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Where to Live When My State is Submerged Under Water?
A Study of the International Legal Protection for Climate Refugees

Hanna Svantesson

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Examiner: Erika Lunell
Supervisor: Maria Sjöholm

Abstract

With an increasing amount of persons migrating because of the adverse impacts following climate change, the examination of these persons' international legal protection is a necessity. Climate refugees' status as refugees is debatable and as of today not acknowledged by international conventions. This is partly because of the difficulty of defining this group as migrating because of reasons attributable to climate change.

One example of the current climate change induced migration is the recently increased occurrence of persons applying for citizenship in neighbouring States of submerging small Island States in the Pacific Ocean. Following the non-recognition of climate refugees in international conventions, these persons have a slim chance to enjoy refugee protection in other States.

The study examines the area of international refugee law in order to identify whether climate refugees are offered any protection. It furthermore looks into international environmental law as well as international human rights law in the search for possible subsidiary protection. A legal gap is identified, which motivates a shorter presentation of possible future solutions in order to bridge it. The study finds that the current legislation is neither satisfying nor sufficient, entailing the need for the adaptation or supplementation of the international legal protection for climate refugees.

List of Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
UDHR	Universal Declaration on Human Rights
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

Table of Contents

1. Introduction.....	1
1.1 Background	1
1.2 Purpose and Research Questions	2
1.3 Delimitations	2
1.4 Materials and Method	3
1.5 Outline.....	6
2. The Nexus of Migration and Climate Change.....	7
2.1 Introduction.....	7
2.2 What is Climate Change?.....	8
2.3 What is a Climate Refugee?.....	9
3. Climate Refugees in International Refugee Law	11
3.1 Introduction.....	11
3.2 Refugee Status and Protection	11
3.3 The Principle of Non-Refoulement.....	17
3.4 The Pacific Ocean Island States Cases	18
3.4.1 <i>AF (Kiribati)</i>	18
3.4.2 <i>AD (Tuvalu)</i>	21
3.5 Summary	22
4. Climate Refugees in International Environmental Law	25
4.1 Introduction.....	25
4.2 The No-Harm Principle.....	25
4.3 The Aim to Reduce Greenhouse Gas Emissions	25
4.4 Summary	26
5. Climate Refugees in International Human Rights Law	28
5.1 Introduction.....	28
5.2 The Right to Life.....	28
5.3 The Right to Privacy	30
5.4 The Prohibition of Torture	31
5.5 The Right to a Clean Environment	32
5.6 Summary	32
6. The <i>de lege ferenda</i> Discussion.....	34
6.1 Introduction.....	34
6.2 The Difficulty of Defining Climate Refugees	34
6.3 The Future Codification Options	35
6.4 Supplementing Protection from Other Instruments	36

7. Summarizing Analysis and Conclusion	38
7.1 Summarizing Analysis	38
7.2 Conclusion	40
8. Bibliography	42

1. Introduction

1.1 Background

Human migration always has occurred, and always will occur. It implies the process of human mobility, where migrants are persons who leave their State of origin to remain, temporarily or permanently, in another State.¹ Historically, the world has seen a number of different reasons causing persons to migrate, *inter alia* labour-oriented, fleeing war or conflict, lack of economic opportunity, because of family, political reasons, food shortage, or simply in hope of a better standard of life in a new State.

With the increasing adverse consequences of climate change, the amount of persons migrating because of these is rapidly growing. A number of estimated climate refugees² well referred to, is one by the UN related International Organization for Migration (IOM). In 2014, it predicted the existence of somewhere between 25 million and one billion climate refugees by the year of 2050.³ Moreover, it is widely recognized that ‘...human mobility, in both its forced and voluntary forms, is increasingly impacted by environmental and climatic factors’.⁴ Sea level rise, natural disasters, earthquakes, flooding and drought are examples of climate change consequences entailing sudden or gradual, temporary or permanent migration. As of today, the international legal protection of these climate refugees is not entirely satisfying. While international conventions provide protection for a list of different types of migrants, the ones identified as climate refugees, as of today, fall between two stools.

As a graphically illustrative example of climate change induced migration, the submerging of small Island States in the Pacific Ocean is used throughout the study. In international law, a ‘State’ is defined after the criteria of a permanent population, a defined territory, a government as well as the capacity to enter into relations with other States.⁵ Following sea level rise and ultimately the complete disappearance of an Island State, the criteria of a defined territory will no longer be met, entailing the non-existence of the State. Within international law, this way of State extinction has never before been dealt with.⁶ The question arises of the upcoming situation for these persons, and their potentially acknowledged status and protection as refugees.

¹ Dieter Kugelmann, ‘Migration’ (2009) in *Max Planck Encyclopedia of Public International Law (MPEPIL)*. (online edn) paras 3–4 accessed 4 June 2019.

² The term ‘climate refugee’ is used throughout the study, see why under section 2.3.

³ International Organization for Migration (IOM), *Outlook on Migration, Environment and Climate Change* (2014) 38.

⁴ *Ibid* ix.

⁵ Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention) Article 1.

⁶ Jane McAdam, *Climate Change Displacement and International Law*, (2010) Side Event to the High Commissioner’s Dialogue on Protection Challenges, 8 December 2010, Palais des Nations, Geneva 6.

Although migration may occur within a State, whereas national or municipal law is applicable, cross-boarder migration is subject to international law. However, people may not migrate when and to where they wish. National immigration legislation constitute the obstacle of free movement, and in order to be granted refugee status, one has to be recognized as a refugee according to the 1951 Convention relating to the Status of the Refugee (1951 Refugee Convention)⁷.

The complexity of the nexus, and mainly the causality between climate change effects and migration, is difficult to grasp. In order to define climate refugees, one has to *inter alia* distinguish and identify the migration as climate change induced, and separate this from other factors causing the migration. This is not often an easy task, since the choice or non-choice to migrate often has more than one factor. With many voices raising concerns about the current situation and the future challenges, the world awaits a suitable solution to define and protect climate refugees. As climate change with its consequences constitutes a novel cause for migration, the current international legal protection for refugees might hence be in need of adaptation or supplementation.

1.2 Purpose and Research Questions

The study aims to determine the international legal protection for climate refugees by examining primarily the field of international refugee law, and subsequently international environmental law and international human rights law. The study seeks to identify the core obstacles and challenges in providing climate refugees their suitable status and protection. As deficiencies in the existing protection are found, the study furthermore aims to present solutions to the gaps in order to address the subject as a whole. In order to fulfil the purposes, the study aims to answer the following research questions:

Do climate refugees enjoy protection under international refugee law? If not, may supplemented protection be found under international environmental law or international human rights law?

1.3 Delimitations

The study is limited to examining the international legal protection for persons migrating because of climate change consequences and no other forms of migration will be considered.

Because of the complexity in defining to what extent climate change is due to human actions, and given that this definition is not truly of relevance to this study, the study chooses not to distinguish between human-made and natural climate change. Meaning to say that all forms of changes within the climate with the possible consequence of migration is being considered.

⁷ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention).

A large number of people fleeing consequences of climate change choose to move within their own States, as a primary solution. However, since the study examines international law, it thereby solely looks into cross-boarder migration, and will thus not attend to the occurrences of internal movement.

In the presentation of the *de lege ferenda* discussion, three main issues are tabled. These are chosen because of their frequent figuration among scholars and experts. There are a number of additional aspects to be considered within the debate, however these are in the study limited to the most fundamental ones.

1.4 Materials and Method

As for materials of international law, the sources recognized in the Statute of the International Court of Justice (ICJ Statute)⁸ are considered. Its Article 38(1) lists international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations, and; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of law, as the sources of international law.

A convention is a type of treaty, which in Article 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT)⁹ is defined as an, in written form concluded and by international law governed, international agreement between States. As for interpretation of treaties, Article 31(1) of the VCLT holds that these ‘...shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Furthermore, the principle of *pacta sunt servanda* is essential in terms of treaties, constituting the basis for the binding nature of these.¹⁰ As for the selection of treaties, the study includes the ones that address the status of, the occurrence of, or in some other way acknowledges climate refugees and their position. While focusing mainly on international conventions, the study additionally looks into regional treaties in order to undertake a thorough examination of the climate refugee protection. Considering the large amount of existing international human rights treaties, a selection of these have been made on the basis of relevance in terms of human rights linked to the protection of climate refugees.

International custom, with its pre-supposing of an established practice as well as the psychological element *opinio juris*, is binding on all States, with the exception of the occurrence of a special or local custom. A rule, which has been adopted in a treaty, is binding on the State Parties of that treaty. However, if the rule is applied in the practice of non-State

⁸ Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) USTS 993 (ICJ Statute).

⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

¹⁰ Hugh Thirlway, ‘The Sources of International Law’ in Malcolm D Evans (ed), *International Law*, 4th edn (OUP 2014) 95.

Parties, it may take on the character of a customary rule.¹¹ Hence, the repetitive acts of States play an important role in possibly creating international custom. In terms of the protection of climate refugees, a regional practice may amount to the acknowledgement of their status as refugees, possibly entailing a legally valid local custom. The, relevant to the subject and later presented, principle of non-refoulement is recognized as international custom¹², entailing its universally binding legality.

The general principles of law may be invoked in the case of a non-satisfying application of rules from a treaty or from international custom.¹³ However, it is by scholars held that this particular source of law has a less practical significance in determining the rights and obligations of States.¹⁴ As for general principles of law, the study presents the relevant principles of non-refoulement, of no-harm and of common but differentiated responsibility.

Under Article 38(1) *in fine*, the ICJ Statute recognizes subsidiary means for the determination of international law, namely judicial decisions and the teachings of the most highly qualified publicists of the various nations. The study hence includes the examination of certain national case law. In order to portrait the existing situation for climate refugees, national cases from the New Zealand Immigration and Protection Tribunal serve as tangible examples. As there are a number of similar cases from the same Tribunal within just a few years, the ones presented in the study are selected because of their descriptive and thoroughly examining nature. Although these cases are on a national level, the rulings from national Courts and Tribunals are noteworthy from an international viewpoint as well, given their possible impact on customary international law. Furthermore, cases from, mainly, the European Court of Human Rights (ECtHR) are tabled in order to present the Court's interpretation of relevant human rights. In terms of the discussion regarding the definition of climate refugees, the interpretation of certain prerequisites as well as the *de lege ferenda* debate, views and opinions by well-known and respected authors and scholars are presented.

Furthermore, and as left out of Article 38(1) of the ICJ Statute, the study examines various international as well as regional soft law instruments. These are legally non-binding, however possibly filling the role of reflecting a consensus and a will among the Signatory Parties, or as constituting a first step in a process eventually leading to conclusion of a multilateral treaty.¹⁵ Numerous soft law instruments are presented in the study, although with the awareness of their legally non-binding nature.

The sources of international law listed in Article 38(1) of the ICJ Statute have been criticized of being inadequate, out of date, or ill-adapted to the modern view of international law.

¹¹ Ibid 91 and 93.

¹² United Nations High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007) para 15.

¹³ Thirlway (n 10) 91.

¹⁴ Ibid 105.

¹⁵ Alan Boyle, 'Soft Law in International Law-Making' in Malcolm D Evans (ed), *International Law*, 4th edn (OUP 2014) 118–19.

Suggestions have been made that additional sources should be included in the list.¹⁶ However, the enumeration of the sources in the Article stands firm, and the study hence recognizes and accepts the listed sources as the applicable ones.

As for the hierarchy of the international law sources, scholars claim that in practice, the two most important sources are treaties and international custom. The intention of the general principles of law was that these should provide a fall back source of law, in the case of the non-application of a treaty or a customary rule. Furthermore, the two principles of *lex specialis derogat generali* and *lex posterior derogat priori* are tools in the event of choosing between, in one situation, two applicable rules. The principles imply that the special rule overrides the general rule, and that the later rule overrides the earlier rule.¹⁷

Since the study includes one descriptive *de lege lata* section as well as one section presenting a *de lege ferenda* discussion, two different methods are mainly applied. Chapters 3–5, constituting the *de lege lata* presentation, follow the legal dogmatic method, in which a limited number of sources, namely the law, *travaux préparatoires*, court practice and literature of jurisprudence, are examined in order to identify the applicable law.¹⁸ The sources differ slightly from the ones acknowledged within international law, e.g. the usage of *travaux préparatoires*, which do not constitute a heavy source within international law.

