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**The Legal Protection of Climate Change Refugees: An Analysis of the Proposed Solutions to Closing the Protection Gap**

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# 1 Introduction

## 1.1 Current Situation – from Climate Change to Human Displacement

A growing body of researchers suggest that the adverse effects of climate change are some of the largest challenges faced globally, and it is estimated that these effects will cause the displacement of more than 200 million people by 2050.<sup>1</sup> Although these estimates are uncertain, climate change is predicted to cause the largest refugee crisis “in human history”.<sup>2</sup> Climate Change Refugees from Bangladesh alone are estimated to outnumber all current refugees worldwide.<sup>3</sup>

The Intergovernmental Panel on Climate Change (IPCC) report that climate change has led to increased frequency and intensity of droughts, an increase in extreme weather events, increased land degradation, increased ice melting and an increase in extreme high sea levels.<sup>4</sup> Furthermore, climate change is projected to “undermine food security” through negatively impacting crop yields.<sup>5</sup> These negative effects on the environment may lead to areas being uninhabitable, and in turn lead to displacement.

Due to climate change being a “collective action problem at the global scale” there is a need for a collective response to the issue of Climate Change Refugees.<sup>6</sup> Currently, the “main objective” of the “international legal framework is mitigation of climate change”, and not to address displacement due to climate change.<sup>7</sup> However, seeing how a rapidly increasing number of individuals will be displaced due to climate change, recognition of the problem and

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<sup>1</sup> Norman Myers, "Environmental refugees: a growing phenomenon of the 21st century," *Philosophical transactions of the Royal Society of London. Series B, Biological sciences*, 357 (2002), no. 1420, 609-613.

<sup>2</sup> Frank Biermann and Ingrid Boas, "Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees," *Global Environmental Politics*, 10 (2010), no. 1, 60-88, p. 83. Due to the multitude of reasons of why people migrate it is hard to single out climate change as the primary reason for displacement making the calculation hard.

<sup>3</sup> Frank Biermann and Ingrid Boas, "Protecting Climate Refugees: The Case for a Global Protocol," *Environment: Science and Policy for Sustainable Development*, 50 (2008), no. 6, 8-17; Myers (2002).

<sup>4</sup> Intergovernmental Panel on Climate Change (IPCC), *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*, 2019; Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, 2014.

<sup>5</sup> Intergovernmental Panel on Climate Change (IPCC) (2014) p. 4; Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, 2014.

<sup>6</sup> Intergovernmental Panel on Climate Change (IPCC) (2014) p. 76; Intergovernmental Panel on Climate Change (IPCC) (2014) p. 76.

<sup>7</sup> Sumudu Atapattu, "Climate Change, Human Rights, and Forced Migration: Implications for International Law," *Wisconsin International Law Journal* 27 (2009), no. 3, 607- 636, p. 608.

legal protection is needed. Both climate change and displacement are highly politicized topics, and a legal solution to the climate change displacement issue is dependent on political will. However, the notion of state sovereignty and immigration as a national security issue has led to strict migration laws and a reluctance to open state borders to an influx of people displaced by climate change.<sup>8</sup>

## **1.2 Thesis Scope**

Research has shown that climate-related movement will be predominantly internal and gradual, meaning that the majority of people will be displaced within their own states.<sup>9</sup>

Persons forced to leave their homes, but remaining within the border of their state, are known as internally displaced persons (IDP). Although the global report on internal displacement show that there were 23,9 million new internally displaced persons due to weather related disasters in 2019, these people still enjoy the protection of their state and are covered by the Guiding Principles on Internal Displacement.<sup>10</sup> Furthermore, international law does not govern activities within states. Thus, the topic of internal displacement lies beyond the scope of international law and therefore also beyond the scope of this thesis. Yet, states will become uninhabitable or be unable to facilitate their internally displaced population causing displacement across international borders. The focus of this thesis is on cross border displacement, and the adequacy of the international law protecting Climate Change Refugees.

## **1.3 Purpose of the Thesis and Research Questions**

The research objectives and research questions of this thesis are formulated on the basis of an underlying hypothesis that there exists a legal protection gap in the management of Climate Change Refugees which needs to be addressed by the international society. Therefore, the purpose of this thesis is to contribute towards narrowing down the legal protection gap through analysing international law, establishing to which degree international law provides legal protection for Climate Change Refugees, and thereafter proposing possible solutions. The analyses undertaken in this thesis intend to contribute to the ongoing legal discussion on the legal protection of Climate Change Refugees.

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<sup>8</sup> Sumudu Atapattu, "'Climate Refugees" and the Role of International Law," Oxford Research Group, 2018, <https://www.oxfordresearchgroup.org.uk/blog/climate-refugees-and-the-role-of-international-law>, (accessed 18 February 2021); Atapattu (2018)

<sup>9</sup> Jane McAdam, *Climate Change, Forced Migration and International Law*, Oxford University Press 2012, p. 16.

<sup>10</sup> Internal Displacement Monitoring Centre, "Global Report on Internal Displacement 2020," 2020, <https://www.internal-displacement.org/global-report/grid2020/>, (accessed 29 April 2021).

To fulfil the purpose of the thesis, several research questions must be addressed. These being:

- (1) Who are defined as Climate Change Refugees?
- (2) Why is there no agreed-upon definition of Climate Change Refugees?
- (3) How are Climate Change Refugees currently protected under international law?
- (4) Is there a need to provide stronger protection for Climate Change Refugees?
- (5) How can this protection need be filled?

## **1.4 Sources and Methodology**

The topic of the thesis is situated within the areas of refugee law, human rights law and environmental law. As this thesis is written on the topic of international law it will be applying international legal methodology. The thesis will apply a legal analysis of the law *de lege lata*, to determine to what extent current international law offers protection to Climate Change Refugees. Furthermore, the thesis evaluates the ways in which the protection of Climate Change Refugees can be better met, thus applying an analysis of the law *de lege ferenda*.

The international legal system differs significantly from the domestic legal system in four ways. Firstly, the sources applied are different. Secondly, states are the subjects of international law. Thirdly, within the international legal system, treaties are negotiated between state parties. This differentiates the international legal system from domestic legal systems where a legislator creates and enacts laws. And finally, according to the 1969 Vienna Convention on the Law of Treaties (VCLT) art. 34, a treaty only creates rights and obligations for consenting states.<sup>11</sup> However, states can be bound by international customary law without explicit agreement.

Article 38 of the 1945 Statute of the International Court of Justice (ICJ Statute) lists the most central sources applicable in international law.<sup>12</sup> As primary sources, art. 38 lists international conventions, international custom, and the general principles of law recognized by civilized nations. As secondary sources the art. 38 lists judicial decisions and the teachings of the most highly qualified publicists of the various nations. Although the article is only formally binding for the ICJ, the article is seen as a guide for all application of international law. The primary sources relied upon for this thesis include conventions such as the 1951 Convention

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<sup>11</sup> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969 (entered into force 27 January 1980) 1155 UNTS 331; "Vienna Convention on the Law of Treaties,"

<sup>12</sup> Statute of the International Court of Justice, San Francisco, 26 June 1945 (entered into force 24 October 1945)

relating to the Status of Refugees (Refugee Convention).<sup>13</sup> The secondary sources of law consulted are judicial decisions and the teachings of the most highly qualified publicists. The teachings of the most highly qualified publicists are especially important to this thesis, as the topic of Climate Change Refugees is relatively new and therefore was not considered when the Refugee Convention was negotiated. Thus, the literature better reflects the current challenges faced by people displaced due to climate change than that outlined in the Refugee Convention. The judicial decisions available on the topic stem mostly from domestic courts. They provide an insight into how states interpret and apply international law on cases where people have been displaced by climate change. The application of the Refugee Convention is done by the states themselves, thus it is important to look at how the States interpret and implement the convention. However, domestic judicial decisions only “have “decisional authority” for the parties to the dispute” but might have some authority in “guiding future interpretations of the law”.<sup>14</sup>

All convention articles relevant to the thesis will be interpreted in accordance to the VCLT articles 31 and 32. It must be pointed out that the principles for treaty interpretation included in the VCLT reflects customary international law, and will thus give guidance to the interpretation of treaties concluded before the VCLT.<sup>15</sup> Further methodological considerations will be touched upon in the thesis where it is called for.

## **1.5 Structure**

An introduction to the context of climate change and displacement, and the methodological considerations of the thesis, are offered in this first chapter. Chapter two examines the definitions of people displaced by climatic events, explores why a definition and terminology is so hard to settle on, and lastly provides an overview of the ways in which climate change can lead to displacement. The second chapter also offers a working definition of Climate Change Refugee that will be the basis for the rest of the thesis. Chapter three applies an analysis of the law de lege lata, evaluating international law governing refugees today, and to what extent it protects Climate Change Refugees. Chapter four looks at the ways in which change in international law can be brought about, while exploring solutions to the protection of Climate Change Refugees. The proposed solutions are analysed with the aim of evaluating

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<sup>13</sup> Convention relating to the Status of Refugees, Geneva, 28 July 1951 (entered into force 22 April 1954) 189 UNTS 137.

<sup>14</sup> Odile Ammann, *Domestic Courts and the Interpretation of International Law*, Brill Nijhoff 2020, p. 157.

<sup>15</sup> Matthew Scott, "Refugee Status Determination in the Context of "Natural" Disasters and Climate Change: A Human Rights-Based Approach," *Faculty of Law, Lund University*, (2018), p. 263.

their merits and the likelihood of implementation. Lastly, chapter five offers an overview and a conclusion.



## 2 The Issue of Climate Induced Displacement

### 2.1 Introductory Remarks

This chapter examines the definitions of people displaced by climatic events, explores why a definition and terminology is so hard to settle on and provides an overview of the ways in which climate change can lead to displacement. The purpose of this chapter is to provide some background to the debate of climate change displacement and lay the foundation for the coming analysis of the legal protection of Climate Change Refugees.

### 2.2 The Disproportionality of Climate Change Displacement

Climate change is an issue of environmental justice. States have, to differing degrees, contributed to climate change through their greenhouse gas emissions (GHG). States that historically have contributed little to climate change will be the ones most heavily impacted by climate change.<sup>16</sup> Thus, climate change will hit states in an “unfair” manner relative to their contribution to the problem. Furthermore, the impacts of climate change will affect the already vulnerable areas of the world especially hard. This is due in part to their geographical location, but also due to the fact that developing nations are more at risk to the adverse effects of climate change as they lack the financial and technical ability to mitigate and adapt to climate change.<sup>17</sup>

The IPCC has reported that “[p]eople who are socially, economically, culturally, politically, institutionally, or otherwise marginalized are especially vulnerable to climate change.”<sup>18</sup>

Climate change can intensify inequalities, and is described as a poverty multiplier, pushing poor people further into poverty as well as increasing the number of people living in poverty.<sup>19</sup> The most serious impacts of climate change are expected in already disadvantaged areas of sub-Saharan Africa and Southeast Asia.<sup>20</sup> Moreover, “the largest percentage of refugees is found in countries neighbouring their country of origin.”<sup>21</sup> Due to migration to neighbouring states, refugees often end up in already disadvantaged states. The fact that the

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<sup>16</sup> Intergovernmental Panel on Climate Change (IPCC) (2014); Intergovernmental Panel on Climate Change (IPCC) (2014).

<sup>17</sup> Masa Kovic, ““Environmental Refugees”: Does International Law fail to offer them legal protection?,” *Faculty of Law, University of Toronto*, (2008).

<sup>18</sup> Intergovernmental Panel on Climate Change (IPCC) (2014) p. 54.

<sup>19</sup> Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, 2018; Kovic (2008).

<sup>20</sup> Intergovernmental Panel on Climate Change (IPCC) (2018).

<sup>21</sup> World Bank, *The Impacts of Refugees on Neighboring Countries: A Development Challenge*, 2011, p. 1.

most disadvantaged states are most heavily hit by the adverse effects of climate change, as well as hosting the largest number of refugees, leads to a need for a response to the issue of climate change induced displacement so as to disperse the burden.<sup>22</sup>

### **2.3 Settling on Terminology – Why Climate Change Refugee is the Preferred Term**

The international society has not been able to agree upon what terminology to use when addressing individuals displaced by climate change. Several terms have been used to describe people displaced by environmental reasons, some of these being Climate Change Refugees, environmental migrants, climate change migrant, and environmentally displaced persons.<sup>23</sup>

The terms refugee, migrant, and displaced person carry different meanings from a legal perspective, indicating different access to international protection.<sup>24</sup> The term refugee indicates that the person has met the requirements of the Refugee Convention, and will receive protection from the international society. The term migrant, on the other hand, might indicate volunteer movement often due to “the desire for economic improvement” as opposed to refugees who are “forced or compelled to relocate by external forces”.<sup>25</sup> Due to climate change leading to a gradual deterioration of the environment leaving some room to decide when, where, and how people will relocate, some believe the term migrant to be fitting. The UNHCR has proposed using the term environmentally displaced persons (EDPs). The usage of EDP is preferred as it creates a clear distinction between refugees who enjoy legal protection under the Refugee Convention and people displaced due to environmental reasons.<sup>26</sup> However, the term refugee indicates an urgency and need of protection. This need

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<sup>22</sup> Angela Williams, "Turning the Tide: Recognizing Climate Change Refugees in International Law " *Law & Policy*, 30 (2008), no. 4, 502-529.

<sup>23</sup> Christel Cournil, "The Protection of "Environmental Refugees" in International Law," in *Climate Change and Migration*, ed. Etienne Piguet, Antoine Pécoud, and Paul de Guchteneire, Cambridge University Press 2011, 355-383; Atapattu (2009); Lauren Nishimura, "'Climate Change Migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies," *International journal of refugee law*, 27 (2015), no. 1, 107-134; Brooke Havard, "Seeking Protection: Recognition of Environmentally Displaced Persons under International Human Rights Law," *Villanova Environmental Law Journal*, 18 (2007), no. 1.

<sup>24</sup> Brendan Gogarty, "Climate-change Displacement: Current Legal Solutions to Future Global Problems," *Journal of law, information and science*, 21 (2011), no. 1, 167-188, p. 169.

<sup>25</sup> Diane C. Bates, "Environmental Refugees? Classifying Human Migrations Caused by Environmental Change," *Population and Environment*, 23 (2002), no. 5, 465-477, p. 467.

<sup>26</sup> Sadako Ogata, "Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, at the Swiss Peace Foundation, Geneva, 30 October 1992," The UN Refugee Agency, 1992, <https://www.unhcr.org/admin/hcsp/3ae68fad20/statement-mrs-sadako-ogata-united-nations-high-commissioner-refugees-swiss.html>, (accessed 2 May 2021); Atapattu (2009) p. 621.

for protection can be as strong for people fleeing from the negative effects of climate change as those fleeing persecution protected by the Refugee Convention.

