

Climate Change Induced Migration in International Law

Addressing the Protection Gap in International Law Regarding
Internationally Displaced Persons Due to the Impacts of Climate Change:
The Example of Pacific Island States

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LIST OF ABBREVIATIONS

AR	IPCC Assessment Report
CAT	Convention Against Torture
CCPR	See HRC
COP	Conference of the Parties (to the UNFCCC)
GCM	Global Compact for Safe, Orderly and Regular Migration
GHG	Greenhouse gas
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
LCA	Ad Hoc Working Group on Long-term Cooperative Action
NDC	Nationally Determined Contributions
OAU	Organisation of African Unity
PA	Paris Agreement
PSIDS	Pacific Small Island Developing States
TFD	Task Force on Displacement
UN	United Nations
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
WMO	World Meteorological Organization
WIM	Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts

1 Introduction

The direct links between climate change and human migration are debated¹ but more and more accepted. Part of the debate sees an increase shortly in the number of people who migrate due to climate change impacts. The impacts of climate change on natural and human systems, such as the rising of temperatures, droughts, extreme weather events or the rise of sea level will trigger mass displacement. For example, Norman Myers estimated that by 2050, there would be 200 million climate migrants worldwide, based on the already significant numbers of climate migrants at the beginning of the century as well as the scientific prognostics concerning climate change impacts in the future². In contrary, another part of the debate is reluctant to give a significant role of climate change drivers of migration: for them, it would be impossible to do so because both climate change induced migration would only be at its beginning, and because of the lack of evidences³. In any case, the unprecedented global climate crisis is pushing or threatening millions of people to move due to the impacts of the climate on their home or livelihood.

The UNHCR estimated that 70,8 million people were forcibly displaced at the end of 2018⁴, only including ‘*persecution, conflict, violence, or human rights violations*’⁵. The different migration causes are hard to assess since displacement is usually multicausal, and there is a lack of reliable data when it comes to environmental migration. However, future estimates show that climate migration will exponentially increase in the next decades⁶. The 2020 World Migration Report by the International Organization for Migration (IOM)⁷ warns that scholars and academics have been critical of the reliability of such models. However, they still do influence national policies and media⁸. Either way, ‘*anthropogenic climate change is expected to increasingly affect migration and other forms of people moving to manage (..) changing risks*’, according to the IOM⁹. These changing risks include extreme ‘disruptions such as cyclones, floods and wildfires’ as well as ‘slow-onset processes, such as sea-level rise changes

¹ John R. Campbell, *Climate-Change Migration in the Pacific*. The Contemporary Pacific 26, no. 1 (2014) 1.

² Norman Myers, *Environmental Refugees: An emergent security issue*, 13th Economic Forum (May 2005) 1.

³ Campbell (n 1) 2.

⁴ United Nations High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2018* (Report, 20 June 2019) 2.

⁵ Ibid.

⁶ IOM, Migration Research Series no 31 – Migration and Climate Change (2008), 9.

⁷ IOM, World Migration Report 2020, (2019) 253.

⁸ Ibid.

⁹ Ibid.

in rainfall patterns and droughts’, still according to the IOM World Migration Report 2020. Those displaced will, more likely, move gradually and mainly internally¹⁰. Also, it remains challenging to assert the causation for migration in the first place¹¹. Even though climate change migration causation is hard to evaluate, climate change has been recognised as a threat multiplier on security around national borders or food resource control¹².

Climate change and its consequences will inevitably lead to increasing migration flux either in the short or long-term future; however, protection of climate induced migration is not universally and officially recognised.

1.1 Research questions and objectives

The principal research question guiding this thesis is including two parts: *is climate change induced migration across borders addressed in international law? If not, how can climate change induced migrants be protected under international law (i.e. treaty and custom)?*

To follow this research question, the first sub-question will be answered:

- What is the current international legal framework around climate change induced migration?

The thesis assumes that there is indeed a gap in international law regarding climate induced migration. The thesis will address the gap by analysing possible solutions and developments through these two sub-questions:

- Can recent climate change litigation regarding climate change induced migration develop rights?
- Which solutions can be developed in order to create adequate protection of climate change induced migration?

The objective of the thesis is to address the gap in international law concerning climate change induced migration. The objective is followed through the analysis and interpretation of

¹⁰ Phillip Dane Warren, *Forced Migration After Paris COP21: Evaluating The ‘Climate Change Displacement Coordination Facility’*, Columbia Law Review (1 December 2016) Vol.116(8) 2113.