The task of the legal dogmatic method is to fix or define the current applicable law. It includes the systematization of the applicable law, meaning the identifying of *inter alia* correlations, similarities and principles. The aim of the method is, for two users of it, to find the very same answer to a legal problem. This is accomplished by the use of the same sources, which within the legal dogmatic method are already determined and there is thus no need to question their validity. According to Sandgren, since soft law documents are consulted, the study also partially follows the legal analytic method. This method is not as bound to a limited selection of sources, and thereby allows for a wider range of sources. Hence, this method is to be seen as more free and open-minded.¹⁹

Chapter 6 of the study presents a *de lege ferenda* discussion of the international legal protection for climate refugees. The method used in this section is by Sandgren called the legal political method, which is important to clearly distinguish from the other two. Argumentation according to the legal political method is based on the belief that the law within an area is deficient, and thereby aims to help analyse and suggest the possible change and improvement of it. Hence, the argumentation is usually not completely free from subjectivity and might include the non-legal presentation of opinions, which according to the legal dogmatic method would be defined as non-scientific.²⁰ Chapter 6 of the study presents

¹⁶ Thirlway (n 10) 95.

¹⁷ Ibid 93 and 109.

¹⁸ Claes Sandgren, *Rättsvetenskap för uppsatsförfattare: Ämne, material, metod och argumentation*, 3rd edn (Norstedts Juridik 2015) 43; Jan Kleineman, 'Rättsdogmatisk metod' in Fredric Korling & Mauro Zamboni (eds), *Juridisk metodlära* (Studentlitteratur AB 2013) 28.

¹⁹ Sandgren (n 18) 43–7.

²⁰ Ibid 47–8.

argumentation by scholars and experts, and thus follows the legal political method in order to table possible future developments and solutions. This is presented with the awareness of its step outside the legal dogmatic method, but found necessary in order to illustrate suggestions provided to fulfil the legal gap in the protection of climate refugees.

1.5 Outline

The study consists of seven chapters. It follows the structure of initially clarifying the essential terms and concepts relevant to the subject, tabling a *de lege lata* examination of the applicable areas of law, presenting a *de lege ferenda* discussion on solutions to the existing challenges, which all are tied together in the final summarizing analysis and conclusion.

Chapter 2 of the study presents an overview of the nexus between migration and climate change. It also distinguishes between the areas of international refugee law, international environmental law and international human rights law, and clarifies the different subjects of the areas. The chapter explains the terms ‘climate change’ and ‘climate refugees’ in order to provide the reader with the terminological tools needed. It furthermore presents a short overview of the situation in the most affected areas in the world, in terms of climate change and its consequences with migration flows. The purpose of the chapter is to give an introduction to the subject, in order to present the following *de lege lata* examination.

Chapters 3–5 present a *de lege lata* examination of the, in regard to the international legal protection of climate refugees, three relevant areas of international law, namely international refugee law, international environmental law and international human rights law. With the tools of *inter alia* international as well as regional conventions and other instruments, case law and views from scholars, the aim of the chapters is to thoroughly examine the international legal protection of climate refugees.

Chapter 6 tables a doctrinal debate with *de lege ferenda* suggestions and solutions. The opinions highlighted are those of frequently occurring scholars and experts within the field. Since the consensus is that a legal gap in the protection for climate refugees exists, the study would not be complete without a future looking section mirroring the possible ways of combating this gap.

Chapter 7 consists of an overall summary with an analysis of what has been found in the study. This is where the main part of analysis is presented, although chapters 3–5 do include shorter sections of summaries in order to provide the reader with shorter abstracts along the way.

2. The Nexus of Migration and Climate Change

2.1 Introduction

The link between migration and climate change is complex and multifaceted. In terms of the protection of climate refugees, the international law areas of refugee law, environmental law as well as human rights law all overlap. The climate refugee requests the status and protection offered by various refugee instruments, claiming climate change impacts as the reason for its need to migrate. Furthermore, rights within international environmental law and international human rights law, such as the right to a clean environment and the right to life, are invoked to support their claims.

It is although important to attempt to keep the areas separated, e.g. in terms of their subjects and objects, which do differ. Refugee law, environmental law and human rights law are all pieces of the international public law puzzle. The system of international law was and is designed to make inter-State coexistence as easy as possible, and with the function to provide the means to reduce international friction and to avoid conflict.²¹ This makes the State the original subject of international law.²² After the Second World War, however, the focus was slightly shifted to the individual and her rights.

The amount of international and regional legal framework regulating migration is sizeable, and in order to enjoy protection under international refugee law, one has to be acknowledged as a refugee. As will be presented, there are several different definitions of a refugee, however the 1951 Refugee Convention requires an individual to be the subject of persecution and thus of the protection provided in the Convention. Similarly, the various regional refugee instruments also hold the individual in the centre in terms of offering protection. An exception is, however, certain European Union (EU) regulations²³, which offer protection only in the case of mass influx, and hence not to the individual *per se*.

The area of international environmental law is constructed with the environment as the subject. The international environmental law instruments²⁴ hold that the purposes of these are to protect and preserve the environment, and this by *inter alia*, however mainly, the reducing of greenhouse gas emissions. The individual might although be seen as the indirect subject of international environmental law, since the purpose of reducing greenhouse gas emissions is based on the aim to uphold the well-being of our planet, which constitutes the sole home of the individual.

²¹ Nigel Rodley, 'International Human Rights Law' in Malcolm D Evans (ed), *International Law*, 4th edn (OUP 2014) 785.

²² Thilo Marauhn, 'Changing Role of the State' in Daniel Bodansky, Jutta Brunnée & Ellen Hay (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 728.

²³ See section 3.2 of the study.

²⁴ See section 4.3 of the study.

Moreover, certain rights under international human rights law are requested in terms of a subsidiary protection, regarding the rights and protection of climate refugees. In this area of law, it is clear that the individual is the subject and the bearer of the rights included. As stated in the very first paragraph of the Preamble of the International Covenant on Civil and Political Rights (ICCPR)²⁵, the State Parties recognize the inherent dignity and the equal and inalienable rights of all members of the human family. The amount of human rights instruments is rapidly increasing, reflecting a collective attention on the individual and her rights.

2.2 What is Climate Change?

The United Nations Framework Convention on Climate Change (UNFCCC)²⁶ defines ‘climate change’ as meaning ‘...a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods’.²⁷ As defined in the Cancun Agreements²⁸, climate change impacts may include ‘...sea level rise, increasing temperatures, ocean acidification, glacial retreat and related impacts, salinization, land and forest degradation, loss of biodiversity and desertification’.²⁹ Furthermore, climate change impacts may include sudden onset events, such as hurricanes. These two types of climate change consequences may lead to migration; both permanent or temporary, as well as voluntary or forced.³⁰

Some areas are particularly vulnerable to climate change entailing migration flows. To mention a few, South and East Asia are sensitive to sea level rise having severe effects on their large populations living in low-lying areas, the Nile Delta and the west coast of Africa are facing changed patterns of rainfall causing serious impacts for food insecurity, and small Islands States, *inter alia* the Bahamas, Kiribati, the Maldives and the Marshall Islands, are particularly vulnerable to sea level rise entailing the future impossibility of continued inhabitation.³¹ One example of the latter is the recent occurrences of Kiribati and Tuvalu citizens seeking refuge in New Zealand due to sea level rise.³²

As for future risks and challenges in terms of climate change, the Intergovernmental Panel on Climate Change (IPCC) identifies *inter alia* the risk of death, injury, ill-health and disrupted

²⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

²⁶ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

²⁷ Ibid Article 1 para 2.

²⁸ United Nations Framework Convention on Climate Change (UNFCCC), Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UN Doc. UNFCCC/CP/2010/7/Add.1, 15 March 2011 (Cancun Agreements).

²⁹ Ibid para 25.

³⁰ Daniel Bodansky, Jutta Brunnée & Lavanya Rajamani, *International Climate Change Law* (OUP 2017) 314.

³¹ International Organization for Migration (IOM), *Migration and Climate Change* (2008) No. 31 IOM Migration Research Series 31.

³² See section 3.4 of the study.

livelihoods in low-lying small Island States, the risk of severe ill-health and disrupted livelihoods for large urban populations due to inland flooding, the risk of mortality during periods of extreme heat, the risk of food insecurity linked to warming, drought or flooding, and the risk of insufficient access to drinking water. These risks will most definitely contribute to an increase of climate change induced migration.³³

2.3 What is a Climate Refugee?

Initially, a distinction between the terms ‘migrant’ and ‘refugee’ is in order. According to the United Nations High Commissioner for Refugees (UNHCR), a ‘migrant’ is a person who chooses to move for reasons such as improving their lives by finding work, education, family reunion or such. Migrants may safely return to their home State, unlike refugees.³⁴ IOM holds that the word migrant constitutes an umbrella term, with no clear definition under international law, however reflecting the ‘...understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons’.³⁵

The broader definition of the term ‘refugee’ includes someone in flight for reasons such as from oppression, threat to life or liberty, prosecution, deprivation, poverty, war or from natural disasters, earthquake, flood, drought or famine.³⁶ UNHCR holds that refugees are people for whom denial of asylum may entail deadly consequences.³⁷ The definition of a refugee in the 1951 Refugee Convention is, however, not as wide, as it demands the refugee to have well-founded fear of being persecuted for one of five reasons.³⁸ There is a thin line between voluntary and forced movement, as many migratory flows are not easy to categorise as one or the other. Migration from environmental disasters has been defined as involuntary movement, while migration occurring from the gradual deterioration of the environment falls more towards the voluntary end.³⁹

One of the first times the term ‘environmental refugee’ was used, is the frequently referred to definition stated by UN Environment Programme researcher Essam El-Hinnawi in 1985. He held that:

Environmental refugees are defined as those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked

³³ Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects*, Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (CUP 2014) 13.

³⁴ United Nations High Commissioner for Refugees (UNHCR), *UNHCR viewpoint: ‘Refugee’ or ‘migrant’ – Which is right?* (2016).

³⁵ International Organization for Migration (IOM), *Glossary on Migration* (2019) No. 34 International Migration Law 130.

³⁶ Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd edn (OUP 2007) 15.

³⁷ UNHCR Viewpoint (n 34).

³⁸ See the full definition under section 3.2 of the study.

³⁹ Diane C. Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’ (2002) 23(5) *Population and Environment* 465, 467–68.

environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life. By ‘environmental disruption’ in this definition is meant any physical, chemical and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life.⁴⁰

Bates defines climate refugees as ‘people who migrate from their usual residence due to changes in their ambient non-human environment’. This definition includes the parts of climate change and it causing migration, although perhaps not providing further precision to the term. Furthermore, Bates identifies three categories of disruptions, namely environmental refugees due to disasters, expropriation of environment and deterioration of environment. She holds that the category of environmental refugees due to disasters consists of short-term refugees migrating from acute disasters in a geographically limited area. The disasters may be natural, such as hurricanes, floods, tornadoes or earthquakes, or anthropogenic disasters, such as the release of radioactive clouds. The second category, environmental refugees due to expropriation of environment, involves the permanent displacement of people whose home is appropriated for land use entailing the impossibility of their continued residence. Bates gives the example of the displacement of indigenous people as modern land use expands into their territories. As for the third category, environmental refugees due to deterioration of environment, the migration is non-planned and caused by gradual deterioration such as contamination from industrial pollution causing the non-suitability for human habitation. Also, the increasing degradation of the atmosphere by additional carbon dioxide may cause the rising of sea levels entailing this type of migration. People from deteriorating environments share the universal lack of recognition as refugees. Unlike the two previous categories, these refugees have a larger scope to determine how to respond to environmental change, given its gradual and slow-onset nature.⁴¹

In sum, the difference between the terms ‘migrant’ and ‘refugee’ lies in the possibility of choosing to return to the home State. The migrant has the possibility to safely return, whereas the refugee does not. Although climate refugees are not acknowledged as a type of refugee in the 1951 Refugee Convention, leaving one’s home State due to an environmental disaster is not compatible with the voluntary option of safely returning as long as the situation is ongoing, making the use of the term ‘refugee’ most suitable in this regard. Thus, the term ‘refugee’, and not ‘migrant’, is used throughout the study.