Scholars do not agree on whether to use the term Climate Change Refugees or environmental refugees.<sup>27</sup> Scholars preferring the term environmental refugees refer to people displaced due to the harmful effects of “environmental change induced by human or natural causes”, while the term Climate Change Refugees refer to people displaced by human-induced climatic events.<sup>28</sup> It is not always clear what events are due to climate change and what events are natural, as many natural disasters are exacerbated by climate change. Thus, it is hard to draw a clear line between the two. Some scholars have argued that the term environmental refugee is too broad, as it covers, among other things, one-off natural disaster events such as earthquakes, tsunamis and volcano eruptions, alongside extreme weather events and rising sea levels.<sup>29</sup> Displacement due to natural disasters can be just as devastating as those caused by climate change, and people displaced by one-off natural disaster events need protection alongside other forcefully displaced persons. However, the increased displacement witnessed today is due to human-induced climate change, and it is this displacement that need acknowledgement in international law.<sup>30</sup> The legal definition needs to be drawn somewhere, and as slow degradation due to climate change is predicted to displace millions of people from low lying areas, this will be the focus of this thesis.

Although in legal terms there is no such thing as a Climate Change Refugee, this does not mean that the usage of the term is obsolete.<sup>31</sup> Defining someone as a Climate Change Refugee says something about the reason for their displacement and the seriousness of their condition. Thus, this is the term I have chosen to use throughout the thesis to describe those displaced by climate change.

## **2.4 Defining Refugees Due to Climate Change**

Within international law there is no agreement on how to define Climate Change Refugees, although several attempts have been made by scholars.<sup>32</sup> Settling on a definition of Climate Change Refugees is important as it will determine who should be offered international legal

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<sup>27</sup> Margit Ammer and Lisa Sadlmayr, "Legal Status and Legal Treatment of Environmental Refugees," (2010); Williams (2008).

<sup>28</sup> Ammer and Sadlmayr (2010); Williams (2008).

<sup>29</sup> Atapattu (2009).

<sup>30</sup> Williams (2008). p. 506

<sup>31</sup> McAdam (2012).

<sup>32</sup> Biermann and Boas (2010).

protection due to climate change displacement. Ideally, protection would be offered to all displaced persons regardless of the reason for the displacement, however the law has to “trace some lines somewhere to enjoy a certain degree of effectiveness”, and a definition is needed to delimit rights and obligations.<sup>33</sup> Thus, the aim of this section is to decide on a definition that will determine who is to be granted protection due to climate change displacement. To determine who can be defined as a Climate Change Refugee, we need to look at some of the attempts at definitions made by scholars.

The concept of environmental refugees was introduced in 1985 by El-Hinnawi as

“people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.”<sup>34</sup>

The definition does not distinguish between internal displacement and displacement across international borders. El-Hinnawi’s definition has been criticized for being too broad.<sup>35</sup> This puts the usefulness of the definition into question. Bierman and Boas have defined climate refugees as

“people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of the three impacts of climate change: sea level rise, extreme weather events, and drought and water scarcity.”<sup>36</sup>

The definition has been criticized for the use of the term “near future” as it is vague and hard to define.<sup>37</sup> Furthermore, the definition only includes displacement due to three impacts of climate change: sea level rise, extreme weather events, and drought and water scarcity. Displacement due to any other impact of climate change, such as glacial melting, is not included in this definition. Determining the cause of displacement is difficult, and such a specification only seems to make the determination of who falls within the definition even

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<sup>33</sup> Giovanni Sciacaluga, *International Law and the Protection of Climate Refugees*, Palgrave Macmillan 2020, p. 24.

<sup>34</sup> Essam El-Hinnawi, “Environmental Refugees,” United Nations Environment Programme (1985) as cited in Atapattu (2009).

<sup>35</sup> Richard Black, "Environmental Refugees: Myth or Reality?," *Working Paper*, (2001), No. 34, 1-19.

<sup>36</sup> Biermann and Boas (2010) p. 67.

<sup>37</sup> Atapattu (2009) p. 630.

more complicated.<sup>38</sup> Furthermore, the definition only makes mention of the need to leave due to an alteration of the “natural environment”, it does not mention how severe this alteration must be. The balance between a meaningful definition that says something about what a Climate Change Refugee is, and encompassing all the aspects of climatic displacement, has proven to be difficult, and one of the reasons no agreement has been found on the topic.

The disagreement on how to define and determine who should be protected due to climate change displacement hinders the implementation of legal protection for such displaced individuals. The two most important aspects of the definition of Climate Change Refugees are, however, (1) the transformation of the environment to one less suitable for human occupation and (2) the acknowledgment that this degradation causes displacement.<sup>39</sup> As this recognises that the degradation of the environment leads to displacement. These two aspects can both be found in the above definitions. The proposed definition only encompasses displacement across international borders, and specifies that the environment must be unsuitable for human habitation, and that displacement is due to human-induced climate change. The thesis will base itself on the United Nations Framework Convention on Climate Change’s (UNFCCC) definition of climate change found in art. 1 (2). The provision defines climate change as “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.” Therefore, the definition of Climate Change Refugees will also only encompass human-induced climate change. This thesis will base itself on a definition of Climate Change Refugees as *individuals who are forced to flee abroad due to a transformation of the environment to one not suitable for human occupation due to human-induced climatic events.*

## **2.5 The Difficulties Surrounding the Defining of Climate Change Refugees**

There is no agreed upon definition of Climate Change Refugees within international law. One of the reasons it is so hard to agree upon a definition of Climate Change Refugees is due to the complexity of climate-induced displacement. Climate change interacts with other factors such factors, and it is hard to pinpoint exactly what causes displacement. Furthermore, people

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<sup>38</sup>Julian Borger, "Conflicts Fuelled by Climate Change Causing New Refugee Crisis, Warns UN," The Guardian, 2008, <http://www.guardian.co.uk/environment/2008/jun/17/climatechange.food>, (accessed 1 March 2021). Jane McAdam, "Climate Change Displacement and International Law: Complementary Protection Standards," *UNHCR Division of International Protection*, (2011), p. 8.

<sup>39</sup> Bates (2002).

displaced by climate change have different protection needs based on the different climatic events that caused their displacement.

The United Nations High Commissioner for Refugees (UNHCR) has recognized difficulties in categorizing displaced people based on the reasons for their displacement, because displacement is often the result of a combination of factors such as conflict, environmental and economic pressures.<sup>40</sup> McAdam argues that climate change “overlays pre-existing pressures” such as overcrowding, unemployment, development concerns and may “provide a ‘tipping point’ that would not have been reached in its absence”.<sup>41</sup> Climate change is often referred to as a risk amplifier, and it is climate change acting alongside already-existing pressures in a society that causes people to end up displaced. The problem in distinguishing the reason why individuals migrate leads to problems in defining what constitutes climate change displacement, and how to differentiate it from displacement owing to socioeconomic or political reasons.

As the reasons for displacement are multifaceted, some scholars maintain that the usage of the term Climate Change Refugee is “misleading” and does not help us understand the “complex processes at work in specific situations of impoverishment, conflict and displacement.”<sup>42</sup> The term is believed to be inaccurate as it specifically highlights the environmental reason for displacement. Thus, it is important to be mindful that climate change does not act in a vacuum, but together with other factors that can lead to displacement.

Climate change is a complex issue, and can cause displacement through alteration of the environment rendering places uninhabitable.<sup>43</sup> To make sense of the myriad ways in which climate change can lead to displacement, scholars have tried to categorize the climatic events responsible. Broad categories, such as *sudden-onset* and *slow-onset* as proposed by McAdam, can be a useful way to understand the nature of displacement. However, it is difficult to place environmental events within well-defined, neat categories.

The needs of people encountering slow- and sudden-onset climatic event are different. Sudden-onset events often lead to immediate and temporary displacement, while in the case of slow-onset events the displacement might be anticipated but will be permanent due to the

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<sup>40</sup>Borger (2008); McAdam (2011) p. 8.

<sup>41</sup> McAdam (2012) p. 16-17.

<sup>42</sup> Stephen Castle, "Environmental Change and Forced Migration: Making Sense of the Debate," *Working Paper*, (2002), No. 70, 1-14, p. 5.

<sup>43</sup> Sciacaluga (2020) p. 9.

environment being too deteriorated to sustain human habitation.<sup>44</sup> Furthermore, it is believed that the displacement due to sudden onset events will “directly expel populations,” while slow-onset events lead to a deterioration of the environment and the movement is seen to be of a more voluntary nature, as the change in the environment happens over time and the movement can happen pre-emptively.<sup>45</sup> This shows that different environmental events could lead to different migration flows.<sup>46</sup> However, there is a constant interaction “between the slower climate processes and more rapid-onset events” as “[s]low-onset processes, like sea level rise and erosion, may exacerbate sudden-onset disasters, such as storm surges, king tides, and flooding”.<sup>47</sup> Furthermore, distinguishing between forced and voluntary movement is important to current legal regimes offering protection, such as the Refugee Convention.<sup>48</sup>

Examples of slow-onset events caused by climate change are rising sea levels, drought, desertification, land degradation, and glacial melting, among others.<sup>49</sup> Rising sea levels lead to the degradation of low-lying areas and island states, and threaten the existence of island states through complete submersion.<sup>50</sup> Sea level rise causes issues such as flooding and salt contamination of land and fresh water sources, which in turn is a threat to food and water security in the impacted areas.<sup>51</sup> Coastal erosion causing loss of land and infrastructure is another adverse effect. Thus, people living in areas affected by rising sea levels can face land-loss and lose access to fresh water and food. This will in turn force the population to flee their homes.

Land degradation is the process of “turning fertile land into less or non-productive land”.<sup>52</sup> When land degradation processes take place in arid and semi-arid areas it is called desertification, and the process then turns fertile land into desert.<sup>53</sup> Land degradation and desertification are caused by growing populations increasing the pressure on the land,

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<sup>44</sup> Nishimura (2015) p. 112-113.

<sup>45</sup> Graeme Hugo, "Environmental Concerns and International Migration," *The International Migration Review*, 30 (1996), no. 1; Bates (2002) p. 468.

<sup>46</sup> Bates (2002) p. 468.

<sup>47</sup> Jane McAdam, "Building International Approaches to Climate Change, Disasters, and Displacement," *The Windsor yearbook of access to justice*, 33 (2017), no. 2, p. 3.

<sup>48</sup> Nishimura (2015) p. 113.

<sup>49</sup> These are some of the adverse effects of climate change. The length and the objective of the thesis does not allow a more in-depth examination of all the adverse effects of climate change.

<sup>50</sup> Williams (2008).

<sup>51</sup> Williams (2008) p. 505.

<sup>52</sup> EU Science HUB, "Desertification and Drought," 2019, <https://ec.europa.eu/jrc/en/research-topic/desertification-and-drought>, (accessed 29 April 2021); World Health Organization, "Climate Change: Land Degradation and Desertification," 2020, <https://www.who.int/news-room/q-a-detail/climate-change-land-degradation-and-desertification>, (accessed 6 May 2021).

<sup>53</sup> EU Science HUB (2019); World Health Organization (2020)

unsustainable agricultural and livestock practices degrading the quality of the soil, deforestation and extreme weather events such as drought and coastal surges salinating the land.<sup>54</sup> Drought is a natural phenomenon, but climate change is expected to increase the frequency, duration and severity of droughts.<sup>55</sup> Drought endangers the food and water security and livelihoods of people, and the reduction of food production and fresh water supplies might force inhabitants to move to survive.<sup>56</sup>

Extreme weather events such as storms and floods are examples of sudden-onset climate events that cause displacement. Extreme weather events can lead to land and homes being destroyed, leaving people with no home, livelihood, or access to food. The effects of extreme weather events are enhanced by deterioration associated with slow-onset events. Floods can be caused by natural rainfall or by glacial melting and rising sea levels, but the severity can be amplified by human development in the floodplains of rivers. Thus, although rainfall is a sudden-onset event, the heavily developed areas surrounding rivers intensifies the effects of flooding as natural drainage is no longer available. One such example is Bangladesh, which is located on the flood plains of the Ganges and Brahmaputra.<sup>57</sup> The growing population in the Himalayan region has resulted in greater demands on the Himalayan forest for fuel, leading to massive deforestation. This deforestation has led to a drainage problem, which in turn amplifies the effect of flooding.<sup>58</sup> The frequency of extreme weather events, such as storms, are predicted to grow due to the changing climate.

## 2.6 Concluding Remarks

The complexity of climate change-induced displacement makes it hard to agree upon a definition of a Climate Change Refugee. Under international law, the reasons why people flee are crucial in determining their rights, and therefore a definition needs to be agreed upon to determine who should be awarded protection.<sup>59</sup> The first step towards a solution to the protection need of Climate Change Refugees would be to settle on a definition of who should be protected. However, due to the current international climate, an agreed-upon definition is

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<sup>54</sup> World Health Organization (2020); United Nations Convention to Combat Desertification, "TST Issues Brief: Desertification, Land Degradation and Drought," 2013, <https://sustainabledevelopment.un.org/content/documents/1803tstissuesdldd.pdf>, (accessed 29 April 2021).

<sup>55</sup> EU Science HUB (2019)

<sup>56</sup> World Health Organization (2020)

<sup>57</sup> Shouvik Kumar Guha, "According Refugee Protection to Environmental Migrants: An Overview Under International Refugee Law," *International Journal of International Law*, 2 (2015), no. 1, p. 129.

<sup>58</sup> Guha (2015) p. 129.

<sup>59</sup> Atapattu (2009).



likely to be narrow, due to state's reluctance in taking on the responsibility of protecting a new large group of people. This section has proposed a definition of Climate Change Refugee, and settled on the terminology that will be used throughout the rest of the thesis.

## 3 The International Legal Framework Governing Climate Change Refugees

### 3.1 Introduction

Several legal frameworks govern refugees today. To determine whether individuals displaced by climate change are protected, we need to look closer at refugee law both on an international and regional level, the law of statelessness, human rights law, and environmental law. The objective of this chapter is to analyse the above-mentioned areas of law to identify possible gaps in the protection of Climate Change Refugees.

### 3.2 International Refugee Law

The Refugee Convention was implemented as a response to the refugee problem following the Second World War to ensure the safety and security of displaced people. The nature of displacement has changed since the convention's inception, but apart from the 1967 Protocol no changes have been made to the convention. This section will therefore be examining whether the Refugee Convention offers protection to individuals displaced by climate change.