¹¹ Ibid.

¹² IPCC, *AR5 Climate Change 2014: Impacts, Adaptation, and Vulnerability* (2014) 6.

the law as it is (*de lege lata*) and the law as it should be (*de lege ferenda*), as well as interpretations of legal concepts such as the scope of jurisdiction of international and national courts, or the power of international treaty bodies. Also, the thesis places significant value on non-state actors and national initiatives in a context where the global community is more and more reluctant to delegate powers to international institutions.

1.2 Definitions

According to the United Nations Framework Convention on Climate Change of 1992 (UNFCCC), climate change is ‘*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 other natural climate variability that has been observed over comparable time periods.*’¹³. The IPCC has developed a more extensive definition where climate change refers to any modification of climate over time as a result of human activity or due to natural variability¹⁴. These modifications of climate over time can ‘*reveal significant vulnerability and exposure of (...) many human systems to current climate variability*’¹⁵, and one manifestation of the impacts of climate change affecting human populations is migration.

Affected groups displaced by climate change can be described by many terms, including ‘climate refugees’, ‘climate migrants’ or ‘environmental migrants’. Both in international law and between academics, there is no agreed definition and terminology about climate change displacement. The numerous causes behind the nature of climate change disasters and individual migration decisions make it hard to develop a unique terminology encompasses all scenarios. Even international organisations such as the IOM has its own definition. The IOM defines ‘climate migration’ as ‘*the movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border.*’¹⁶ The IOM also includes

¹³ UNGA, United Nations Framework Convention on Climate Change (9 May 1992) 1771 UNTS 107 (UNFCCC) Article 1(2).

¹⁴ IPCC, *Climate Change 2007: Synthesis Report*. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, (2007) 30.

¹⁵ IPCC, Report 2014 (n 12) 6.

¹⁶ IOM, *International Migration Law: Glossary on Migration* (2019) 31.

'*climate migration*' as a subcategory of '*environmental migration*', and warns that the definition '*does not have any specific legal value*'¹⁷. For Campbell, climate change-related migration refers to '*a movement in response to a long-term trend or set of trends where a return to a set of environmental conditions similar to those that existed prior to migration is likely to be unobtainable*'¹⁸.

For the purpose of the thesis, the terms '*climate change induced migration*' and '*climate change induced migrant*' will be used as the primary terminology to describe the groups affected by climate change impacts pushing them to move, to include all scenarios where there is a displacement of population due to climate change impacts. This thesis also acknowledges that '*climate change induced migrant*' is not a universally accepted term. The thesis will not discuss the voluntary or nonvoluntary feature of climate change induced migration. It is understood that the terminology used encompasses all cases of population movement driven by climate change impacts on the environment of the displaced persons.

1.3 Methodology

The primary methodology used to answer the research question will be through legal analysis. To do so, the law as it currently is (*lege lata*) will be explored through interpretation. *De lege ferenda* will also be analysed to determine if customary law around climate change induced migration includes a right for protection.

An analysis of legislation, treaties and case law will be used throughout the thesis. The thesis will use Pacific island states as an example: the reason is that the Pacific is one of the most affected regions by climate change, and where migration on that basis has been flourishing in the past few years. This analysis will enable a comparative approach, where numerous legal documents of national and international nature can be discussed through their differences and similarities of interpretation.

In addition to primary sources of international law, soft law instruments such as official documents from the UN, reports as well as teachings and literature from academics and scholars in the fields of international law will be used. These documents will provide a basis for the interpretation of possible development in international law as well as customary law.

¹⁷ Ibid.

¹⁸ Campbell (n 1) 9.

Judicial decision by national jurisdictions will be analysed in order to illustrate the development of state practice according to customary international law.

Finally, the conceptual analysis of the current framework will be driven in order to feature *de lege ferenda* opinions.

1.4 General structure

After laying out the scientific knowledge around climate change from the past decades, Chapter 2 conducts an analysis of the *lex lata* on climate change induced migration through treaties, conventions and international framework but also with non-governmental and other governance initiatives. Chapter 3 then uses specific case law both at the national and international level to illustrate how climate change litigation can address the gaps in international law. This chapter uses the context of climate change in Pacific small islands, and more specifically, the case of Ioane Teitiota, a Kiribati national in New Zealand. Chapter 4 introduces several legal and non-legal potential options to address the gap and introduces interpretations and solutions that can be developed, at national, regional and international level. The final chapter contains a summary of the key features of the thesis and answers the research questions.