⁴⁰ Essam El-Hinnawi, *Environmental Refugees* (1985) Nairobi, Kenya: United Nations Environmental Programme 4.

⁴¹ Bates (n 39) 468–74.

3. Climate Refugees in International Refugee Law

3.1 Introduction

International refugee law derives from a number of international and regional treaties as well as general principles of law. The legal protection of refugees dates back to the establishment of the 1933 Convention Relating to the International Status of Refugees (1933 Refugee Convention)⁴², constituting the predecessor to the later 1951 Refugee Convention. The 1951 Refugee Convention has inspired later and equivalent regional instruments, which all together provide the international legal protection for refugees. Cross-boarder refugee movement furthermore initiate the application of the principle of non-refoulement, holding the prohibition for States to send back refugees to their State of origin.

3.2 Refugee Status and Protection

According to international law, the refugee has the right to the protection called asylum. The right to seek and enjoy asylum is stated in Article 14(1) of the Universal Declaration of Human Rights (UDHR)⁴³, which stipulates the right for everyone to seek and to enjoy in other countries asylum from persecution. The UDHR, developed post the Second World War, is a non-binding instrument and does not carry any legal force of its own.⁴⁴ Thus, it does not constitute a treaty, and thereby is to be considered soft law.⁴⁵ The interpretation as well as the legal status of the Article in contemporary international law has been subject to discussion. The Article entails a human right to *de facto* asylum by a right to seek and to get temporary human rights protection against persecution in other States. Although, it does not provide a right to be granted formalized *de jure* asylum or permanent residence, as the receiving State is not forced to grant asylum to every applicant.⁴⁶

The 1951 Refugee Convention might *prima facie* seem to be the most plausible international instrument providing protection for climate refugees. The Convention was the first human rights treaty adopted by the UN after the Second World War⁴⁷, and it ‘...accords the status of a refugee to a person who has lost the protection of their state or origin or nationality’⁴⁸. Its Preamble attests of an aim to build on the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, and to assure refugees the widest

⁴² Convention Relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663 (1933 Refugee Convention).

⁴³ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR).

⁴⁴ Rodley (n 21) 787–88.

⁴⁵ Ademola Abass, *Complete International Law* (OUP 2014) 697.

⁴⁶ Terje Einarsen, ‘Drafting History of the 1951 Convention and the 1967 Protocol’ in Andreas Zimmermann, Jonas Dörschner & Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 48.

⁴⁷ Einarsen (n 46) 40.

⁴⁸ United Nations High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis* (1990) 6.

possible exercise of these fundamental rights and freedoms.⁴⁹ At the time of its adaptation, the Convention was seen as an instrument of burden sharing, and the binding obligation upon States as a necessity for effective international cooperation regarding refugee problems.⁵⁰

As a brief background, the Convention was drafted after the Second World War following refugee flows of exceptional dimensions. Already in 1926, Europe experienced the presence of nearly 10 million uprooted people. Factors such as the formation of new States, creating migrating minority groups, and new groups of people exposed to persecution due to *inter alia* the Franco regime in Spain and the Nazi takeover in Germany, lead to large streams of refugees. The approach to the problem by the League of Nations consisted of defining different categories of refugees after their national origin, e.g. ‘Russians’, ‘Armenians’ and later on also refugees of *inter alia* Assyrian, Syrian and Turkish origins. Despite this administrative effort, the UN General Assembly in 1946 held that ‘...the problem of refugees and displaced persons of all categories is one of immediate urgency’ and the work of the 1951 Refugee Convention commenced. Furthermore, the imminent situation resulted in the establishment of the International Refugee Organization (IRO) in 1946, with the purpose to seek voluntary return, integration in the State of refuge, or resettlement in a third State. Three years later, the IRO would be replaced with the institution of UNHCR.

The drafting process of the 1951 Refugee Convention started in 1946 with the participation from the UN Secretary-General, an Expert Committee, the Social Committee of the UN Economic and Social Council and the Third Committee of the UN General Assembly. The work on the definition of refugees was exceptionally extensive, with more than 500 pages of official documents relating to it.⁵¹ The first paragraph of Article 1(a)(2) of the Convention lists the types of ‘refugees’ as providing protection to any person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The Article is the single most important provision of the Convention, as it lays down the basis for the scope of the instrument. Migrants who fulfil the criteria in the Article are called Convention refugees, while the remaining are considered voluntary migrants.⁵² The recognition of a person’s refugee status does not make him a refugee, but declares him to be one. UNHCR holds that a person does not become a refugee because of his recognition, but is

⁴⁹ 1951 Refugee Convention (n 7) Preamble paras 1–2.

⁵⁰ Einarsen (n 46) 40.

⁵¹ Ibid 43–49.

⁵² Bates (n 39) 467.

recognized because he is a refugee.⁵³ The definition is however vague, requiring a considerably amount of interpretation. Over the years, this has entailed numerous approaches and understandings of the term ‘refugee’ among contracting States, academics, and decision-makers, *inter alia* due to the non-developed authoritative jurisprudence by any international tribunal.⁵⁴ In terms of determining whether a person is in fact a refugee, the Convention does not provide for a specific procedure, but State Parties must apply it in good faith in accordance with VCLT.⁵⁵

According to Weis, the most important factor concerning the determination of refugee status is the element of a ‘well-founded fear of persecution’.⁵⁶ The phrase replaced the earlier League of Nations’ approach of defining refugees by categories.⁵⁷ The component alone offers a wide range of interpretations. Weis holds that the definition of this prerequisite is to be objectively determined, and that the applicant must show reason to well-founded fear of persecution by presenting evidence of an objective risk.⁵⁸ UNHCR identifies ‘fear’ as being subjective, entailing that the determination of refugee status primarily requires an evaluation of the applicant’s statements, rather than a judgement on the current situation in his State of origin. The element of the fear as being ‘well-founded’ expresses that the refugee’s fear furthermore must be supported by an objective situation. Hence, both a subjective and an objective determination of the refugee’s ‘well-founded fear’ must be made.⁵⁹

As for the prerequisite of ‘persecution’, one may not find a definition of the term either in the Convention or in its *travaux préparatoires*. According to Weis, its absence might have an underlying motive, but should however imply ‘injurious or oppressive action’. Case law of the United Nations Human Rights Committee (HRC) show that ‘...detention, confinement, and banishment of account of political opinions’ amount to persecution, thus entailing the concept of the term to be wider in scope than expressed in the 1951 Refugee Convention, as well as associated with the denial of certain human rights. Weis furthermore identifies future challenges in the current narrow definition of persecution, one of these being the linkage between the refugee regime and human rights.⁶⁰

UNHCR holds that the expression ‘owing to well-founded fear of being persecuted’ must be linked to one of the, in the same Article, stated grounds. Hence, it rules out *inter alia* persons as victims of famine or natural disasters.⁶¹ As for agents of persecution, UNHCR states that persecution normally is related to actions performed by the authorities of a State. Persecution may also be performed by the local population, if their serious discriminatory or offensive

⁵³ United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees* (1992) HRC/IP/4/Eng/REV.1 para 28.

⁵⁴ Einarsen (n 46) 49–50.

⁵⁵ Ibid 40.

⁵⁶ Weis (n 48) 7.

⁵⁷ UNHCR Handbook (n 53) para 37.

⁵⁸ Weis (n 48) 8.

⁵⁹ UNHCR Handbook (n 53) paras 37–8.

⁶⁰ Weis (n 48) 8–9.

⁶¹ UNHCR Handbook (n 53) para 39.

acts are tolerated by the authorities.⁶² McAdam identifies ‘persecution’ as entailing human rights violations that are sufficiently serious, because of their nature or their repetition. Adverse climate change consequences do not, as of today, meet the threshold of ‘persecution’. McAdam holds that part of the reason why, is the difficulty to identify a persecutor in regard to climate change impacts. Moreover, even if persecution could be identified, it is still required to have a link to one of the Convention grounds, e.g. race or religion.⁶³

The exhausting list⁶⁴ of reasons of well-founded fear of persecution includes race, religion, nationality or membership of a particular social group or political opinion. Climate refugees were not considered at the time the Convention was drafted; hence it does not recognize climate change as a reason of well-founded fear of being persecuted. As for the five Convention grounds, climate refugees might *prima facie* possibly fall under the scope of owing to well-founded fear of being persecuted for the reason of ‘membership of a particular social group’, entailing the recognition as a refugee. The definition of such social group has been described as the ground with the least clarity, constituting a last minute amendment to the Convention.⁶⁵ UNHCR defines a ‘social group’ as ‘...a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the existence of one’s human rights.’⁶⁶ Zimmermann and Mahler although claim that given the ‘living instrument’ nature of the refugee definition in the 1951 Refugee Convention, it must be interpreted in the light of changed circumstances, with the notion of ‘membership of a particular social group’ as an example of possible expansion.⁶⁷

With the purposes to make the treaty-based protection of refugees universal and to remove the effects of the temporal and geographical limitations as stated in Article 1(b) of the 1951 Refugee Convention, its 1967 Protocol⁶⁸ was drafted. Constituting a supplementary treaty to the Convention, it primarily concerns the question of universality of the general refugee definition.⁶⁹ Apart from the removal of the temporal and geographical limitations, the Protocol does not present an additional definition of the term ‘refugee’.

⁶² Ibid para 65.

⁶³ McAdam (n 6) 1–3.

⁶⁴ Weis (n 48) 9 para 4.

⁶⁵ Andreas Zimmermann & Claudia Mahler, ‘Article 1 A, para. 2’ in Andreas Zimmermann, Jonas Dörschner & Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 390–91.

⁶⁶ United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (2002) HCR/GIP/02/02 para 11.

⁶⁷ Zimmermann & Mahler (n 65) 299.

⁶⁸ Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

⁶⁹ Einarsen (n 46) 40 and 68.

In addition to the 1951 Refugee Convention and its Protocol, a number of regional refugee instruments have been adopted, particularly in Africa and the Americas. These deal with matters as *inter alia* the granting of asylum, travel documents and travel facilities.⁷⁰

In Africa, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa⁷¹, entered into force in 1974. The Convention is a regional complement to the 1951 Refugee Convention with the overall purpose to provide a better life and future to the constantly increasing number of refugees in Africa, as reflected in its Preamble. In terms of the definition of a refugee, its Article 1 presents a somewhat broader definition in comparison to the 1951 Refugee Convention. Its first paragraph repeats the definition as stated in the 1951 Refugee Convention, and furthermore in Article 1(2) identifies a refugee as also applying to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. As this widened definition, however, does not explicitly include climate refugees, van der Vliet suggests that people who are displaced on account of ‘events seriously disturbing public order’ might be included.⁷²

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)⁷³ entered into force in 2012, addressing internal displacement caused by *inter alia* natural disasters, within African State Parties. The Convention was the world’s first legally binding regional instrument to enforce an obligation on states to protect and support internally displaced persons.⁷⁴ Its Preamble attests of the aim to adopt measures in order to prevent and end internal displacement caused by conflicts and natural disasters.⁷⁵ The Convention defines an ‘internally displaced person’ as a person who have been forced or obliged to flee or to leave their home as a result of or in order to avoid the effects of *inter alia* violations of human rights or natural or human-made disasters, and who has not crossed a State border.⁷⁶ Article 5(4) of the Convention holds that ‘State Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change’. Although the Convention does not protect refugees of cross-border movement, it recognizes the problem of climate change migration and holds that internally displaced persons, migrating from *inter alia* climate change, do enjoy protection.

⁷⁰ UNHCR Handbook (n 53) para 20.

⁷¹ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

⁷² Jolanda van der Vliet, ‘Climate refugees’: A legal mapping exercise’ in Simon Behrman & Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018) 22.

⁷³ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) 3013 UNTS (Kampala Convention).

⁷⁴ European Parliamentary Research Service (EPRS), *The Concept of ‘Climate Refugee’ – Towards a Possible Definition* (2019) PE 621.893 6.

⁷⁵ Kampala Convention (n 73) Preamble para 6.

⁷⁶ Ibid Article 1(k).