Article 1 A (2) defines a refugee as someone who, due to “a well-founded fear of persecution”, is “outside the country of his nationality”, and the persecution causing the displacement must be based on “reasons of race, religion, nationality, membership of a particular social group or political opinion”. Thus, for Climate Change Refugees to be granted the protection offered refugees in international law, they must meet the cumulative requirements of art. 1 A (2).

The Refugee Convention does not contain a definition of “a well-founded fear of persecution”. Thus, we must interpret the convention text in accordance with VCTL art. 31. The ordinary meaning of “well-founded fear” indicates a worry about something bad happening that is “based on facts or good reasons.”<sup>60</sup> The UK House of Lords has stated in *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals* that the requirement indicates “a reasonable degree of likelihood” of persecution.<sup>61</sup> Thus, the persecution need to meet a certain degree of likelihood. The ordinary meaning of the term

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<sup>60</sup> Cambridge Dictionary, "Well founded ", <https://dictionary.cambridge.org/dictionary/english/well-founded>, (accessed 10 May 2021).

<sup>61</sup> *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)*, UK House of Lords (Judicial Committee), [1988] AC 958, [1988] 1 All ER 193, [1988] 2 WLR 92, [1988] Imm AR 147, 1987. Since 2009 the UK House of Lords have been known as the Supreme Court of the United Kingdom

“persecution” suggests a “cruel treatment over a long time.”<sup>62</sup> McAdam maintain that persecution entails a violation of human rights that are “particularly serious, either because of their inherent nature or because of their repetition.”<sup>63</sup> It has been established that climate change has negative impacts on people’s enjoyment of their human rights. Thus, if the adverse impacts of climate change become severe it could amount to “persecution”.

However, it follows from *R v. Secretary of State for the Home Department Ex parte Adan, Ex parte Aitseguer* that “persecution is not limited to cases where a state carried out or tolerated the persecution; it encompasses instances where a state is unable to afford the necessary protection to its citizens.”<sup>64</sup> Thus, persecution occurs when an act by the government harms individuals, but also when the government is unable to protect its citizens from cruel treatment by other actors.<sup>65</sup> In the case of Climate Change Refugees, it is the adverse effects of climate change that is the cause of the human rights violations, and not any act or omission by their governments. Cooper argues that governments play a role through not protecting its citizens against environmental degradation happening at the hands of multilateral companies or foreign states, and therefore “refugees seeking refuge from the resulting environmental degradation are effectively seeking refuge from their governments.”<sup>66</sup> McAdam do not agree with Coopers understanding of persecution as governments are not responsible “for climate change as a whole”.<sup>67</sup> The states that will be most heavily impacted by climate change are largely states that have made small contributions to climate change, thus it might not be fitting to say that individuals fleeing the adverse effects of climate change are fleeing persecution by their governments.

Moreover, to gain protection under the Refugee Convention the persecution must be “for reasons of” either “race, religion, nationality, membership of a particular social group or political opinion”. The persecution needs to be based on the membership of a social group that “exist independently of the persecution at issue”.<sup>68</sup> In the case of Climate Change Refugees, there needs to be something outside the fact that they face climate change

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<sup>62</sup> Cambridge Dictionary, "Persecution," <https://dictionary.cambridge.org/dictionary/english/persecution>, (accessed 2 May 2021).

<sup>63</sup> McAdam (2012) p. 45.

<sup>64</sup> *R v. Secretary of State for the Home Department, Ex parte Adan*, House of Lords (Judicial Committee), CO/872/98, 1998.

<sup>65</sup> Jessica B. Cooper, "Environmental Refugees: Meeting the Requirement of the Refugee Definition," *N.Y.U. Environmental Law Journal*, 6 (1998), no. 2, 480-530.

<sup>66</sup> Cooper (1998) p. 502.

<sup>67</sup> McAdam (2012) p. 45.

<sup>68</sup> Cooper (1998) p. 522.

displacement that make them a distinct social group. Cooper argues that Climate Change Refugees are “persecuted for reasons of their membership in a social group of persons who are politically powerless to protect their environment”, and therefore they meet the requirements of art. 1 A (2).<sup>69</sup> McAdam, on the other hand, maintains that people affected by the adverse effects of climate change do not constitute a particular social group, as they are not connected by a “fundamental, immutable characteristic other than the risk of persecution itself” and therefore, do not meet the requirements of art. 1 A (2).<sup>70</sup> The refugee appeal case no. 72189/2000 from New Zealand, concerning the refugee status of a family from Tuvalu, maintain that the appellants cannot be seen as being “differentially at risk of harm amounting to persecution” due to any one of the five convention grounds as “all Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu.”<sup>71</sup> The argument hinges on the view that the impacts of climate change are “indiscriminate, rather than tied to particular characteristics such as a person’s background or beliefs.”<sup>72</sup> This view has been held in other cases by New Zealand courts as well. Therefore, the judicial decision from New Zealand indicated that Climate Change Refugees are not interpreted to be protected by the Refugee Convention. However, the New Zealand Immigration and Protection Tribunal have in the Teitiota case stated that “while 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. Care must be taken to examine the particular features of the case.”<sup>73</sup> This is important as it points to the possibility of Climate Change Refugees being interpreted to fall within the refugee definition in the future.

The interpretation of the refugee convention art. 1 A (2) found in the above case does not translate to other cases in other domestic courts, as states are responsible for interpreting the Refugee Convention, and consequently different states interpret the convention differently. However, New Zealand is a state receiving several refugee applications from Pacific Islanders claiming to be displaced by climate change and due to the number of cases the “jurisprudence provides the most comprehensive analysis by decision-makers to date about the scope and

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<sup>69</sup> Cooper (1998) p. 487.

<sup>70</sup> McAdam (2012) p. 46.

<sup>71</sup> *Refugee Appeal Nos. 72189/2000, 72190/2000, 72191/2000, 72192/2000, 72193/2000, 72194/2000 & 72195/2000*, New Zealand: Refugee Status Appeals Authority, 2000, Para 13.

<sup>72</sup> McAdam (2012) p. 46.

<sup>73</sup> *Refugee Appeal Nos. 72189/2000, 72190/2000, 72191/2000, 72192/2000, 72193/2000, 72194/2000 & 72195/2000*, para 64.

content of protection for people escaping the impacts of climate change and disasters.”<sup>74</sup>

Thus, the judicial decisions from New Zealand can be important in indicating how art. 1 A (2) is interpreted in cases relating to people displaced due to climate change over time.

The terms of art. 1 A (2) are vague enough that they could offer protection to Climate Change Refugees. However, the way the article is currently interpreted, Climate Change Refugees do not meet the requirements in art. 1 A (2). The convention’s refugee definition is conservatively interpreted because states are concerned with increasing numbers of refugees, and therefore want to limit foreign individuals’ access to their territory.<sup>75</sup> The refugee definition is a product of its time, and therefore does not offer adequate protection what is predicted to be the largest group of refugees globally.<sup>76</sup>

### 3.3 Regional Refugee Law

#### 3.3.1 Introductory Remarks

At the regional level, the Organization of African Unity (OAU) has adopted the 1969 OAU Convention governing the Specific Aspects of the Refugee Problems in Africa, and the Organization of American States (OAS) has adopted the 1984 Cartagena Declaration regulating refugees within these regions.<sup>77</sup> Both these instruments offer a broader refugee definition than the one found in the Refugee Convention.<sup>78</sup> The broader definitions were adopted due to needs within the regions that were not covered by the Refugee Convention.<sup>79</sup> The OAU expanded the definition due to the number of people displaced “by wars of independence” in African states.<sup>80</sup> Similarly, the OAS enacted the declaration to assist the refugees generated by “years of armed conflict and generalized violence in the region.”<sup>81</sup> Whether the instruments offer protection to Climate Change Refugees will be explored below. This is of particular interest as Africa is predicted to generate a large number of Climate Change Refugees, and these displaced persons might already be protected by regional law.

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<sup>74</sup> Jane McAdam, "The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement," *Migration Studies*, 3 (2015), no. 1, 131-142, p. 132.

<sup>75</sup> United Nations High Commissioner for Refugees (UNHCR), *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, 2005.

<sup>76</sup> Cooper (1998).

<sup>77</sup> The OAU Convention Governing the Specific Aspects of the Refugee Problems in Africa, Addis-Ababa, 10 September 1969 (entered into force 20 June 1974)

<sup>78</sup> McAdam (2012).

<sup>79</sup> Cooper (1998) p. 496.

<sup>80</sup> Cooper (1998) p. 496.

<sup>81</sup> Cooper (1998) p. 497.

Furthermore, the broader definition can give some insight into how a wider Refugee instrument can be worded.

### **3.3.2 The 1969 Convention on the Specific Aspects of Refugee Problems in Africa**

The OAU Convention art. 1 (1) restates the Refugee Convention art. 1 A (2), while art. 1 (2) defines refugees as

“every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

Whether Climate Change Refugees are protected by the OAU Convention hinges on whether natural disasters or environmental degradation can be considered “events seriously disturbing the public order”. The phrase “events seriously disturbing the public order” encompass a magnitude of different events and is not defined elsewhere in the convention. Thus, the phrase must be interpreted in accordance with the “ordinary meaning” of the terms of the treaty to determine whether Climate Change Refugees are protected under the OAU Convention art. 1 (2). The ordinary meaning of the word “disturbance” indicates an interruption of a settled or peaceful condition or use of violence.<sup>82</sup> The fact that the disturbance has to concern the public order means that it must interfere with the operations of society. Furthermore, the term “seriously” indicates that there must be a degree of gravity to the disturbance.<sup>83</sup> If we look at the ordinary meaning of the phrase it seems to be able to encompass events caused by climate change as they disrupt the order of society.

Kälin asserts that the phrase refers to public disturbances resulting in violence, such as a riot, and not to natural disasters.<sup>84</sup> Lopez, on the other hand, argues that environmental events such as droughts can be considered “events seriously disturbing the public order”.<sup>85</sup> Article 1 (2)

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<sup>82</sup> Cambridge Dictionary, "Disturbance," <https://dictionary.cambridge.org/dictionary/english/disturbance>, (accessed 2 May 2021).

<sup>83</sup> Micha Bond Rankin, "Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years on," *South African journal on human rights*, 21 (2005), no. 3, 406-435, p. 415.

<sup>84</sup> Walter Kälin, "Conceptualising Climate-Induced Displacement," in *Climate Change and Displacement: Multidisciplinary Perspectives*, ed. Jane McAdam, Hart Publishing 2010.

<sup>85</sup> Aurelie Lopez, "The Protection of Environmentally-Displaced Persons in International Law," *Environmental Law*, 37 (2007), no. 2, 365-409.

require the disturbance to be serious, and it is unclear what kind of environmental degradation will meet this requirement. Africa has seen several droughts and famines that have disrupted lives in societies and led to civil unrest. Rwelamira points out that famine and drought are among the most challenging situations on the African continent.<sup>86</sup> Thus, it would be natural for these events to be covered by art 1 (2). However, Rankin maintain that evidence suggests that states “take a relatively restrictive approach to interpreting the definition”.<sup>87</sup> Kälin similarly considers it unlikely that states would accept “an expansion of the concept beyond its conventional meaning of public disturbances resulting in violence”, as this would lead to an extra burden on the African states.<sup>88</sup> This would indicate that Climate Change Refugees are not currently considered refugees in accordance with the OAU convention art. 1 (2). Furthermore, the OUA Convention art. 1 (2) only leads to a right to temporary protection. This is because the needs of displaced persons at the time of the agreement were predominantly temporary.<sup>89</sup> Climate Change Refugees displaced by slow-onset events such as rising sea level will lead to permanent protection needs.

### 3.3.3 The 1984 Cartagena Declaration

The Cartagena Declaration is a non-binding instrument, but is incorporated into domestic law in many countries in Central and South America.<sup>90</sup> Therefore, the Declaration is influential even if it is a soft law instrument. The definition of refugees as outlined in the Cartagena Declaration is similar to the one found in the OAU Convention. The Cartagena Declaration art. 3 (3) defines refugees as

“persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”.

The phrase “other circumstances which have seriously disturbed public order” is not defined elsewhere in the declaration. The wording of art. 3 (3) is modelled after the OUA convention art. 1 (2), thus the ordinary meaning indicates an interruption of a settled or peaceful

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<sup>86</sup> M. R. Rwelamira, "Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa," *International journal of refugee law*, 1 (1989), no. 4, 557-561.

<sup>87</sup> Rankin (2005) p. 415.

<sup>88</sup> Kälin (2010).

<sup>89</sup> Cooper (1998) p. 498.

<sup>90</sup> United Nations High Commissioner for Refugees (UNHCR), "Refugee Definition," <https://emergency.unhcr.org/entry/55772/refugee-definition>, (accessed 2 May 2021).

condition, or use of violence that interfere with the operations of society. If we look at the ordinary meaning of the phrase it seems to be able to encompass events caused by climate change as they disrupt the order of the society. However, The Committee of Legal Experts to the Committee of the Internationals Conference on Central American Refugees (CIREFCA), have interpreted the phrase “other circumstances which have seriously disturbed the public order” as referring to man-made action and not natural disasters.<sup>91</sup> It is, however, unclear where the line between man-made and natural disaster is drawn as we see the rise of man-made climate change leading to natural disasters and environmental degradation.<sup>92</sup> McCue argues that “the more closely linked an environmental disruption is to human intervention, then the more likely it could be considered within the Cartagena Declaration”.<sup>93</sup> Thus, the Cartagena Declaration has the prospect of offering protection to Climate Change Refugees, but is currently interpreted in a way that excludes Climate Change Refugees.

### **3.3.4 Concluding remarks**

The definition of refugees in the Cartagena Declaration and in the OAU Convention points to an alternative way of defining refugees that is open to interpretation and adaptation to the changing global refugee problem. It is also broader than the definition found in the Refugee Convention. Renaud et. al. argue that it is the definition that comes “closest to some form of official international recognition” that has the potential to encompass Climate Change Refugees.<sup>94</sup> These instruments do however only apply to individuals living within Africa and Central and South America, and would therefore not offer protection to all individuals displaced by climate change.<sup>95</sup> Still, they indicate how regional agreements can better the conditions of their inhabitants.

## **3.4 The International Law Governing Statelessness**

The refugee convention and regional conventions do not seem to offer adequate protection to Climate Change Refugees. Rising sea levels pose a threat to the existence of island states, such as Kiribati, Tuvalu, and the Maldives, as they risk being submerged. In the case of island states threatened by rising sea level, the question is whether citizens can be considered

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<sup>91</sup> Gregory S. McCue, "Environmental Refugees: Applying International Environmental Law to Involuntary Migration " *Georgetown International Environmental Law Review*, 6 (1993), no. 1, 151-190, p. 175.

