to climate change. It is difficult to establish causality, and some would occur regardless of climate change. Not all natural hazard-related disasters are climate-related. Some disasters, such as geophysical disasters (e.g. earthquake, tsunami), are not influenced by the climate and changes in the climate. Displacement related to sudden-onset disasters have similar characteristics and those affected have similar needs. We should not discriminate between climate-related and other disasters and those affected by them when it comes to protection and assistance. Normally, it is conceptually sounder to speak of all sudden-onset natural hazard-related disasters as potential triggers of movement rather than separating out those related to climate or climate change. (An exception is the focus on the link to climate change for prevention, responsibility and funding through climate change agreements.)
   b. Most of the movement is likely to be internal and temporary displacement. This depends on inter alia response and recovery efforts.
   c. Internally displaced persons are clearly covered by the 1998 Guiding Principles on Internal Displacement and domestic and regional instruments based on the Principles. Those who are cross-border displaced are in a different situation. The 1951 Convention relating to the Status of Refugees, as modified by the 1967 Protocol, and most other domestic and regional
refugee laws do not clearly apply to people driven from their homes by natural hazard-related disasters. Human rights law applies but has several limitations and weaknesses.

2) Scenario 2: The occurrence of slow-onset natural hazard-related disasters.
   a. Climate change influences the frequency, severity, timing and/or spatial distribution of certain slow-onset disasters. For the same reasons mentioned in scenario 1, it is conceptually sounder to speak of all slow-onset natural hazard-related disasters as potential triggers of movement rather than separating out those related to climate or climate change.
   b. Some may choose to migrate within the country, others migrate abroad. At some point, the conditions may deteriorate to a point where movement is forced rather than voluntary.
   c. It is somewhat unclear how the 1998 Guiding Principles on Internal Displacement is, or could be, applied in slow-onset disaster cases. Some people risk being considered migrants rather than displaced persons. Human rights law applies to migrants but has several limitations and weaknesses. Some migrants may also enjoy guarantees in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, but this instrument has several limitations and weaknesses. People who are displaced or migrate across state borders face the same situation regarding refugee law as discussed in Scenario 1. Sea-level rise is a gradual process and is considered under this scenario. In the case of the small island states, statelessness issues may arise, but it is unclear how statelessness law would apply and whether needs would be adequately met.

3) Scenario 3: The occurrence of unrest seriously disturbing public order, generalised violence or armed conflict.
   a. Climate change influences the occurrence and characteristics of certain natural hazard-related disasters, which in turn can play a role in triggering conflicts and violence. Disasters that are not related to climate or climate change may also trigger conflicts. Displacement related to violent conflicts
have similar characteristics and those affected have similar needs. We should not discriminate between climate-related and other conflicts and those affected by them when it comes to protection and assistance. It is conceptually sounder to speak of all violent conflicts as potential triggers of movement rather than separating out those related to climate, climate change or the environment.

b. Conflict is likely to result in displacement, mostly within the country of origin or residence.

c. Internally displaced persons are clearly covered by the 1998 UN Guiding Principles on Internal Displacement and domestic and regional instruments based on the Principles. People who are cross-border displaced can, in some countries and regions, get refugee status or complementary (perhaps temporary) protection status. For others, as a minimum, human rights law applies but has several limitations and weaknesses. International humanitarian law will also apply in cases of armed conflict.

4) Scenario 4: Disaster risk reduction, adaptation and mitigation measures involving movement of people.

a. Measures by government authorities and other actors to allegedly mitigate climate change, adapt or reduce disaster risks can result in displacement. One phenomenon that needs attention is that of authorities seeking to move people from certain areas and using climate change and disasters either as a legitimate reason or simply as a pretext.

b. While some evacuation and relocation happens voluntarily, it is in other cases forced. The resulting displacement is mainly within the country of origin or residence.

c. Some relevant protection standards for internally displaced persons can be found in the 1998 UN Guiding Principles on Internal Displacement. As for people who cross a border owing to such measures, their situation and needs are not clearly addressed in any instrument. Human rights law applies to all but has several limitations and weaknesses. Norms and guidelines on displacement in the context of development projects may apply by analogy.
In relation to the framework developed by Foresight (2012), some drivers are clearly environmental such as 1) and 2). However, as mentioned in the sections 3.2 on (un)natural disasters and 3.3 on multi-causal movement, these phenomena also have political, social, economic and demographic aspects. The economic aspect is particularly clear in 2) since slow-onset disasters typically affect livelihoods and economic opportunities. Other drivers in the typology may be seen as falling under the political category such as 3) and 4).

3.4.3 Protection from, during and after displacement
Protection is a central concept and a term that is used frequently in the thesis. I use the term loosely and understand it as a rights-based concept relating to several fields of law. Historically, the concept was first and foremost meant to serve as operational guidance for humanitarian actors. According to Derman, Hellum and Sandvik (2013), the background for the development of the concept is the legitimacy crisis of humanitarian agencies resulting from their inability to protect civilians in Somalia, the former Yugoslavia and Rwanda in the late 1990s as well as more general charges of inefficiency, mismanagement and waste. “Humanitarian protection” involved a shift to a rights-based humanitarianism where “victims’” or “beneficiaries” were re-conceptualized as rights-holders; humanitarian agencies became their advocates; and, political engagement was seen not only as legitimate but necessary (Derman, Hellum and Sandvik, 2013). The concept was defined in the workshops organised at the end of the 1990s by the International Committee of the Red Cross (ICRC, 2001): “The concept of protection encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. human rights law, humanitarian law, and refugee law).”

There is consensus that protection activities include preventing or putting a stop to a specific pattern of abuse and/or alleviating its immediate effects; restoring people’s dignity and ensuring adequate living conditions through reparation, restitution, and rehabilitation; and, fostering an environment conducive to respect for the rights of individuals in accordance with the relevant bodies of law (ICRC, 2001). A critique of humanitarian action has been that it did not address root causes; the human rights
agenda, on the other hand, was centrally concerned with root causes, structural injustices and power imbalances (Derman, Hellum and Sandvik, 2013). While some have criticised the protection concept of being diffuse, highly contested and/or too aspirational (Addison, 2009), it serves its purpose in this thesis, which has an open and exploratory character.

The ICRC workshops were primarily concerned with protection of civilians during conflict. Since the 1990s the scope of protection has widened to encompass “wider civilian populations considered vulnerable or at risk as a result of war, persecution, generalized violence, local conflict, mass atrocity and natural disaster” (Addison 2009, p. 2). Another important and relevant development is the alternative understanding of sovereignty as responsibility to protect. A third important development is the 1998 Guiding Principles on Internal Displacement, which has sections on “protection from displacement”, “protection during displacement” and “return, resettlement and reintegration.” In parallel to this development of the concept, the range of actors that have incorporated protection as an objective has grown rapidly to include for example NGOs and civil society organisations in addition to states and mandated protection agencies such as UNHCR. While the state holds primary responsibility to secure rights to people on its territory or within its jurisdiction, I am concerned with securing rights of those displaced whether they claim them from states or non-state actors.

A possible limitation and weakness of the concept as traditionally understood is reflected in the ICRC reference to “rights of the individual.” My view is that a person is intimately linked to the social and natural environment. The relevant bodies of law also contain social, cultural and collective rights. With entire groups of people – perhaps even nations – displaced from their homes, cultural and other collective rights are crucial to uphold as well as the more individual-focused civil and political rights. The debate of the generations of human rights is also a concern to de Sousa Santos (2002). He believes that a cross-cultural reconstruction is needed, which includes an adjustment of the western individualism in rights.

Another challenge and risk is that while humanitarianism traditionally was focused on alleviating any extreme suffering and the needs of people, the rights-based
humanitarianism requires a relevant right (see also Rieff, 2003, cited in Sandvik, 2013). In some cases, forms of suffering do not directly and clearly correspond to an already existing right. I do not follow such a formalistic and legalistic reading of the concept, however. While some theoretical papers and case studies focus on formulating the pressing issues in rights language and showing how existing law and rights can be applied, I also explore people’s experiences and challenges in a broad sense and regardless of whether they can be formulated in rights language.

The concept has also been criticised for describing protection in terms of the activities of those who seek to protect those affected by conflict and crisis, privileging the perspective of human rights defenders over the perspective of those affected, the objectives of organisations working on protection over the needs and demands of affected populations (Addison, 2009). Many humanitarian actors allegedly adhere to participatory approaches, but actual humanitarian operations often fail to incorporate such approaches, or do so in a manner that is little more than cursory. In several of the thesis papers I explore the experiences and needs of affected persons as they are communicated to me through interviews and observations with those affected. I let this inform what rights are relevant and needed.

There may be a particular risk in focusing on protection of displaced persons in a climate change context, namely that we put less effort into preventing climate change, disasters and displacement (Kolmannskog, 2009b). For example, the government of Tuvalu did not want relocation to feature in international agreements because of the fear that industrialised countries might simply think that they can solve problems like rising sea levels by relocating affected populations rather than reducing greenhouse gas emissions (McAdam and Loughry, 2009). While most thesis papers focus on protection during displacement, several also explore prevention of displacement and durable solutions to displacement (Kolmannskog, 2010; Kolmannskog, 2012b; Kolmannskog, in press). In line with the 1998 Guiding Principles on Internal Displacement, I understand the concept of protection to encompass protection from displacement, during displacement and after displacement (the latter normally formulated as seeking “durable solutions” to displacement).

The international community’s responsibility regarding climate change and
displacement has at least three main elements (Kolmannskog, 2008; Kolmannskog, 2009a; Kolmannskog, 2009b; Kälin, 2010). First, mitigation of climate change is a must to limit the changes in natural hazards and thereby protect people from displacement. There is increasing attention on, and development of, the right not to be displaced (Morel, Stavropoulou and Durieux, 2012). Second, the international community has a responsibility to support and strengthen adaptation, including ex-ante disaster risk reduction; this would also help prevent displacement. The reduction of disaster risks and vulnerabilities has been described by the European Court of Human Rights as an obligation linked to the rights to life, privacy and property (ECtHR, 2008). While reducing the risks of disasters can reduce the need to move, some people are still displaced. Arguably, we therefore also have the third responsibility of protecting those displaced and seeking durable solutions to their displacement.

3.4.4 Defining displaced persons
In the following I introduce central categories of people relating to displacement. The first terms – climate (change) refugee and environmental refugee – are of a more popular kind, while the next – environmentally displaced person – is meant as a descriptive, overall term used for research purposes. These differ from the remaining terms, which are terms of art in existing law. The understanding of these definitions depend on interpretation, and several thesis papers explore more in-depth the possibilities inherent in context-oriented and dynamic interpretations (see for example Kolmannskog, 2012a).

3.4.4.1 (De)constructing “climate refugees” and “environmental refugees”
Over the last few years the term “climate refugees” has been gaining popularity in the debate on climate change (Kolmannskog, 2008). The similar but broader concept of “environmental refugees” has a longer history (El-Hinnawi, 1985; Myers and Kent, 1995). In the 1980s, the environment was high on the political agenda and refugees were generally perceived as innocent victims who deserved help. In this context, the term may at first have served a humanitarian agenda, helping direct international attention to, for example, the drought-affected, internally displaced people of Sudan (Haug, 2003; Kolmannskog, 2008). Today, internally displaced persons (IDPs) are
recognised as a group of forced migrants, and the political climate for refugees and other displaced people has changed.

Kibreab (1997) argues that the use of the terms relates to the agenda of those who wish to restrict asylum laws and policies. Much literature on the topic today, however, argues for an extension of international law and protection to cover these groups (Kolmannskog, 2008). The terms can, nevertheless, have unfortunate side effects. They may benefit actors trying to restrict asylum practices so long as there is not a public consensus to extend protection and assistance, while there is increasingly a public misperception that many of those seeking asylum are so-called climate refugees or environmental refugees and not “real” refugees entitled to protection by law (Kolmannskog, 2008).

The projected numbers of climate refugees seem to have been used in attempts to sensitisce public opinion and decision-makers to the issue of climate change. Some actors seem to support or even stir up a fear in developed countries that they, if not literally flooded, will most certainly be flooded by climate refugees if nothing is done with climate change (Kolmannskog, 2008). By securitising the issue of climate change, environmentalists and others have succeeded in getting it onto the agenda of decision-makers. On the other hand, the security discourse can make new areas relevant for policing and military considerations and promote repressive tendencies. A language of emergency can also remove climate change impacts from the ordinary reach of human rights law – either legally due to derogation clauses or rhetorically and discursively (Kolmannskog, 2008). Finally and most importantly, the security discourse may not help us see the problem from the perspective of the so-called environmental or climate refugees themselves (Kolmannskog, 2008).

3.4.4.2 Environmentally displaced person

In general, I have avoided the terms “climate refugees” and “environmental refugees”. While a name can make a group of people more visible and recognised, it also runs the risk of misrepresenting them and excluding others. Many of the people we are concerned with here may in fact fit under several other existing categories in policy and law, as will become clear. In some of the papers of this thesis, however, I have for
practical reasons used the term “environmentally displaced person” (EDP) as a descriptive term referring to those forcibly displaced at least partly due to a natural hazard-related disaster, including climate-related disasters.

This term also includes those displaced by events or processes less related to climate change. As mentioned in section 3.4.2 presenting the typology, the end results for someone fleeing a climate-related cyclone and those fleeing a non-climate-related earthquake or tsunami are often the same, namely temporary or permanent displacement with particular protection needs. Separating out climate-related displacement can be justified in order to establish climate change as an important cause of displacement, responsibility for displacement and the need for cutting greenhouse gases, and funding. From the perspective of those displaced, however, there is normally no compelling reason to distinguish between the climate-related and the other disaster-related causes (Kolmannskog and Myrstad, 2009; Kolmannskog, 2012a; Kälin, 2010). I only separate out climate change when it can be justified as mentioned above.

3.4.4.3 Asylum seeker and refugee

Asylum seeker is not a term defined in international law. This group of persons can be descriptively defined as persons who have crossed an international state border in search of protection, but whose claims for refugee status have not yet been decided (Castles, 2006). Castles (2006) describes how asylum seekers sometimes live in a drawn-out situation of uncertainty and inactivity, since determination procedures and appeals may take many years. Meanwhile, countries offer different types of protection and rights. For example, many countries do not allow them to work. In others, they risk arbitrary deportation. While some in the end get refugee status and permits to remain, others are deported, and yet another group go into hiding from the authorities.

While refugees in popular usage may refer to all displaced people, the legal definition is rather narrow. The 1951 Convention relating to the Status of Refugees was created mainly by European males for the specific problems of European males after the Second World War; it is a product of its time and creators (Kolmannskog 2008; Kolmannskog 2012a). According to article 1 A of the 1951 Convention as modified
by the 1967 Protocol (which deleted the geographic and temporal limitations), a refugee is a person who

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country […]”

Refugees are entitled to a series of rights laid out in the Convention. However, several states (in particular some developing countries) have made reservations to parts of the Convention while other states (in particular developed countries) avoid effective rights protection in more indirect ways.

The Convention remains a product of its time and place of origin, and has come under attack for not addressing today’s problems of generalised violence, natural hazard-related disasters and mass migration. After assessing the different grounds and other criteria of the 1951 Convention, several scholars conclude that those displaced by natural hazard-related disasters cannot be refugees (see for example Falstrom, 2002). Many would say that the majority of the people in need of protection today do not qualify as “refugees” in the 1951 Convention sense.