Another regional, although non-binding, declaration presenting a wider definition of the term ‘refugee’ is the 1984 Latin-American Cartagena Declaration on Refugees⁷⁷. Its third paragraph identifies the need to enlarge the concept of refugees and defines these as, in addition to the definition in the 1951 Refugee Convention, persons who have fled their country because of their lives, safety or freedom and have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order. Similarly to the extended definition in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, climate refugees might fall under the category of ‘other circumstances which have seriously disturbed public order’.

On the EU level, a number of directives have been issued which are partially relevant in terms of climate refugees. As stated in Article 288 of the Treaty on the Functioning of the European Union (TFEU)⁷⁸, Directives constitute legal acts of the EU and shall be binding upon all its Member States to which it is addressed. The TFEU furthermore holds that the Union’s policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Refugee Convention.⁷⁹

The Directive 2001/55/EC (Temporary Protection Directive)⁸⁰ offers a temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin.⁸¹ Its Article 3(2) stipulates that Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement. The Directive defines ‘displaced persons’ as persons who have had to leave their State of origin and are unable to return, and who may fall within the scope of the 1951 Refugee Convention or other instruments, and in particular persons who have fled areas of armed conflict or persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.⁸² Although the Directive has never been used, one might be successful in claiming that climate refugees would fall under its scope. However, it merely provides a temporary protection and would perhaps, and if ever applicable to climate refugees, not be a suitable solution in the long-term. Furthermore, as stated in Article 1 of the Directive, it is solely applicable in the case of mass influx and thus not in the situation of an individual application.

⁷⁷ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984) OAS.

⁷⁸ Treaty on the Functioning of the European Union (Consolidated version 2012) OJ 2012/C 326/01 (TFEU).

⁷⁹ Ibid Article 78(1).

⁸⁰ Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences Thereof (2001) OJ L212 12–23 (Temporary Protection Directive).

⁸¹ Ibid Article 1.

⁸² Ibid Article 2(c).

The Directive 2011/95/EU (Qualification Directive)⁸³ *inter alia* aims to lay down standards for a uniform status for refugees or for persons eligible for subsidiary protection.⁸⁴ Its Article 2(d) holds the same refugee definition as stated in the 1951 Refugee Convention, with the exception of referring solely to third-country nationals, entailing the exclusion of protection for EU citizens. However, the Directive furthermore offers a subsidiary protection for a third-country national or a stateless person, who does not qualify as a refugee, but who nevertheless face a real risk of suffering serious harm and is unable or unwilling to avail himself to the protection of his State of origin.⁸⁵ The prerequisite of ‘serious harm’ is in Article 15 of the Directive defined as consisting of either (a) the death penalty or execution, or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict. The possibility for a climate refugee to enjoy protection following one of these grounds is vague, given these prerequisites.

3.3 The Principle of Non-Refoulement

One of the most fundamental principles of international refugee law is the principle of non-refoulement. This customary international law principle⁸⁶ was originally codified in the 1933 Refugee Convention, and is today found under Article 33(1) of the 1951 Refugee Convention. The Article stipulates a prohibition for a contracting State to expel or return a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. In other words, it prohibits States to return a refugee to a State where he is likely to face persecution, torture or other ill treatment.⁸⁷ Constituting a principle of customary international law, it is hence applicable also to States not parties to the 1951 Refugee Convention.

The principle is furthermore codified in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁸⁸. Its Article 3(1) holds that no State Party shall expel, return or extradite a person to another State where the substantial grounds for believing that he would be in danger of being subjected to torture. Also, Article 7 of the ICCPR has been interpreted as containing a prohibition on refoulement.⁸⁹ Article 22(8) of the 1969 American Convention on Human Rights⁹⁰ states that an alien in no case may be

⁸³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (2011) OJ L337 9-26 (Qualification Directive).

⁸⁴ Ibid Article 1.

⁸⁵ Ibid Article 2(f).

⁸⁶ UNHCR Advisory Opinion (n 12) para 15.

⁸⁷ Goodwin-Gill & McAdam (n 36) 201.

⁸⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

⁸⁹ Goodwin-Gill & McAdam (n 36) 208–9.

⁹⁰ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

deported or returned to a State in which his right to life or personal freedom is in danger of being violated.

UNHCR states that the principle of non-refoulement does not entail a right of the individual to be granted asylum. However, it does mean that ‘...where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion.’⁹¹

As the protection against refoulement is applicable to persons defined as refugees under the 1951 Refugee Convention, UNHCR further holds that the principle also applies to persons who have not yet had their status formally declared.⁹² Although this is to be understood as including persons awaiting a, in a new State, final determination of their status as refugee or non-refugee, the climate refugee seeking protection is here included. Other than this, it is hard to see the aid of the principle of non-refoulement, in terms of protecting climate refugees.

3.4 The Pacific Ocean Island States Cases

As mentioned previously, a number of small Island States in the Pacific Ocean are currently experiencing sea level rise causing unsustainable livelihood conditions. These occurrences serve as a tangible example in terms of understanding the nexus of migration and climate change. The situation of sea level rise in the Pacific Ocean has lead to a number of regional Tribunal and Court cases, challenging the scope of the refugee status and protection.

3.4.1 *AF (Kiribati)*

In 2013, the New Zealand Immigration and Protection Tribunal tried the case of *AF (Kiribati)*⁹³ in which the Kiribati appellant claimed an entitlement to be recognised as a refugee on the basis of changes to his environment in Kiribati due to climate change associated sea level rise.⁹⁴ Kiribati is an Island State in Oceania consisting of several small islands and atolls. According to the examination of the Tribunal, the islands *inter alia* experiences droughts, crop failures, excessive rainfalls and coastal erosions causing livelihood issues for its population.⁹⁵ Kiribati Government reports show a deteriorating state of the general health of the Kiribati people, with issues such as vitamin deficiencies and malnutrition, mirroring the States’ problem of food insecurity.⁹⁶ The Tribunal consulted an expert on the field who presented that the State Islands are no more than three metres above

⁹¹ UNHCR Advisory Opinion (n 12) para 8.

⁹² Ibid para 6.

⁹³ *AF (Kiribati)* [2013] NZIPT 800413.

⁹⁴ Ibid para 2.

⁹⁵ Ibid para 5.

⁹⁶ Ibid para 10.

sea level and that the population of the lower islands had started to migrate to the main island of Tarawa.⁹⁷

The appellant was born on a small Kiribati low-lying atoll with houses built on coral debris. He later moved to a village in the island of Tarawa, which over time became overcrowded and experienced regularly flooding causing the wells upon which the appellant depended for water to become salty.⁹⁸ The appellant and his wife found their living situation unsustainable. After consulting family members residing in other parts of Kiribati and understanding that they were experiencing similar problems, the couple concluded that there was no land anywhere in the State of Kiribati to which they could relocate in order to avoid the onset of sea level rise, and therefore decided to emigrate to New Zealand.⁹⁹

The Tribunal found the appellant to be credible and thus accepted his account entirely.¹⁰⁰ Following this, and as a step in the Tribunal's assessment of the case, it had to determine whether to recognise the appellant as a) a refugee under the 1951 Refugee Convention, b) as a protected person under the CAT, and/or c) as a protected person under the ICCPR.¹⁰¹ With referral to one of its earlier decisions, the Tribunal identified the principal issues in order to determine this, as: a) objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?, and b) if the answer is yes, is there a Convention reason for that persecution?.¹⁰² In terms of the prerequisite of 'being persecuted', the appellant claimed that its concept does not require human agency, that the Latin etymology of the word 'persecute' '...has a passive voice of fleeing from something or an active quality of following somebody' and accordingly that '...persecution does not require an actor in the passive sense'. The appellant claimed that the climate change consequences causing his migration thereby fall under the scope of the definition of persecution. This submission was although rejected by the Tribunal, by its referral to the definition in the 1951 Refugee Convention, which requires the appellant to establish that he is at risk of 'being persecuted' and that this is linked to one of the Convention grounds entailing protection.¹⁰³

Furthermore, the appellant held that he had the right to claim refugee status in New Zealand as an internally displaced person, referring to Principle 15 of the Guiding Principles on Internal Displacement¹⁰⁴. As the Tribunal must have regard to relevant international human rights instruments, it although dismissed the Guiding Principles as applicable in this case, given its soft law nature as well as its inapplicability in situations of cross-boarder movement. It was concluded by the Tribunal that the appellant was at no stage ever an internally displaced person, according to the Principles' definition, which for this requires a factor of

⁹⁷ Ibid para 13.

⁹⁸ Ibid paras 23–7.

⁹⁹ Ibid paras 29–31.

¹⁰⁰ Ibid paras 38–41.

¹⁰¹ Ibid para 36.

¹⁰² *AF (Kiribati)* [2013] NZIPT 800413 para 44.

¹⁰³ Ibid paras 51–2.

¹⁰⁴ United Nations Commissioner for Refugees (UNHCR), *Guiding Principles on Internal Displacement* (1998).

‘forced’ migration. The Tribunal held that ‘[i]n this case, it is clear to the Tribunal that this appellant has undertaken what may be termed a voluntary adaptive migration – that is, to adapt to changes in the environment in South Tarawa detailed in the 2007 NAPA, by migrating to avoid the worst effects of those environmental changes’ and it hence held that his migration was not to be considered as ‘forced’.¹⁰⁵

After having examined the scope of the 1951 Refugee Convention, by referring to earlier cases and findings from scholars, the Tribunal concluded that ‘[w]hile in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist.’¹⁰⁶

In conclusion, the New Zealand Immigration and Protection Tribunal found that the appellant had not provided the evidence that established that the presented environmental conditions were so severe that his life was at risk or that he and his family would not be able to resume their prior life with dignity. The Tribunal furthermore held that although the appellant’s standard of living would be better if he would live in New Zealand, this does not amount to serious harm for the purposes of the 1951 Refugee Convention.¹⁰⁷ Hence, the appellant was not to be recognized as a refugee under the 1951 Refugee Convention. Nor was the appellant to be recognized as a protected person under the CAT, since no evidence was provided entailing the risk of him being subject to torture if returning, or under the ICCPR, since he had not provided evidence showing any act or omission by the Kiribati Government which might imply him being ‘arbitrary deprived’ of his life in accordance with Article 6 of the Convention.¹⁰⁸ In sum, no international legal instrument was found which would entail the refugee protection of the appellant wishing to migrate to New Zealand because of environmental change and its possible consequences to his life.

The case was by the appellant appealed to the High Court of New Zealand¹⁰⁹. After having evaluated the findings from the Tribunal, the Court mostly confirmed its reasoning, highlighting the fact that the appellant, if he would return, would not be subjected to individual persecution and that his situation does not appear to be different from that of any other Kiribati national.¹¹⁰ The Court concluded by holding that ‘[t]he attempt to expand dramatically the scope of the Refugee Convention and particularly Article 1A(2) is impermissible’¹¹¹, confirming the decision of the Tribunal.¹¹²

¹⁰⁵ Ibid paras 45–9.

¹⁰⁶ Ibid para 64.

¹⁰⁷ Ibid para 74.

¹⁰⁸ Ibid paras 76–88.

¹⁰⁹ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125.

¹¹⁰ Ibid para 54.

¹¹¹ Ibid para 63.

¹¹² Ibid para 64.

One year later, the appellant appealed the decision of the High Court to the Court of Appeal of New Zealand¹¹³, claiming erroneous in law¹¹⁴ *inter alia* consisting of the High Court's definition of a 'refugee'. The High Court did not find any erroneous in law, and ended up dismissing the appeal.¹¹⁵

Although providing further evidence to the case, also the Supreme Court of New Zealand¹¹⁶ dismissed it and claimed that the appellant would not face serious harm if returning to Kiribati.¹¹⁷ Furthermore, the Supreme Court accentuated the fact that both the Tribunal and the High Court did emphasise that their decisions '...did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction' and that the Supreme Court's decision in this case '...should not be taken as ruling out that possibility in an appropriate case'.¹¹⁸

3.4.2 AD (Tuvalu)

In 2014, the New Zealand Immigration and Protection Tribunal tried the case of *AD (Tuvalu)*¹¹⁹. The married couple appellants, citizens of the Pacific Ocean Island State of Tuvalu, claimed that if they would be deported back to Tuvalu they would be separated from the husband's family residing in New Zealand, as well as risking the suffering of adverse impacts of climate change and socio-economic deprivation.¹²⁰ The appellants claimed that, prior to coming to New Zealand, their lives in Tuvalu had become increasingly more difficult following the effects of climate change. They had lived in New Zealand since 2007, temporarily holding visitor permits and later living unlawfully in the State. The appellants furthermore held that they '...would be deprived of their ability to have 'a safe and fulfilling life' if forced back to Tuvalu'.¹²¹ The Tribunal was to examine whether these factors would amount to 'exceptional circumstances of a humanitarian nature', in order to determine whether or not to grant residence visas for the appellants.¹²²

In accordance with section 207 of the New Zealand Immigration Act 2009¹²³, the Tribunal found that '...there are exceptional circumstances of a humanitarian nature, which would make it unjust or unduly harsh for the appellants to be removed from New Zealand'.¹²⁴ By 'exceptional circumstances', the Tribunal held that the circumstances must be well outside the

¹¹³ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173.