<sup>92</sup> McCue (1993).

<sup>93</sup> McCue (1993) p. 175.

<sup>94</sup> Fabrice Renaud et al., "Control, Adapt or Flee: How to Face Environmental Migration?," *Interdisciplinary Security Connections Publication Series of UNU-EHS*, (2007), 1-44, p. 12.

<sup>95</sup> Renaud et al. (2007) p. 12.



stateless if the landmass has been submerged.<sup>96</sup> Therefore, it is interesting to turn to the law governing stateless persons.

The Convention Relating to the Status of Stateless Persons (Convention on Statelessness) art. 1 (1) define a stateless person as a “person who is not considered as a national by any State under the operation of its law.”<sup>97</sup> Therefore, the law governing stateless persons only come into play when a person is not considered a national by any state. The status as “stateless” has historically been given in cases where exile has “left populations deprived of recognition by any existing State.”<sup>98</sup> Thus, the statelessness concept is often applicable to people who are no longer recognized as a national of their home state. The Rohingya, who are not recognized as nationals of Myanmar, is one such example.<sup>99</sup> However, according to Park, if a state “cease to exist, citizenship of that State would then cease, as there would no longer be a State of which a person could be a citizen”.<sup>100</sup> Therefore, it must be determined whether a submerged island state is no longer considered a state in the legal sense, and whether the state’s displaced population could gain protection in accordance with the Convention on Statelessness.

It follows from customary international law that for a state to exist four cumulative criteria must be met. A State must have a defined territory, a permanent population, an effective government, and the capacity to enter into relations with other states.<sup>101</sup> Rising sea level might cause a state to lose its permanent population, its defined territory, and its effective government. The ordinary meaning of the word “territory” can refer to an area of land.<sup>102</sup> The land territory will in some cases be completely submerged. Thus, the requirement of a territory will no longer be met. The ordinary meaning of the term “permanent population” refers to a population that inhabits an area over a long time.<sup>103</sup> However, the “permanent

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<sup>96</sup> Thea Philip, "Climate Change Displacement and Migration: an Analysis of the Current International Legal Regime's Deficiency, Proposed Solutions and a Way Forward for Australia," *Melbourne Journal of International Law* 19 (2018); Michael B. Gerrard and Gregory E. Wannier, *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, Cambridge University Press 2013, p. 57.

<sup>97</sup> Convention relating to the Status of Stateless Persons, New York, 28 September 1954 (entered into force 6 June 1960) 360 UNTS 117.

<sup>98</sup> Etienne Piguet, "Climatic Statelessness: Risk Assessment and Policy Options," *Population and Development Review*, 45 (2019), no. 4, 865-883, p. 867.

<sup>99</sup> Amal de Chickera, "Statelessness and identity in the Rohingya refugee crisis," Humanitarian Practice Network, 2018, <https://odihpn.org/magazine/statelessness-identity-rohingya-refugee-crisis/>, (accessed 10 May 2021).

<sup>100</sup> Susin Park, "Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States," *UNHCR*, (2011), p. 4.

<sup>101</sup> Philip (2018) p. 648-649; Gerrard and Wannier (2013) p. 57; McAdam (2017) p. 8.

<sup>102</sup> Cambridge Dictionary, "Territory," <https://dictionary.cambridge.org/dictionary/english/territory>, (accessed 2 May 2021).

<sup>103</sup> Cambridge Dictionary, "Permanent ", <https://dictionary.cambridge.org/dictionary/english/permanent>, (accessed 2 May 2021).

population” should be linked to the territory.<sup>104</sup> The requirement of the territory sustaining a permanent population will become problematic when the island is submerged. Furthermore, the government must be in effective control over its territory and population.<sup>105</sup> This requirement is hard to meet when the territory is submerged.

Although, the requirements of statehood are no longer met, this does not automatically warrant an extinction of the state. According to Park, extinction has happened very few times, and when it has happened it has been in the context of “succession, whereby another State replaced the extinct one”.<sup>106</sup> In the present case there will be no succession. Park argues that “a presumption of continuity applies to existing States even if the criteria of statehood appear to be met in a limited fashion only”, while pointing to the governments in exile during the Second World War who were able to “continue diplomatic relations with other States”.<sup>107</sup> However, in the case of entirely submerged states, the loss of territory means that the permanent population cannot return.<sup>108</sup> Thus, the presumption of continuity might not be as strong in the case of disappearing island states. Even if a government continues to exist and is recognized, as was the case for exiled governments during the Second World War, “its legal capacities would nonetheless be limited, because of its lack of territory and permanent population”.<sup>109</sup> The government would be reliant on a host state, and the rights that the host state grants.<sup>110</sup> The government of a submerged island state could therefore not offer its citizens the rights and protection usually associated with statehood.<sup>111</sup> An option for submerged island states is acquiring land in another state and to continue governing there. This way the population could keep its nationality and would not be rendered stateless.<sup>112</sup>

In legal scholarship there is uncertainty about whether submersion will lead to the state’s non-existence. Several scholars have argued for the continued international recognition of states whose territory has been submerged.<sup>113</sup> However, even if the inhabitants of submerged island states are considered stateless, a problem of the timing of the protection exist. It is believed that the islands risk becoming uninhabitable before they are completely submerged, due to

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<sup>104</sup> Park (2011) p. 5.

<sup>105</sup> Park (2011) p. 5.

<sup>106</sup> Park (2011) p. 6.

<sup>107</sup> Park (2011) p. 6.

<sup>108</sup> Park (2011) p. 6.

<sup>109</sup> Park (2011) p. 7.

<sup>110</sup> Park (2011) p. 13.

<sup>111</sup> Park (2011).

<sup>112</sup> Park (2011) p. 18.

<sup>113</sup> Piguet (2019) p. 875. Gerrard and Wannier (2013) p. 58.

salinization and erosion leading to lack of fresh water supplies, ruined agricultural land, and land loss.<sup>114</sup> Additionally, the protection of stateless people would only cover citizens of submerged island nations, and not the millions of other people displaced by climate change, for example from large delta states such as Bangladesh and Vietnam. Furthermore, the convention currently only has 95 parties. Thus, many states do not offer protection to Stateless persons in accordance with the Convention on Statelessness, and the Convention Relating to the Status of Stateless Persons do not provide adequate legal protection for Climate Change Refugees in general.

### **3.5 International Human Rights Law**

Climate change will negatively impact individuals' enjoyment of their human rights, and states' ability to fulfil their human rights obligations and to protect their inhabitants.<sup>115</sup> The IPCC has projected that climate change will negatively affect the health of millions of people through increased instances of diseases, malnutrition and "increased deaths, disease and injury due to heatwaves, floods, storms, fires and droughts."<sup>116</sup> The right to life, food, water, health and housing will therefore be threatened by climate change.<sup>117</sup> Thus, we must turn to international human rights law to see whether it offers protection to Climate Change Refugees.

International human rights set out obligations states must meet within their territory, and states have a responsibility to respond when individuals' rights are at risk.<sup>118</sup> These are regulated through the widely ratified International Covenants on Civil and Political Rights (ICCPR) and the International Covenants on Economic, Social and Cultural Rights (ICESCR) among others.<sup>119</sup> The right to life is protected in art. 6 of the International Covenant on Civil and Political Rights (ICCPR) as well as in regional human rights treaties. The right to life is recognized in international law to give rise to obligations of non-refoulement.<sup>120</sup> As climate

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<sup>114</sup> Keshav Somani, "Sea-Level Rise, Climate Refugees and Statelessness," 2020, <https://rmlnlulawreview.com/2020/10/11/sea-level-rise-climate-refugees-and-statelessness/>, (accessed 18 February 2021); Philip (2018).

<sup>115</sup> McAdam (2012) p. 52; Stellina Jolly and Nafees Ahmad, *Climate Refugees in South Asia: Protection Under International Legal Standards and State Practices in South Asia*, Springer 2019, p. 108.

<sup>116</sup> Intergovernmental Panel on Climate Change (IPCC), *Summary for Policymakers in Climate Change 2007: Impacts, Adaptation and Vulnerability*, 2007, p. 12.

<sup>117</sup> McAdam (2011).

<sup>118</sup> McAdam (2012) p. 52.

<sup>119</sup> International Covenant on Civil and Political Rights, New York, 16 December 1966 (entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966 (entered into force 3 January 1976) 993 UNTS 3.

<sup>120</sup> McAdam (2012) p. 54.

change threatens individuals' enjoyment of human rights, the question is whether climate change can give rise to protection against expulsion through the principle of non-refoulement. It therefore needs to be established whether international human rights law recognizes climate change as a threat to the right to life.

The principle of non-refoulement obligates states to not expel or return any individual to another state if the individual is exposed to "serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment."<sup>121</sup> The Refugee Convention art. 33 prohibits the return of an individual "in any manner" to the nation "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or opinion." However this protection only applies to persons recognized as a refugee under the terms of the Refugee Convention, and is therefore not applicable to Climate Change Refugees.<sup>122</sup> The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) art. 3 prohibits refoulment where "there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>123</sup> The ICCPR also carries non-refoulment obligations where there are "substantial grounds for believing that there is a real risk of irreparable harm" such as a threat to the right of life that follows from art. 6 and or a threat to the right to be free from torture or other cruel, inhuman or degrading treatment or punishment that follows from art. 7.<sup>124</sup> The ICCPR does not refer to a prohibition of refoulement, but has been interpreted to encompass it.<sup>125</sup>

The prohibition on refoulment due to torture and where an individual's life is at risk forms part of customary international law, and is thus binding for all states.<sup>126</sup> However, the "prohibition of *refoulement* to a risk of cruel, inhuman or degrading treatment or punishment" is not currently recognized as customary international law.<sup>127</sup> The principle of non-refoulment prevents the return of individuals if their life is threatened. The Office of the United Nations

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<sup>121</sup> 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, p. 8-9.

<sup>122</sup> United Nations High Commissioner for Refugees (UNHCR) (2007) p. 2.

<sup>123</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984 (entered into force 26 June 1987)

<sup>124</sup> United Nations High Commissioner for Refugees (UNHCR) (2007) p. 9.

<sup>125</sup> Helene Ragheboom, *The International Legal Status and Protection of Environmentally-Displaced Persons : a European Perspective*, vol. 8, Brill Nijhoff 2017, p. 184.

<sup>126</sup> United Nations High Commissioner for Refugees (UNHCR) (2007) p. 11.

<sup>127</sup> United Nations High Commissioner for Refugees (UNHCR) (2007) p. 11.

High Commissioner for Human Rights (OHCHR) has recognized that climate change poses a threat to the right of life.<sup>128</sup> However, this does not necessarily mean that Climate Change Refugees will be offered protection against refoulement. Currently the breaches of human rights caused by climate change are deemed insufficient, but a recent case brought to the UN Human Rights Committee, the Teitiota case, recognizes that the negative impacts of climate change on human rights could in theory give rise to a non-refoulement obligation.<sup>129</sup> Thus, the principle of non-refoulement could offer protection to Climate Change Refugees that manage to enter a third country.

The Teitiota case concerns Ioane Teitiota who migrated to New Zealand due to the effects of climate change on his home island Tarawa in Kiribati, but he overstayed his residency permit and faced the prospect of being returned. In 2012 he filed to be recognized as a refugee claiming that Tarawa had become unsafe due to sea level rise leading to saltwater contamination of fresh water, erosion, and uninhabitable land. The New Zealand Immigration and Protection Tribunal recognized that Tarawa had been negatively impacted by population growth, urbanization, and limited infrastructure development, and that “these impacts had been exacerbated by both sudden-onset environmental events, such as storms, and slow-onset processes, such as sea level rise”.<sup>130</sup> The Tribunal assessed whether a return would constitute an arbitrary deprivation of life under ICCPR art. 6. They noted that the right to life must be interpreted broadly, and that an arbitrary deprivation of life involves an interference that is not prescribed by law, not proportional to the ends sought, not necessary in the particular circumstances of the case and that the state has a positive obligation to protect its citizens against such arbitrary deprivation of life. The Tribunal asserted that states “have positive duties to protect life from risks arising from known natural hazards and that failure to do so may, in principle, constitute an omission”.<sup>131</sup> However, Teitiota could not point to any “act or omission by the Kiribati Government which might indicate a risk that he will be ‘arbitrarily deprived’ of his life”.<sup>132</sup> Evidence showed that the Kiribati government was active in the work against the negative impacts of climate change. The court could not establish that there was

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<sup>128</sup> OHCHR, *Understanding Human Rights and Climate Change*, 2015, 1-28.

<sup>129</sup> *Communication No. 2728/2016, Teitiota v New Zealand*, United Nation Human Rights Committee., UN Doc CCPR/C/127/D/2728/2016, 2019.

<sup>130</sup> *AF (Kiribati) [2013] NZIPT 800413*, New Zealand: Immigration and Protection Tribunal, Decision, 2013.

<sup>131</sup> *AF (Kiribati) [2013] NZIPT 800413*.

<sup>132</sup> *AF (Kiribati) [2013] NZIPT 800413*.

“a sufficient degree of risk to his life” at the “present time”, and the risk was not deemed to be imminent.<sup>133</sup>

In 2015 Teitiota lodged a complaint with the United Nations Human Rights Committee (Human Rights Committee) arguing that New Zealand would violate his right to life if they returned him.<sup>134</sup> The Human Rights Committee found that climate change “may expose individuals to a violation of their rights under articles 6 or 7” which would trigger “the *non-refoulement* obligations of sending states”.<sup>135</sup> Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized”.<sup>136</sup> The decision by the Human Rights Committee in the Teitiota case confirms the potential for non-refoulement obligations arising from art. 6 of the ICCPR in circumstances where climate change has degraded the physical environment so much that it would become incompatible with the right to life. Thus, the principle of non-refoulement can protect Climate Change Refugees from being returned. However, as argued by McAdam, climate change would need to be “substantially developed” before such harms would be recognized as a threat to the right to life.<sup>137</sup> The case is an important indicator of the rights people displaced by climate change hold. Although the judgment is not binding for future jurisprudence, it will still be influential.

The purpose of the principle of non-refoulement is to protect individuals from being returned to a place where their life or freedom would be threatened. Thus, the principle does not give individuals a right to enter other states but gives them protection once they have crossed an international border. The principle of non-refoulement could, in the future, be applicable for Climate Change Refugees following the Teitiota case. International human rights law does not currently offer adequate protection to Climate Change Refugees.

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<sup>133</sup> *AF (Kiribati) [2013] NZIPT 800413*.