It is important to appreciate that the refugee concept is socially and historically constructed and not inherently (“natural”) and morally right. At the same time it is strategically important to see what is politically possible to do today. There is little will to expand the refugee concept and protection. In several thesis papers, I put forward the argument for dynamic and context-oriented interpretations (see in particular Kolmannskog, 2012a). The now 60-year-old Convention has shown some flexibility and remained relevant. For example, gender-related persecution was not considered by the male drafters of the Convention either, but feminist jurisprudence has been relatively successful in arguing for a gender-sensitive interpretation of the Convention. Similarly, it may be too quick to say that those displaced in the context of natural hazard-related disasters are never covered by the refugee definition. Appreciating contextual vulnerability in “unnatural disasters”, and the multi-causality of human mobility, it should not be hard to find that a person may flee both persecution and a natural hazard-related disaster, and that disasters often have a
political or human rights aspect with certain people denied assistance before, during or after a disaster due to their political opinions or other characteristics. This is explored more in-depth in theoretical papers (in particular Kolmannskog, 2012a) as well as more empirically oriented case studies (in particular Kolmannskog, 2010, and Kolmannskog, 2012b).

3.4.4.4 Stateless person

The topic of island states that may disappear due to sea level rise and the potential statelessness of its citizens, has been much debated among international lawyers (McAdam, 2010). The question may be very interesting from a legalistic point of view, but less so from an activist or pragmatic point of view. Many of the island states will probably be uninhabitable due to natural hazard-related disasters and other climate change effects long before the sea possibly swallows them. People are therefore likely to move before the territory of the state has disappeared. Such displacement has similarities with other cross-border displacement.

Even if the territory of the state does disappear, the state does not necessarily cease to exist and its citizens will not necessarily be stateless according to the 1954 Convention Relating to the Status of Stateless Persons (McAdam and Saul, 2010; Kälin and Schrepfer, 2012). Furthermore, it is doubtful if the islanders and others have anything to gain from being considered stateless. These issues are explored further in theoretical papers (in particular Kolmannskog, 2012a).

3.4.4.5 Migrant

There are no definitions of “migrant” or “environmental migrant” as such in international law. The International Organization for Migration uses a working definition of “environmental migrants” but this is merely a descriptive term and it is not widely accepted (IOM, 1996). The closest we come is the definition of “migrant worker” which has a legal definition. According to the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families article 2(1), a migrant worker is “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” Not all migrants will be migrant workers, and a major weakness of this
instrument is that it has been accepted by very few migrant-receiving countries. States may nonetheless be bound by some of the provisions to the extent that they mirror rights protected under other treaties or customary law, such as certain human rights. The thesis papers do not include much exploration of the concept of migrants and their rights since the focus remains on displacement.

3.4.4.6 Human

As a starting point, we can say that human rights apply to all humans. According to the 1966 International Covenant on Civil and Political Rights, article 2(1), “[e]ach State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant […]” The rights-holder is formulated as “every human being” (for example, article 6(1)) or “everyone” (for example, article 9) and in other such terms in the mentioned treaty as well as other human rights treaties.

While human rights scholars and activists have construed human rights as innate, universal, basic rights of every human, some anthropologists have challenged the universality and stressed the cultural relativity of all values. I believe we have to ask whose interest the universality/rights or the relativity/local culture argument serves in each case. Culture is not easily defined – we often find progressive and repressive tendencies in every culture – and there will be differing interests and social exclusion in every society. Between the conflicting anthropological and legal positions is a process-oriented approach that views human rights as a social construction; one which is formulated and negotiated by differently positioned actors seeking dignity, justice and freedom in a context of legal globalization (Derman, Hellum and Sandvik, 2013). Furthermore, several human rights scholars set out a middle ground position, emphasizing the need to develop a united set of principles without losing focus on difference, through a sustained intra-cultural and cross-cultural dialogue (De Sousa Santos, 2002; Derman, Hellum and Sandvik, 2013).

A fundamental challenge is to determine whom we consider human. In some cases, we dehumanise certain people to such an extent that we deem it legitimate that we deny them human rights (Rorty, 1998). Rather than disagreeing that all humans
should have certain rights, I believe we often disagree on whom we consider sufficiently human to have these rights. I explore this to some extent in thesis papers (for example, Kolmannskog, in press), and hopefully the case studies that present some life stories will contribute to a humanisation or a sentimental education as Rorty (1998) puts it.

According to human rights instruments “no one” shall be subjected to inhuman treatment (see for example the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR, article 3). In several papers I argue that some solution to the normative protection gap in cross-border displacement may be found in dynamic and context-oriented interpretations of human rights law and considerations of the possibility, permissibility and reasonableness of return (see in particular Kolmannskog and Trebbi, 2010, and Kolmannskog 2012a). In some cases forced return may constitute inhuman treatment. For a human rights lawyer, the focus is not so much why and how someone left initially, but rather whether the gradual deterioration has reached a critical point where they cannot be expected to return now (Kolmannskog 2009b; Kolmannskog and Trebbi 2010; Kolmannskog 2012a; Kälin and Schrepfer 2012).

Human rights law has several limits, however, including not providing a right to enter and stay and dictating the content of any protection. Still, it can provide a basis for complementary, possibly temporary, protection status. The complexity involved in contextual vulnerability and multi-causal human mobility may be better accommodated in a human rights-based approach rather than in provisions separating out disasters or the environment as a cause for displacement. Continuing to build on human rights also means that we are not just creating a new narrow category for protection and excluding others in need. On the other hand, human rights obligations are likely to only cover the most extreme situations and often the discretion in interpreting human rights involves the risk that we are too much at the mercy of the few who are tasked to interpret and apply it (see also Andenæs, 2006 who argues that clear rules with little room for discretion is best for the marginalised and poor). This is particularly a challenge in the field of immigration law because of the volatile political situation and shifting feelings toward refugees and other immigrants.
3.4.4.7 Internally displaced person

There is broad consensus that the majority of those displaced for whatever reason remain within their country of origin. The 1998 Guiding Principles on Internal Displacement provides the normative framework for addressing all displacement occurring within a country. The Guiding Principles is a soft law instrument. It can be considered a synthesis of international refugee law, humanitarian law and human rights law as applied in the context of internal displacement. “Internally displaced persons” (IDPs) are broadly and descriptively defined in the Introduction of the 1998 Guiding Principles on Internal Displacement as

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

With this definition, the Guiding Principles recognise the human rights and protection needs of people displaced in the context of climate change and natural hazard-related disasters (Kolmannskog 2008; Kolmannskog 2012a; Kolmannskog, in press). Thesis papers show how internal displacement and rights in the context of natural hazard-related disasters have become more recognised after major disasters such as the Asian tsunami and Hurricane Katrina, and discuss some challenges in this particular context (see in particular Kolmannskog, in press). A rather unclear legal area concerns those who move in the context of slow-onset disasters like drought. Are they migrants or displaced? This is also explored in some of the case studies (in particular Kolmannskog, 2010), and relates to the idea of returnability explored under human rights in general.

The question of categorisation as an internally displaced person is important not only from a legal point of view, but also when it comes to operational protection (Kolmannskog 2008; Kolmannskog, 2012a; Kolmannskog, in press). The label may be crucial for qualifying for assistance as many organisations provide support to target groups identified in their own mandates. Birkeland (2003) has claimed that environmental factors are seldom given due attention and that it is important to secure
an inclusive understanding of the IDP category rather than trying to fit displaced into separate categories such as environmental refugees in order to secure rights.

Climate change and the changes in natural hazard-related disasters re-actualize the debate of whether internally displaced people in general are well enough protected and what would be the best way to enhance their protection. This is further discussed in thesis papers (Kolmannskog, 2012a; Kolmannskog, in press).

3.4.5 Cosmopolitan legality

According to socio-legal scholar Boaventura de Sousa Santos (2002), modernity has been an ambitious and revolutionary sociocultural paradigm based on a tension between social regulation and social emancipation. Eventually, however, with consolidation of the liberal state the tension tilted in favour of regulation, and with so-called neo-liberalism we have reached a crises and paradigmatic transition. We face modern problems for which there are no modern solutions. The aim of de Sousa Santos’ book *Toward a New Legal Common Sense* is to contribute to “a new legal common sense capable of devolving to law its emancipatory potential” (p. xix). The path is both analytical and explicitly political. As my research goal is to contribute to securing effective rights for displaced persons, I have found some of de Sousa Santos’ concepts inspiring, and in the following I introduce these.

De Sousa Santos sees displaced persons as a “sector of growing, transnational Third World of people” (p. 224). The state and the national boundaries it controls – a control often considered a key element of the traditional version of sovereignty – have performed crucial roles in the creation of refugee and migration regimes throughout the history of modern capitalism. While goods and certain privileged people are moving almost freely, the movement and situation of displaced people is increasingly regulated in a strict and inhuman manner. By definition displaced people are treated as second- or third-class citizens, according to de Sousa Santos. He believes that one of the types of forced displacement that is most likely to grow in the coming years is that linked to environmental factors, and this raises issues of justice and rights:

“More stridently even than others, environmental refugee flows portray the dark side of capitalist world development and global lifestyles. They should,
therefore, become the best candidates for the application of a new and more solidary transnational conception of burden sharing. It is, however, very doubtful that that may ever occur. Environmental refugees occupy the outer fringes of a generally precarious system of international protection” (p. 226).

(I am critical to some of the formulations and ideas of de Sousa Santos in general and in this quote in particular. For example, I prefer “responsibility sharing” as a term and concept to the idea of refugees being a “burden” that should be shared. Kolmannskog, (2012b) shows that refugees may in fact be a “benefit”. I have already critiqued the concept “environmental refugee” in section 3.4.4 on definitions of displaced persons. Finally, the gloomy outlook in this particular quote makes little sense when one considers that his project is about social emancipation, and he elsewhere in the same book writes about how to improve the situation of those displaced.)

De Sousa Santos defines globalisation as “the process by which a given local condition or entity succeeds in extending its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local” (p. 178). He uses the examples of English being a “globalized localism” and French having become the rival localised condition. While hegemonic globalisation is characterised by neo-liberal capitalism, there is another kind that meets and clashes with this: “globalization from below or counter-hegemonic globalization comprising subaltern cosmopolitanism and common heritage of humankind” (de Sousa Santos 2002, p. 182).

Hegemonic globalisation does not exclude “the opportunity for subordinate nation-states, regions, classes or social groups and their allies to organize globally in defense of perceived common interests, and use to their benefit the capabilities for transnational interaction created by the world system” (p. 180). De Sousa Santos describes subaltern cosmopolitanism as “a loose bundle of projects and struggles”, “counter-hegemonic globalization” and “the struggle against social exclusion” (p. 459). Subaltern cosmopolitanism cannot be defined precisely since “the progressive character of cosmopolitan coalitions can never be taken for granted. It is, rather, intrinsically unstable and problematic, and can only be sustained through permanent
reflexivity” (p. 181). (I return to the issue of researcher-activism and reflexivity in chapter 4 on methodology and methods). I believe my project, which consists of concrete and local case studies as well as progressive explorations of law, forms part of this “loose bundle” of subaltern cosmopolitan projects.

Drawing on examples of concrete political-juridical practices, de Sousa Santos formulates the conditions for an emancipatory use of law, a subaltern cosmopolitan legal theory – “cosmopolitan legality” in short. The conditions for cosmopolitan legality is summed up in eight theses. The first thesis is “It is one thing to use a hegemonic instrument in a given political struggle. It is another thing to use it in a hegemonic fashion” (p. 466). State law and individual rights can be used if integrated into broader political struggle and they are not seen as both the means and ends of social practice. The second thesis is closely related: “A non-hegemonic use of hegemonic legal tools is premised upon the possibility of integrating them in broader political mobilizations that may include legal as well as illegal actions” (p. 467). Dominant classes, groups and states use legal instruments in their own self-interests. Law has various possibilities for interpretation and application. Once integrated in the broader subaltern cosmopolitan struggles, “[m]anipulability, contingency and instability from below is the most efficient way of confronting manipulability, contingency and instability from above” (p. 467). Furthermore, law is only one of many possible political strategies. Yet another thesis states that “[t]he gap between the excess of meaning and the deficit of task is inherent to a politics of legality. Cosmopolitan legality is haunted by this gap” (p. 469). This refers partly to social expectations and experiences. According to de Sousa Santos, many people around the world now have negative expectations, and in such a period, “cosmopolitan legality may find itself in the position of being most effective when defending the legal status quo, the effective enforcement of laws as they exist in the books” (p. 470). Lile (2011) also writes that the majority of people fighting for human rights today are on the side of the law, dreaming of a world where existing law is implemented; the relationship between the law and “the governed” is not as problematic as it may be in other cases.

My project recognises that law operates in a larger context, including the political
climate for IDPs, asylum seekers and refugees today. There is little will to legislate better, effective rights for displaced persons. It also recognises that the interpretation and application of law has political dimensions. One example is how states (such as European states) employ a restrictive interpretation of “refugee” and seek to undermine access to protection for asylum seekers. I counter this by exploring and promoting protection possibilities in existing law, including using hegemonic instruments such as the 1951 Convention relating to the Status of Refugees. I argue that we – progressive human rights lawyers and judges, humanitarian and development agency staff, grassroots organisations, displaced persons and the public at large – should fully exploit existing law by applying a (progressive) dynamic, context-oriented interpretation of law relating to displaced persons as well as develop new law and policy on domestic, regional and international levels. Counter-hegemonic interpretations and more effective implementation of already existing laws are needed to improve the rights of displaced persons. While I suggest some legal reform, I am aware that new laws may become little more than new distractions; the states are seen to act, to do something, while in reality little changes (on the symbolic function of law, see Aubert, 1950, and Andenæs, 2006).

Yet another thesis is “[c]osmopolitan legality is voracious in terms of the scales of legality” (p. 468). Cosmopolitan legality tends to combine different scales, such as the local, national and global. (The notion of scales is part of de Sousa Santos’ “cartography of law” which he lays out in de Sousa Santos, 2002. Laws are maps of social territories. The distortions are according to rules of scale, projection and symbolisation.) In the thesis papers (in particular Kolmannskog and Trebbi, 2010) I argue that we need a multi-track approach where we must work on law at all scales for different purposes.

After identifying the conditions for cosmopolitan legality, de Sousa Santos moves on to mention some relevant, illustrative instances. One of these concerns human rights. In an earlier chapter discussing displacement, he proposes that “[p]eople enter specific countries, but they are members of all of them, and the guarantee of their human rights must be provided for by all countries according to their resources […]” (p. 237). Currently, however, human rights are a western “globalized localism” (p.
and they must be cross-culturally reconstructed. Important parts of the solution that I put forward as a response to the normative protection gap in cross-border displacement such as the returnability test (Kolmannskog and Trebbi, 2010; Kolmannskog, 2012a) are inspired by human rights principles. While de Sousa Santos highlights human rights as an instance, I believe other systems such as refugee law are also highly relevant for cosmopolitan legality. In the thesis papers I hope to show how issues are conceived in different contexts through case studies while the overarching concepts of human rights and these other systems remain (or become) relevant.

3.4.6 Living law and legal pluralism

The legal scholar Eugen Ehrlich, widely considered one of the pioneers of socio-legal studies, wrote that, “living law in contradistinction to that which is being enforced in the courts and other tribunals […] is the law which dominates life itself” (Ehrlich 1936/2009, p. 493). I explore state law and how law is – or could be – formally understood according to the courts and doctrinal lawyers. This relates to research question 1B on rights. However, the research goal and questions of this thesis goes beyond a description of state law, as I seek to contribute to securing effective rights (see in particular research question 1C). Hence, I cannot limit my exploration to law on paper and in courts. As Ehrlich wrote,

“Only a tiny bit of real life is brought before the courts and other tribunals; and much is excluded from litigation […] Moreover the legal relation which is being litigated shows distorted features which are quite different from, and foreign to, the same relation when it is in repose […] The sociological method therefore demands absolutely that the results which are obtained from the judicial decisions be supplemented by direct observation of life” (Ehrlich 1936/2009, p. 495).