¹¹⁴ *Ibid* para 2.

¹¹⁵ *Ibid* paras 39–42.

¹¹⁶ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.

¹¹⁷ *Ibid* para 12.

¹¹⁸ *Ibid* para 13.

¹¹⁹ *AD (Tuvalu)* [2014] NZIPT 501370-371.

¹²⁰ *Ibid* para 2.

¹²¹ *Ibid* paras 5, 9, 12 and 14.

¹²² *Ibid* para 2.

¹²³ New Zealand Immigration Act 2009 No. 51 (assented 16 November 2009) New Zealand Parliamentary Counsel Office.

¹²⁴ *AD (Tuvalu)* (n 119) para 30.

normal run of circumstances and constitute an exception rather than the rule.¹²⁵ The circumstances in this case consisted of family ties within New Zealand, which would be disrupted if the appellants were to be deported from the State. As the only son in the family, the father was the sole person in the family able to provide assistance to his mother. She relied entirely on the help of the applicant, who aided her by *inter alia* taking her to the doctor and to church.¹²⁶ Furthermore, the family had two children both born in New Zealand, however not New Zealand citizens. Taking into account Article 3 of the United Nations Convention on the Rights of the Child (CRC)¹²⁷, the Tribunal found that the best interest of the children were to remain living in New Zealand, given their social connections such as family and school attendance.¹²⁸

Thereby, the Tribunal granted the appellants residence visas¹²⁹, the reason being the imminent separation from the appellants' New Zealand resided family. This reason reached the threshold of 'exceptional circumstances of a humanitarian nature' as stated in the New Zealand Immigration Act 2009.

In terms of climate change, and although the appellants claimed that it would cause the deprivation of their ability to have a safe and fulfilling life in Tuvalu, the Tribunal accepted that exposure to natural disasters may amount to a humanitarian circumstance, but that the appellants needed to present the evidence that it is unjust or unduly harsh to deport the particular appellants.¹³⁰ The Tribunal acknowledged that the impacts of climate change might adversely affect the enjoyment of human rights.¹³¹ However, this was not the reason for the granted visas in the case at hand, but merely one of the reasons to why the appellants desired to migrate in the first place.

3.5 Summary

The 1951 Refugee Convention together with a number of regional instruments, both hard law and soft law, constitute the current framework of offered protection for refugees. The right to seek and enjoy asylum is stated in the UDHR, dated back to 1948. The right, however, does not imply an obligation for States to grant the protection to every applicant.

The 1951 Refugee Convention holds that refugee status is acknowledged to persons having well-founded fear of being persecuted for one of five grounds. These grounds are because of race, religion, nationality, membership of a particular social group or political opinion. The list is exhaustive, and thus leaves certain categories of possible refugees outside the scope of protection.

¹²⁵ Ibid para 18.

¹²⁶ Ibid para 19.

¹²⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

¹²⁸ *AD (Tuvalu)* (n 119) paras 23–4 and 26.

¹²⁹ Ibid paras 37–8.

¹³⁰ Ibid para 32.

¹³¹ Ibid para 28.

The Kampala Convention was the first convention to enforce an obligation on States to protect and support internally displaced persons. Although offering a protection for persons who have been internally displaced due to natural or human-made disasters, including climate change, the Convention is merely applicable to these, and not to cross-boarder migrants. However, the Convention and its provided protection as well as enforcement of obligation on States, reflect the issues of climate change induced migration and the need to protect climate refugees.

The two regional instruments of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration, both provide a broader definition of the term ‘refugee’. They both offer refugee protection for persons who owing to events or circumstances seriously disturbing public order, is compelled to leave his State of origin. One may argue that a type of climate change consequence might fall under this category.

On the EU level, the Temporary Protection Directive and the Qualification Directive offer a temporary protection in the event of a mass influx for persons from third countries who are unable to return to their country of origin and a subsidiary protection for refugees and a slightly widened group of persons, respectively. As climate refugees might fall under their scope, persons migrating from climate change are not provided with an explicit protection.

The customary international law principle of non-refoulement stipulates a prohibition for a contracting State to expel or return a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. As the grounds listed are the same ones as in the 1951 Refugee Convention definition of a refugee, the principle of non-refoulement might not offer much assistance for climate refugees.

The presented case law reflects the increased attempts among small Island State citizens, claiming their status as refugees because of climate change impacts. What is noteworthy is the consistent resistance among the Tribunal and the Courts to step outside the scope of the definition of a refugee stated in the 1951 Refugee Convention. While pointing out the critical situation as well as the need for a possible extended definition of refugees, the Tribunal and the Courts dismiss the applications because of the applicants’ non-compliance with the definition in the 1951 Refugee Convention. One should not blame the Tribunal’s and the Courts’ interpretation of the scope of acknowledged refugee types, however their highlighting of the need of a solution is to be taken seriously. It is furthermore interesting to note how the Tribunal and the Courts, after examining international refugee law, also look into the possible protection under international human rights law.

As of today, climate refugees do not enjoy protection under the 1951 Refugee Convention. This is because of their non-recognition as refugees as they do not belong under one of the five Convention grounds. Equivalent regional refugee instruments follow the definition from the 1951 Refugee Convention, entailing no other outcome in the acknowledgement of persons migrating because of climate change consequences. Some of these, as presented, do however

contain a somewhat broader definition of the term, opening up to a possible inclusion of climate refugees as to the enjoyment of refugee protection. However, the current international legal protection for climate refugees, provided by international refugee law, is deficient.

4. Climate Refugees in International Environmental Law

4.1 Introduction

The modern development of international environmental law had its starting point post the Second World War, and was particularly developed in the 1960's.¹³² The 1972 Stockholm Conference on the Human Environment led to a Declaration of Principles (Stockholm Declaration)¹³³, which, with its Article 1, constituted the very first instrument in international environmental law stipulating the right to a healthy environment. A number of international legal instruments concerning the prevention and combating of climate change has since been developed.

4.2 The No-Harm Principle

The customary international law no-harm principle, entailing '...the obligation imposed on States not to allow their territory to be used in such a manner so as to cause significant harm to the territory of other States'¹³⁴, constitutes the very basis of international environmental law. Stemming from the *Trail Smelter Arbitration*¹³⁵, the principle holds that States have a duty to prevent, reduce, and control pollution and significant transboundary environmental harm.¹³⁶ The principle was later codified for the first time in Principle 21 of the Stockholm Declaration.

The object of the no-harm principle is to respect state sovereignty and thus focuses on the relationship between States. The role of the individual and her rights are not directly of significance, however the ignorance of the territory of States and of state sovereignty indirectly affects the individual in terms of *inter alia* her right to a clean environment.¹³⁷ As for climate refugees, the no-harm principle thus does not support or entail their explicit protection.

4.3 The Aim to Reduce Greenhouse Gas Emissions

The UNFCCC entered into force in 1994 and marked the starting point of international cooperation to prevent climate change.¹³⁸ The Convention today constitutes the foundation of the UN climate regime.¹³⁹ Its non-binding Preamble *inter alia* expresses the acknowledgements and concerns regarding human activities substantially increasing the

¹³² Catherine Redgwell, 'International Environmental Law' in Malcolm D Evans (ed), *International Law*, 4th edn (OUP 2014) 690.

¹³³ Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972) UN Doc. A/CONF/48/14/Rev.1 (Stockholm Declaration).

¹³⁴ Redgwell (n 132) 689.

¹³⁵ *Trail Smelter Arbitration (U.S. v Canada)* (1938) 3 RIAA 1905–1982, 1965.

¹³⁶ Redgwell (n 132) 696.

¹³⁷ See section 5.5 of the study.

¹³⁸ Petra Minnerop, 'Climate Protection Agreements' (2018) in *Max Planck Encyclopedia of Public International Law (MPEPIL)* (online edn) para 9 accessed 17 April 2019.

¹³⁹ Bodansky, Brunnée & Rajamani (n 30) 118.

atmospheric concentrations of greenhouse gases. The twentieth paragraph of the Preamble recognizes the particular vulnerability of low-lying and small Island States, countries with low-lying coastal areas or areas liable to floods, droughts and desertification, to the adverse effects of climate change. However, in terms of protection for people migrating due to climate change, the UNFCCC is silent.

In order to cooperatively manage the responsibility of addressing and combating negative effects of climate change, the principle of common but differentiated responsibility was shaped. Article 3(1) of the UNFCCC states that the State Parties should protect the climate on the basis of equity and according to their common but differentiated responsibilities and respective capabilities, entailing the developed States to take the lead. Article 4 of the UNFCCC describes the cooperative commitments in detail, *inter alia* to formulate and implement national or regional programmes containing measures to combat climate change and to develop appropriate plans for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification.¹⁴⁰ However, it was not until the drafting of the Kyoto Protocol¹⁴¹ that developed States shaped explicit targets and timetables for the reduction of greenhouse gas emissions, and the commitments hence got a substantial and more concrete meaning.¹⁴²

The non-binding Cancun Agreements, launched in 2011, affirms with its Article 1 that climate change is one of the greatest challenges of our time, and holds in its Article 8 that State Parties should fully respect human rights in all climate change related actions. Furthermore, its Article 14(f) states that all State Parties shall undertake '[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'. Following this, the Paris Agreement¹⁴³, signed in 2016, in its Article 2(1)(a) established the goal of keeping the increase in global average temperature to well below 2 °C above pre-industrial levels. In terms of climate refugees, the Paris Agreement in its Preamble merely recognizes that climate change is a common concern of humankind and that the State Parties, when taking action to address climate change, should respect human rights including the rights of migrants.¹⁴⁴

4.4 Summary

A number of instruments concerning climate change and the aim to reduce greenhouse gas emissions have been adopted in later day. Stemming from *inter alia* the no-harm principle implying the obligation not to cause significant harm to the territory of other States, the aim to

¹⁴⁰ UNFCCC (n 26) Article 4(1)(b) and (e).

¹⁴¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol).

¹⁴² Redgwell (n 132) 707.

¹⁴³ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) FCCC/CP/2015/10/Add.1.

¹⁴⁴ Ibid Preamble para 11.

combat the negative impacts of climate change is now an elevated priority. Although with States as the direct subject, the rights for individuals may be seen as possibly violated indirectly, given the environment as constituting the very foundation of human life.

The UNFCCC is silent on protection for climate refugees, however its Preamble explicitly acknowledges the particular vulnerability of *inter alia* low-lying and small Island States. The Kyoto Protocol gave a substantial meaning to the principle of common but differentiated responsibility, in that developed States shaped explicit targets and timetables for the reduction of greenhouse gas emissions. The Cancun Agreements identifies climate change as one of the greatest challenges of our time and that State Parties should fully respect human rights in all climate change related actions. The Agreements furthermore hold that State Parties shall undertake measures to *inter alia* enhance the cooperation with regard to climate change induced migration. Moreover, climate change is recognized as a common concern of humankind in the Preamble of the Paris Agreement.

Although the environmental law instruments mentioned more or less do recognize climate refugees and their situation, the overall purpose of these is to reduce greenhouse gas emissions. The instruments thereby do not provide a protection for climate refugees. However, the mentioning of the situation of climate refugees in regard to environmental concerns do reflect their acknowledgement and might help to push for a solution in terms of their protection.

5. Climate Refugees in International Human Rights Law

5.1 Introduction

The adoption of the UN Charter in 1945 marked the starting-point for the modern human rights instruments and made the advancement of human rights a purpose of the UN.¹⁴⁵ The UN Charter paved the way for the International Bill of Human Rights, namely the UDHR, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁴⁶. The Bill framed the basic human rights that we know today and that have inspired numerous international, regional and national human rights instruments.