<sup>134</sup> Jane McAdam, "Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement," *The American journal of international law*, 114 (2020), no. 4, 708-725, p. 711.

<sup>135</sup> *Communication No. 2728/2016, Teitiota v New Zealand*, Para 9.11.

<sup>136</sup> *Communication No. 2728/2016, Teitiota v New Zealand*, Para 9.11.

<sup>137</sup> McAdam (2012) p. 54.

### 3.6 International Environmental Law

The focus within environmental law has been the prevention of climate change and adaptation to climate change.<sup>138</sup> However, parties to the UNFCCC have agreed on “measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels” through the Cancun Adaptation Framework.<sup>139</sup> The Cancun Adaptation Framework was introduced in 2011 with the objective to “enhance action on adaptation” through international cooperation.<sup>140</sup> However, these are voluntary recommendations, and have failed to lead to specific policy or regulation on climate change displacement.<sup>141</sup> Thus, the Cancun Adaptation Framework has had little impact on the situation faced by Climate Change Refugees. Nishimura believes that the “treatment of the human rights implications of climate change” by the UNFCCC is superficial, and demonstrate states’ reservations to enact clear rights and obligations on Climate Change Refugees.<sup>142</sup> Therefore, international environmental law has limited applicability on Climate Change Refugees.

### 3.7 Conclusion

International law does not currently offer adequate protection to Climate Change Refugees as they do not fit neatly into any international protection regime.<sup>143</sup> Climate Change Refugees do not meet the definition of refugee in the Refugee Convention, and the regional refugee instruments are currently not interpreted to include Climate Change Refugees. Climate Change Refugees in general are not considered to be stateless, however individuals who in the future will be displaced from submerged island states could gain protection as Stateless persons. The Teitiota case highlights the fact that the adverse impacts of climate change can lead to non-refoulement obligations extending to Climate Change Refugees. However, currently the effects of climate change are not considered to be severe enough to grant them the right of non-refoulement. Due to the existing protection gap there is a need for legal regulation granting rights to Climate Change Refugees. How this protection gap can be filled will be discussed in the next chapter.

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<sup>138</sup> Nishimura (2015).

<sup>139</sup> Nishimura (2015) p. 116; United Nations Framework Convention on Climate Change, New York, 9 May 1992 (entered into force 21 March 1994) 1771 UNTS 107.

<sup>140</sup> UNFCCC, "Cancun Agreements," <https://unfccc.int/process/conferences/pastconferences/cancun-climate-change-conference-november-2010/statements-and-resources/Agreements>, (accessed 1 May 2021).

<sup>141</sup> Nishimura (2015).

<sup>142</sup> Nishimura (2015) p. 116.

<sup>143</sup> Nishimura (2015) p. 114.

## **4 Possible Solutions for the Protection of Climate Change Refugees**

### **4.1 Introduction**

The adverse effects of climate change have the potential to displace large numbers of people. Having reviewed international law governing refugees, it is evident that a regulation gap exists with regards to Climate Change Refugees. Although different approaches to the Climate Change Refugee problem have been proposed, there seems to be a common understanding that action is needed due to the number of people who are predicted to be displaced due to climate change and the “lack of effective response to the problem”.<sup>144</sup> Some scholars have proposed amending the Refugee Convention so that it covers Climate Change Refugees, some have proposed a protocol under the UNFCCC, while others have proposed negotiating a new agreement more appropriate for protecting Climate Change Refugees. These suggestions include international treaties and soft law instruments. This chapter will examine the practical ways in which international law can be changed, as well as analyse different possible solutions for addressing the protection of Climate Change Refugees, reviewing the advantages and disadvantages of the different potential solutions.

### **4.2 Protecting Climate Change Refugees Through Changing Existing Treaties**

#### **4.2.1 Protection Through Amending the Refugee Convention**

One of the potential ways to fill the protection gap for Climate Change Refugees is through extending the reach of the Refugee Convention so that it covers Climate Change Refugees. This could be done through an amendment of the Refugee Convention, or through a Protocol to the refugee convention. The Maldives proposed amending the Refugee Convention in 2006 by extending the definition of refugees to cover Climate Change Refugees through a “Protocol on Environmental Refugees: Recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees.”<sup>145</sup> In 2009 the Bangladeshi Finance Minister stated that the Refugee Convention should be amended to extend the protection offered.<sup>146</sup>

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<sup>144</sup> Louise Olsson, "Environmental Migrants in International Law," *Faculty of Law, Örebro University*, (2015).

<sup>145</sup> Atapattu (2009) p. 633.No further information is available on this proposal.

<sup>146</sup> Jane McAdam, "Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer," *International journal of refugee law*, 23 (2011), no. 1, 2-27, p. 6.



Several important treaties, such as the Refugee Convention, were created after the Second World War, and have been in force for several decades.<sup>147</sup> Due to multilateral treaties' importance in governing the international community, treaties need to be capable of adapting to changing international conditions to avoid stagnation. However, this must be balanced by the interest in stability.<sup>148</sup> Thus, international treaties have built-in mechanisms for revision or amendment as an attempt to balance these needs. Amendment is the formal legal device for changing an international treaty. The term amendment refers to a "formal agreement between the States Parties to alter the provisions of a treaty with respect to all of them."<sup>149</sup> Amendment processes are a crucial way in which to address any shortcomings that have risen after the conclusion of a treaty.<sup>150</sup>

The Refugee Convention contains a separate provision establishing mechanisms for change. Article 45 provides that "any Contracting State" may "request revision" by a "notification addressed to the Secretary-General of the United Nations" and that the General Assembly of the United Nations "shall recommend the steps, if any, to be taken in respect of such request". The ordinary meaning of the term "Contracting State" refers to States that are parties to the treaty.<sup>151</sup> Thus, any state that is party to the convention may initiate a revision of the Refugee Convention. Moreover, the General Assembly decides whether to recommend further procedures with regards to the revision request.<sup>152</sup> For the General Assembly to recommend revision, a simple majority within the General Assembly is required.<sup>153</sup> If a revision is not recommended by the General Assembly, the revision process is not necessarily over. The requesting state may seek support in contracting states regarding the revision proposal.<sup>154</sup> This is what is referred to as the UN and non-UN track for amendment. The legal difference between the two tracks is that through the UNs involvement, more states than the contracting

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<sup>147</sup> Stefan Kadelbach, "International Law Commission and role of subsequent practice as a means of interpretation under Articles 31 and 32 VCLT," *Questions of International Law*, 2018, <http://www.qil-qdi.org/international-law-commission-and-role-of-subsequent-practice-as-a-means-of-interpretation-under-articles-31-and-32-vclt/>, (accessed 01 May 2021).

<sup>148</sup> Malgosia Fitzmaurice and Panos Merkouris, "Amendment/Modification/Revision of Treaties: Motion as Change," in *Treaties in Motion: The Evolution of Treaties from Formation to Termination*, ed. Malgosia Fitzmaurice and Panos Merkouris, Cambridge University Press 2020, 182-269.

<sup>149</sup> Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, Springer 2018, p. 760.

<sup>150</sup> M. J. Bowman, "The Multilateral Treaty Amendment Process—A Case Study," *International and Comparative Law Quarterly*, 44 (1995), no. 3, 540-559.

<sup>151</sup> Terje Einarsen, "Part Eight Final Clauses, Article 45," in *1951 Convention Relating To the Status of Refugees and its 1967 Protocol: A Commentary*, ed. Andreas Zimmermann, Oxford University Press 2011, 1650-1664.

<sup>152</sup> Einarsen (2011) p. 1659.

<sup>153</sup> Einarsen (2011) p. 1659.

<sup>154</sup> Einarsen (2011) p. 1660.

states must be officially informed about the request for revision, and the General Assembly has a formal, advisory role to play.<sup>155</sup>

If the General Assembly recommends that the revision process goes on, a broad conference would likely be held on the matter where the contracting states would decide by a simple majority whether to revise the convention and what revision ought to be adopted.<sup>156</sup> In the case where the General Assembly does not recommend revision, VCLT art. 40 (2) sets out the procedure.<sup>157</sup> The contracting states shall be notified about the revision proposal and have the right to take part in the negotiation and conclusion of any agreement for the amendment of the treaty. The amendment of the Refugee Convention requires a simple majority by the contracting states.

However, it follows from VCLT art. 40 (4) that the amendment will only be binding for the parties to the treaty if they agree to become parties to the amendment.<sup>158</sup> The other contracting states will still be bound by the original convention.<sup>159</sup> Therefore, different legal regimes are established under the same treaty, causing fragmentation of law.<sup>160</sup> Fragmentation can create “conflicting and incompatible rules, principles, rule systems and institutional practices” and is therefore undesirable.<sup>161</sup> In the case of Refugees it is important to spread the burden, thus it is advantageous that as many states as possible take on the responsibility of protecting refugees. Due to the lack of political will in taking on the responsibility of protecting more refugees it is unlikely that a proposed amendment on protection of Climate Change Refugees will get mass support. Thus, states will end up having different legal obligation under the Refugee Convention.

An amendment proposal needs a majority to be adopted.<sup>162</sup> In the case of the Refugee Convention, the amendment process will likely be cumbersome due to the number of states with differing views and interests that are needed to agree on an amendment, causing the process of reaching an agreement to be time-consuming. The time-consuming nature of the treaty amendment process is a setback, and affects the usefulness of the process. The problem

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<sup>155</sup> Einarsen (2011).

<sup>156</sup> Einarsen (2011).

<sup>157</sup> Einarsen (2011).

<sup>158</sup> Dörr and Schmalenbach (2018) p. 773.

<sup>159</sup> Einarsen (2011).

<sup>160</sup> Dörr and Schmalenbach (2018).

<sup>161</sup> Michele Emily Oliver, "Globalisation or Fragmentation of International Law: Challenges for Harmonisation " *De Jure*, (2008), p. 439.

<sup>162</sup> Jan Klabbers, "Treaties, Amendments and Revision," in *Max Planck Encyclopedias of International Law*, ed. Anne Peters and Rüdiger Wolfrum, Oxford University Press 2006.

of displacement of Climate Change Refugees is acute, and the protection need is dire. Due to the process of amending a multilateral treaty being a time-consuming one, this might not be the right way to deal with the protection needs of Climate Change Refugees. Furthermore, deciding on an amendment that will gain a majority may lead to a compromise. Thus, agreeing on protection for Climate Change Refugees might lead to an amendment where the protection of Climate Change Refugees has been watered-down due to states' interest in their sovereignty and border protection.

Several legal scholars have argued against amending the Refugee Convention as they believe that the amendment process will weaken the protection afforded refugees.<sup>163</sup> This is due to states being reluctant to take on the responsibility to receive more refugees. The fear is that, if an amendment process is initiated, it will lead to a renegotiation of the Refugee Convention and due to the "current political environment" it could result in lower protection standards for refugees and "even undermine the international refugee protection regime altogether."<sup>164</sup> Thus, the amendment of the refugee convention can cause individuals who are protected by the convention today to lose their protection status. Moreover, the fact that the implementation of the convention occurs on a national level means that states can still be restrictive in their interpretation of the convention text, even if an amendment is enacted.

The Refugee Convention has been revised once through the 1967 Protocol relating to the Status of Refugees. The protocol extended the reach of the Refugee Convention to events occurring after 1 January 1951, and from covering European events to covering global events. Although this took the form of a protocol, and not an amendment to the Convention, it shows that making changes to the Refugee Convention is possible. An advantage of this suggestion is the possibility of using a "well-recognized and established legal instrument" to protect Climate Change Refugees.<sup>165</sup> This new regulation would build on the support already in place for the instrument, such as the UNHCR. Furthermore, as the Refugee Convention is the main convention dealing with refugees, it would be natural to protect Climate Change Refugees

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<sup>163</sup> See United Nations High Commissioner for Refugees (UNHCR), *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, 2009; Vikram Kolmannskog and Lisetta Trebbi, "Climate Change, Natural Disasters and Displacement: a Multi-track Approach to Filling the Protection Gaps," *International review of the Red Cross*, 92 (2010), no. 879, 713-730; Jane McAdam, "Seven reasons the UN Refugee Convention should not include 'climate refugees'," 2017, <https://disasterdisplacement.org/staff-member/seven-reasons-the-un-refugee-convention-should-not-include-climate-refugees>, (accessed 1 May 2021).

<sup>164</sup> United Nations High Commissioner for Refugees (UNHCR) (2009) p. 9.

<sup>165</sup> Kolmannskog and Trebbi (2010) p. 720.

under the Refugee Convention. Although an amendment will be time-consuming, one can assume that it will take less time than implementing an entirely new instrument.

An amendment of the Refugee Convention seems like a desirable option, as it builds on an already well-established instrument that has decades of experience dealing with refugees, and will likely be less time-consuming than the negotiation of a completely new instrument. However, the clear lack of political will to take on a bigger responsibility to protect refugees among the states party to the Refugee Convention makes an amendment a less ideal way of dealing with the protection of Climate Change Refugees.

#### **4.2.2 Inclusion of a Protocol Protecting Climate Change Refugees Under the UNFCCC**

Another way of protecting Climate Change Refugees is through a Protocol to the UNFCCC. The United Nations Framework Convention on Climate Change is a framework convention that states general obligations on climate change . A protocol is “an instrument which is subsidiary to a treaty” and which can “further elaborate a framework convention”.<sup>166</sup> Under framework conventions, individual protocols establish “substantive obligations in implementation of the general objectives of the convention”.<sup>167</sup> A protocol under the UNFCCC can, according to art. 17, be adopted by the Conference of the Parties (COP). Thus, for a protocol to be adopted, the parties to the UNFCCC must be in agreement on such an adoption. The rules of the VCLT applies to protocols, and “protocols are not necessarily easier to negotiate than other treaties”.<sup>168</sup> This will potentially lead to a lengthy negotiating process.

Scholars have argued for the inclusion of a protocol to the UNFCCC that regulate Climate Change Refugees as they believe that the UNFCCC provides an international framework “within which to address the causes and consequences of climate change,” and due to climate change displacement being a consequence of climate change it is natural that the response falls under the UNFCCC.<sup>169</sup> Gibb and Ford, and Biermann and Boas, are among the scholars

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<sup>166</sup> United Nations Forum on Forests, *An Overview of International Law*, 2004, p. 5.

<sup>167</sup> Edith Brown Weiss, *Environmental Change and International Law: New Challenges and Dimensions*, United Nations University Press 1993.

<sup>168</sup> Nele Matz-Lück, "Framework Conventions as a Regulatory Tool," *Goettingen Journal of International Law*, 1 (2009), no. 3, 439-458, p. 452.