1.5 Scope and limitations

Even though climate change induced migration includes both internal and international displacement in most definitions, this thesis will only include displacement across international borders. Internally displaced persons remain under the protection of their country of nationality or residence. For this reason, internally displaced persons are protected at least under national law.

The methodology and interpretations adopted in this thesis are influenced by a human rights perspective, and as such, can be qualified as a limitation.

Ultimately, the thesis assumes that global actors, in the present context, are reluctant to build and adopt new international tools related to migration in its entirety, especially when those are legally binding towards the parties.

2 Overview of the situation for climate change induced migrants

The scientific background of climate change must be examined to fully understand the current context around climate change induced migration, using the example of Pacific island states which are particularly vulnerable to climate change impacts.

2.1 The phenomenon of climate change induced migration

2.1.1 Scientific assessment of climate change

Climate change has been a problem known for decades, and scientists were interested in the phenomenon early on. Indeed, at the end of the 19th century, science had already raised the question of whether the release of carbon dioxide in the atmosphere had an impact on the climate¹⁹. Nonetheless, it is not before 1979 that the first World Climate Conference took place²⁰. The interest about climate change grew the following years, and in 1988 the Intergovernmental Panel on Climate Change (IPCC) was founded by both the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO)²¹. The IPCC started its work of preparing a comprehensive review of climate change and its different impacts. Since then, the IPCC has found a role as the leading organisation on climate change science and its various reports on climate change are highly respected among scientists, presenting the most accurate data available on climate change and its consequences. The IPCC itself does not conduct any research; the Assessment reports are put together by scientists from all over the world who volunteer their time to assess scientific papers on climate change to publish a comprehensive summary for all to access to²².

As early as 1990, the IPCC was already talking about sea-level rise, warming up temperatures²³ leading to vast amounts of movements of people with a unique risk for island and

¹⁹ In the *Philosophical Magazine and Journal of Science* (Series 5, Volume 41, April 1896), Svante Arrhenius was the first scientist to discuss the contribution of carbon dioxide in the greenhouse effect while also speculation about the consequences of the variations of carbon dioxide in the atmosphere contributed to long-term variations in climate.

²⁰ WMO, *A History of Climate Activities* Vol 58 (3) (2009).

²¹ IPCC, *History of the IPCC*, <<https://www.ipcc.ch/about/history/>> (accessed 22 October 2019).

²² IPCC, *About the IPCC* <<https://www.ipcc.ch/about/>> (accessed 22 October 2019).

²³ IPCC, *First Assessment Report (FAR) - Working Group I: Scientific Assessment of Climate Change* (1990) 6, 257.

coastal communities²⁴. With the work of the IPCC, we know today that climate change is a real phenomenon happening and having effects on every aspect of our lives. These consequences include droughts, other natural catastrophes such as hurricanes, floods, an increase of the temperatures and thus, the melting of ice around the world, leading to the rise of the oceans' levels²⁵. These impacts of climate change can exacerbate the land degradation process²⁶. Agriculture is already impossible in some dry areas and is even more concerning when whole State territories become barren to agriculture: salination and desertification of agricultural land lead to the decrease of livestock production²⁷. At the same time, coastal erosion added to the sea level rise put more pressure on land use, between livestock or habitation²⁸.

All future greenhouse gas emission (GHGs) scenarios project increasing impacts on land, some areas facing more risks than others, while some regions will face risks that were not anticipated²⁹. Today's science shows the strong likelihood of climate change impacts on land, thus putting pressure on already existing risks to food systems. Indeed, the effects of climate change are pressuring the availability of water and food in some regions.

2.1.2 Climate change and Pacific island states

The thesis will focus on the Pacific Small Island Developing States (PSIDS) (or Pacific island states). It designates Kiribati, Federated States of Micronesia, Nauru, Republic of Marshall Islands, Papua New Guinea, Samoa, Solomon Islands, Tonga, Vanuatu, and Fiji³⁰. These sovereign states and territories are located within the tropics of the southern and western Pacific Ocean. Pacific island states here will be treated as a group even though all its

²⁴ IPCC, FAR - Working Group II: Impacts Assessment of Climate Change (1990) 3.