The application of law and the effects of law can never be inferred from the understanding of law in courts and by lawyers alone. As concerns displacement, exploring other sources than case law is even more pertinent since there is no global refugee court to provide authoritative guidance. Many cases are in stead decided by state bureaucrats and non-state actors such as UNHCR. Furthermore, in the case of
displacement in our particular context, the issue has been explored in formal legislation and adjudication to a very limited extent.

Ehrlich goes on to ask, “[h]ow shall we quarry that part of the living law that has not been embodied in a legal document but which nevertheless is a large and important part thereof? There is no other means but this, to open one’s eyes, to inform oneself by observing life attentively, to ask people, and note down their replies” (Ehrlich 1936/2009, p. 498). The case studies included in this thesis seek to explore the lives and rights of displaced persons in practice. As already mentioned, even the (mainly theoretical and doctrinal) legal papers draw on some findings from the (mainly empirical) case studies. The idea that “judicial decisions be supplemented by direct observation of life” has been central to sociological jurisprudence. (I describe socio-legal and doctrinal approaches in more detail in chapter 4 on methodology and methods.)

While several of Ehrlich’s findings and theories have been criticised by later socio-legal scholars, many central ideas remain defining of the field. A main legacy, which remains relevant today and has been useful in understanding some of the issues in this thesis, is the distinction between state and societal law; and, that state law (including international law that has been developed and adopted by states), is not necessarily defining for how law is applied and followed in society. State monopoly on the creation of legal norms appeared only in modern times, this monopoly was never fully realised, and some would say it appears rather shaky in this era of globalisation (Coutu, 2009). The thesis looks both at state law, societal law and the interaction.

Let me highlight two examples from my thesis that show how living law as a concept is useful, and in particular that non-state, local and/or international actors may be crucial in law and protection on the ground. In Somalia, formal state laws are often not worth more than the paper they are written on; the traditional Somali customary law, xeer, is more important in practice (Kolmannskog, 2010). While xeer is a polycentric legal system, some generally accepted norms relevant in a climate change and disaster context can be identified. For example, there are resource-utilisation rules regarding use of water and pasture, and the temporary or permanent donation of livestock and other assets to those in need. The second example relates to
Somalis displaced to Kenya (Kolmannskog, 2012b). For those displaced to another country in the context of natural hazard-related disasters, international law experts in Geneva and elsewhere have identified a normative protection gap (IASC, 2008). UNHCR is among the agencies working to secure rights at a global and abstract level. At the same time, UNHCR is an important local actor on the ground. In Kenya for example, UNHCR Kenya and the Kenyan government cooperate closely, and all people from South Central Somalia were formally recognised as *prima facie* refugees in 2011. It is likely that a series of factors apart from formal state law were influential in how international and domestic law was applied on the ground. (We could call these extra-legal factors if we by law refer to the narrow formal understanding of it.)

Ehrlich had an idealised view of “societal law” – which mainly made up “living law” and which he saw as based upon cooperation and voluntary adherence – compared to “state law” which he believed was grounded in domination (Coutu, 2009). To understand this we must appreciate the socio-political context at the time. Ehrlich lived in the periphery of the Austrian-Hungarian empire. When various liberation movements emerged in the empire in the late 1800s and early 1900s, the empire sought to oppress these through law (Stjernquist and Widerberg, 1985). Some liberation movements therefore saw it as part of their task to show that the local people lived according to their own laws, and that the formal, imperial laws disturbed the social life. A movement to collect and describe the customary law started (Stjernquist and Widerberg, 1985). Today, the situation is very different in much of the world. As already mentioned in section 3.4.5 on cosmopolitan legality, for many of those oppressed and excluded parts of formal state law, such as human rights, could be to their benefit if only implemented.

De Sousa Santos (2002) has a different view on “societal law” and “state law.” An important thesis of cosmopolitan legality is that “[n]on-hegemonic forms of law do not necessarily favour or promote subaltern cosmopolitanism” (p. 468). Non-hegemonic laws may include traditional customary law, such as *xeer*. De Sousa Santos does not believe that such laws are necessarily counter-hegemonic and inherently good or better than state law. This must be concretely tested in each case. In the case of *xeer*, a relevant thesis paper (Kolmannskog, 2010) mentions that the
system has its limitations; for example, weak and powerless clans can only seek client status with a more powerful clan and hope that they fulfil their obligations. Power, of course, is not all gathered in the state, but is unequally distributed in different social relations.

Several socio-legal scholars have accepted Ehrlich’s “living law” as a starting point for legal pluralism, which can refer to “the idea that more than one legal system operate in a single political unit” (de Sousa Santos 2002, p. 89; see also Griffiths, 1986). De Sousa Santos mentions three main periods, contexts or traditions of legal pluralism. In addition to legal pluralism within the colonial and post-colonial context and legal pluralism in the modern capitalist societies, there is now also a postmodern kind: “whereas before the debate was on local, infrastate legal orders coexisting within the same national time-space, now it is on suprastate, global legal orders coexisting in the world system with both state and infrastate legal orders” (p. 92). The two examples mentioned above from thesis papers illustrate that the concept of living law and legal pluralism can be useful for understanding law(s) within one state as well as how international law interacts with these and is applied in a local context.

Another important contribution from de Sousa Santos is that the idea of a near-dichotomy of state (centrism) and (anti-state) societal law should be replaced by the ideas of “legal porosity” and “interlegality” (p. 437), “the state and the interstate system as complex social fields in which state and non-state, local and global social relations interact, merge and conflict in dynamic and even volatile combinations” (p. 94). Again, the above example from Kenya illustrates how a local and international actor may belong to the same agency, UNHCR, and the dynamic relationship with the state and host community. (Derman, Hellum and Sandvik (2013) also describe a complex interplay of international and local actors in human rights in cases from Africa.) According to some newer anthropological scholarship on legal pluralism, the relationship between culture and rights is constantly reconceptualized through a process characterized by fluidity and contestation, and human rights are translated, adopted or resisted in different local contexts. Thus, the universalist/relativist dichotomy is transcended (Derman, Hellum and Sandvik, 2013).
3.5 Conclusion

In this chapter I have shown that so-called natural disasters involve human factors and has social and political dimensions. This is also related to the multi-causality of human mobility. What triggers a person to move makes up a complex picture. Several factors, including the nature/environmental, political and social, may interact. This has consequences for the application of law, and in particular law, which is focused on the causes of movement such as refugee law. In order to ensure the protection of persons displaced in the context of natural hazard-related disasters, it is necessary to appreciate the complexities of disasters and displacement.

In the section describing my approach to the law, I not only introduced the central definitions of displaced persons – including refugee, IDP and human – but also a holistic understanding of protection from, during and after displacement, and a typology that I use as a starting point for conceptualising protection of displaced persons. In the summary of the thesis papers in chapter 5 I refer to both the research questions and the typology. In chapter 3 I have also introduced the concepts of cosmopolitan legality, which is useful in a political project such as mine; and living law and legal pluralism, which are important for understanding law in practice and effective rights.

I see the division between this thesis’ theory and methodology as a rather blurry one, and the following chapter builds on concepts already introduced and describes methodology and methods in more detail.
4. Research methodology and methods

4.1 Holistic and counter-hegemonic epistemology and methodology

Rather than being theory-driven, my work has been motivated by the goal to contribute to securing effective rights for displaced persons, and I have used theory and methods as appropriate, including both legal-doctrinal and social science-based theories and methods. As mentioned in section 1.3 on research goal and questions, this thesis addresses questions that are typically addressed in different disciplines and by different methods. My phenomenological reality is that the questions have been fluid and linked. I refuse to submit to traditional scientific categorisation and modern science thinking. The result is the current, interdisciplinary work. As de Sousa Santos (2002) writes, we are confronted with modern problems for which there are no modern solutions. We are in between.

As de Sousa Santos writes about his own book *Towards a New Legal Common Sense*, “this book does not recognize itself in either of the two conventional fields: theoreticism and empiricism” (de Sousa Santos 2002, p. xviii). I further agree that neither theory nor empirical work are single proper sites of scientific truth. As de Sousa Santos, I have preferred “a grounded theory, a theory that has its feet on the ground while refusing to be tied down and prevented from flying” (p. xviii). This reflects lived reality for the researcher as well.

I borrow methods from different traditions, and they all combine to create a holistic sense of experience for me, which I have presented in the thesis. Thus, some papers, which on the face seem mainly theoretical and doctrinal, contain references to some empirical findings while more empirical case studies may also contain some theoretical speculation. This is not unlike research within feminist jurisprudence and women’s law, which provide interesting examples of combinations of doctrinal approaches and sociological approaches (Dahl, 1985, cited in Andenæs, 1996).

De Sousa Santos (2004) claims that knowledge(s) and theories of knowledge(s) are political, and that “there is no global social justice without global cognitive justice” (de Sousa Santos 2004, p. 238). This thesis employs qualitative research, which is close to the experiences and phenomenological reality of displaced persons. This form
of research is recognised within sociology and socio-legal studies in Norway. In other
disciplines and places it is considered less representative, less objective, etc., and
therefore lower and less of a science than quantitative research. This relates to de
Sousa Santos’ “sociology of absences” (de Sousa Santos, 2004): The monoculture of
knowledge turns modern science into the sole criteria of truth. All that is not
recognised or legitimated by the canon is declared non-existent. Another mode of
production of non-existence is relevant for the case studies that emphasise local
contexts: The monoculture of the universal and the global implies that some realities
are defined as particular and local and therefore of less value or even non-existent.
The idea behind the “sociology of absences” is to expose the modes of production of
non-existence, confront these and replace monocultures with ecologies. By arguing
for the quality and value of a certain kind of research – qualitative case studies and
progressive interpretation of existing law – and carrying it out, I hope to contribute to
these ecologies in general and within the fields of law, sociology and socio-legal
studies in particular.

De Sousa Santos (2004) also operates with another concept of interest to the
epistemology and methodology of this thesis, the “sociology of emergences,” which
aims to “identify and enlarge the signs of possible future experiences, under the guise
of tendencies and latencies, that are actively ignored by hegemonic rationality and
knowledge” (de Sousa Santos 2004, p. 241). When exploring the experiences,
including thoughts and emotions, of those displaced and other persons, possibilities
arise. Applying a certain kind of interpretation – dynamic and context-oriented – of
existing law, new possibilities arise for protection. Finally, de Sousa Santos claims
that the movement of people in itself is relevant to epistemology,

“Subordinate transnational movements are movements of knowledges that have
been suppressed and marginalized […] Learning from them, learning form the
South, is one of the epistemological prerequisites of a cosmopolitan politics.
[…] the view that results from such learning is the epistemological condition for
engendering practices of counter-hegemonic globalization” (de Sousa Santos
4.2 Researcher-activism and reflexivity

As already mentioned, my goal is to contribute to securing effective rights for persons displaced in the context of climate change and natural hazard-related disasters. It is a personal and political goal. There are elements of action research in my work. Lewin (1946) described this as “a comparative research on the conditions and effects of various forms of social action and research leading to social action.” Socio-legal pioneers within this approach in Norway include Aubert (1970) and Mathiesen (1971). Mathiesen (1971) defines action research as research that is concerned with practical and political action more than theory testing and building. Research primarily feeds back into the action that is researched, and research is a never-ending project.

Throughout my work on the topic, I have had several roles, including that of researcher, refugee rights activist, adviser and journalist. The studies I have undertaken have been informed by, and informed, advocacy and policy-making efforts. Governments and other major actors on one side and researchers on the other side can sometimes collude in stalling action and change by calling for more research. In popular and political advocacy as well as policy papers based on my research, I have pointed out what should be done now, and that more research is also necessary.

The first report by NRC, Future floods of refugees, as well as later work was financed by the Norwegian Ministry of Foreign Affairs and contributed directly to the development of Norway’s official positions and politics. I helped identify the research gap on numbers of people displaced by natural hazard-related disasters and followed up by helping initiate the first study on the matter through IDMC. In collaboration with others in the IASC, I have worked towards recognition for migration and displacement in the climate change agreement by participating in the negotiations, knowledge sharing and advocacy. I have been part of efforts to address the protection gap in cross-border displacement through close collaboration with the UNHCR and the Norwegian Ministry of Foreign Affairs, participation in the Nansen Conference on Climate Change and Displacement and currently as member of the consultative committee of the Nansen Initiative. Based on case studies on the Horn of Africa and other research, I have drafted disaster legislation in cooperation with members of the
East African Legislative Assembly. NRC and I will further contribute to a consultation on the Horn of Africa arranged by the Nansen Initiative at the end of 2013. Moreover, I hope that mine and other’s research already has involved some concrete changes for those affected. For example, the interviews with affected persons and the close cooperation with NRC meant that some of the concerns about unfulfilled, basic needs were brought to the attention of NRC or another service-provider in camps and elsewhere as well as UN agencies and the official and governmental authorities.

There is a dynamic relationship between different parts of the research project: Findings from the empirical case studies influence my interpretation of what the law is and should be. Vice versa, I perceive, interpret and present social reality in a certain way here based on my motivation and view of the law. I furthermore affect the interviewees by my mere presence. Observations are not independent of the participation of the observer.

Particularly as a researcher-activist it has been important with a high level of reflexivity. Reflexivity is also at the core of the idea of subaltern cosmopolitanism. I have questioned my role and influence and whether what I am doing can feasibly be seen as contributing to securing effective rights. At times I have wondered if much of the work is a form of subtle marketing of NRC, and if I have a too close relationship with major actors such as the Norwegian Ministry of Foreign Affairs, UNHCR and the Nansen Initiative. Overall, however, I believe research and action so far has been more effective by working with and through these humanitarian actors.

Another point related to reflexivity is that research and information should influence the ideas shaping the action, and that preconceived ideas or ideas that become rigid must be questioned. Mathiesen (1971) refers to attempts from the media and criminal justice sector at placing KROM, a criminal justice NGO, somewhere on the political map, which could help neutralise the organisation. In reality, as an action research inspired organisation, the participants left the positioning of KROM on the “revolutionary-reform” scale open or “unfinished” in Mathiesen’s words. In a similar way, I have attempted not to establish myself and the project in any one position and
strategy, but rather let research and information guide which positions to take.

Mathiesen (1971) claims action research follows from the recognition of values in research. My experience is that there is no value-free research and it is better to declare ones personal and political positions pertaining to the research. This has become more common within legal studies as well over the last decades (Koskenniemi, 2009). However, lawyers generally have had little training in self-awareness (Vick, 2004). Many legal scholars and lawyers are regularly driven by political motivations, such as striving to secure the individual person’s freedom and integrity, due process and other such values (Stjernquist and Widerberg, 1985; Eng, 2007). These values are often engrained as more general principles in the legal system itself, and lawyers have been socialised into these through education. A way lawyers typically seek to ensure these values is to adapt laws and rights to new situations so that decision-makers are bound by the legal system (Stjernquist and Widerberg, 1985). This could be seen as related to my choice of a dynamic and context-oriented interpretation of existing law (see section 4.5.2). Furthermore, group interest and political and social considerations often operate in the background regardless of whether the legal scholar and lawyer explicitly disclose them or not, and are aware of them or not (Bruun, 1982 cited in Andenæs, 1996; Stjernquist and Widerberg, 1985). For example, socio-legal research has shown that there is a connection between the political and economic values and backgrounds of judges and how they interpret the law (Stjernquist and Widerberg, 1985; Mathiesen, 2005). By being explicit about the room for diverse interpretations of law and the role of personal and political factors, this thesis illustrates that doctrinal studies is not an apolitical study or venture. Hopefully, this serves as an invitation to other lawyers and socio-legal scholars to be more explicitly personal and political in their research, thereby creating better science. In contrast to the doctrinal lawyers, socio-legal scholars regularly have political motivations that they disclose and see their research directly linked to particular political projects (see chapter 3 on the works of de Sousa Santos and Ehrlich and section on 4.3 on socio-legal studies).