<sup>169</sup> Kolmannskog and Trebbi (2010) p. 721. See Christine Gibb and James Ford, "Should the United Nations Framework Convention on Climate Change recognize climate migrants?," *Environmental Research Letters*, 7 (2012), no. 4, 1-9., Biermann and Boas (2010).

that have recommended the protection of Climate Change Refugees under environmental law, and the proposal of Gibb and Ford will be analysed in detail.

Gibb and Ford argue that Climate Change Refugees should be addressed as an adaptation issue within the UNFCCC, due to migration being a way of adapting to changes in climate and the UNFCCC having a mandate to address adaptation issues.<sup>170</sup> They believe that framing the issue of Climate Change Refugees within an adaptation lens will be perceived as less of a threat to national security, identity, and sovereignty, and will therefore lead to willingness to implement the suggested protocol. They argue that the UNFCCC does not impose on state sovereignty as states are encouraged to take action within their borders, and to implement policies based on guiding principles set out in the protocol.<sup>171</sup> Thus, states have some room to decide the best way to implement the goals set out in the protocol. Although this provides the states with freedom, this could lead to several different responses, and to varying degrees of protection in different states.

Recognizing Climate Change Refugees under the UNFCCC “would ensure a fairer cost burden” due to the concept of common but differentiated responsibility being foundational to the UNFCCC.<sup>172</sup> Gibb and Ford argue that the acknowledgment of climate displacement, migration, and planned relocation issues in the UNFCCC’s Cancun Adaptation Framework indicates a willingness by states to address the issue of Climate Change Refugees.<sup>173</sup> Therefore, they believe that there is “sufficient momentum and political will” to recognize Climate Change Refugees.<sup>174</sup> The Cancun Adaptation Framework contains voluntary recommendations, and so its importance lies in the recognition of Climate Change Refugees’ need for protection. However, the measures under the Cancun Adaptation Framework have been limited.

Gibb and Ford have pointed out that the decision-making process in the UNFCCC is “slow, involves significant compromises” and has “yielded largely political, not legal commitments”.<sup>175</sup> International regulatory processes are slow due to the number of parties

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<sup>170</sup> Gibb and Ford (2012).

<sup>171</sup> Gibb and Ford (2012).

<sup>172</sup> Gibb and Ford (2012) p. 3.

<sup>173</sup> Gibb and Ford (2012).

<sup>174</sup> Gibb and Ford (2012).

<sup>175</sup> Gibb and Ford (2012) p. 4.

involved, and their differing needs lead to a number of compromises. However, this is the reality with other options for regulating climate change displacement as well.

One of the advantages of the proposal is that a protocol under the UNFCCC will ensure that the focus is both on the issue of displacement, as well as on the underlying causes of climate change displacement. Furthermore, the UNFCCC have near universal membership and therefore is a well-recognized and established instrument.<sup>176</sup> The UNFCCC has a broad mandate to deal with issues of climate change, and already mention adaptation. It has been established that migration is an adaptation response, and so the issue of climate change displacement might already fall within the mandate of the UNFCCC.

The limited measures under the Cancun Adaptation Framework might point to the UNFCCC not being the right place for regulating the protection of Climate Change Refugees. Furthermore, the fact that the UNFCCC deals with state to state relations and is not designed to deal with refugees support this view.

### **4.3 Change Through Interpretation – Interpreting the Refugee Convention to Include Climate Change Refugees**

When no agreement to amend the Refugee Convention can be found, other ways in which international law can protect Climate Change Refugees must be considered. One way in which legal obligations can change is through the interpretation of legal texts. Legal text must always be interpreted, “even if its scope and the meaning of its terms may appear evident and clear”.<sup>177</sup> Interpretation is the process of establishing the true meaning of a legal text.<sup>178</sup> The wording of a treaty is presumed to be an expression of the intention of the parties, and thus the interpretation must be based on the text of the treaty.<sup>179</sup>

The VCLT articles 31-33 establish methods by which international treaties should be interpreted. VCLT art. 31 (1) asserts that the ordinary meaning of the terms of the treaty needs to be determined in the “context” of the treaty and in the “light of its object and purpose”.<sup>180</sup> The fact that the treaty terms need to be interpreted within its context means that the treaty as a whole has to be considered, as “words obtain their meaning from the context in which they

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<sup>176</sup> Gibb and Ford (2012).

<sup>177</sup> Dörr and Schmalenbach (2018) p. 567.

<sup>178</sup> Dörr and Schmalenbach (2018) p. 560.

<sup>179</sup> Dörr and Schmalenbach (2018) p. 560.

<sup>180</sup> Dörr and Schmalenbach (2018) p. 580.

are used”.<sup>181</sup> Article 31 (2) specifies that the title, preamble, annexes and protocol to a treaty must be considered.<sup>182</sup> The object and purpose of the treaty must be considered, however they “may only be used to bring one of the possible ordinary meanings of the terms to prevail and cannot establish a reading that clearly cannot be expressed with the words used in the text”.<sup>183</sup> Some treaties specify the purpose of the treaty within the preamble. According to art. 31 (3), “together with the context” the interpreter must take into account subsequent agreement on the interpretation of the treaty, subsequent practice in the application of the treaty, and any relevant rules of international law.

Looking at the definition in art. 1 A (2) of the refugee convention, the meaning of the term “social group” is not clear. According to Dörr, a dynamic approach can be used when interpreting generic terms, that is, terms “whose content the Parties expected would change through time” and thus “intended to be given its meaning in light of the circumstances prevailing at the time of interpretation”.<sup>184</sup> Thus, it must be established whether a term is meant to be interpreted in a dynamic manner.<sup>185</sup> The rest of the “for reasons of” requirements are quite specific, whereas “social group” is a general term that encompass all the other groups mentioned in art. 1 A (2). It can therefore be assumed that the term “social group” was included in the provision to allow for the article to be adaptable to the changes in protection needs. The term “social group” seems to be of such a dynamic nature, and therefore must be interpreted within the current context. The purpose of the Refugee Convention is the protection of persecuted people, which also supports a dynamic interpretation of art. 1 A (2), so as to adapt to the current protection needs.

The interpreter also needs to take into account subsequent practice in the application of the treaty. States’ actions can indicate their understanding of the treaty obligations, and these may change due to changing times and circumstances.<sup>186</sup> Although there are currently no examples of states interpreting the Refugee to include Climate Change Refugees, we know that states interpret the convention text differently. In the USA and Canada, the “social group” requirement is interpreted to include “[p]eople ‘persecuted’ under China’s one child policy”,

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<sup>181</sup> Dörr and Schmalenbach (2018) p. 582.

<sup>182</sup> Dörr and Schmalenbach (2018) p. 582.

<sup>183</sup> Dörr and Schmalenbach (2018) p. 586-587.

<sup>184</sup> Dörr and Schmalenbach (2018) p. 573.

<sup>185</sup> Dörr and Schmalenbach (2018) p. 573.

<sup>186</sup> Rahim Moloo, "Changing Times, Changing Obligations? The Interpretation of Treaties over Time," *American Society of International Law*, 106 (2012), 261-264, p. 261.

while this is not the case in Australia.<sup>187</sup> This shows that the refugee definition is flexible, and is interpreted differently in different states. McAdam argues that “the convention’s definition of a refugee” is “capable of dynamic interpretation over time”, pointing to how gender-related persecution has been accepted as a ground for protection.<sup>188</sup> Therefore, there is room for the refugee definition to develop through interpretation.<sup>189</sup>

Thus, the issue of protection for Climate Change Refugees can be solved through interpreting the Refugee definition in art. 1 A (2) of the Refugee Convention so that it includes Climate Change Refugees. Although the thesis finds that Climate Change Refugees are not currently protected by the Refugee Convention, Cooper argues that due to the general wording of art. 1 A (2), the article can be interpreted to include Climate Change Refugees.<sup>190</sup> This would give Climate Change Refugees rights to protection through an interpretation of the Refugee Convention.

Cooper believes that the term persecution is so broad that it covers environmental degradation caused by government’s actions or failure to act, and that Climate Change Refugees are subject to persecution due to being “members of a “social group” of people who are politically powerless to protect their environment”.<sup>191</sup> Furthermore, Cooper maintains that it is due to being members of this “social group” that “governments of the developed world continue to expose them to the risks of environmental degradation.”<sup>192</sup> The term “social group” is broad, and according to Cooper acts as a “catchall” for groups not fitting into the other categories listed in art. 1 A (2) and was included “specifically to protect refugees persecuted on account of unforeseen reasons.”<sup>193</sup> The term “social group” was included to ensure the development of the Refugee Convention alongside the development of society.

The advantage of this proposal is that it builds on a treaty with broad backing. Furthermore, the use of terms within the treaty text that can change with time allows for a dynamic instrument that does not have to go through the time-consuming process of an amendment. However, there is currently little political will to expand the interpretation in such a manner as

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<sup>187</sup> Adrienne Millbank, "The Problem with the 1951 Refugee Convention," 2000, [https://www.aph.gov.au/about\\_parliament/parliamentary\\_departments/parliamentary\\_library/pubs/rp/rp0001/01r\\_p05#problems](https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp0001/01r_p05#problems), (accessed 1 May 2021).

<sup>188</sup> McAdam (2017)

<sup>189</sup> Millbank (2000)

<sup>190</sup> Cooper’s view on art. 1 A has been explored in section 3.2.

<sup>191</sup> Cooper (1998) p. 526.

<sup>192</sup> Cooper (1998) p. 525-526.

<sup>193</sup> Cooper (1998) p. 521.



to include Climate Change Refugees. Several states that are uninterested in expanding their protection responsibility enforce restrictive interpretations of the definition. Some states see the influx of refugees as a threat to their sovereignty.<sup>194</sup> Due to this reluctance, and states' restrictive interpretation of the Refugee Convention, the protection gap is unlikely to be filled through a broadened interpretation of the Refugee Conventions art. 1 A (2).<sup>195</sup>

#### **4.4 Protection Through the Development of Customary International Law**

International law may also evolve through the emergence of customary international law, regulating a matter previously unregulated or covered by a treaty.<sup>196</sup> Custom may be regarded as a form of tacit agreement: changes in law that are not explicitly agreed upon, but parties give their silent consent or raise no objection to the change. Customary international law can be described as evidence of a general practice accepted as law. It is composed of two elements: firstly, state practice, and secondly, that the state practice must follow from opinion juris or the belief that the practice reflects international law.<sup>197</sup>

The practice by states or international organizations that can lead to the development of customary international law are acts and omissions communicated to at least one other actor.<sup>198</sup> There is no requirement on duration for a practice to become customary international law, however, if the practice is extensive and uniform, the time aspect is of less importance.<sup>199</sup> This has been established by the ICJ in the North Sea Continental Shelf cases.<sup>200</sup> The ICJ also reaffirmed that the practice does not need to be completely uniform as long as it is consistent.<sup>201</sup> Lastly, the practice needs to be accompanied by a conviction that it is obligatory by law.<sup>202</sup>

One clear advantage of customary international law is that it is binding for all international actors.<sup>203</sup> Thus, customary international law on the protection of Climate Change Refugees

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<sup>194</sup> Castle (2002) p. 10.

<sup>195</sup> Jane McAdam, "Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010–2013," *Refugee* 29 (2014), no. 2, 11-26, p. 12.

<sup>196</sup> Dörr and Schmalenbach (2018).

<sup>197</sup> André da Rocha Ferreira et al., "Formation and Evidence of Customary International Law " *UFRGS Model United Nations Journal* 1(2013), 182-201.

<sup>198</sup> Ferreira et al. (2013).

<sup>199</sup> Ferreira et al. (2013).

<sup>200</sup> *The North Sea Continental Shelf Cases*, International Court of Justice, Judgment, 1969, para 74.

<sup>201</sup> *The North Sea Continental Shelf Cases*, para 73-74.

<sup>202</sup> Ferreira et al. (2013); *The North Sea Continental Shelf Cases*.

<sup>203</sup> Ferreira et al. (2013).

would hinder a fragmented legal regime developing. Furthermore, the development of customary international law on an area could happen swiftly if the practice is consistent. This will be beneficial for the issue of Climate Change Refugees as there is a need for a swift response. However, the development of customary international law is dependent on an extensive and uniform practice. As states are currently reluctant to offer protection to Climate Change Refugees, it is unlikely that international customary law will develop on the subject. It is improbable that customary international law is the way in which Climate Change Refugees will be offered legal protection.

#### **4.5 Protection Through the Creation of New Treaties Governing Climate Change Refugees**

Due to the nature of the international community, there is no “central agency with powers to legislate on behalf of the international community as a whole”, thus multilateral treaties are the principal method of determining international legally binding norms giving rise to obligations for states.<sup>204</sup> Multilateral treaties are therefore important tools in governing the international community, and can have global or regional reach. International law can evolve through the creation of a new treaty covering a previously unregulated area of law.

The VCLT art. 2 (1) (a) defines a treaty as a written international agreement between states governed by international law. The VCLT art. 6 to art. 25 regulate the conclusion and entry into force of new treaties. The development of a new treaty starts with recognizing an area where international legal action is required.<sup>205</sup> A declaration is adopted to express a consensus on the issue.<sup>206</sup> The treaty-making process usually consists of preliminary studies that investigate national and international activity and law on the area. This can happen through convening an expert group.<sup>207</sup> Thereafter, the preparation for the initial draft commences.<sup>208</sup> Succeeding this is the negotiating stage, which is generally the longest stage due to the fact that the negotiation of the treaty’s term and text involves “mediation of the various interests concerned”.<sup>209</sup>

Art. 9 asserts that the treaty text is adopted through the consent of the participating states. The negotiation of a new treaty can take place at an international meeting where officials from all

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<sup>204</sup> Bowman (1995) p. 540; Weiss (1993).

<sup>205</sup> Weiss (1993).

<sup>206</sup> Weiss (1993).

<sup>207</sup> Weiss (1993).

<sup>208</sup> Weiss (1993).