Apart from the areas of refugee law and environmental law, international human rights law might offer a protection for climate refugees, constituting a net of protection possibly bridging the legal gap. Claiming that climate change consequences constitute a violation of human rights might be seen as a complement to the existing refugee law instruments. This is, in international law, known as ‘complementary protection’, describing a protection based on human rights as a supplement to that provided under the 1951 Refugee Convention.¹⁴⁷ State obligations also play a leading part in terms of the upholding of human rights.

5.2 The Right to Life

The right to life is to be identified as the most important of all rights, since life is the precondition for the exercise of all other rights.¹⁴⁸ Initially codified in Article 3 of the UDHR, which stipulates the right to life, liberty and the security of person, the provision can be found in all major human rights conventions. The right to life is not absolute, in the sense that not all deprivations of life will be considered as violating the right. Possibly lethal actions in international armed conflicts might be permissible under international humanitarian law and the use of force by law enforcement officials to protect life if no other means are available, are all consistent with international human rights law. Furthermore, the continuing existence of the death penalty in some States shows the derogable nature of the right to life.¹⁴⁹

Article 6(1) of the ICCPR stipulates the inherent right to life for every human being, and has been held as ‘the supreme right’ by the HRC. It is not to be interpreted narrowly, and holds the entitlement of individuals to be free from acts or omissions that may cause their unnatural or premature death. The right to life is, according to the HRC, to be seen as a prerequisite for the enjoyment of all other human rights.¹⁵⁰ In terms of protection for climate refugees, the

¹⁴⁵ Rodley (n 21) 783.

¹⁴⁶ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

¹⁴⁷ McAdam (n 6) 4–5.

¹⁴⁸ Niels Petersen, ‘Life, Right to, International Protection’ (2012) in *Max Planck Encyclopedia of Public International Law (MPEPIL)* (online edn) para 1 accessed 3 July 2019.

¹⁴⁹ Rodley (n 21) 803.

¹⁵⁰ United Nations Human Rights Committee (UNHRC), *General Comment No. 36: Article 6 (The Right to Life)* of the ICCPR (2018) CCPR/C/GC/36 paras 2–3.

Covenant itself is silent. However, the HRC has commented on the issue, identifying that ‘[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life’, and furthermore stressing the importance of measures taken by State Parties to preserve and protect the environment, in order to reduce the risk of violations of the right to life.¹⁵¹

The Second Optional Protocol to the ICCPR¹⁵² is the only international treaty solely treating the right to life¹⁵³, as it aims at the abolition of the death penalty. The Protocol allows for no executions within State Parties, with the exception of the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.¹⁵⁴

The right to life is furthermore stipulated in Article 2(1) of the European Convention on Human Rights (ECHR)¹⁵⁵, which states that everyone’s right to life shall be protected by law. The Article additionally contains a derogation, according to which the right may be subject to the exception of the execution of a sentence of a court following the conviction of a crime for which this penalty is provided by law. As the Article is essentially formulated as a negative right, it may also implicate a positive duty on states. As rulings from the ECtHR have shown, a violation of Article 2 may occur if an individual’s right to life is threatened by a State’s failure to uphold adequate basic health or safety care.¹⁵⁶

This was found in the ruling of the ECtHR in *Öneryildiz v Turkey*¹⁵⁷, where the applicants claimed that *inter alia* Article 2 of the ECHR had been violated. The applicants held the Turkish authorities responsible for the death of their relatives as well as the destruction of their property following a methane explosion at the municipal rubbish tip close to their home.¹⁵⁸ The Court held that ‘...the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye rubbish tip’ and that they ‘...consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals’.¹⁵⁹ Hence, the State of Turkey was found guilty of violating the right to life as stated in the ECHR.¹⁶⁰

¹⁵¹ Ibid para 62.

¹⁵² Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414.

¹⁵³ Rodley (n 21) 802.

¹⁵⁴ Second Optional Protocol to the ICCPR (n 152) Articles 1(1) and 2(1).

¹⁵⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR).

¹⁵⁶ See e.g. *Öneryildiz v Turkey* App No. 48939/99 (ECtHR, 30 November 2004); *Mehmet Şentürk v Turkey* App No. 13423/09 (ECtHR, 9 April 2013).

¹⁵⁷ *Öneryildiz v Turkey* (n 156).

¹⁵⁸ Ibid para 2.

¹⁵⁹ Ibid para 101.

¹⁶⁰ Ibid para 118.

In *Budayeva and others v Russia*¹⁶¹, the applicants claimed the Russian authorities responsible *inter alia* for the death of a person and for putting their lives at risk, following the authorities' failure to diminish the consequences of a mudslide in the town of Tyrnauz. The occurrence of mudslides in Tyrnauz was generally known to its inhabitants as well as to the authorities.¹⁶² Hence, the State of Russia was found to have failed its obligations under Article 2 of the ECHR, namely to protect the lives of its citizens.¹⁶³

As the case law shows, Article 2 of the ECHR may be violated if a State fails to uphold adequate basic health or safety care. As for climate refugees, their situation is probable to entail the violation of one or both of these, and as the ECtHR holds, States have a responsibility in terms of the obliged upholding of these rights.

5.3 The Right to Privacy

Article 12 of the UDHR, as well as Article 17(1) of the ICCPR, prohibits arbitrary interference with one's privacy, family, home or correspondence. In the case of *Peck v the United Kingdom*¹⁶⁴, the ECtHR held that '[p]rivate life is a broad term not susceptible to exhaustive definition'¹⁶⁵, mirroring the wide definition of the concept. Components such as a person's identity, integrity, intimacy, autonomy, communication and sexuality have been identified as included.¹⁶⁶ According to the HRC, 'home' is to be understood as to '...indicate the place where a person resides or carries out his usual occupation'.¹⁶⁷ The HRC moreover holds that the right to privacy, as stated in the ICCPR, is '...required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons'.¹⁶⁸

The right is furthermore codified in Article 8 of the ECHR, having entailed a numerous amount of cases before the ECtHR. The Article lists the four rights of private life, family life, home and correspondence, however all of the rights can be said to fall within the concept of 'privacy'.¹⁶⁹ The ECtHR has taken a wide view of both the concepts of 'home' and 'interference'. In regard to environmental matters, violations of Article 8 have been found where authorities have failed to take adequate measures.¹⁷⁰ However, there is an absent occurrence of cases treating these rights in terms of climate refugees.

¹⁶¹ *Budayeva and others v Russia* App Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008).

¹⁶² Ibid para 15.

¹⁶³ Ibid para 160.

¹⁶⁴ *Peck v the United Kingdom* App No. 44647/98 (ECtHR, 28 January 2003).

¹⁶⁵ Ibid para 57.

¹⁶⁶ Ineta Ziemele, 'Privacy, Right to, International Protection' (2009) in *Max Planck Encyclopedia of Public International Law (MPEPIL)* (online edn) para 7 accessed 14 July 2019.

¹⁶⁷ Ibid para 5.

¹⁶⁸ United Nations Human Rights Committee (UNHRC), *General Comment No. 16: Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)* of the ICCPR (1988) HRI/GEN/1/Rev.6 (Vol. I) para 1.

¹⁶⁹ Iain Cameron, *An Introduction to the European Convention on Human Rights*, 7th edn (Iustus Förlag AB 2014) 121.

¹⁷⁰ Ibid 127.

In *López Ostra v Spain*¹⁷¹, the applicant claimed a violation of Article 8 since the State of Spain had failed to take any measures against the contamination, smell and noise from a waste treatment plant close to her home. After receiving numerous complaints from inhabitants of the town, the authorities shut down parts of the plant's activities, however not the entire plant, causing continued harm.¹⁷² The Court held that '[n]aturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely'¹⁷³, and hence found the State of Spain guilty of violating the right.

5.4 The Prohibition of Torture

Inter alia Article 7 of the ICCPR and Article 3 of the ECHR establishes the prohibition of torture. The Articles hold that no one should be subjected to torture or inhuman or degrading treatment or punishment. The definition of 'torture' is to be found in Article 1(1) of the CAT, which stipulates torture as an act by which severe physical or mental pain or suffering is intentionally inflicted on a person for the purpose of obtaining him information. The prohibition of torture is part of customary international law and has attained the rank of a *jus cogens* norm. The prohibition of refoulement¹⁷⁴ to a risk of torture is included in this peremptory norm. Following its *jus cogens* status, all States are bound by the prohibition, regardless of the States' adaptation of treaties treating it.¹⁷⁵

In *Soering v the United Kingdom*¹⁷⁶, the applicant, a German national, was detained in prison in England, pending extradition to the United States of America to face charges of murder.¹⁷⁷ The question before the ECtHR was whether a decision of the United Kingdom to extradite the applicant would constitute a breach of Article 3 of the ECHR. The applicant held that there was a serious likelihood that he would be sentenced to death if extradited to the United States of America.¹⁷⁸ Although holding that the death penalty itself would not constitute a breach, since the ECHR does allow for the death penalty's use in certain situations, the ECtHR found that certain factors contributed to the violation and thereby constituted a breach of Article 3. Those were the length of the detention prior to execution, the extreme conditions on death row, the applicants' age and mental state as well as the possibility of his extradition to Germany.¹⁷⁹

¹⁷¹ *López Ostra v Spain* App No. 16798/90 (ECtHR, 9 December 1994).

¹⁷² *Ibid* para 9.

¹⁷³ *Ibid* para 51.

¹⁷⁴ CAT (n 88) Article 3(1); See section 3.3 of the study.

¹⁷⁵ UNHCR Advisory Opinion (n 12) para 21.

¹⁷⁶ *Soering v the United Kingdom* App No. 14038/88 (ECtHR, 7 July 1989).

¹⁷⁷ *Ibid* para 11.

¹⁷⁸ *Ibid* para 76.

¹⁷⁹ *Ibid* para 111.

5.5 The Right to a Clean Environment

Article 24 of the African Charter on Human and Peoples' Rights¹⁸⁰ stipulates the right for all peoples to a general satisfactory environment favourable of their development, with the term 'general satisfactory' to be seen as meaning 'healthy'.¹⁸¹ The African Commission on Human and Peoples' Rights identifies the Article as imposing an obligation for States to take measures '...to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources'.¹⁸²

The right to a healthy environment is furthermore codified in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol)¹⁸³. Its Article 11 states everyone's right to live in a healthy environment and that the State Parties shall promote the protection, preservation and improvement of the environment. In a 2017 landmark Advisory Opinion¹⁸⁴ from the Inter-American Court of Human Rights, regarding a Colombian case concerning the environmental obligations of States, the Court held, with a reference to Article 11, that the degradation of the environment can cause irreparable damage to human beings, which is why a healthy environment is a fundamental right for the existence of humanity¹⁸⁵. It hence recognized the right to a healthy environment as an autonomous human right.¹⁸⁶

It is hence acknowledged, by regional human rights instruments as well as by the Inter-American Court of Human Rights, that the right to a clean environment is to be seen as an autonomous human right. However, the recognition has not yet been made on an international level.

5.6 Summary

The right to life is the right upon which all other rights derives and thus the precondition for the exercise of all other rights. It is furthermore not to be interpreted narrowly. In terms of the right to life explicitly for climate refugees, the human rights conventions are silent. However, the HRC has identified climate change as one of the most serious threats to the ability of present and future generations to enjoy the right to life. Rulings from the ECtHR show that a violation of the right to life under Article 2 of the ECHR may occur if an individual's right to life is threatened by a State's failure to uphold adequate basic health or safety care.

¹⁸⁰ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 1520 UNTS 217.

¹⁸¹ Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (OUP 2019) 548.

¹⁸² Ibid 551.

¹⁸³ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' (adopted 17 November 1988, entered into force 16 November 1999) OASTS 69 (San Salvador Protocol).

¹⁸⁴ Inter-American Court of Human Rights, *Advisory Opinion OC-23/17* (2017).

¹⁸⁵ Ibid 27 para 59 *in fine*.

¹⁸⁶ Ibid 102 para 5.