²⁵ 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*, Summary for Policymakers (August 2019) A.2.7 – 10.

²⁶ Ibid.

²⁷ Ibid, A5.4-A5.5 – 17-18.

²⁸ IPCC, Report 2019 (n 25) A.2.7 – 10.

²⁹ Ibid, A.5.

³⁰ Statement by H.E. Mr Robert G. Aisi, Permanent Representative of Papua New Guinea to the UN and Chair of the PSIDS to the United Nations at the Open Working Group on Sustainable Development Goals (18 April 2013), New York.

members are not politically or economically homogenous. There are nonetheless common characteristics to these countries, allowing this analysis.

According to the Third Assessment Report of the IPCC on Small island states³¹ (including Pacific island states), common characteristics are numerous. First, Pacific island states are limited in physical size, restricting the solutions and adaptations options to climate change and sea-level rise. In the worst case, abandoning territories would be the only option available where entire islands would be crossed off the map. These territories, due to their limited size, are also generally limited in natural resources. Besides, natural resources have been managed in a highly unsustainable way in human activities, rendering them even more scarce.

The consequences of global warming are similar in these countries. In the last decades, there has been an increasing international concern for Pacific Islands States regarding climate change consequences. The key climate and ocean drivers of change impacting small island communities include ‘*variations in air and ocean temperatures; ocean chemistry; rainfall; wind strength and direction; sea levels and wave climate; and particularly the extremes such as tropical cyclones, drought, and distant storm swell events.*’³² Sea level rise is one of the consequences of global warming and impacts directly small-island communities. Generally, most of the small-islander populations are located within a few hundred meters range from the coast, as well as their infrastructures and their socio-economic activities³³. Therefore, small islands are highly vulnerable to any changes in climate, sea-level, shoreline, and inundations. Indeed, according to the IPCC Special Report on Global Warming of 1.5°C (2018), ‘*increasing warming amplifies the exposure of small islands [...] to the risks associated with sea-level rise for many human and ecological systems, including increased saltwater intrusion, flooding and damage to infrastructure (high confidence)*’³⁴.

³¹ IPCC, *Chapter 17: Small island States*, in *Climate Change 2001: Impacts, Adaptation and Vulnerability*, contribution of Working Group II to the Third Assessment Report (2001).

³² IPCC, *Chapter 29: Small islands* in *AR5 Climate Change 2014: Impacts, Adaptation, and Vulnerability* (2014) 23.9 – 1619.

³³ IPCC Report 2001 (n 31) 859.

³⁴ IPCC, 2018: Summary for Policymakers. In: *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) B.2.3 – 8.

Pacific island states are also highly exposed to natural hazards such as hurricanes, volcanic eruptions, tsunamis, and droughts. These weather and climate events are exacerbated by climate change, making Pacific islands states gradually more vulnerable to these natural disasters.

Since small islands states are generally under exposure to significant variations in climatic and oceanic conditions every year, they developed systems which are adapted to the consequences it can bring³⁵. Thus, the strategies that they can implement to adapt to climate change are usually *‘the same as those that constitute sound environmental management, wise use of resources, and appropriate responses to present-day climate variability’*, according to the IPCC³⁶.

The IPCC Special Report on Global Warming of 1.5°C shows the emergency of the situation for small island states where the risks associated with sea-level rise are higher at a 2°C global warming compared to 1.5°C. Governments have accepted this temperature limit within the IPCC³⁷ but also more officially during the COP21, in the Paris Agreement. One of the main goals of the Paris Agreement is to keep *‘a global temperature rise this century well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5°C’*³⁸. This number enables a slower rate of sea-level rise, allowing better planning for adaptation procedures globally³⁹. However, for some vulnerable regions such as small islands states, the experience of high *‘multiple interrelated climate risks’* is very probable, even at global warming of 1.5°C⁴⁰.

Since the Paris Agreement in 2015 and the hopes it brought concerning limiting global warming at 2°C, the UN Environment Program (UNEP) has assessed how countries are implementing changes to fulfil their commitment. The Emissions Gap Report 2019 shows that if no action is taken to strengthen the current commitments to halt climate change, temperatures

³⁵ IPCC Report 2001 (n 31) 849.

³⁶ Ibid.

³⁷ IPCC, Press Release on the Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments (8 October 2018).