<sup>209</sup> Weiss (1993).

relevant parties participate. The negotiations will eventually result in a text that has to be agreed on by the participating parties. However, the process from planning a new treaty to agreeing on a text can be very time-consuming. Looking to an international treaty that is currently being negotiated, the treaty regulating the conservation and sustainable use of Biodiversity Beyond National Jurisdiction (BBNJ), it is evident that the treaty-making process is time-consuming. The BBNJ instrument was recommended through a UN resolution in June 2015 after a decade of informal efforts.<sup>210</sup> The first session formally negotiating the agreement was held in September 2018 and it is still being negotiated. This shows that the negotiation of an international treaty takes a long time, and that a new international treaty for the protection of Climate Change Refugees is likely to be time-consuming. After being negotiated, a treaty needs to be ratified by states, this can cause the treaty to take even longer before it enters into force. Some treaties do not enter into force for years because of lack of ratification.<sup>211</sup> Furthermore, for a treaty to be effective it needs wide ratification. Thus, multilateral treaties take time to conclude, may be slow to come into force, and bind only those parties involved to the treaty.<sup>212</sup>

Several new international instruments have been proposed as the ideal way to deal with the displacement of Climate Change Refugees.<sup>213</sup> Zartner Falstrom has proposed a new instrument that uses the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as a model. In the same way individuals cannot be returned to their home country if they fear torture, individuals would under the convention not be returned if they fear environmental impacts on their lives. However, the protection under the Convention Against Torture is temporary, and similarly the proposed convention for Climate Change Refugees would offer only temporary protection while the need for protection is in place.<sup>214</sup> Individuals can be returned once it is deemed safe.

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<sup>210</sup> Elizabeth M. De Santo et al., "Stuck in the Middle with you (and not Much Time Left): The Third Intergovernmental Conference on Biodiversity Beyond National Jurisdiction," *Marine Policy*, 117 (2020).

<sup>211</sup> Weiss (1993).

<sup>212</sup> Christine Mary Chinkin, "The Challenge of Soft Law: Development and Change in International Law," *The International and Comparative Law Quarterly*, 38 (1989), no. 4, 850-866, p. 860.

<sup>213</sup> See Dana Zartner Falstrom, "Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment," *Colorado Journal of International Environmental Law and Policy*, (2001), 1-19; Bonnie Docherty and Tyler Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees," *Harvard Environmental Law Review*, 33 (2009), no. 2, 349-404; McCue (1993).

<sup>214</sup> Zartner Falstrom (2001).

Zartner Falstrom argues that the advantage of a convention modelled on the Convention against torture is its focus on temporary protection. She believes that states are more likely to assist Climate Change Refugees on a temporary basis, than on a permanent basis.<sup>215</sup> Thus, there will be more political will to enact her proposed treaty than a treaty based on permanent resettlement. Zartner Falstrom's argument that states will be more inclined to implement a treaty based on temporary protection assumes that the protection need will be temporary. However, climate change is predicted to lead to both temporary and permanent protection need. It can therefore be questioned whether there will still be political will to implement such a treaty if the protection need turns out to be of a permanent nature.

Temporary protection makes sense in the context of torture. Individuals fear torture by the regime in power, or during an unstable governing situation in their home country. While a regime change might remove the fear of torture, thus enabling a return, the environmental degradation due to climate change is expected to leave some areas completely uninhabitable due to the level of degradation. The prospect of return is not the same for some Climate Change Refugees as for victims of torture. Thus, it can be questioned whether Zartner Falstrom's proposed international treaty will offer adequate protection to those most in need of protection. Although the protection need might be temporary today, in the future climate change will likely lead to permanent protection needs.

Docherty and Giannini have proposed a new international treaty that will guarantee Climate Change Refugees human rights protections and humanitarian aid through burden sharing between the host state, the home state, and the international community.<sup>216</sup> Furthermore, they propose the establishment of administrative bodies to implement the instrument, including a global fund, a coordinating agency, and a body of scientific experts.<sup>217</sup> In the same way as Zartner Falstrom uses the Convention on Torture as a model, Docherty and Giannini's proposed instrument uses the Refugee Convention as a model. They believe this to be an advantage, as it draws on an already existing framework and therefore some of the groundwork is already in place. Similarly, it builds on the principle of non-refoulement prohibiting forced return to a home state when "climate-induced environmental change would threaten the refugee's life or ability to survive".<sup>218</sup>

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<sup>215</sup> Zartner Falstrom (2001).

<sup>216</sup> Docherty and Giannini (2009) p. 391.

<sup>217</sup> Docherty and Giannini (2009) p. 402.

<sup>218</sup> Docherty and Giannini (2009) p. 377.

The proposed instrument would allow for determination of refugee status on a group basis, opposed to what is generally the case today.<sup>219</sup> This would “increase opportunities to formulate solutions that would keep the integrity of a group intact, which could help preserve cultures and national identities”.<sup>220</sup> Although implementation of refugee status on a group basis makes sense for Climate Change Refugees, it is unlikely that states will agree to such a regime.

One advantage of the proposal of implementing an international treaty is the proposed burden-sharing regime, where host states would be responsible for implementing human rights guarantees, home states would focus on “preventing or preparing for climate-induced migration”, and the international community, including the “states that have contributed most to climate change”, would offer support through “financial assistance proportional to states’ contributions to climate change and capacity to pay”.<sup>221</sup> This way, the burdens and responsibilities are shared, and are not placed solely on the host states. Still, the main argument for a new treaty is that it will be designed to deal with Climate Change Refugees specifically.<sup>222</sup> The issue of Climate Change Refugees is a multidisciplinary one and needs to be dealt with through different legal principles deriving from human rights, humanitarian assistance, and international environmental law, and a standalone treaty could draw on all these areas of law.<sup>223</sup> Lastly, the fact that a treaty governing Climate Change Refugees will be legally binding for states is an advantage of the proposal.

McAdam has argued against the implementation of an international treaty on Climate Change Refugees. Her aversion is based on the concern that the effort to implement an international treaty will shift the focus away from the responses to environmental degradation. She highlights the importance of a treaty being viewed as “one of a number of mechanisms that may respond to climate-induced displacement, rather than as *the* solution.”<sup>224</sup> However, both Docherty and Giannini’s and Zartner Falstrom’s treaties focus on the underlying causes of climate change alongside protection of displaced persons.

McAdam also argues that displacement is due to a number of factors, such as poverty, and not just the effects of climate change. Thus, she questions the reasoning behind a treaty where

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<sup>219</sup> Docherty and Giannini (2009) p. 374.

<sup>220</sup> Docherty and Giannini (2009) p. 375.

<sup>221</sup> Docherty and Giannini (2009) p. 379.

<sup>222</sup> Docherty and Giannini (2009) p. 350.

<sup>223</sup> Docherty and Giannini (2009) p. 392.

<sup>224</sup> McAdam (2011) p. 8.

protection is based on the drivers of displacement instead of the needs of those who move.<sup>225</sup> Zartner Falstrom's proposed treaty does, however, seem to be based on the need for protection as it offers temporary protection for as long as the need for protection is in place.<sup>226</sup> Individuals can be returned once it is deemed safe. Thus, the Convention will only protect individuals for as long as they have a protection need.

McAdam further argues that the causal link between slow-onset climatic events and displacement might be hard to prove, as so many other factors impact on people's decision to flee, and displacement due to slow-onset events often takes place before the area is uninhabitable.<sup>227</sup> The development of a new international treaty will take years to negotiate and to be ratified by states, as seen in the example of the BBNJ process. Especially in areas where a gap in regulation exists, it will be difficult to reach agreement, and therefore lead to a time-consuming process.<sup>228</sup> A treaty will be based on a compromise, and once it has been negotiated it still needs to be ratified, implemented and enforced. Lack of consensus during negotiation can lead to ratification gaps where some states are not ready to ratify, and therefore weakening the effectiveness of the treaty. McAdam points to the fact that the problems with the present refugee regime "stem predominantly from a lack of political will, rather than an absence of law", and therefore a treaty will not "solve" the protection problem.<sup>229</sup>

For a new international treaty governing Climate Change Refugees to become a reality states need to come to an agreement on the treaty text. Thus, the text is likely to be a compromise between all the involved parties, which can take a long time to negotiate due to states' differing values and needs. Lastly, for a new treaty to be effective, it requires states to ratify the treaty and stay committed to it. All stages of this process require political will from states, which does not seem to be present in the case of Climate Change Refugees at this moment. Thus, if an international treaty is negotiated it is unlikely to gain support within much of the international community.

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<sup>225</sup> McAdam (2011).

<sup>226</sup> Zartner Falstrom (2001).

<sup>227</sup> McAdam (2011).

<sup>228</sup> Walter Kälin and Nina Schrepfer, "Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches," *UNHCR Legal and Protection Policy Research Series*, (2012).

<sup>229</sup> McAdam (2011) p. 17.

## 4.6 Developing Protection of Climate Change Refugees Though Regional Approaches

Another option would be to create regional agreements or treaties on the topic. These will also need to be negotiated between states, but will have a regional, not global reach. As climate change will affect parts of the world differently, there might be more political will at a regional level to deal with the issue of Climate Change Refugees. The feeling of belonging to a community that exists between states within the same region may contribute to this process, thus eliminating part of the problem associated with a treaty with a global reach. Furthermore, the regional agreements could build on well-established regional groups that already collaborate on other topics. This offers an existing framework in which the regional response could be developed.<sup>230</sup>

Kolmannskog and Trebbi propose a multi-track approach, where a regional response is one approach proposed alongside others. They point to the importance of a regional approach in dealing with the adaptation measures, and use the relocation of displaced people in the Asia-Pacific region as an example.<sup>231</sup> Williams also propose a regional approach to addressing the protection of Climate Change Refugees. Williams maintains that the UNFCCC can be used as a “base” for this regional approach, as it “currently promotes regional policy development” on adaptation which could extend to the issue of Climate Change Refugees.<sup>232</sup> As different regions are dealing with different issues at different times, she believes that a regional solution will be able “to achieve a greater level of commitment from participating states than might otherwise be achieved at the international level”.<sup>233</sup> Williams point to the broader refugee definition in the regional instruments discussed in part 3.3, as an example of how a regional commitment can go further than the international commitment.<sup>234</sup>

Moreover, she argues that this regional response circumvents the difficulties with settling on a definition of Climate Change Refugees. The regions can themselves decide who should be protected.<sup>235</sup> Furthermore, it allows for taking into account “the specific displacement challenges facing that particular area” and developing a regime to best “reflect individual regional capacities.”<sup>236</sup> Thus, a regional treaty could focus on the specific problems faced by

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<sup>230</sup> Williams (2008) p. 518.

<sup>231</sup> Kolmannskog and Trebbi (2010) p. 722.

<sup>232</sup> Williams (2008) p. 519.

<sup>233</sup> Williams (2008) p. 518.

<sup>234</sup> Williams (2008) p. 518.

<sup>235</sup> Williams (2008) p. 520.

<sup>236</sup> Williams (2008) p. 521.

the region. Another advantage of a regional agreement is that fewer states would have to agree on a response. Therefore, a regional response to Climate Change Refugees could be swifter and less time-consuming than is the case of an international response.

Williams point to another global problem that has been successfully solved through regional cooperation as an example of how the regional response could work. The Regional Seas Programme under the United Nations Law of the Sea Convention (UNCLOS) has thirteen regional programs aimed at engaging regional states in protecting the shared marine environment “by concluding regional treaties and action plans responding to the specific needs of states and establishing relevant and appropriate responsibilities and obligations”.<sup>237</sup> As the issue of climate change displacement is also a global issue with different regional effects, this could offer valuable insight.

The proposal of solving the protection gap on Climate Change Refugees through regional regulations would lead to a fragmentation of the law where individuals displaced in different regions are offered different levels of protection. Furthermore, the proposal is based on the idea that regional agreements are easier to agree on than international agreements. However, the regional sense of community may not be so strong in all areas. Furthermore, this proposal could lead to an uneven burden. While the issue of climate change displacement is one of international significance, the impacts will be felt regionally where some regions will be more affected than others, both through uninhabitable land leading to displacement among the population and the influx of displaced persons within neighbouring states.

Displaced individuals are often displaced to areas close to their home state due to proximity and a feeling of belonging.<sup>238</sup> The development of regional agreements might thus be appropriate. However, the development of regional treaties does not exclude the possibility of an international response. Regional and international agreements can complement each other, as is the case with the Refugee Convention and the OUA convention on the specific aspects of refugee problems in Africa.<sup>239</sup>

The advantage of a regional approach is that it can target the Climate Change Refugee problem in a more specific way than a global regime, however regional responses can cause

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<sup>237</sup> Williams (2008) p. 518; United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982 (entered into force 16 November 1994) 1833 UNTS 3.

<sup>238</sup> Williams (2008).

<sup>239</sup> Williams (2008).



frictions and fragmentation as they create different legal obligations.<sup>240</sup> Despite this, within regional collaboration states are more likely to have their needs and concerns heard, and be more inclined “to comply with these regulations and regimes”.<sup>241</sup>

#### **4.7 Filling the Protection Gap Through a Soft Law Approach**

Another way for international law to develop is through the negotiation of soft law instruments. Soft law usually refers to a written instrument “containing principles, norms, standards, or other statements of expected behavior”.<sup>242</sup> Although soft law instruments are political commitments and do not give rise to legal obligations, they can lead to the development of law.<sup>243</sup> Shelton argue that soft law approaches have sometimes proven “to be as effective as law to address international problems” and are “frequently incorporated into subsequent treaties or becoming customary international law as a consequence of state practice”.<sup>244</sup> The norms and principles set forth in the soft law instrument might develop to become an important part in the governing of the international society, as well as becoming legally binding domestically.<sup>245</sup> Chinkin points to the “success of the development of human rights law from the Universal Declaration on Human Rights” as an example of this development.<sup>246</sup>

Kolmannskog has argued for a soft-law approach, using the 1998 UN Guiding Principles on Internal Displacement (Guiding Principles) as an example, and suggests the creation of principles governing internationally displaced Climate Change Refugees.<sup>247</sup> The Guiding Principles are standards outlining the protection available to IDPs.<sup>248</sup> They address protection against displacement, protection during displacement, framework for humanitarian assistance and protection during return and resettlement. Through looking closer at the Guiding Principle, we can learn something about the effectiveness of a soft law approach to Climate Change Refugees.

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<sup>240</sup> Gerhard Hafner, "Pros and Cons Ensuing from Fragmentation of International Law," *Michigan Journal of International Law*, 25 (2004), no. 4, 849-863, p. 856.

<sup>241</sup> Hafner (2004) p. 859.

<sup>242</sup> Dinah L. Shelton, "Soft Law," *GW Law Faculty Publications & Other Works*, (2008), 1-29, p. 3.

<sup>243</sup> Shelton (2008) p. 1.

<sup>244</sup> Shelton (2008) p. 1.

<sup>245</sup> Shelton (2008).

<sup>246</sup> Chinkin (1989) p. 860.

<sup>247</sup> Vikram Kolmannskog, "Climates of Displacement," *Nordic Journal of Human Rights*, 26 (2008), no. 4, 302-320.