The right to privacy, codified *inter alia* in the UDHR and the ICCPR, prohibits arbitrary interference with one's privacy, family, home or correspondence. The right is to be interpreted broadly, with factors such as a person's identity, integrity, intimacy, autonomy, communication and sexuality included in the definition of a person's private life. The definition of 'home' is also to be defined as wide, according to the HRC. Following rulings from the ECtHR, violations of the right to life have been found where authorities have failed to take adequate measures in regard to environmental matters.

The prohibition of torture, including the principle of non-refoulement, is acknowledged as a *jus cogens* norm. 'Torture' is, in Article 1(1) of the CAT, defined as an act by which severe physical or mental pain or suffering is intentionally inflicted on a person for the purpose of obtaining him information. In *Soering v the United Kingdom*, the possible extradition of a person to the United States of America, where the applicant was facing the death penalty, was found of violating the prohibition of torture as stated in Article 3 of the ECHR.

As all human beings depend on the environment we live in, it being clean, healthy and sustainable is crucial. The San Salvador Protocol stipulates everyone's right to live in a healthy environment and that the State Parties shall promote the protection, preservation and improvement of the environment. Although it is not yet recognized or established in the international context, the world is however seeing numerous regional statements, identifying the right to a clean environment as an autonomous human right.

It is clear that several human rights may be subject of violation, including those of climate refugees. Climate change consequences may hinder the enjoyment of *inter alia* the right to life, the right to privacy and the right to a clean environment. While international human rights law might be more substantial than instruments of international environmental law in providing protection for climate refugees, the human rights instruments however cannot offer a direct or explicit recognition of the climate refugee in terms of its status or protection as a refugee.

6. The *de lege ferenda* Discussion

6.1 Introduction

As a step in straightening the international legal protection for climate refugees, the doctrinal debate presents a number of recommendations and solutions. Scholars agree that action is needed, but in terms of which would be the most efficient and suitable way, opinions differ. The following chapter presents the existing and future challenges and proposed solutions to them, mirroring the complexity of the nexus.

6.2 The Difficulty of Defining Climate Refugees

IOM identifies the lack of an internationally accepted legal definition of climate refugees as part of the non-existing legal framework. It furthermore holds that a clear-cut category for climate refugees is difficult to construct, since the causes behind the decision to move seldom are solely because of climate change consequences. Furthermore, factors such as conflict, poverty, demographics or governance often effect the decision to migrate. Thus, to create a clean categorization and definition of climate refugees is not an easy task.¹⁸⁷

Bates does not only contribute with the distinctions between different types of causes of migration, namely disasters, expropriations and deteriorations.¹⁸⁸ She furthermore holds that an improvement, by researchers and policy makers, of the concepts that describe and analyse the relationship between the environment and migration, is required. Looking ahead, she hopes that her presented classifications system can contribute to support their research in defining climate refugees and their international legal protection.¹⁸⁹

Docherty and Giannini hold that a new definition of ‘climate refugees’ should include the six elements of forced migration, temporary or permanent relocation, movement across the borders, disruption consistent with climate change, sudden or gradual environmental disruption, and a more than likely standard for human contribution to the disruption. They furthermore hold that this definition is best designed for a binding instrument rather than for a wide-ranging policy.¹⁹⁰

Zimmermann and Mahler are of the opinion that the definition of a refugee in the 1951 Refugee Convention constitutes a part of a ‘living instrument’, similar to clauses in treaties generally and in human rights instruments particularly. They argue that Article 1(a)(2) ‘...must thus be interpreted not only in light of developments in international law which have

¹⁸⁷ IOM Outlook (n 3) 27–8.

¹⁸⁸ Bates (n 39); See section 2.3 of the study.

¹⁸⁹ Bates (n 39) 475.

¹⁹⁰ Bonnie Docherty & Tyler Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ (2009) 33 The Harvard Environmental Law Review 349, 372.

taken place ever since the adaption of the 1951 Convention, but also in light of changed circumstances'.¹⁹¹

6.3 The Future Codification Options

Docherty and Giannini hold that the best solution would be the creation of a completely new legal instrument, distinct and independent from the existing refugee Conventions, which would provide the suitable protection for climate refugees. The instrument should guarantee human rights protection as well as humanitarian aid. They are of the opinion that the 1951 Refugee Convention lacks an environmental mandate and the adequate technical tools, and that the UNFCCC has limitations in terms of it being neither people-centered nor remedial in nature, why a new instrument constitutes the best solution.¹⁹² IOM, on the other hand, doubts the solution of one single protective instrument, holding that '[g]iven the sensitivity behind both migration and environmental management, consensus among States over a single binding instrument may be hard to reach. In this context, a soft law approach may be initially more viable, taking the example of the UN Guiding Principles on Internal Displacement.'¹⁹³

Another subject of discussion is the possibility to create different regional frameworks offering protection, adapted to the local needs and situations. As a proposed regional solution, New Zealand Climate Change Minister James Shaw in 2017 announced the Governments' consideration to create a new visa category for people displaced by climate change. With efforts being made through the Nansen Initiative, Shaw held that '[t]here might be a new, an experimental humanitarian visa category for people from the Pacific who are displaced by rising seas stemming from climate change, and it is a piece of work that we intend to do in partnership with the Pacific Islands'.¹⁹⁴ Also McAdam identifies regional soft law declarations as a more suitable and effective solution.¹⁹⁵

As McAdam tables the numerous calls for a new international treaty, e.g. a Protocol to the 1951 Refugee Convention or to the UNFCCC, with the object to protect climate refugees, she doubts that the establishing of a new treaty would be the best solution. She holds that an international treaty protecting climate refugees would address cross-boarder movement on the expense of the more common internal movement. Moreover, McAdam foresees the pragmatic issue that States seem to lack the political will to establish a new instrument protecting climate refugees.¹⁹⁶

After researching the nexus between climate change and migration in Somalia and Burundi on the behalf of UNHCR, Kolmannskog identifies the lack of legal protection provided for climate refugees and holds that new legal solutions are in place. In addition to this, he

¹⁹¹ Zimmermann & Mahler (n 65) 299.

¹⁹² Docherty & Giannini (n 190) 402.

¹⁹³ IOM Outlook (n 3) 27.

¹⁹⁴ Radio New Zealand, *NZ considers developing climate change refugee visa* (2017).

¹⁹⁵ Jane McAdam, 'Swimming Against the Tide: Why a Climate Change Displacement Treaty is not the Answer' (2011) 23(1) *International Journal of Refugee Law* 2, 21.

¹⁹⁶ *Ibid* 4–13.

highlights the role and responsibilities of international humanitarian agencies, as the affected States usually have limited capacity and/or will to protect its citizens in this regard. Furthermore, he holds that States already affected by climate change, such as droughts and floods, might have certain strengths such as local customary law frameworks and mechanisms, which he recommends to be further researched and supported.¹⁹⁷

The Nansen Initiative was launched by Norway and Switzerland in 2012. It identified the serious legal gap regarding protection for people migrating following climate change. The Nansen Initiative did not aim to create new legal standards, but rather to build consensus among states, in order to protect people displaced across borders, by setting up a Protection Agenda. The Agenda covered the areas of preparedness before displacement occurs, protection and assistance during displacement, and transition to solutions in the aftermath of the disaster.¹⁹⁸ The Initiative was concluded in 2015, and one year later the Platform on Disaster Displacement, a state-led initiative working towards better protection for people displaced across borders in the context of disasters and climate change, was launched. The aim of the Platform is to implement the Nansen Initiative Protection Agenda and to provide a toolbox for States to better prevent, prepare and respond to situations when people are forced to seek cross-border protection following climate change. States may choose to endorse the Protection Agenda, which is a non-binding legal instrument, merely mirroring a consensus of the need of protection for climate change caused cross-border migration.¹⁹⁹

6.4 Supplementing Protection from Other Instruments

Docherty and Giannini hold that it is vague to claim that international environmental law provides any substantial protection for climate refugees. The UNFCCC is identified as preventative in its nature, and primarily concerns state-to-state relations. The Convention was not designed to deal with the issue of climate refugees and thereby provides them little protection.²⁰⁰ As international environmental law primarily deals with the protection of the environment, IOM however highlights that it does include some instruments and general principles relevant for climate refugees. This by imposing certain obligations on States, which also serves as protection in terms of individuals, including climate refugees.²⁰¹

The later year rapid development and expanded scope of the international human rights framework may play a part in the existing protection gap of climate refugees. As it widens into a universally applicable and all-inclusive tool, IOM holds that the concept of protection also for environmental-caused movement requires a broader meaning in order to meet the protection of the rights promised to every human being at all times and without any

¹⁹⁷ Vikram Kolmannskog, *Climate Change, Disaster, Displacement and Migration: Initial Evidence from Africa* (2009) Research Paper No. 180 UNHCR 15.

¹⁹⁸ The Nansen Initiative: *Towards a protection agenda for people displaced across borders in the context of disasters and the effects of climate change* (2019).

¹⁹⁹ The Platform on Disaster Displacement: *A state-led initiative working towards better protection for people displaced across borders in the context of disasters and climate change* (2019).

²⁰⁰ Docherty & Giannini (n 190) 358.

²⁰¹ IOM Outlook (n 3) 31.

discrimination. As an example, the prohibition of refoulement, constituting one of great relevance for climate refugees, is to be found in international human rights law.²⁰² van der Vliet partly agrees, and considers that even though the protection possibilities under international human rights law are weak, it is still helpful to frame migration following climate change in this way.²⁰³

²⁰² IOM Outlook (n 3) 29 and 31.

²⁰³ van der Vliet (n 72) 21.

7. Summarizing Analysis and Conclusion

7.1 Summarizing Analysis

The current gap in the international legal protection for climate refugees consists of many factors. The non-recognition of climate refugees in Article 1(a)(2) of the 1951 Refugee Convention marks the absence of their protection, and constitutes somewhat of a dead end in this regard. The reason behind climate refugees not falling under its scope is fundamentally because of their non-existence at the time of the drafting of the Convention. In order to possibly adjust the Convention or to create a new legal instrument entailing their protection, a fixed definition of the climate refugee is essential.

The task to define the climate refugee consists of several challenging layers. First and foremost, one has to determine the qualified climate change consequences, which reaches the threshold of constituting the absolute *need* to migrate. Already here, this determination is subject to discussion. Taking the example of increased temperatures²⁰⁴, one person might be more sensitive to heat than its neighbour, entailing different subjective views of the point when migration is inevitable. As El-Hinnawi highlighted in 1985²⁰⁵, the climate refugee is defined partly because of its forced reason for migration. The distinction between forced and voluntary migration thus also leaves room for a subjective interpretation, and the question arises who is to decide when a situation becomes unsustainable and thereby entails the forced migration.

Furthermore, in order to create a new category of climate refugees under the 1951 Refugee Convention, one has to strictly circle the relevant group of persons and distinguish these from other categories of migration. This is not an easy task, as the cause of migration rarely has only one factor. It would have to be decided whether the reason for the flight *mainly* or *solely* would need to stem from climate change consequences. Perhaps this reason to migrate is never the only one, as climate change often is seen to entail, as an example, the lack of access to food and water, constituting the direct reason of migration. Poverty is another factor, often playing a part in this regard. However, the submerging Island States in the Pacific Ocean might constitute a suitable example of when climate change consequences is solely the reason for the migration, since the gradual extinction of the States is the exclusive reason for the migration.

The increased occurrences of citizens from the small Island States of Kiribati and Tuvalu applying for visas in neighbouring States²⁰⁶ serve as an illustrative example in regard to the situation for climate refugees. In the cases, the Tribunal and Courts of New Zealand consistently found that the 1951 Refugee Convention was not applicable in terms of climate refugees. Furthermore, and what is mainly noteworthy, is the Tribunal's and Courts'

²⁰⁴ As exemplified in the Cancun Agreements (n 28) para 25.

²⁰⁵ See section 2.3 of the study.

²⁰⁶ See section 3.4 of the study.

identification of the issue and their highlighting of the fact that climate change consequences in the future might find its way into the Convention as a ground for protection.²⁰⁷

One other solution might be to include climate refugees under the existing category of having well-founded fear of being persecuted for the reason of ‘membership of a particular social group’. As Zimmermann and Mahler hold²⁰⁸, one might argue that climate refugees form a particular social group since they together constitute a defined group, subject to the consequences of climate change. Although, again, it is not an easy task to define this distinguished group of persons.