Much has been written on the role of values in research. Bourdieu argues that the social scientist is inherently laden with biases, and by becoming reflexively aware of those biases we can produce better research (Bourdieu and Wacquant, 1992). I do not
believe that we can – or should even try to – set aside all personal and political values. Longino (2004) argues that the fact that researchers have certain values does not mean that science cannot be objective; rather we may reach “objective” results because of the scrutiny by those with diverse values. Cosmopolitan legality and corresponding methods are political. According to de Sousa Santos (2004), the sociologies of absences and emergences replace the axiology of progress and development, which have justified destruction, with the axiology of care. Thus, “their objectivity depends upon the quality of their subjective dimension […] cosmopolitan consciousness and non-conformism before the waste of experience” (de Sousa Santos 2004, p. 242).

4.3 A socio-legal approach

As the research goal and questions of this thesis involves contributing to securing effective rights, a socio-legal approach is necessary. Banakar (2009) explores the similarities and differences between a series of (sub-)disciplines which he refers to as “socio-legal research” or “socio-legal orientations.” When I use the term “socio-legal” in this thesis, I use it in a broad sense to encompass these orientations. Banakar (2009) describes tensions between a legal and a sociological image of society that characterise socio-legal studies in general and determines the more particular orientation of different socio-legal fields regarding, for example, how to understand, conceptualise and study law.

Sociology of law goes back to Durkheim and Weber who used the study of law as a means to investigate the underlying social mechanisms of modernity, such as social differentiation, integration, forms of authority and the role of rationality. According to Banakar (2009), this orientation relies on concepts and theoretical frameworks from sociology, treats law either as a socially dependent or independent variable, and adopts an empirical approach to collecting the data it needs in order to conduct its analysis. He further claims that most studies within this orientation ignore concepts and ideas, which are internal to law and legal reasoning and through which law constructs its images of society and impacts on social relations. They regularly adopt a bottom-up perspective on law, focusing on the experiences of ordinary men and women and those marginalised, rather than taking the perspective of the judge or the state. Research question 1C) How do law and other factors interact and affect the
*lives of those displaced?* is illustrative of this. According to Banakar’s overview, Law and Society is primarily an American movement established after the Second World War, which only differs from sociology of law in that it does not limit itself theoretically or methodologically to sociology, trying instead to accommodate several social science disciplines.

Sociological jurisprudence is also closely linked with sociology of law. However, it is more interested in legal theory and legal education. Ehrlich (1936/2009) criticised legal positivism and the doctrinal approach for its conceptual formalism and neglect of empirical facts such as the role of social forces in creating the legal order and shaping legal behaviour. He argued that legal education and research as well as judicial decision-making should adopt the methods and insights of social sciences in order to counterbalance this shortcoming. Compared to the typical sociologist of law who adopts an outside perspective, the sociological jurist would take into consideration the internal point of view of lawyers by studying legal cases and court decisions. Compared to the typical doctrinal lawyer, however, he or she would not stop there but would also pay attention to how social norms operate and disputes are settled by extra-legal means. When addressing research question *1B) How, and to what extent, can those displaced find protection through existing law or legal reform?* I mainly look “inside” the legal system and its traditional sources but I sometimes supplement with what I have found “outside” through the case studies.

According to Banakar (2009), Socio-Legal Studies in the UK has grown mainly out of lawyers’ interest in interdisciplinary studies of law. Banakar (2009) describes two approaches within this orientation, Law in Context and Policy Research. As the doctrinal lawyer, scholars of Law in Context are interested in issues, which are internal to the processes and operations of law, but in contrast to the doctrinal lawyer, they use social theory and empirical research in a broad sense to study these and recognise the important role of extra-legal factors. According to Wheeler and Thomas (2002, cited in Banakar 2009, p. 69), the “socio” in Socio-Legal Studies does not refer to sociological theory or to an empirical understanding of the broader context of social development, but represents “an interface with a context within which law exists”. Policy Research is more empirically oriented and concerned with social
policy, regulation, enforcement and implementation issues, such as how law affects social behaviour or social conditions. These studies often draw attention to the gap between the intentions of law and its effect once it is interpreted and enforced, and might suggest technical solutions such as changing (parts of) the law. Parts of this thesis could also be considered Policy Research.

Banakar (2009) admits that all socio-legal researchers have in common that they study legal issues by the use of social science methods and could be said to form one interdisciplinary community. Banakar and Travers (2005) further argue that the separation between the sociology of law and socio-legal studies is an obstacle, which hinders the development of the social scientific studies of law. The thought behind the presentation above was to show the diverse topics and approaches that may be used by socio-legal scholars. I am no purist, however, seeking clear disciplinary boundaries and definitions. It should also be noted that the presentation above is based on a British view. For example, this view sharply distinguishes between Socio-Legal Studies and the sociology of law. According to Banakar (2009), such a division would not apply to the Scandinavian situation. At the University of Oslo, sociology of law is placed within the Faculty of Law and has been a rather generous meeting place of law and other disciplines, encouraging a range of research questions and methods. A distinguished professor at the department Mathiesen (2005) understands sociology of law to be the scientific study of the relationship between law and society.

Banakar emphasises the epistemological tensions between law and social science (Banakar, 2009) and has earlier (Banakar, 1998) described law as the dominating and higher status father, sociology as the slightly repressed mother, and sociology of law as the confused stepchild unable to find its identity. As a response, Mathiesen (1998) claims that it is not all that bad to be stepchild. The fact that sociology of law does not have a clear and stable paradigmatic foundation, frees the thoughts and provides space for creativity. Sand (2000) and Hellum (2000) have also engaged in this debate. Banakar has in turn responded to some of the criticism and clarified his position (Banakar, 2001). He wants a meta-theoretical umbrella, and sees fragmentation in socio-legal studies and research calling itself socio-legal without “really” being socio-legal as major problems. Lile (2011) is not so fearful of the “unreal” socio-legal
research and concludes that socio-legal studies (sociology of law in his words) are a combination of law and sociology where one draws to a larger or lesser extent on both of these fields. I support such a generous and flexible definition. Andenæs (1992) points out that it is the problem statement and research questions that should decide which methods to use and not the other way around. He fears the situation where it is the disciplines that decide the problem statements and research questions. I believe my research project calls for different theories, methodologies and methods. I am not too concerned with being inside or outside particular disciplines and agree with Andenæs’ thinking on this.

As already mentioned, sociology of law is typically considered to provide an external perspective on law while doctrinal legal studies provide the internal perspective. As Banakar writes, this is problematic if we want a holistic understanding of law,

“The view from within, i.e. the lawyer’s perspective of the law is hidden from the sociologist and therefore becomes automatically excluded from his/her scope of observation and analysis. Thus it is understood that the sociologist is expected to avoid making comments on matters defined by lawyers as technical legal issues which are only visible to initiated ‘insiders’. Since the sociologist willingly – and perhaps in an attempt to avoid criticism – declares himself/herself as incompetent to critically review, analyse or comment on the legal mode of decision making and argumentation, then he/she is forced to treat a large part of the activities constituting the legal field as politically neutral” (Banakar 1998, p. 9).

This thesis benefits from the author being trained in both doctrinal law as well as a range of humanistic and social science disciplines, and thus includes both the internal and the external perspectives. While the case studies address typical questions asked in sociology of law, even the more doctrinal papers may be considered part of a socio-legal approach. There is a socio-legal dimension to these studies as well since I show that there is room for different interpretations and applications of the law, and a dynamic, context-oriented interpretation driven by certain motivations is one that may provide more effective protection. While not a main aim of the thesis, it illustrates how the internal legal perspective is not merely technical and apolitical, and the usefulness of combining the external and internal perspectives in one piece of work.
Just as there is multi-causality in human mobility, there will regularly be several interacting causes and effects in any social phenomenon, including those involving law. This makes it problematic to speak of the effect(s) of law alone (see also Mathiesen, 2005; Lile, 2011). Research question 1C) How do law and other factors interact and affect the lives of those displaced? is intentionally formulated broadly to include both law and other factors. Further complexity results from the fact that the law, which may have certain effects that the researcher wants to study, is not a permanent, static entity that can easily be identified. The law must itself be interpreted, and as I show in the thesis it can be interpreted in different ways. How it is interpreted may be influenced by how the lawyer experiences and perceives social reality. This is reflected in the papers addressing research question 1B) How, and to what extent, can those displaced find protection through existing law or legal reform?

In sum, there is a very close relationship between the law and society. The thesis has more of an exploratory character and does not seek to establish clear links between certain laws and other social phenomena. The case studies are not based on any particular set of potentially influencing or explanatory factors (see for example Dalberg-Larsen, 2005, cited in Lile, 2011, for a list of factors influencing law’s effect). While clear and precise questions may be necessary in quantitative research, qualitative research can be more open and exploratory.

4.4 Case studies

4.4.1 The case study approach – what it is and why I employ it

This thesis adopts a case study approach. According to VanWynsberghe and Khan (2007), there is a myriad of different definitions and understandings of what a case study is. They themselves offer a prototype view mentioning seven features. I paraphrase them in the following.

1) Small n: The case study calls for an intensive and in-depth focus on the specific unit of analysis and generally requires a much smaller sample size than survey research.

2) Contextual detail: Case studies aim to give the reader a sense of “being there”
by providing a highly detailed, contextualized analysis.

3) Natural setting: Case study researchers choose to systematically study situations where there is little control over behaviour, organisation, or events. The case study is uniquely suitable for research in complex settings; a central concept is that complex settings cannot be reduced to single cause and effect relationships.

4) Boundedness: Case studies provide a detailed description of a specific temporal and spatial boundary.

5) Working hypotheses and lessons learned: Researchers can generate working hypotheses and learn new lessons based on what is uncovered or constructed during data collection and analysis in the case study.

6) Multiple data sources: Case studies often use multiple sources of data. This offers findings that are likely to be convincing and accurate.

7) Extendability: Case studies can enrich and potentially transform a reader’s understanding of a phenomenon by extending the reader’s experience.

According to Baxter and Jack (2008), there are two key approaches to case studies, one proposed by Robert Stake and the second by Robert Yin. Both seek to ensure that a phenomenon is well explored. According to Baxter and Jack (2008), they also have in common philosophical underpinnings, namely a constructivist paradigm. Reality is understood to be socially constructed. Truth and meaning are created jointly by the researcher and the people he or she researches and have pluralist and subjective dimensions.

In general, I follow the approach of Yin (2003). He defines a case study as “an empirical inquiry that investigates a contemporary phenomenon within its real-life context” (Yin 2003, p. 13). Disaster-related displacement is a complex phenomenon that can benefit from this approach. Yin (2003) goes on to categorise case studies as explanatory, exploratory, or descriptive. The explanatory is used when seeking to explain presumed causal links; the exploratory is used to explore situations in which the intervention being studied has no single set of outcomes; and, the descriptive type is used to describe an intervention or phenomenon and the real-life context in which it occurs. Although I don't believe these types are completely separate and rigid in
practice, I would say that my case studies are closer to the latter two categories; they explore and describe. Yin (2003) also differentiates between single, holistic case studies and multiple-case studies. Several of the studies I have undertaken are best classified as multiple case studies, which enable the researcher to explore similarities and differences within and between cases with each case having a different context. For example, Somalis displaced to Egypt had similar as well as different experiences to those displaced to Kenya (Kolmannskog, 2012b).

The case studies contribute to addressing all the research questions. Research question 1A) How is displacement in the context of climate change and natural hazard-related disasters experienced and how is it best conceptualised? is addressed through case studies and theoretical speculation and conceptualisation. One could say that this question relates to clarifying “the facts” and how we can perceive and frame these in order to establish, through legal methodology, what the law is. Furthermore, legal regulation is a form of translation of different fields of social reality (Sand, 2008; see also de Sousa Santos, 2002, on cartography of law). The case studies can help challenge, and improve, the legal translation.

The application of law depends on the local context. The case study approach is particularly suited to addressing questions such as research question 1C) How do law and other factors interact and affect the lives of those displaced? The case studies explore what the main protection challenges are, how relevant law is (not) applied, the limits of law and what factors interact with law. Some thesis papers show that the refugee concept is applied in some contexts of a natural hazard-related disaster and not in others (Kolmannskog, 2010; Kolmannskog, 2012b). Other papers show that a challenge that is as crucial as the human rights framing of displacement issues is the humanisation project to ensure that we see people as humans who have these human rights (Kolmannskog, in press). Psychological, sociological, political and ethical elements are as important as the legal. The presentation of some life experiences of mothers, husbands, children and other actual, unique human beings through the case studies may in itself contribute slightly to addressing the concern about humanisation. We need stories that can create empathy and make us see others as humans who are entitled to human rights.
While research question 1B) How, and to what extent, can those displaced find protection through existing law or legal reform? is mainly addressed through doctrinal and theoretical papers, the findings from case studies feed into these as well. In the former papers I refer to relevant empirical material from case studies as well as more traditional doctrinal material. Moreover, according to hermeneutics, how we interpret a (legal) text depends on the understanding we already have of the matter concerned (i.e. the facts and the law) (Gadamer, 1994). I therefore see the case studies as closely linked to the more doctrinal part of the thesis. Finally, the use of case studies should not be too unfamiliar for lawyers. Often lawyers research certain cases – decisions by the Supreme Courts in particular – and conclude how the law should be applied (see section 4.5.1).

4.4.2 Selection of cases

According to Baxter and Jack (2008), there is a tendency for case study researchers to attempt to answer a question that is too broad or a topic that has too many objectives for one study. I recognise that I have frequently fallen victim to this as well. In order to avoid or reduce this problem, several authors including Yin and Stake suggest placing boundaries such as time and place. As described in section 1.4 on research contexts and institutional affiliation, there are several contexts that are relevant to this thesis. Cases were partly chosen due to NRC field presence. Here I will go into some more detail about the places and times chosen for the case studies.

While all countries will eventually be affected by climate change, some are more immediately and particularly vulnerable. While producing the smallest amount of greenhouse gases, Africa is one of the most vulnerable continents to climate change and has the greatest lack of adaptive capacity (IPCC, 2007). Somalia and Burundi are considered among the most vulnerable countries in the world (Global Humanitarian Forum, 2009). The Horn of Africa is already severely affected by droughts, conflicts and displacement, and provides important contexts to explore the lives and rights of those displaced.

A central country in the case studies is Somalia (Kolmannskog, 2010; Kolmannskog, 2012b). The climate in Somalia is arid to semi-arid. The drought cycle has changed
over the last decades from once every ten years – when the droughts were given names – to becoming an almost nameless constant. Livestock and rain-fed agriculture, the main livelihoods and components of the economy, directly depend on the weather and environment. As a water-stressed, low-lying, coastal, poor, and war-torn country, Somalia is especially vulnerable to further climate change. In 2009 (Kolmannskog, 2010) as well as in 2011 (Kolmannskog, 2012b), drought intensified in many regions, and people fled within the country as well as to neighbouring countries such as Kenya.

Burundi is another place that was chosen in Kolmannskog (2010). The country has recently come out of a civil war. The small, landlocked country struggles with a high population density, land scarcity, deforestation and one of the highest poverty levels in the world. The majority of the working population is employed in the agricultural sector, many as subsistence farmers with rain-fed farms. The trend of higher mean temperatures, a longer dry season, and heavier and more concentrated rains is only set to increase with further climate change. To survive the drought in 2008 in the northern province of Kirundo, several people left in search of other livelihoods both within the country and to neighbouring countries such as Rwanda.