<sup>248</sup> Internal Displacement Monitoring Centre, "Guiding Principles on Internal Displacement," <https://www.internal-displacement.org/internal-displacement/guiding-principles-on-internal-displacement>, (accessed 2 May 2021).

The IDP guiding principles were developed “at a time when there was little political will for a new convention” and are based upon “existing human rights law, humanitarian law, and refugee law.”<sup>249</sup> In the same way, Kolmannskog and Trebbi argue that one could develop guiding principles on displacement due to climate change and base it on already existing refugee law, environmental law, and human rights law, while “highlighting best practices from different countries and regions.”<sup>250</sup> However, the proposed principles would not be legally binding, thus it would be up to the individual state how they follow and implement the principles.<sup>251</sup>

The Guiding Principles have, according to Cohen, served as a “catalyst for the development of binding law on internal displacement”.<sup>252</sup> In 2006 the Great Lakes Pact in Africa adopted a protocol implementing the Guiding Principles as a regional framework, and the member states incorporated the provisions of the Guiding Principles into domestic law.<sup>253</sup> Currently more than 20 states have incorporated the Guiding Principles into national law.<sup>254</sup> Moreover, in 2009, the legally binding Kampala Convention was adopted by 53 African states obliging “states to take concrete measures on the ground to improve conditions for IDPs”.<sup>255</sup> Some of its provisions are based on the Guiding Principles. Thus, even though the Guiding Principles are not themselves legally binding, the principles have been implemented in domestic law and incorporated in legally binding Conventions. In the same way, a soft law instrument on Climate Change Refugees could lead to legally binding regulation over time.

There are several advantages with a soft law instrument. A soft law instrument can outline a vision that states are required to work towards, and can develop into legally binding obligations over time.<sup>256</sup> Furthermore, Kälin and Schrepfer argue that soft law allow states to balance their sovereignty with the need to establish rules to govern international relations.<sup>257</sup> Thus, states might be less reluctant to agree to a soft law initiative than a hard law initiative.<sup>258</sup> In that way a response to Climate Change Refugees can be negotiated and

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<sup>249</sup> Kolmannskog and Trebbi (2010) p. 728.

<sup>250</sup> Kolmannskog and Trebbi (2010) p. 728.

<sup>251</sup> Kolmannskog and Trebbi (2010) p. 728.

<sup>252</sup> Roberta Cohen, "Lessons Learned from the Development of the Guiding Principles on Internal Displacement," *The Crisis Migration Project*, (2013), p. 11.

<sup>253</sup> Cohen (2013).

<sup>254</sup> Cohen (2013) p. 11.

<sup>255</sup> Cohen (2013) p. 11.

<sup>256</sup> Kälin and Schrepfer (2012) p. 71.

<sup>257</sup> Kälin and Schrepfer (2012) p. 71.

<sup>258</sup> Daniel Thürer, "Soft Law " in *Max Planck Encyclopedias of International Law*, ed. Anne Peters and Rüdiger Wolfrum, Oxford University Press 2009, 6.

implemented quicker than a legally binding instrument.<sup>259</sup> A soft law instrument could shape state practice, and possibly become the foundation for a future convention.<sup>260</sup> The UNHCR reported that the incorporation of the Guiding Principles led to “concrete benefits to IDPs”, showing that soft law can effect state conduct.<sup>261</sup> Furthermore, although an instrument is legally binding, it does not always ensure rights as states must adopt and comply with the treaty for it to have effect, and this is not always the case.

Although soft law has legal relevance, it is not legally binding.<sup>262</sup> The fact that it is not legally binding can lead to resistance among states in following the principle set out in the instrument. Kälin et. al. found in their review of the Guiding Principles that “states sometimes insist on the applicability of domestic laws that are not beneficial to IDPs.”<sup>263</sup> This might also be the case with a soft law instrument protecting Climate Change Refugees. A legally binding instrument can hold governments accountable for their actions in a way a soft law instrument cannot. The main advantage of settling on a soft law instrument is that it is the most realistic option in the current climate of scepticism towards refugees. Moreover, a soft law instrument could act as a steppingstone towards further obligations.

## 4.8 General Challenges

There are several challenges met when attempting to fill the protection gap for Climate Change Refugees. Firstly, we are faced with the difficulty of defining Climate Change Refugees. This is due to how displacement is often due to climate change in conjunction with other factors. Thus, it is not always clear whether the displacement is due to climate change or other factors such as socioeconomic conditions. The difficulties settling on a definition leads to problems in deciding how to deal with climate change displacement.

Additionally, the international community may lack the political will to negotiate, adopt and implement an effective new instrument.<sup>264</sup> There is evidence from the current refugee regime that states are reluctant to receive refugees, and therefore it is difficult to imagine that states will take on the additional responsibility of protecting Climate Change Refugees at this point

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<sup>259</sup> Kälin and Schrepfer (2012) p. 72.

<sup>260</sup> Atapattu (2009).

<sup>261</sup> Cohen (2013) p. 11.

<sup>262</sup> Walter Kälin, "How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework," *Brookings/Cuny Project on Internal Displacement*, (2001).

<sup>263</sup> Walter Kälin et al., "Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges," *Brookings-Bern Project on Internal Displacement*, (2010), p. 5.

<sup>264</sup> Philip (2018) p. 652.

in time. A treaty requires wide ratification and implementation to solve the Climate Change Refugee problem. Therefore, the issue of political will might be detrimental to the legal protection of Climate Change Refugees. Cullen even point to the current pandemic as a hindrance through its exacerbation of isolationist politics.<sup>265</sup>

As shown above, several scholars believe that the protection of Climate Change Refugees may “come at the expense of other displaced people”. A commitment to take on the protection of Climate Change Refugees might lead to weakened protection of refugees that are currently protected by the Refugee Convention, this is especially believed to be the outcome if amendment to the Refugee Convention is initiated due to the lack of political will to protect refugees.<sup>266</sup>

Another challenge is that treaty-making and treaty-amendment processes are time-consuming, while the protection needs of Climate Change Refugees are acute. Several communities will potentially suffer without any legal regulation; both the receiving states that might be faced with an influx of people fleeing from degrading environments and the people displaced by the adverse effects of climate change will suffer if no agreement on protection is sought.

#### **4.9 Concluding Remarks**

This section has examined some of the ways in which international law can evolve to meet the challenge of Climate Change Refugees. All the explored mechanisms have their advantages and disadvantages. There are several hindrances to negotiating and implementing a Climate Change Refugee response, such as the lack of political will, isolationism, and the time-consuming process of negotiating a new or amended instrument. Especially due to the global reach of the issue, and the responsibility that developed states have in the development of climate change, it is important that a global response is agreed upon. The process from planning a new treaty to agreeing on a text can be very time-consuming. However, a new treaty has the advantage of being a blank slate, and the actors are not bound by a previously agreed-upon framework during the negotiation. Although amending an existing treaty, such as the Refugee Convention, is less time-consuming and potentially less complicated than the implementation of a new treaty, it is dependent on the political will and support of multiple states in order to be efficient.

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<sup>265</sup> Miriam Cullen, "Disaster, Displacement and International Law: Legal Protections in the Context of a Changing Climate," *Politics and governance*, 8 (2020), no. 4, 270-280.

<sup>266</sup> Gibb and Ford (2012) p. 4.

Currently, the implementation of a soft law instrument setting out principles of best practice can be an option for dealing with climate change displacement. Although a soft law solution will not lead to legally binding obligations, the experience from the Guiding Principles on Internal Displacement show that a soft law instrument can be influential and lead to implementation of the principles into domestic law or subsequent legally binding instruments. States might be more likely to agree on a soft law instrument, therefore it can be implemented more quickly than a legally binding response.

Furthermore, the experience of regional conventions complementing the Refugee Convention show that there might be more political will at a regional level to enact stronger protection for refugees. Therefore, through analysing the proposed solutions to the Climate Change Refugee protection gap, the implementation of a soft law instrument and regional protection seems to be the best solution at this time considering the current political climate. However, there is a need for a legally binding solution on the global level, but this does not seem to be possible to implement in the near future.

## 5 Conclusion

This thesis has examined how climate change can lead to displacement, finding that climate change is a complex issue that will alter the environment rendering places uninhabitable.<sup>267</sup> Furthermore, climate change will affect the already vulnerable areas of the world especially hard. This is due in part to their geographical location, but also due to the fact that developing nations are more at risk of the adverse effects of climate change as they lack the financial and technical ability to mitigate and adapt to climate change.<sup>268</sup> States that have contributed little to climate change will be the ones most heavily impacted by climate change.<sup>269</sup>

The thesis found that there is no agreed-upon definition of the term Climate Change Refugees, but settled on a definition of Climate Change Refugees as *individuals who are forced to flee abroad due to a transformation of the environment to one not suitable for human occupation due to man-made climatic events*. The difficulty of settling on a definition is due to the complexity of climate change-induced displacement. Firstly, there are difficulties in categorizing displaced people based on the reasons for their displacement, due to climate change acting alongside already existing pressures in a society. It is therefore difficult to determine whether displacement is due to climate change, or other factors such as socioeconomic conditions. Secondly, the multitude of ways in which climate change can displace populations leads to a range of different protection needs, further obstructing the acceptance of a single definition. The needs of people encountering slow- and sudden-onset climatic events are different. Sudden-onset events lead to immediate protection needs, but the displacement might be temporary, while with slow-onset events the displacement might be anticipated, but the protection need will be of a permanent nature.<sup>270</sup> In the case of slow-onset events, movement can happen pre-emptively, making it hard to determine whether the movement is forced or voluntary, and this distinguishment is important to current legal regimes offering protection such as the Refugee Convention.<sup>271</sup> Under international law the reasons why people flee is crucial in determining their rights, and a definition is therefore a prerequisite for protection being awarded.<sup>272</sup>

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<sup>267</sup> Sciacaluga (2020) p. 9.

<sup>268</sup> Kovic (2008).

<sup>269</sup> Intergovernmental Panel on Climate Change (IPCC) (2014); Intergovernmental Panel on Climate Change (IPCC) (2014).

<sup>270</sup> Nishimura (2015) p. 112-113.

<sup>271</sup> Nishimura (2015) p. 113.

<sup>272</sup> Atapattu (2009).

Several legal frameworks govern refugees today. Through an analysis of international law, it is evident that no legal framework offers adequate protection to Climate Change Refugees. Although it has been argued that the Refugee Convention can be interpreted to include Climate Change Refugees due to the vague wording of Art. 1 A (2), the evidence from domestic courts shows that the Refugee Convention does not offer protection to Climate Change Refugees, and in the end the determination of status is done “by the relevant national authorities”.<sup>273</sup>

The regional instruments The Cartagena Declaration and the OAU Convention operate with broader refugee definitions than the Refugee Convention, and they are open to interpretation and adaptation to the changing global refugee problem. However, they are currently not interpreted to encompass Climate Change Refugees, and thus currently do not offer protection to Climate Change Refugees. The Convention Relating to the Status of Stateless Persons similarly does not provide adequate legal protection for Climate Change Refugees. Currently, there is uncertainty surrounding whether submersion due to rising sea levels will lead to a state’s non-existence, and in turn to its citizens being considered Stateless. However, even if the inhabitants of submerged island states are considered stateless, there remains a problem of the timing of the protection, as the protection need will be in place before the complete submersion of the island states.<sup>274</sup> Furthermore, the protection of stateless people would only cover citizens of submerged island nations, and not the millions of other people displaced by climate change.

The different legal frameworks currently offering protection to refugees do not offer adequate protection to the majority of Climate Change Refugees. Although, some individuals could be protected through the law of stateless people, the protection need goes beyond those few individuals. Through the Teitiota case it has become evident that the adverse impacts of climate change can lead non-refoulement obligations. However, the Human Rights Committee maintain that currently the effects of climate change are not sufficient to grant Climate Change Refugees protection against being returned to their home state. Furthermore, the right of non-refoulement does not offer a right to enter another state. Thus, the thesis found that Climate Change Refugees are not currently protected under international law, and therefore a protection gap exists in regard to Climate Change Refugees.

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<sup>273</sup> Cournil (2011) p. 4; Cooper (1998).

<sup>274</sup> Somani (2020); Philip (2018).

The thesis finds that there is a need for stronger protection for Climate Change Refugees, as the adverse effects of climate change is expected to displace millions of people. The issue of climate change is a global one, and therefore there is a need for a global response to the protection of Climate Change Refugees. The thesis analysed proposed solutions for the protection of Climate Change Refugees, and found that the advantage of an international treaty regulating Climate Change Refugees is the fact that it would be legally binding, and enforceable on state parties.<sup>275</sup> Thus, states could be held accountable for non-compliance. Treaties are useful where normative gaps exist, as is the case with Climate Change Refugees.<sup>276</sup> However, it seems that the lack of political will among states will hinder the implementation of a new treaty.

The implementation of a soft law instrument setting out principles of best practice is an alternative option for addressing climate change displacement. The experience from the Guiding Principles on Internal Displacement shows that a soft law instrument can be influential, and can lead to implementation of the principles into domestic law or subsequent legally binding instruments. States might be more likely to agree to a soft law instrument, than a hard law instrument, therefore it can come in place quicker than a legally binding response. Although a legally binding instrument especially tailored to deal with the Climate Change Refugee problem would be preferred, this does not seem to be possible at this time, therefore a soft law instrument is the proposal that is most likely to offer a viable solution to Climate Change Refugees at present. Furthermore, the experience of regional conventions complementing the Refugee Convention indicates that there might be more political will at a regional level to enact stronger protection for refugees.

Although there is a long way to go for Climate Change Refugees to gain international protection, there have been some recent positive developments. The Teitiota case determined that environmental degradation due to climate change can lead to rights of non-refoulement due to climate change negatively impacting on the right to life. Earlier this year a Bangladeshi man was granted a right to stay in France due to the level of pollution in Bangladesh being deemed detrimental to his health. International news coined him the world's first Climate Change Refugee. These two cases show that there are small positive developments in the international recognition of the plight of Climate Change Refugees.

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<sup>275</sup> Philip (2018).

<sup>276</sup> Kälin and Schrepfer (2012).



Through analysing the proposed solutions to the Climate Change Refugee protection gap, this thesis concludes that the implementation of a soft law instrument, and a regional approach to protection, are the most likely proposals to be efficiently implemented within the current political climate. The protection gap for Climate Change Refugees is not likely to be filled soon, primarily due to an aversion of states to take on the obligation to protect more people. A soft law instrument could be a starting point towards meeting the protection needs of Climate Change Refugees, and the hope is that states will eventually become more open to their legal recognition. In this way, through the implementation of a soft law instrument and regional protection, the international community can attempt to slowly close the protection gap for Climate Change Refugees.

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