The suggestion to create a new universal instrument with the object of protecting climate refugees might be a difficult task, *inter alia* given the challenge to among States agree upon a definition of the climate refugee. As a permanent difficulty within public international law, States’ different political wills as well as priorities are probable to constitute obstacles in the creation of a climate refugee instrument. Furthermore, a new instrument might cause issues in terms of overlapping or conflicting with parts of the content of the existing 1951 Refugee Convention.

Another option is to create regional instruments in areas of the world particularly affected by climate change, providing the climate refugee its protection. A regional climate refugee instrument might be effective in identifying the specific regional knowledge and the needs of the local situation. The challenge of agreeing on the definition of the climate refugee would probably also be easier, given the fewer number of involving States. Perhaps regions would find helpful guidance from the Nansen Initiative and its Protection Agenda²⁰⁹, which provides States with the tools needed in terms of offering protection to climate refugees. However, the occurrence of different protection in different areas of the world might be criticized as unfair or unjust. Additionally, one may argue that migration is a question of public international law and thus that the issue of the protection for climate refugees has to be dealt with on an international level.

Adjusting the 1951 Refugee Convention to include a new category protecting also climate refugees might, however, be the most reasonable and practical way to go. As Zimmermann and Mahler have pointed out²¹⁰, the living nature of the Convention’s definition of refugees entails the demand of it being interpreted in the light of changed circumstances. The contemporary development of climate refugees must be seen as a decent candidate in this regard. However, also this solution includes the challenge of the State Parties to agree upon a definition of the climate refugee.

²⁰⁷ See section 3.4.1 of the study.

²⁰⁸ See section 3.2 of the study.

²⁰⁹ See section 6.3 of the study.

²¹⁰ See section 3.2 of the study.

As for the hunt of supplementing protection from other areas of international law, the study has found that neither international environmental law nor international human rights law offer a substantial protection for climate refugees. The search for supplemented protection under international human rights law was distinctly illustrated by the Tribunal and Courts of New Zealand's method of consulting also this area of law, after finding international refugee law non-applicable.²¹¹ The Tribunal and Courts did, however, not manage to find any substantial protection for climate refugees within these areas of law.

With States as the subject of international environmental law, it is difficult for the individual to claim any explicit rights from this area of law. The rapid development of human rights entails an extensive protection for the individual. Climate refugees are undoubtedly subject of human rights violations, *inter alia* the right to privacy. Sea level rise and coastal erosion are examples of violations of climate refugees' integrity and home. As shown in e.g. the ECtHR's ruling in *Öneryildiz v Turkey*²¹², States have a far-reaching responsibility in the obligation of upholding the human rights of their citizens. These identified obligations might be the pathway into the future protection of climate refugees.

One may instead see the instruments treating international environmental law and international human rights law as important in terms of providing factors and rights to consider in the development of including a refugee protection for climate refugees. *Inter alia* the UNFCCC and the ICCPR might be seen as a foundation for a future protection, either in constructing a new climate refugee convention, or in including climate refugees in the existent 1951 Refugee Convention. The observations and recognition of the situation for climate refugees within instruments of international environmental law and international human rights law may be seen as a force, lobbying for the future acknowledgement of the climate refugee.

7.2 Conclusion

Climate refugees do not *de lege lata* enjoy international legal status or protection on the ground of migrating following climate change. The 1951 Refugee Convention is the main international instrument presenting a list of groups and reasons, which entail refugee protection. As we have learned, climate refugees are not to be found in this list. The amount of existing soft law documents on the area however mirrors a growing consensus and a will among States to address the issue of the lacking protection for climate refugees.

Following this, and as we have learned, an explicit supplementing protection is not to be found, neither under international environmental law nor under international human rights law. The growing number of instruments within these fields reflects the increasing global concern on climate change and the human-caused impact regarding it, as well as an expansion of international human rights. However, in terms of substantial regulations regarding the protection of climate refugees, these instruments are silent.

²¹¹ See section 3.4 of the study.

²¹² See section 5.2 of the study.

With an increasing number of climate refugees and attempts to claim protection in neighbouring States²¹³, the *de lege ferenda* debate regarding the issue is boiling. The discussion focuses mainly on the need of a definition of the climate refugee, as well as on the different options of the future codification of the protection. As the discussions go on, and before the State of the climate refugee is submerged under water, one may hope for a suitable adapted or supplemented, international or regional, legal protection, addressing and protecting the persons subject of the adverse consequences of climate change.

²¹³ See section 3.4 of the study.

8. Bibliography

Treaties

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ‘Protocol of San Salvador’ (adopted 17 November 1988, entered into force 16 November 1999) OASTS 69 (San Salvador Protocol)

African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) 3013 UNTS (Kampala Convention)

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123

Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) USTS 993 (ICJ Statute)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR)

Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention)

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)

Convention Relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663 (1933 Refugee Convention)

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol)

New Zealand Immigration Act 2009 No. 51 (assented 16 November 2009) New Zealand Parliamentary Counsel Office

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45

Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414

Treaty on the Functioning of the European Union (Consolidated version 2012) OJ 2012/C 326/01 (TFEU)

United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT)

International Cases

Arbitral Awards

Trail Smelter Arbitration (U.S. v Canada) (1938) 3 RIAA 1905–1982

European Court of Human Rights

Budayeva and others v Russia App Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008)

López Ostra v Spain App No. 16798/90 (ECtHR, 9 December 1994)

Mehmet Şentürk v Turkey App No. 13423/09 (ECtHR, 9 April 2013)

Peck v the United Kingdom App No. 44647/98 (ECtHR, 28 January 2003)

Soering v the United Kingdom App No. 14038/88 (ECtHR, 7 July 1989)

Öneryildiz v Turkey App No. 48939/99 (ECtHR, 30 November 2004)

National Cases

AD (Tuvalu) [2014] NZIPT 501370–371

AF (Kiribati) [2013] NZIPT 800413

Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment [2013] NZHC 3125

Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment [2014] NZCA 173

Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment [2015] NZSC 107

UN Materials

Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972) UN Doc. A/CONF/48/14/Rev.1 (Stockholm Declaration)

El-Hinnawi E, *Environmental Refugees* (1985) Nairobi, Kenya: United Nations Environmental Programme

Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects*, Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (CUP 2014)

International Organization for Migration (IOM), *Glossary on Migration* (2019) No. 34 International Migration Law, available at <https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf> accessed 16 May 2019

International Organization for Migration (IOM), *Migration and Climate Change* (2008) No. 31 IOM Migration Research Series, available at <http://publications.iom.int/system/files/pdf/mrs-31_en.pdf> accessed 14 June 2019

International Organization for Migration (IOM), *Outlook on Migration, Environment and Climate Change* (2014), available at <http://publications.iom.int/system/files/pdf/mecc_outlook.pdf> accessed 27 April 2019

Kolmannskog V, *Climate Change, Disaster, Displacement and Migration: Initial Evidence from Africa* (2009) Research Paper No. 180 UNHCR

McAdam J, *Climate Change Displacement and International Law* (2010) Side Event to the High Commissioner's Dialogue on Protection Challenges, 8 December 2010, Palais des Nations, Geneva, available at <<https://www.unhcr.org/4d05ecf49.pdf>> accessed 20 July 2019

United Nations Framework Convention on Climate Change (UNFCCC), Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UN Doc. UNFCCC/CP/2010/7/Add.1, 15 March 2011 (Cancun Agreements)

United Nations High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007)

United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (2002) HCR/GIP/02/02

United Nations Commissioner for Refugees (UNHCR), *Guiding Principles on Internal Displacement* (1998)

United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees* (1992) HRC/IP/4/Eng/REV.1

United Nations High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis* (1990), available at <<https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>> accessed 25 April 2019

United Nations High Commissioner for Refugees (UNHCR), *UNHCR viewpoint: 'Refugee' or 'migrant' – Which is right?* (2016), available at <<https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html>> assecced 24 April 2019

United Nations Human Rights Committee (UNHRC), *General Comment No. 16: Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)* of the ICCPR (1988) HRI/GEN/1/Rev.6 (Vol. I)

United Nations Human Rights Committee (UNHRC), *General Comment No. 36: Article 6 (The Right to Life)* of the ICCPR (2018) CCPR/C/GC/36

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR)

Books

Abass A, *Complete International Law*, 2nd edn (OUP 2014)

Bodansky D, Brunnée J & Rajamani L, *International Climate Change Law* (OUP 2017)

Boyle A, 'Soft Law in International Law-Making' in Malcolm D Evans (ed), *International Law*, 4th edn (OUP 2014)

Cameron I, *An Introduction to the European Convention on Human Rights*, 7th edn (Iustus Förlag AB 2014)

Einarsen T, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann, Jonas Dörschner & Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011)

Goodwin-Gill GS & McAdam J, *The Refugee in International Law*, 3rd edn (OUP 2007)

Kleineman J, 'Rättsdogmatisk metod' in Fredric Korling & Mauro Zamboni (eds), *Juridisk metodlära* (Studentlitteratur AB 2013)

Kugelman D, 'Migration' (2009) in *Max Planck Encyclopedia of Public International Law (MPEPIL)* (online edn) accessed 4 June 2019

Marauhn T, 'Changing Role of the State' in Daniel Bodansky, Jutta Brunnée & Ellen Hay (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008)

Minnerop P, 'Climate Protection Agreements' (2018) in *Max Planck Encyclopedia of Public International Law (MPEPIL)* (online edn) accessed 17 April 2019

Murray R, *The African Charter on Human and Peoples' Rights: A Commentary* (OUP 2019)

Petersen N, 'Life, Right to, International Protection' (2012) in *Max Planck Encyclopedia of Public International Law (MPEPIL)* (online edn) accessed 3 July 2019

Redgwell C, 'International Environmental Law' in Malcolm D Evans (ed), *International Law*, 4th edn (OUP 2014)

Rodley N, 'International Human Rights Law' in Malcolm D Evans (ed), *International Law*, 4th edn (OUP 2014)

Sandgren C, *Rättsvetenskap för uppsatsförfattare: Ämne, material, metod och argumentation*, 3rd edn (Norstedts Juridik 2015)

Thirlway H, 'The Sources of International Law' in Malcolm D Evans (ed), *International Law*, 4th edn (OUP 2014)

van der Vliet J, 'Climate refugees': A legal mapping exercise' in Simon Behrman & Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018)

Ziemele I, 'Privacy, Right to, International Protection' (2009) in *Max Planck Encyclopedia of Public International Law (MPEPIL)* (online edn) accessed 14 July 2019

Zimmermann A & Mahler C, 'Article 1 A, para. 2' in Andreas Zimmermann, Jonas Dörschner & Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011)

Journal Articles

Bates D, 'Environmental Refugees? Classifying Human Migrations Caused by Environmental Change' (2002) 23(5) *Population and Environment* 465

Docherty B & Giannini T, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *The Harvard Environmental Law Review* 349

McAdam J, 'Swimming Against the Tide: Why a Climate Change Displacement Treaty is not the Answer' (2011) 23(1) *International Journal of Refugee Law* 2

Miscellaneous

Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984) OAS, available at <https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf> accessed 15 June 2019

Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences Thereof (2001) OJ L212 12–23 (Temporary Protection Directive)

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (2011) OJ L337 9–26 (Qualification Directive)

European Parliamentary Research Service (EPRS), *The Concept of 'Climate Refugee' – Towards a Possible Definition* (2019) PE 621.893, available at <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI\(2018\)621893_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf)> accessed 28 April 2019

Inter-American Court of Human Rights, *Advisory Opinion OC-23/17* (2017), available at <http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf> accessed 17 July 2019

Radio New Zealand, *NZ considers developing climate change refugee visa* (2017), available at <<https://www.rnz.co.nz/international/pacific-news/342749/nz-considers-developing-climate-change-refugee-visa>> accessed 15 June 2019

The Nansen Initiative: *Towards a protection agenda for people displaced across borders in the context of disasters and the effects of climate change* (2019), available at <<https://www.nanseninitiative.org/secretariat/>> accessed 22 May 2019

The Platform on Disaster Displacement: *A state-led initiative working towards better protection for people displaced across borders in the context of disasters and climate change* (2019), available at <<https://disasterdisplacement.org/the-platform/our-response>> accessed 3 June 2019