The field trips for the case studies in Kolmannskog (2010), one on Somalia and Kenya and another on Burundi, were carried out in July 2009. Due to security concerns, the research relating to Somalia was carried out in Nairobi and Dadaab in Kenya, as well as Hargeisa and surrounding areas in Somaliland. In Burundi the focus was on Kirundo, but here I could travel more freely to other areas. The studies concern the displacement situations in those places and at those times.

Field visits for the case studies in Kolmannskog (2012b), one on Somalis in Kenya and the other on Somalis in Egypt, were carried out in Kenya (mainly Dadaab and Nairobi) in late May 2012, and Cairo, Egypt, in early June of 2012. Part of the reason for choosing Kenya and Egypt is that both are major receiving and transit countries and the expectation that the experiences of, and responses to, the displaced would differ due to the countries’ different legal, socioeconomic and political contexts. The studies concern the displacement situations in those places at those times.
The 26 December 2004 tsunami and Hurricane Katrina in August 2005 are, in contrast to the other cases, incidents of sudden-onset disasters. Among the reasons for choosing these are the enormity of the disasters and displacement; the different legal, socioeconomic and political contexts; that issues were framed in human rights language; and, the legal and political developments that followed. Developing countries are particularly vulnerable to climate change and disasters and suffer severe effects. The example of Katrina illustrates that also developed countries are vulnerable, and degrees of vulnerability vary among people within a country. The case studies in Kolmannskog (in press), one on the tsunami and the other on Katrina, were based mainly on documents reviewed in 2012. The places and time periods covered were the USA and a series of Asian countries – in particular Sri Lanka, India and Thailand – from the onset of the disasters in 2004 and 2005 and subsequent developments.

4.4.3 Data sources and methods

A hallmark of case study research is the use of multiple data sources (Yin, 2003; VanWynsberghe and Khan, 2007). Potential data sources may include, but are not limited to, archival records, media articles, internet stories, interviews, physical artifacts, direct observations, and participant-observation. Some case study researchers also collect and integrate quantitative survey data. Thus, the case study approach, while normally considered part of qualitative research, challenges the dichotomy of qualitative and quantitative research. As Baxter and Jack (2008, p. 554) write, “[e]ach data source is one piece of the “puzzle,” with each piece contributing to the researcher’s understanding of the whole phenomenon.”

In the case studies included in the thesis, I have relied on semi-structured and unstructured interviews and discussions, analysis of documents and written materials, and some participatory observation. Kolmannskog (in press) is mainly based on sources such as UN reports, media reports, existing research and secondary sources, while Kolmannskog (2010) and Kolmannskog (2012b) also included interviews, discussions and participatory observation.

In-depth, semi-structured interviews were carried out based on open-ended questions
relating to the displacement dynamic and protection needs and responses. Interviewees included those who had had some experience of displacement partly due to natural hazard-related disasters. The link to the natural hazard-related disaster was self-identified. I wanted a balance in gender and age, and people with refugee status or recognised IDPs as well as people with less regularised status. The interviewees were mainly identified through local NRC staff on the basis of criteria that I communicated to them before visits. To a much lesser extent, identification also occurred through snowball-sampling techniques: When other people with interesting information or experiences were identified during interviews, these persons would also be contacted and interviewed. To create holistic and multi-perspective case studies, information was collected by targeting, not only those displaced, but also the local population, returnees, government officials, UNHCR staff, humanitarian staff, academics and others.

The number of interviewees in Kolmannskog (2010) was 49 in total. The majority was what I at the time and in the paper called “experts”, referring to UNHCR staff, academics and others who were interviewed but had not themselves been displaced. I subsequently avoided such exclusionary and misguided use of the term. The displaced persons themselves are of course experts on their situation. For Kolmannskog (2012b) there were 8 individual interviews of displaced persons in Kenya and one discussion group with three displaced persons in Egypt. I also had one discussion group (10 people) in Dadaab consisting of people belonging to the host community and several interviews with UNHCR staff, NRC and other humanitarian agency staff and government officials.

Interviews were mainly carried out by the author of this paper with some assistance from the current NRC climate adviser, Tine Ramstad, in Kolmannskog (2012b). In a typical interview with those displaced I introduced myself and others accompanying me, such as NRC staff serving as translator. I said that I was a researcher and NRC was facilitating my visit. I presented my interest in displacement in the context of natural hazard-related disasters (normally drought) and the person’s experiences of this. I clarified that the information would be used for research purposes and the person remain anonymous. I asked if there were any questions to me or us. I would
ask if the person was comfortable with the interview being audio-recorded, and informed that the audio-records would be used for research purposes and destroyed afterwards. In all cases I took notes. If the person gave their permission, I would start audio-recording at this point.

After the introduction and clarifications, I proceeded with open-ended interview questions. Following a phenomenological approach, the subjective experiences of those displaced were in focus. I would follow up on their statements and not stick rigidly to assumptions and questions I had prepared. I asked about the previous place of residence, including livelihood and family life; the disaster itself, including how it came about, how the person coped or not, and how it otherwise affected the person; the decision to move and the actual journey, including, in cases of cross-border displacement, why the person decided to go to another country and whether there were obstacles such as soldiers or bandits along the borders; life in exile, including asylum application processes in cases of cross-border displacement, what assistance and protection the person got and how the person coped and felt treated; and, finally, thoughts about the future, including whether the person wanted to return to the previous home and what was necessary for that to happen, whether the person wanted resettlement or to move on to a third place, or whether the person wanted to stay and integrate locally. I normally rounded off by asking whether the person had anything to add that might be important for me to understand the person’s story, and saying that there was also an opportunity again now to ask me or the NRC staff any questions or raise concerns, although we could not promise that NRC could address them. This often triggered requests about shelter or food assistance, and regularly NRC took note of these, and, if deemed appropriate according to humanitarian principles, sought to either address them directly themselves or raise them with other agencies.

These questions and the set-up were adapted in interviews with the local population and others such as government officials, UNHCR staff and humanitarian agency staff. These interviews and discussions would mostly revolve around the perception of and responses to those displaced, including how they should be treated.

The interviews with the displaced persons regularly took place in NRC offices.
Although movement was restricted in some areas such as Dadaab, Hargeisa and Cairo due to security concerns, there was a certain level of participatory observations in the camps and cities. The information from the interviews with the displaced persons informed the desk-study, participatory observation and interviews with others such as UNHCR and government officials, and vice versa, so there was a constant dynamic between the different methods and data sources used. Some thesis papers such as Kolmannskog (2012b) also draw on some existing quantitative data (Enghoff et al., 2010; Refugee Consortium of Kenya, 2012).

4.4.4 Presentation and analysis

As in any other qualitative study the data collection and analysis occur concurrently, and the type of analysis engaged in will depend on the type of case study. Analysis and presentation of material are also very linked.

“The goal of the report is to describe the study in such a comprehensive manner as to enable the reader to feel as if they had been an active participant in the research […] It is important that the researcher describes the context within which the phenomenon is occurring as well as the phenomenon itself. There is no one correct way to report a case study. However, some suggested ways are by telling the reader a story, by providing a chronological report, or by addressing each proposition […] In order to fully understand the findings they are compared and contrasted to what can be found in published literature in order to situate the new data into preexisting data” (Baxter and Jack 2008, p. 555).

My field notes and recorded interviews and discussions were already a selection of the material that exists. Reading over notes or listening to recordings I would see certain themes and organise the material according to this. The inductive approach I took also meant that the analysis took place continuously and in an interaction with the gathering of material. While analysing material, I had the opportunity to complement, revise and refine it through for example further interviews and desk review. I presented the case studies in a structure following chronology and/or what I had identified as key findings and themes in the material.
Several case study scholars (Merriam, 1994; Flyvbjerg, 2006) stress the need to consider how to balance the descriptive parts and analytic and interpretative parts as well as their integration in the final presentation.

“As case studies often contain a substantial element of narrative. Good narratives typically approach the complexities and contradictions of real life. Accordingly, such narratives may be difficult or impossible to summarize into neat scientific formulae, general propositions, and theories […] To the case-study researcher, however, a particularly “thick” and hard-to-summarize narrative is not a problem. Rather, it is often a sign that the study has uncovered a particularly rich problematic. The question, therefore, is whether the summarizing and generalization, which the critics see as an ideal, is always desirable” (Flyvbjerg 2006, p. 237).

While I hope one of the main effects of the case studies is a greater appreciation of the complexities on the ground, I normally also sought to conclude by highlighting certain findings and their possible implications.

4.4.5 Trustworthiness and quality of the case studies
Reliability and validity are key concepts for evaluating the quality of research. In quantitative research, “reliability” normally means that a test should obtain the same results over time while “validity” involves being able to generalise findings to a larger target group or contexts. In qualitative research these concepts must necessarily be understood differently, and how to evaluate quality in qualitative research is much debated.

According to Baxter and Jack (2008), it adds to the quality and overall trustworthiness of the case study if the research question(s) is clearly written, the question(s) is substantiated, the case study design is appropriate for the research question, data are collected and managed systematically, and the data are presented and analysed correctly. Related to the latter point is the need to ensure that enough detail is provided in the presentation of the case study so that readers can assess the work.
The use of multiple data sources, types and even researchers also enhances data credibility (Yin, 2003). This is often known as triangulation. According to Baxter and Jack (2008), triangulation enhances data quality based on the principles of idea convergence and the confirmation of findings. There was triangulation of data sources and methods as well as exploration of cases comparatively in Kolmannskog (2010), Kolmannskog (2012b) and Kolmannskog (in press). In Kolmannskog (2012b), Tine Ramstad who had assisted with interviews also read over a first draft presentation of the case studies and commented on how findings were structured and explored. In both Kolmannskog (2010) and Kolmannskog (2012b) the local NRC staff who had participated, also read through and commented on the first draft presentation of case studies.

Baxter and Jack (2008, p. 556) suggest that “[n]ovice researchers should also plan for opportunities to have either a prolonged or intense exposure to the phenomenon under study within its context so that rapport with participants can be established and so that multiple perspectives can be collected and understood and to reduce potential for social desirability responses in interviews.” As mentioned already, the time of different field visits has been very limited, and this is a weakness of the studies.

4.4.6 Weaknesses and ethical considerations in forced migration research

Jacobsen and Landau (2003) claim that social scientists doing fieldwork in humanitarian situations often face a dual imperative – research should be both academically sound and policy relevant – and this may have consequences for methodology and ethics.

“This policy orientation stems in part from the subjects […] Many take seriously David Turton’s admonishment that research into others’ suffering can only be justified if alleviating that suffering is an explicit objective (Turton, 1996: 96) […] At the same time, refugee-related social science aspires to satisfy high academic standards, both to justify its place in the academy and to attract scarce funding for social research. But as work becomes more academically sophisticated, many have the nagging suspicion that it becomes ever more irrelevant to practitioners and policymakers. The tensions described above
create a dual imperative: to satisfy the demands of academic peers and to ensure that the knowledge and understanding work generates are used to protect refugees and influence institutions like governments and the UN” (pp. 185-186).

(This is also related to ideas about action research. Aubert (1970) writes about how action research often follows from researching low status groups. Those researched often want something out of the research. Furthermore, the researcher may have received new knowledge that stirs his or her conscience to act beyond publishing a paper in some academic journal. See also section 4.2.) Rather than seeing the demands as competing or even mutually exclusive, Jacobsen and Landau (2003) claim that “as social scientists trained in logical argument and methodological rigour, work can provide a solid empirical basis for policy and advocacy efforts,” and encourage us to address common issues in forced migration studies without “lapse into the kind of academic abstraction that currently characterises much recent scholarship in political science, sociology and anthropology […]” (p. 186). I hope to have addressed, in particular in section 4.4.5 above, their concern that “[m]uch of the work on forced migration is weakened by the fact that key components of the research design and methodology are never revealed”, and that my readers are informed about “how many people were interviewed, who did the interviews, where the interviews took place, how the subjects were identified and selected and how translation or local security issues were handled” (p. 186).

According to Jacobsen and Landau (2003), the typical methodological and ethical problems confronting social scientists studying forced migrants or their hosts, include non-representativeness and bias, issues arising from working in unfamiliar contexts including translation and the use of local researchers, and ethical dilemmas including security and confidentiality issues and whether researchers are doing enough to “do no harm.”

Local NRC offices assisted me with identifying interviewees as well as during interviews. The agency has no role in status determination or resettlement decisions, but their participation could be problematic since they are among the service providers in the camps and settlements. Reactivity refers to the active presence of the
researcher influencing the behaviour and responses of informants, thereby compromising the research findings (Jacobsen and Landau, 2003). It occurs in all field research, but when informants are marginalised or in a dependent position, methodological problems may become ethical ones. While I clarified that NRC facilitated my research and that the main purpose of the meetings was research, being associated with the NGO was unavoidable. Furthermore, I was in fact often institutionally affiliated with the NGO (see section 1.4). On the other hand, I believe any researcher arriving from the outside in these settings would influence the interviewees to a high degree, potentially invoking hopes of having concerns addressed. I preferred to have an NRC representative present during most interviews not only due to interpretation needs and the local staff’s ability to provide experience-based comments along the way if needed, but also to ensure that critical issues that were raised by interviewees could be noted down and possibly addressed by NRC or another agency.

An obvious limitation for me in the case studies – apart from those merely based on English-language documents (Kolmannskog, in press) – was the need for translation. Part of the meaning may be lost in the translation and this was difficult for me to verify.

The problem of “doing no harm” is particularly difficult to anticipate or control. When displaced persons are interviewed, the information they reveal can be used against them either in the camp or current settlement or in their areas of origin. A person can become stigmatised or targeted if certain information is known about them, for example, that a woman has been raped. I believe that the use of trusted NRC staff lessened the risk of such information leaking out. The contact with an NGO could, however, raise suspicions of special privilege or that the person is sharing sensitive information. We sought to partly address this by coordinating interviews with local heads of communities. Personal and sensitive data has been treated confidentially and I have avoided using and disseminating information that can harm the interviewees. I increase anonymity by not using real names, using fictitious names or just using first names that were very common in the relevant contexts such as Fatima and Ahmed.
The studies must be read against the several limitations mentioned here as well as the short period of field visits, which did not enable trust and relationships to build and much participatory observation to be carried out.

4.5 Doctrinal studies

4.5.1 Doctrinal approach – what it is and why I employ it

While the disciplinary identity of law has never been static or uncontested, I agree with Vick (2004) that a “core” can be identified that has been characteristic for at least a century. This is the doctrinal approach, which remains “the benchmark against which legal academics define themselves and their work, and the point of departure for those engaging in interdisciplinary legal research” (p. 188). Vick (2004) describes doctrinal research in the following terms:

“Doctrinal research treats the law and legal systems as distinctive social institutions and is characterized by a fairly unique method of reasoning and analysis. In its purest form, 'black-letter' research aims to understand the law from no more than a thorough examination of a finite and relatively fixed universe of authoritative texts consisting of cases, statutes, and other primary sources, the relative importance of which depends on the legal tradition and system within which the legal researcher operates” (p. 178).

The doctrinal approach is typically described as an approach for answering the question of what the law is (de lege lata) considered from an internal perspective – as opposed to an external sociological perspective on law. The research question 1B) How, and to what extent, can those displaced find protection through existing law or legal reform? is a question that I primarily seek to answer through a doctrinal approach.

Vick (2004) explores the origin of the doctrinal approach. The law discipline’s place within the university was originally a consequence of a felt need for those engaged in the profession to have academic credentials, and a main purpose of the legal education has been to produce future generations of lawyers. The dominating conception of law as state law in these educations corresponds with the professional
orientation of law graduates, who are usually concerned with the resolution of
disputes through state-sanctioned means or advising clients on how to order their
affairs in light of the rules created by state actors.

While it is often presented as merely mainstream legal methodology, the doctrinal
approach is closely linked with a particular legal philosophy or paradigm, namely
legal positivism. Legal positivism emerged partly as a response to natural law theories
in the Enlightenment. The positivists see law as a more or less closed system of rules,
norms and principles, that is different from, and not necessarily linked to, morality
(Banakar, 2009). Law is defined as whatever has been adopted by the correct
authority such as the sovereign or legislating assembly. Despite recognising the social
nature of the sources of law, positivists pay little, if any, attention to the social
character of these (Banakar, 2009).

The doctrinal lawyer and legal scholar believe that they can find out what the correct
legal rule in a concrete case is by investigating sources that are considered legitimate,
and analysing and ordering what is found. An important basis and inspiration for the
doctrinal approach is how the judge and court operate. The idea is that it is legally
trained judges who in the end decide legal questions. Legal positivist ideology and
state-centrism entail that certain sources are considered relevant such as laws adopted
by the legislature and case law, while others such as ideas of justice are generally
excluded. The ideas of “finding” something and “sources” indicate a belief that the
law is already there; we just have to look in the right places and sum it all up nice and
correctly. This reflects the legal positivist sentiment, and the Enlightenment idea that
the judges should be like mathematicians. The term “factors of legal sources”
(“rettskildefaktorer”) is currently preferred to “legal sources” (“rettskilder”) in
Norway since it better reflects that in reality it is not merely a question of finding the
law.

In Norway, it is common to list seven factors: (state) laws, preparatory works
(including green papers and negotiation records) and other background material to the
laws, case law, government authorities’ practice, private parties’ practice and custom,
legal theory, and concern for a just and fair result in the concrete case (“reelle
hensyn”) (Eckhoff, 1992). Andenaes (1996) claims that this approach is largely based on private law, where there is a conflict between two private parties that is to be decided, and that public law differs on several points, and that the approach must be adapted. For example, the law itself is of a different character, it is regularly non-lawyers who make decisions and the courts rarely engage. This is also true for much of the law relevant to this thesis such as refugee law. There is a blurry boundary between the doctrinal approach and sociological jurisprudence in such cases.

As Eng (2007) points out, the legal methodology consists of guidelines rather than rules. While written law and case law are generally considered to carry much weight, several considerations are necessary to determine their weight in each case, including whether the law is precise or general and addresses the current situation well, the decision is from a lower or higher court and there is consensus or dissent.

Which factors are considered relevant and how much weight they typically carry will vary from legal system to legal system. While Norwegians generally put much weight on formal state law and preparatory works, common law actors generally put much weight on case law and little on preparatory works. In this thesis, I have attempted to explore different systems in line with their own methods. The emphasis of the thesis is on international law. The 1945 Statute of the International Court of Justice article 38 is considered a general expression of which factors we can use when determining international law, but it is not exhaustive (Ruud and Ulfstein, 2011). Relevant material includes treaties, customary law, state practice, preparatory works (including negotiation records), case law, non-binding statements and recommendations from other legal bodies, legal theory, general principles of law, and soft law. The factors reflect that the international system differs from the domestic systems. For example, treaties, which are international agreements normally developed and adopted by states, often serve the purpose internationally that laws serve domestically. Treaties and other normative instruments of particular relevance to this thesis – some of which have already been mentioned elsewhere – include:

- The 1951 Convention relating to the Status of Refugees,
- The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,
- The 1954 Convention Relating to the Status of Stateless Persons,
- The 1998 Guiding Principles on Internal Displacement,
- The 1948 Universal Declaration of Human Rights,
- The 1966 Covenant on Economic, Social and Cultural Rights,
- The 1966 International Covenant on Civil and Political Rights,
- The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms
- The 1990 International Convention on the Protection of the Rights of All Migrant Workers,
- The United Nations Framework Convention on Climate Change.

The 1969 Vienna Convention on the Law of Treaties articles 31 and 32 describe how to interpret treaties. The starting point is the objective meaning of the words, as they would be understood by an average layperson (objective interpretation). The text should be interpreted in its context, however, with regard to the other provisions, system of the treaty and its purpose (teleological interpretation). One may also look to the drafters’ intention (subjective interpretation). The different instruments have particular features or provisions that may influence how one is expected to interpret them. For example, the 1951 Refugee Convention preamble and article 35 mention the states’ duty to cooperate with UNHCR and UNHCR’s supervisory role. Thus, UNHCR statements about how the Convention should be understood carry some weight. Furthermore, it is a rather old Convention, which arguably calls for an emphasis on teleological rather than subjective interpretation.

Citing diverse scholars, Vick (2004) describes how the doctrinal approach has been accused of being “rigid”, “dogmatic”, “formalistic”, “close-minded”, “encouraging intellectual tunnel-vision through an unhealthy preoccupation with technicalities”, “an intellectual strait-jacket on understandings of law and society”, and to “impoverish the questioning law student and teacher” (p. 181). An early critic was Eugen Ehrlich (1936/2009). Important later critics included the legal realists who insisted that the law, legal doctrine, and legal systems are to be understood as instruments of social policy, and that legal doctrine can only be justified if it has a beneficial social effect. Thus, the legal realists undermined the notion that law is “apart” from other social
phenomena, and the societal effects of rules and their underlying values became a legitimate subject of inquiry by legal academics (Vick, 2004). Other legal philosophies or paradigms have also challenged the positivist paradigm, such as feminist jurisprudence and Critical Legal Studies.

Vick (2004) believes that most legal scholarship published today is, at some level, interdisciplinary, at least if the boundaries of the discipline of law are narrowly defined to encompass only doctrinal research focused solely on authoritative legal texts. He claims that there are degrees of interdisciplinarity and a spectrum might be imagined. Much research still attempts to answer what are essentially doctrinal questions about legal rules or proposed law reforms, and much of the focus of the legal education is still on doctrinal methodology. While the case studies in this thesis follow a social science methodology, the thesis papers that primarily address research question 1B) How, and to what extent, can those displaced find protection through existing law or legal reform? (Kolmannskog and Myrstad, 2009; Kolmannskog and Trebbi, 2010; Kolmannskog, 2012a), are closer to the doctrinal end of the spectrum. While these papers to some extent draw on information from the case studies – and are in this sense also a form of sociological jurisprudence – they take the doctrinal approach as a starting point. While there is a certain state-bias in the doctrinal approach, it is a hegemonic approach that I believe can be used in a counter-hegemonic fashion (see section 3.4.5 on cosmopolitan legality). Since this is the approach that most lawyers are socialised into, it makes sense to explore to what extent persons who are displaced and excluded can find protection in existing law through the doctrinal approach.

4.5.2 Choosing a progressive interpretation

While following the doctrinal approach to answer what the law is, I also seek to expose a space in existing law for choices, for example between progressive and conservative interpretations. As will become clear, the description of law always involves normative elements and considerations. What is unusual in this thesis, is that I am explicit about it and my motivation. As mentioned, the doctrinal approach is best considered to consist of guidelines rather than clear rules. Lawyers, however, are generally known to be a group of people with little inclination for self-awareness and
much faith in the universal rightness of what they claim (Vick, 2004). Thus, reflexivity and reflection around one’s own role in the doctrinal approach is not much considered.

First, very little attention is given to how lawyers perceive and present the legally relevant facts and there is a lack of guidelines on how to approach the facts (Andenæs, 1996). There is a complicated interaction between facts, legal rules and result. We can approach facts from different perspectives and present the material in very different ways. If we wish a particular result, we may present only certain facts that can be combined with a rule to produce this result. The hermeneutic model is relevant (Gadamer, 1994): How we interpret a legal text depends on the person’s personal and unique understanding and perception of the factual matter concerned and the law before encountering the facts and the law. Thus, my answers to research question 1A) How is displacement in the context of climate change and natural hazard-related disasters experienced and how is it best conceptualised? which include a typology as well as ideas of multi-causality of disasters and displacement are important for the question 1B) How, and to what extent, can those displaced find protection through existing law or legal reform?

In addition to all the explicit and doctrinally legitimate factors of legal sources, the interpretations and results of a doctrinal investigation are based on personal appreciations of reality and values that may be explicit or implicit, conscious or unconscious (Bruun, 1982, cited in Andenæs, 1996). The doctrinal approach is not mechanical, mathematical or strictly logical but involves deliberation and discretion and is therefore always open to personal and political elements. Describing what the law is (de lege lata) is a normative process because we operate with language, interpretation and choices. What the law is, cannot be separated from the person who describes what it is and this person’s considerations of existing factors of legal sources and what current law is or should be (see also Høgberg, 2012). (Eng (2007) has a slightly different view, preferring to talk of a descriptive-normative combination in de lege lata argument.) Several scholars have highlighted the indeterminacy of law and how the personal and political interact with the legal (see for example Koskenniemi, 1990 and 2009; de Sousa Santos, 2002; Sand, 2008). The prominent
international legal scholar and previous judge Higgins (1994, cited in Ikdahl 2010, p. 25) argues that the distinction between what the law is (de lege lata) and what the law should be (de lege ferenda) is a “false dichotomy”; normative considerations both have and should have a central place and policy factors should be dealt with “systematically and openly” in the description of what the law is. The task of the decision-maker is to choose between claims, which have varying degree of merit, rather than simply “finding the rule” and applying it.

In section 4.2 on researcher-activism and reflexivity, I mention that lawyers and legal scholars regularly have political and other motivations that influence the results of their research and reasoning. A doctrinal investigation with scientific ambitions should become aware and explicit about these elements in the doctrinal investigation. In Norwegian legal methodology, certain considerations that are legitimate fall under the term “reelle hensyn” which roughly refers to the concern for a just and fair result. Generally, however, these are formally considered to be of little weight and they would only include some considerations as legitimate. Thus, many considerations and motivations will remain hidden, sometimes in the guise of other factors.

Which theories of interpretation and which concrete interpretations are chosen, are therefore partly a personal and political matter. In the thesis papers I expose this space for alternative choices in existing law, and I employ a particular kind of interpretation that opens up possibilities in line with cosmopolitan legality, namely a dynamic and context-oriented interpretation.

Dynamic interpretation is well established in international law, especially in human rights law (Andenæs and Bjørge, 2012). For example, the European Court of Human Rights (ECtHR) has clarified that the ECHR is “a living instrument which […] must be interpreted in the light of present day conditions” (see for example ECtHR, 1978). The human rights provisions often contain open and abstract phrases and standards that indicate a dynamic interpretation. For example, what is considered “inhuman treatment” today will be very different from what it was at the time of the drafters.
Dynamic interpretation is sometimes seen to challenge the hegemonic notion of state sovereignty. Some argue that states did not sign up to the interpretations that are now being made and that domestic democracy has been weakened in favour of international, un-elected lawyer courts (for Norway’s part, see Makt- og demokratiutredningen, NOU 2003:19; for a critique of the same, see Andenæs, 2006). On the other hand, we could argue that contemporary understandings of democracy are intrinsically linked with rule of law and human rights. Furthermore, dynamic interpretation can have a link to teleological interpretation. The general purpose of human rights instruments is to strengthen the rights of all humans, including by providing protection from the state. Hence, they must intervene or apply in what was traditionally considered internal affairs, and the state cannot itself decide what is a breach of these rights and not. The historical background for many of these instruments was the grotesque abuses of state sovereignty that occurred during the Second World War, including the Holocaust.

New and complex times also call for new approaches. Ketscher (2000, 2002) argues that there is occurring a needed shift from focusing on hierarchy to arguments in legal reasoning, and we increasingly choose interpretations in line with the values laid down in conventions rather than emphasise the legislator's intentions. With the uncertainties of climate change, traditional views of law are further challenged. This is related to the role of law in a more complex and rapidly changing society (Sand, 2008). Many of the areas of legal regulation are now part of continuous change, and using the past as a frame of reference may be highly insufficient. One solution is the use of general standards or values, which may change reflectively with the situation. Human rights provisions, such as the ban on inhuman treatment, can provide such standards or values. In such cases – in which the scope for interpretation and discretion increase – the choice of interpretation(s) becomes ever more important.

Based on my research goal and theories such as cosmopolitan legality, I believe that we – progressive human rights lawyers and judges, humanitarian and development agency staff, displaced persons and the public at large – should fully exploit existing law by applying a dynamic and context-oriented interpretation of IDP law, refugee law and human rights law in order to strengthen the rights of those displaced in the context of climate change and natural hazard-related disasters.
Shelters for newcomers in the Dadaab refugee camps, 2009.
5. Presentation of the thesis papers

5.1 Introduction

This chapter presents the thesis papers chronologically. Breadth has been chosen partly because I believe it was needed in this rather new and underdeveloped research area. To address the research goal, it is necessary to understand and conceptualise disasters and displacement in the particular context, explore how law and other factors affect those displaced, and explore how existing and new law can secure their rights. I draw on several disciplines, and the thesis grew out of a constant interaction between (mainly empirical) case studies and (mainly theoretical and doctrinal) legal studies. Some idea of how the papers are linked and why I consider them a whole should already be clear from the preceding chapters (see in particular section 1.3 on research questions and approach). The reasons for including a study on European asylum law in addition to the more general doctrinal papers has been described in section 1.4. The selection of cases for the empirical case studies has been described in section 4.4.2.

Most thesis papers have been peer-reviewed and published in international journals and textbooks that are leading within the field. I have been the victim of rather strict and low word counts. This has been a challenge. It may help to read the papers on the background of this rather long thesis introduction. In particular, Chapter 3 and 4 have elaborated on theoretical orientations and central concepts, and methodology and methods.

In the following sections I clarify how each paper addresses the research goal and questions, their contexts, methodologies and methods, how they relate to the typology of climate change effects in section 3.4.2, and main findings and conclusions. The chapter closes with some final remarks and thoughts on ways forward.

This paper primarily addresses research question IB) *How, and to what extent, can those displaced find protection through existing law or legal reform?* It employs a mainly theoretical and doctrinal approach. It focuses on type 1) and 2) in the typology, namely those displaced in the context of natural hazard-related disasters. It further focuses on those who are cross-border displaced, and excludes those who might be recognised as 1951 Convention refugees. The paper uses the term environmentally displaced persons (EDPs) to refer to this group. EU legislation and domestic European laws and practices are explored for protection possibilities. The specific research question can be formulated as follows: To what extent can people who are cross-border displaced in the context of climate change and natural hazard-related disasters be afforded asylum or other protection within the EU framework and national European legislations and practices?

The research involved reading and interpreting texts, including negotiation records, EU directives and domestic laws. Some of the information on the situation in individual European states was gathered through a simple survey. The following question was posted on the European Council for Refugees and Exiles’ discussion forum primo January 2009:

“1) What does your country have of national legislation and/or practice addressing environmental displacement
a. through prevention?
b. through extending or denying protection?
c. through extending or denying leave to stay on humanitarian grounds?
d. in any other manner?
This includes e.g. addressing the issue explicitly in law or through an inclusive or exclusive practice of humanitarian asylum. I would also be interested in how it is addressed as a prevention issue, e.g. through external adaptation support in other countries. Please supply me with some information about the legislation, practice, case-law etc. or let me know where to find it.”

The EU has developed Community legislation on refugees and displaced persons, the Common European Asylum System, which consists of several directives. While certain states and institutions wanted to explicitly include environmental displacement,
the majority and most powerful were opposed. Even without such explicit recognition, a dynamic and context-oriented interpretation may offer some people some protection.

The possibility of temporary protection in situations of “mass influx” is established with the EU Temporary Protection Directive (2001/55/EC). Official minutes of the negotiations reveal that the Finnish delegation was unsuccessful in explicitly including EDPs. We argue that temporary protection can be applicable nonetheless. First, article 2(c) of the Directive does not provide an exhaustive list of categories of persons protected (cf. “in particular”). Second, generalised violations of human rights – a situation that is explicitly mentioned – often occur during or after a natural hazard-related disaster. Third, the term “mass-influx” is to be defined on a case-by-case basis by a qualified majority of the Council. Arguably, if a majority decides that a natural hazard-related disaster calls for invoking the Temporary Protection Directive mechanisms, it is free to do so. The challenge is one of political will rather than legal possibility. It remains to be seen how individual member states practice develops. So far Finland is the only EU country with explicit provisions granting temporary protection to EDPs.

Even if it would be applied, the temporary protection mechanism has other weaknesses from the perspective of those displaced. An individual may still be in need of protection even though he or she does not arrive in a “mass influx” situation. Furthermore, it does not cater for people who need to stay longer or permanently.

According to article 2(e) of the Qualification Directive (2004/83/EC), an applicant may receive subsidiary protection if he or she faces “a real risk of suffering serious harm” as defined in article 15. Subsidiary protection is similar to ordinary refugee protection, but often the status and rights received are not at the same high level. The negotiation documents indicate that both the Commission and the European Parliament suggested that environmental displacement also be considered, but there are few traces detailing how states responded, and the final result shows no explicit mention of this form of displacement. Although the drafters departed from a strong human rights approach, the current article 15 is still based on certain articles of the ECHR. Indications of how article 15 should be interpreted can therefore be found in the case law of the ECtHR. In particular, the case law on “inhuman treatment,” ECHR
article 3, could support protection and a status for EDPs. However, there are cases of people who have been allowed to stay due to the ban on inhuman treatment, but without getting any legal status with rights. While this may be a minimum protection for some EDPs, it would leave them in a legal limbo without much effective protection. Today, Finland and Sweden have provisions explicitly granting protection and status to people who cannot return because of an environmental disaster.

Finally, there are also examples of European states granting discretionary leave to stay on humanitarian grounds. What such status entails of rights varies from country to country. We find relevant practice in both EU and non-EU countries.

The paper concludes by recommending a context-oriented and dynamic interpretation of the relevant EU directives, highlighting the Swedish and Finnish provisions as best practice, considering legal labour migration as part of the solution, and emphasising that a strategy to meet the challenge of environmental displacement must also include climate change mitigation and adaptation outside of Europe.

Since the writing and publishing of the paper, there have been new cases decided by the ECtHR that further clarify the situation. I particularly welcome the Sufi and Elmi-case, which I refer to in a later paper (Kolmannskog, 2012a). This case supports the theory that I have proposed; we can speak of inhuman treatment and protection against return to certain natural hazard-related disaster situations.


This paper primarily addresses research questions 1A) How is displacement in the context of climate change and natural hazard-related disasters experienced and how is it best conceptualised? and 1C) How do law and other factors interact and affect the lives of those displaced? It employs a case study approach, and focuses on type 1), 2) and 3) in the typology, exploring the interaction of climate change, natural hazard-related disasters (in particular drought), conflict and human mobility, as well as
protection challenges and responses. The countries chosen for the case studies are Somalia, Kenya and Burundi. The research questions were formulated as follows for this specific study:

1) What are the links between disasters, conflict, and displacement in the context of climate change?
2) What are the particular protection challenges for displaced people in this context?
3) How does society and law prevent displacement, protect the displaced, and seek durable solutions to the displacement in this context?

The research was based on both a desk-study and a field study. Interviews centred on questions related to the three identified above. While findings differ in the case study of Somalia and Kenya and the case study of Burundi, there are also several similarities. Both cases illustrate how complex the dynamics of a disaster can be. Global climate change and local environmental degradation are only two of many factors in the droughts and conflicts. Large-scale armed conflict may be fuelled through a particular access to resources (e.g. charcoal), and non-environmental factors can play an important role in weakening dispute resolution mechanisms and increasing the risk of violent conflict (e.g. the proliferation of automatic weapons).

While some people are forced to move due to drought and conflict, others are forced to settle or do not have the resources to move. Both case studies show that many of those moving internally or across borders – as well as others, such as government officials and the local population – consider the movement as forced displacement. Somali pastoralists, whose migratory pattern was disturbed, are also considered displaced. The displaced persons face many different protection challenges relating to inter alia food, water, shelter, and healthcare. Rights and the violations are gendered: Some groups of women may face particular challenges, including lack of access and rights to property and land for single, divorced or widowed women in Burundi, lack of resources and mobility during and after disasters, the risk of sexual and gender-based violence as well as other safety risks often in connection with domestic tasks such as firewood collection.
The two case studies indicate that many affected people may qualify as IDPs. They are under the protection of their own government. This may leave them particularly vulnerable and render humanitarian access difficult in some countries such as Somalia, while in other countries such as Burundi the government has political will but little ability to provide protection and assistance.

Movement across borders is partly facilitated by people belonging to the same ethnic and linguistic communities on both sides. The multi-causality of movement also means that some cross-border displaced persons can legitimately be considered refugees. Others adapt their narratives for it to fit with what are considered relevant facts in law, or even more creatively add to their narratives. Many, however, fall outside of traditional refugee definitions. The facilitation of other forms of legal cross-border migration such as labour migration within the East African Community may be part of the solution to address their needs and give other people the option to move now rather than being forcibly displaced later.

(Since the writing and publishing of the paper, I have been engaged to draft regional legislation relating to natural hazard-related disaster, where I included provisions for both internally displaced and cross-border displaced persons within the region as well as provisions on food, water, shelter, healthcare and particular attention to gender-related aspects of rights and violations. If adopted, it could in principle apply to disaster-displaced Burundians in Rwanda, Tanzania and Uganda, but not to Somalis in Kenya since Somalia is not part of the Community.)

Both case studies indicate that the state and state law may play a rather limited role in a conflict and post-conflict situation. In some cases such as Burundi, there is a lack of resources, while Somali authorities have lacked in will and/or ability to protect those displaced. The international and local levels are important, that is, that of international law and humanitarian agencies, and that of local customary law and communities. How the humanitarian agencies understand and interpret their roles, responsibilities, and target groups, including the IDP and refugee concepts, becomes crucial for the protection of many of those displaced. Local law and practices also play an important role. For example, Somali clan law, xeer, contains resource-utilisation rules regarding use of water and pasture, and the temporary or permanent donation of livestock and
other assets to those in need. The system is not ideal, however, particularly not for the less powerful clans. With frequent and intense conflicts and droughts these traditional systems are also in danger of being weakened or even breaking down.

Finally, structural changes and development is needed to address the cycle of disasters and emergency relief. Large parts of Africa are still first and foremost facing “economic” rather than “physical” water scarcity – that is, human, institutional, and financial capital limit access to water even though water in nature is available locally to meet human demands.


This paper primarily addresses research question 1B) *How, and to what extent, can those displaced find protection through existing law or legal reform?* It employs a theoretical and mainly doctrinal approach. It briefly presents the entire typology, and then focuses on type 1) and 2) and cross-border displacement.

My co-author and I briefly describe possible links between climate change and displacement. Through the use of the typology, we then examine current protection instruments and point out protection possibilities and gaps. In summary, we find no normative protection gaps regarding internal displacement as a result of sudden-onset natural hazard-related disasters and internal displacement as a result of conflict. Both scenarios are clearly covered by the 1998 UN Guiding Principles on Internal Displacement. The focus of the remainder of the paper is on the normative gap in cross-border displacement in the context of natural hazard-related disasters, excluding the particularities of statelessness. We explore various proposals for filling this protection gap.

First, we advise against seeking to amend the 1951 Refugee Convention. Today, there is little will to strengthen the rights of those displaced, and opening up for
renegotiations to address what is not good enough may risk destroying what little good we have. Furthermore, the concepts the treaty builds on, such as persecution, may not be relevant to all environmental displacement.

Second, we claim that the UNFCCC and a post-Kyoto climate change agreement can be crucial for the prevention of disasters and displacement and can even play a certain role in protection during displacement. For example, paragraph 14(f) of the Cancun Agreements now calls for cooperation and also ensures funding for actions related to displacement. These instruments cannot and should not be expected to provide a full solution, however. An important reason is their limitation to climate change and climate-related events and processes, excluding many natural hazard-related disasters and related displacement. Other important reasons include the poor implementation record of climate agreements and their lacking recognition of individual or community rights.

Third, we dismiss the suggestion from some scholars and advocates that we should develop a completely new instrument, such as a climate change displacement treaty. Such instruments would exclude those displaced in the context of disasters that are not climate-related. Even those who would be included might not get very strong rights with the current lacking political will to ensure rights for displaced persons. Importantly, we do not need to create a whole new treaty just because the solution for displacement cannot already be found in one single instrument. Calls for new conventions can be a distraction from really dealing with the problems effectively. A multi-track approach – seeking solutions by following several tracks – is more effective.

Fourth, there is a trend in law with more and stronger regional treaties and treaty bodies. Developing existing as well as new regional instruments is a way forward. Among instruments that have potential to increase protection for those displaced we find the 1994 Convention on Regulating Status of Refugees in Arab Countries, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the 1984 Cartagena Declaration on Refugees and the Common European Asylum System.
Fifth, the 1951 Refugee Convention remains relevant when we apply a dynamic and context-oriented interpretation, recognising for example the multi-causality of disasters and displacement. Some of those displaced are considered refugees. Sixth, a dynamic and context-oriented interpretation of human rights law could offer others some protection. In particular, the ban on inhuman treatment could protect against forced return to at least the most extreme natural hazard-related disaster situations. Seventh, we should seek to exploit and expand domestic and regional complementary protection systems. For example, the human rights ban on returning people to certain extreme situations should translate into a protection status and substantial rights. Eight, another way forward that has been suggested and has its strengths is the development of a soft-law instrument such as guiding principles on environmental displacement.

We conclude by claiming that this complex issue needs to be dealt with in several fora (UNFCCC, UNHCR, etc.) and at several levels (domestic, regional, international). A multi-track approach that includes several of the proposals is recommended.


This paper primarily addresses research question IIB) How, and to what extent, can those displaced find protection through existing law or legal reform? It employs a theoretical and mainly doctrinal approach. It focuses on type 1) and 2) of the typology, including internal and cross-border displacement.

The paper is explicitly inspired by de Sousa Santos concept of cosmopolitan legality and in particular the first of the theses: “[i]t is one thing to use a hegemonic instrument in a given political struggle. It is another thing to use it in a hegemonic fashion.” On this background, I investigate what possibilities and limitations are to be found in existing international law for the strengthening of EDP rights. I argue that we – progressive policy makers, human rights lawyers and judges, humanitarian and
development agency staff, displaced persons and the public at large – should fully exploit existing international law by applying a dynamic and context-oriented interpretation of IDP law, refugee law and human rights law, as well as develop new law and policy on domestic, regional and international levels. The paper is structured according to what I see as relevant fields or approaches to international law relating to environmental displacement, such as international law on internal displacement, statelessness, refugees and human rights. The paper draws on both scholarly debates and policy and practitioner discourses.

Many EDPs are IDPs and the 1998 Guiding Principles on Internal Displacement apply to them. They face some particular challenges such as unclear roles and responsibilities of international agencies; issues regarding evacuation, relocation and return; and the risk of being seen as migrating rather than displaced in the context of slow-onset disasters such as drought. The main challenges, which they share with other IDPs, involve a hegemonic understanding of state sovereignty, lack of state ability and will to ensure their rights. Alternative understandings of sovereignty as the responsibility to protect and ensure rights for all citizens are important in IDP advocacy and can be seen as part of subaltern cosmopolitanism. When it comes to the (lacking) will, we must also be prepared for political mobilization of international human rights and even humanitarian intervention. The lack of state ability and will means that humanitarian and development agencies are crucial; they must also understand and apply law and policy in line with cosmopolitan legality and not for example exclude EDPs from their understanding of IDPs.

The application and usefulness of statelessness law is less clear, although the discourse has meant that UNHCR can justify engagement for the island states. Building on the islanders’ own wishes and decisions, we must look beyond existing law to substantially address their plight.

The 1951 Refugee Convention is clearly a product of its time and place, drafted mainly by European men for European men. Applying a dynamic and context-oriented interpretation can be a way of successfully using this hegemonic instrument in a given political struggle. The indeterminacy of law means not only that authorities can manipulate the interpretation of law and its outcomes, but also that we can insist
on a different interpretation and result in line with subaltern cosmopolitanism. The interpretations of the refugee concept build on and go beyond those of my previous papers, and include considerations of multi-causality of movement, and the interaction of human rights violations and persecution in disaster situations.

Similarly, a dynamic and context-oriented interpretation of human rights such as the ban on inhuman treatment could result in protection against return of vulnerable people to at least the most extreme natural hazard-related disaster situations. In the *Sufi and Elmi*-case, the ECtHR discussed what should be the appropriate returnability-test. We should seek to exploit and expand domestic and regional complementary protection systems so that people who cannot be returned also get a status and substantial rights. I discuss whether it is best to continue to build on human rights such as the ban on inhuman treatment or to develop provisions that explicitly mention the environment or natural hazard-related disasters. The complexity of how the natural environment often interacts with socio-economic and political factors is an argument for a human rights-approach. Furthermore, we would avoid creating a new narrow category of protected people, excluding others in need. On the other hand, the discretion and risk of conservative interpretations and applications involved in human rights standards such as inhuman treatment is an argument for explicitly mentioning the environment or natural hazard-related disasters. This last concern could be partly remedied by authoritative guidance.

Rather than creating a new treaty, a more feasible way forward – that could draw on the possibilities and seek to remedy the limitations of existing law – is the creation of a global but pluralistic, soft-law framework on environmental displacement. Guiding principles could be used as authoritative guidance when applying IDP law, refugee law and human rights law to EDPs as well as for inspiration for the development of regional mechanisms addressing the issues of the island states and other instruments. This paper makes some contributions to what such principles could include by emphasising certain interpretations of existing law. The state-driven Nansen Initiative may help contribute to the creation of such a framework.
This paper primarily addresses research questions 1A) How is displacement in the context of climate change and natural hazard-related disasters experienced and how is it best conceptualised? and 1C) How do law and other factors interact and affect the lives of those displaced? The paper employs a case study approach, and focuses on type 2) (displacement related to drought) and, to some extent, the interaction with 3) (conflict). More specifically, the paper explores the experiences of, and legal and policy responses to, Somalis displaced to Kenya and Egypt during the 2011 drought. The two contexts give the possibility to further investigate what the normative gap in cross-border displacement can mean on the ground. Both a desk-study and a field study with interviews, discussion and observation were carried out. The following research questions were formulated for this specific study:

- How did Somalis experience the 2011 drought and movement out of Somalia? (And, indirectly, what could have been done to prevent the displacement?)
- What are their experiences of entering and being exiled in Kenya and Egypt?
- What are the responses from the government, UN and other humanitarian actors, and the civil society?
- What are the Somalis’ and other actors’ thoughts about future solutions to their displacement?

Kenya and Egypt are both parties to the 1951 Refugee Convention, its 1967 Protocol as well as the 1969 African Refugee Convention; and, registration, documentation and refugee status determination are largely carried out by UNHCR. The socio-political contexts are very different, however. There is a large Somali refugee presence in Kenya. At the time of the visits in 2012, the country had troops in Somalia and was experiencing security incidents framed as terrorist attacks in Nairobi and Dadaab. (Several of my NRC colleagues were in fact kidnapped briefly after the visit, but thankfully returned relatively unharmed.) Kenya was also planning to have elections within a year. While refugees were very much part of the political discourse in Kenya,
they were not so much the focus in post-revolutionary Cairo. The importance of the local contexts cannot be stressed enough.

All interviewees mentioned the lack of livelihood options as reasons for leaving Somalia and moving to either Kenya or Egypt. The drought had direct impacts on those involved in agricultural and pastoral livelihoods and affected others indirectly through shortage of products and higher prices. There was agreement that the armed conflict also played an important role in escalating the drought and famine: If the UN and NGOs had been given access to assist the populations in need, people would not have been forced to flee the country. The interviewees had all experienced the movement as forced displacement.

The Kenyan government recognised all people from South Central Somalia as prima facie refugees, due to the on-going generalised violence. This is similar to the finding in the case studies from 2009 (Kolmannskog, 2010). However, in 2012 some experts and NGOs feared that the massive influx of people displaced mainly due to the drought could eventually undermine the regime of granting refugee status on a group basis. In Egypt, the Somalis were subject to individual refugee status determination and had to show a clearer link to persecution or conflict. In these cases, narratives were often adjusted, and many risked not being recognised as refugees and getting formal legal protection. This was more like the situation for the Burundians interviewed in the 2009 case studies. Interestingly, in Egypt and the Arab world there is another relevant regional convention being developed. The 1994 Arab Convention on Regulating Status of Refugees in the Arab Countries article 1 explicitly recognises as refugees those who flee “because of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof.” At the time of the visit, it was merely a draft and not applicable in any country.

The Kenyan response to the Somali crises was complex and shows how a normative gap in international law may have different implications on the ground. The most pressing challenges seemed to be less related to the formal recognition of refugee status. In addition to having a closed border, Kenya stopped registering new arrivals in October 2011 referring to security concerns. In terms of effective protection and
assistance, interviewees experienced particular challenges related to shelter, security and sexual violence in the camps as well as a lack of training and livelihood opportunities. These challenges are probably similar to those of many other refugees in Dadaab and elsewhere in large camps.

Generally, Somalis are welcomed and positively regarded by Egyptians, but Egypt has made reservations against several of the social and economic rights in the refugee conventions. Asylum seekers and refugees have limited access to work, health services and education and no right to permanent residency. In addition to issues related to these rights, mental health issues were raised by several of the displaced Somalis as well as other interviewees. Several of the challenges and rights issues mentioned by the interviewees in these case studies from Kenya and Egypt overlap or are similar to those expressed in the 2009 case studies.

Very few of the interviewees had return to Somalia as their ultimate aim. For return to even be an option, peace and better livelihood opportunities were necessary. While the Kenyan government was opposed to formal integration of the refugees in Kenya, there was a de facto, gradual integration taking place for at least some Somalis. Egypt did not provide permanent residency, and here the interviewees saw no future for themselves. Several of the Somalis in both Dadaab and Cairo were hoping for resettlement, or otherwise being able to move on, to a third country or region such as Europe. While Europe has elaborate asylum legislation on paper (see Kolmannskog and Myrstad, 2009) many countries seek to hinder people from ever arriving to enjoy this formal protection. As in the cases of Kenya and Egypt, extra-legal factors contribute to determining what protection people actually get.

The paper concludes by claiming that a normative gap may have different implications on the ground; that developing new formal legislation such as the Arab Convention is important, but we must recognise that extra-legal factors interact with law and play an important role in whether people have effective rights or not.
This book chapter touches all three research questions: 1A) How is displacement in the context of climate change and natural hazard-related disasters experienced and how is it best conceptualised? 1B) How, and to what extent, can those displaced find protection through existing law or legal reform? and 1C) How do law and other factors interact and affect the lives of those displaced? The chapter focuses on internal displacement and type 1) (tsunami and hurricane) and 4) (evacuations) in the typology. It has theoretical parts as well as a more empirical case study approach that draws on written material such as media reports, UN reports and existing research. The cases explored are the 26 December 2004 tsunami and Hurricane Katrina in August 2005. The main research question in this chapter can be formulated as follows: What are the rights of, and some of the actual experiences of, internally displaced persons in the context of climate change and natural hazard-related disasters in general, and the 26 December 2004 tsunami and Hurricane Katrina in August 2005 in particular? In order to address this question, a subset of questions are raised and addressed:

- What major issues arose in the context of the 26 December 2004 tsunami and Hurricane Katrina in August 2005, and how were they framed as human rights issues?
- What are some of the recent international developments in law and policy?
- How can rights be further promoted?

The chapter begins by presenting the 1998 Guiding Principles on Internal Displacement. While the Guiding Principles apply to internal displacement in the context of climate change and natural hazard-related disasters, many states, UN agencies, NGOs and academics have continued to neglect or actively discriminate against persons displaced by disasters. Some crucial challenges are discussed. The chapter then moves on to the two case studies and explores what major issues arose in
the context of the tsunami and Katrina and how they were framed as human rights issues.

Non-discrimination is a paramount principle in human rights and was relevant in both disasters. For example, in connection with Katrina, rescue and evacuation plans were based on the assumption that people would use their private vehicles, indirectly discriminating against poor Afro-American communities who did not own private cars. In Sri Lanka, “buffer zones” were established along the coast in a discriminatory manner allowing construction of tourism facilities while local residents, particularly the poor and Tamils, were not allowed to return and reconstruct their homes.

Participation is another key element in dignity, human rights and contemporary international law in general. A common post-tsunami complaint was that IDPs were not consulted on decisions that affected them, including evacuations and issues of return, resettlement and reconstruction. There was a similar situation with survivors of Hurricane Katrina.

On the basis of freedom of movement, Guiding Principle 28 spells out three durable solutions, including choosing to return home. This was yet another rights issue that arose. For conflict displaced persons, returning to the place of origin remains a (future) option, but in some disaster situations people simply cannot return. For example, during the tsunami some villages became part of the sea. As in the case of initial evacuation or relocation, it can only be for the safety and health of those affected that a state prohibits return to an area. According to the Guiding Principles, IDPs should also be protected against forcible return or resettlement to places where their life, safety, liberty or health would be at risk.

Although the contexts were very different, this chapter shows how major human rights principles such as non-discrimination and participation were seen as relevant in a western, developed country and developing, Asian countries.

The chapter then highlights some domestic as well as international developments after the disasters. In the aftermath of the tsunami there was increased international
recognition of the importance of a human rights approach in dealing with those affected by disasters, as illustrated through for example the development of the IASC Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster. A transformation may be that we start seeing disasters not merely as natural, but rather see how human rights (violations) play a role in vulnerability and that human rights can be a framework for addressing displacement as well as disaster risk reduction, response, and recovery more generally.

The chapter concludes with a short consideration of how rights can be further promoted by turning the attention to humanisation. While we may recognise that all humans should have certain rights, we often dehumanise some people so much that they are no longer fully seen as humans that can claim such rights. This happened before, during and after the two disasters. One way of addressing this dehumanisation is through insisting on a human rights approach and storytelling and the internationalisation of the issues.

5.8 Final remarks and ways forward

The goal of this thesis has been to contribute to securing effective rights for persons displaced in the context of climate change and natural hazard-related disasters. Theories relating to cosmopolitan legality, living law and legal pluralism were useful for this political and socio-legal project. In order to address the goal, I explored both the lives and rights of those displaced through empirical case studies and a doctrinal approach to law. I have exposed the space for personal and political considerations in the doctrinal approach – and employed a dynamic and context-oriented interpretation of law in order to exploit protection possibilities in existing law and suggest legal reform. The doctrinal papers were also informed by findings in the case studies. As in action research, the goal has not been primarily theory-testing or building but rather to improve practical and political action. While more research is always needed, action on these issues cannot wait. Action and research should be undertaken jointly. The research ideally feeds back into action, from which we again can produce research.

Climate change raises particular issues of responsibility, funding and cooperation.
There is now an important reference in the Cancun Agreement, which will hopefully ensure funding so states will be able to protect displaced populations, as well as foster regional and international cooperation (Kolmannskog and Trebbi, 2010; Kolmannskog, 2012a). More research is needed to suggest how to operationalise this reference as well as investigate how it is eventually applied and works in practice. While it may be justified to focus on climate change and climate-related displacement in certain contexts, such as in UNFCCC, in general I have chosen to address all displacement related to natural hazard-related disasters since the effects and needs are often similar.

Theoretical analysis has shown that many displaced persons are IDPs and the Guiding Principles on Internal Displacement apply to them (Kolmannskog and Trebbi, 2010; Kolmannskog 2012a; Kolmannskog, in press). Empirical case studies confirm that the Guiding Principles are applied and seen as relevant (Kolmannskog, 2010; Kolmannskog, in press). Typical rights violations have to do with discrimination, lacking participation, evacuation and lack of durable solutions. All IDPs, regardless of the reasons for displacement, regularly struggle with lack of state will and/or ability to secure their rights. This calls for international cooperation and support as well as political pressure.

When we apply a dynamic and context-oriented interpretation, the 1951 Refugee Convention and regional refugee instruments remain relevant for some of those who are cross-border displaced (Kolmannskog and Trebbi, 2010; Kolmannskog, 2012a). An appreciation of the contextual vulnerability in disasters and multi-causality of displacement can inform this interpretation. For example, case studies show that people fleeing from Somalia to Kenya were considered refugees as drought and conflict interacted (Kolmannskog, 2010; Kolmannskog, 2012b). It is likely that extra-legal factors also influenced such application of the law. People displaced elsewhere, for example to Egypt, creatively adapted their narratives to make the facts fit with the law (Kolmannskog, 2010; Kolmannskog, 2012b). As with other asylum seekers in general, we can expect that a major challenge for those displaced is credibility; does the decision-maker believe their story or not? Referring to lacking credibility may also function as a legitimate ground for rejecting asylum claims while the underlying reasons are in fact quite different (for example political pressure to limit the total
number of people allowed in). Furthermore, while people may find some protection through formal refugee recognition and status, case studies show that they continue to face challenges that are similar to those faced by other refugees, IDPs and displaced persons relating to *inter alia* shelter, training and livelihood, food security, health, safety and sexual violence, work, and freedom of movement (Kolmannskog, 2010; Kolmannskog, 2012b).

Even with a dynamic and context-oriented interpretation many people fall outside the refugee regime. Some of these people may find protection through human rights law (Kolmannskog and Myrstad, 2009; Kolmannskog and Trebbi, 2010; Kolmannskog, 2012a). A dynamic and context-oriented interpretation of human rights law calls for protection against forced return of persons to the most extreme natural hazard-related disaster situations. We find support for this in case law. Displacement in the context of drought was considered in both empirical and theoretical papers (Kolmannskog, 2010; Kolmannskog and Trebbi, 2010; Kolmannskog, 2012a; Kolmannskog 2012b). As illustrated in the *Sufi and Elmi*-decision, drought – in combination with other factors such as conflict – may become so acute that the people cannot be forcibly returned (Kolmannskog, 2012a). This returnability test enables us to speak of displacement in a slow-onset context and establish when protection is warranted. This does not protect those who move pre-emptively until the drought becomes acute, however. The facilitation of other forms of legal migration may be part of the solution to address their needs and give people the option to move now rather than being forcibly displaced later. More work is needed to explore such options. Furthermore, we should seek to exploit and expand human rights-based complementary protection systems so that people who cannot be returned also get a protection status and substantial rights.

There is potential in developing existing domestic and regional human rights and refugee instruments, including the European Common Asylum System, the African refugee convention and the Arab refugee convention (Kolmannskog and Myrstad, 2009; Kolmannskog, 2010; Kolmannskog and Trebbi, 2010; Kolmannskog, 2012a; Kolmannskog, 2012b). There may also be a need to develop new instruments at the regional level (Kolmannskog and Trebbi, 2010; Kolmannskog, 2012a). Not only is there more political will to address issues on the domestic and regional levels, but it
may also be more appropriate since many climate change effects and natural hazard-related disasters will vary across the globe with local context and vulnerability, and cultural and socio-political differences can be better accommodated at this level. The case studies show that there are no one-size-fits-all solutions, and that we should carefully consider local contextual factors when developing new law (Kolmannskog, 2010; Kolmannskog, 2012b; Kolmannskog, in press). More case studies are therefore needed to explore different contexts.

The case studies in the thesis also show that state law in some circumstances – for example during large-scale conflict or in a post-conflict phase – has little impact while the international and local levels may be crucial (Kolmannskog, 2010; Kolmannskog, 2012b). This relates to theories about living law and legal pluralism. It is of great importance that the international agencies have an inclusive approach to those displaced, not excluding those displaced in the context of natural hazard-related disasters, and that their roles and responsibilities are clarified while retaining flexibility. While lacking state will or ability to protect calls for international humanitarian action, it is also important to be aware of the complex relationship that this may entail. Humanitarian non-state actors may debilitate the state and even render it incompetent and unwilling to protect, or undermine the ability of affected persons to effectively demand their rights from the state (Derman, Herman and Sandvik, 2013). In the case of cross-border displacement, the case studies show how the local and international levels and actors interact and sometimes belong to the same agency, such as UNHCR (Kolmannskog, 2010; Kolmannskog, 2012b). The case studies further show that local systems and customary law may play an important role in the protection of rights (Kolmannskog, 2010). More research on how the Guiding Principles on Internal Displacement and other formal normative instruments on the one hand, and local systems and customary law on the other hand, interact in the context of climate change and disasters and how formal law can build on this relationship could be useful.

A way forward that could draw on possibilities and seek to remedy limitations of existing law, is the creation of a global but pluralistic, soft-law framework on environmental displacement (Kolmannskog and Trebbi, 2010; Kolmannskog, 2012a). The Nansen Initiative could help contribute to building consensus on some important
principles. Guiding principles could be used as authoritative guidance when applying IDP law, refugee law and human rights law in the context of natural hazard-related disasters as well as for inspiration for the development of domestic and regional instruments and mechanisms. Hopefully, this thesis has made some contributions to what such principles could include by emphasising certain interpretations of existing law, highlighting protection challenges and responses, and the interaction of law and other factors. Research – including research on how the Nansen Initiative is working and its challenges – could help contribute to making the initiative and its outcome more effective.

While developing new law and normative instruments is important, there are several factors that interact with these and may be crucial in determining whether rights become effective on the ground or not (Kolmannskog, 2010; Kolmannskog and Trebbi, 2010; Kolmannskog, 2012a; Kolmannskog, 2012b; Kolmannskog, in press). Law and normative instruments may have merely a symbolic function rather than effectively addressing suffering on the ground. With one hand open and stretched out, Europe keeps its self-image as a humanitarian and outward-oriented project; with the other hand stopping people or even clenched into a fist that beats people down, Europe is not so humanitarian and outward-oriented in effect. And, the increasing inhospitality is not confined to Europe. In Kenya, people from South Central Somalia are formally recognised as refugees but the border is closed and effective rights are lacking. Access may become even harder if the potential numbers of legitimate asylum seekers increase. And, as already mentioned, IDPs suffer in their own states. The case studies show that social, economic, cultural, political and other factors in different contexts influence the interpretation and application of law (Kolmannskog, 2010; Kolmannskog, 2012b; Kolmannskog, in press). I have also highlighted the importance of humanisation in general; displaced persons must be seen as human to have human rights and other rights (Kolmannskog, in press). We need a strategic use of law, a sensitisation and mobilisation that is responsive to local contexts, and to address a series of extra-legal factors to secure effective rights for persons who are displaced.
Three friends in a village, Somaliland, 2009.
7. References


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8. Annexes: Thesis papers