³⁸ UNFCCC, *The Paris Agreement* <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> (accessed 29 January 2020).

³⁹ IPCC Report 2001 (n 31) 849.

⁴⁰ Ibid.

can be expected to rise 3.2°C above pre-industrial levels⁴¹. In other words, small island states, including Pacific Island states, will experience exacerbated weather events, sea-level rise, and other effects of climate change mentioned previously.

Under those circumstances, where weather and climate become less and less liveable, and due to the restricted physical characteristics of living on an island, the only plausible adaptation would be migration. The unfolding of displacement is another similar characteristic between these sovereign territories, which is inevitably international. Indeed, small islanders are most likely migrating through airports or ports when leaving their country, thus making it harder to cross borders than it is on land⁴². Also, travelling means are expensive in the South Pacific since it requires travelling over long distances by boat or by plane⁴³.

In reality, financial and legal barriers to international migration make it more likely that people will stay within island territories. It is highly unlikely that a considerable migration flux is going to develop between Pacific islands states to other areas like Australia or New Zealand⁴⁴. Instead, people in these territories will experience a deterioration of living conditions on the islands, increase of unemployment and a higher morbidity⁴⁵. The same economic barriers that prevent vulnerable people from migrating will make wealthier people cross borders, thus increasing already existing social inequalities.

Another similar aspect between the Pacific Islands States is the strong ties linking the people with the land. Pacific island states are the home to many cultures and traditions. Jane McAdam and Maryanne Loughry wrote about how Pacific islanders from Kiribati and Tuvalu perceived the term ‘climate refugees.’⁴⁶ Both countries rejected the term ‘refugees’ since, for them, it recalls an idea of helplessness and lack of dignity. Furthermore, both are not signato-

⁴¹ UNEP, Emissions Gap Report 2019 (26 November 2019) 19.

⁴² Philippe Boncour, Bruce Burson, *Climate change and migration in the South Pacific region: policy perspectives*. Policy Quarterly, 5.4 (2009) 65.

⁴³ Ibid.

⁴⁴ IPCC Report 2014 (n 32)1643.

⁴⁵ IPCC Report 2001 (n 31), 846.

⁴⁶ Jane McAdam, Maryanne Loughry, *We aren't refugees*, Inside Story (30 June 2009) <<https://insidestory.org.au/we-arent-refugees/>> (accessed 3 February 2020).

ries of the Refugee Convention⁴⁷. Even the word ‘refugee’ does not have a translation in both languages. McAdam and Loughry describe that islanders from these countries have no desire to escape from their government. They also mention that Tuvaluans and i-Kiribati people affirm that it will be the actions of other countries that will drive them to migrate, not the actions of their leaders⁴⁸.

Indeed, Pacific small islands participate very little to global GHGs. A 2019 report from the European Union⁴⁹ shows that in 2018, the CO₂ emission of Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tonga, Vanuatu, and Fiji altogether amounted 5,73Mton (0,015% of the CO₂ total yearly emissions) against 11255.88Mton for China (29,71% of the CO₂ total yearly emission)⁵⁰. Pacific island states are the lowest emitters of CO₂ and GHGs. Still, they are one of the first countries to suffer from global warming and its consequences.

McAdam and Loughry also explained that the government of Tuvalu had refused relocation as an adaptation in international agreements⁵¹. There is a fear from islanders in general that industrialised countries will think that relocation is the solution to sea-level rise rather than acting towards reducing carbon emissions⁵². Also, islanders think that relocation should not be sought but rather *‘to assist people and communities in adapting to the changes that are now unavoidable so they can continue to lead dignified lives in the places they call home.’*⁵³ McAdams and Loughry also criticise the use of the term ‘sinking islands’ and ‘climate refugees’ in the media. Indeed, they argue that it is an oversimplification and implies a situation of movement, which in reality does not exist⁵⁴: people are only starting to *‘reluctantly recognising that in the future, their home may no longer be able to sustain them.’*⁵⁵ The two authors

⁴⁷ UNGA, Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137 (Refugee Convention)

⁴⁸ McAdam, Loughry 2009 (n 46).

⁴⁹ Crippa, M., Oreggioni, G., Guizzardi, D., Muntean, M., Schaaf, E., Lo Vullo, E., Solazzo, E., Monforti-Ferrario, F., Olivier, J.G.J., Vignati, E., *Fossil CO₂ and GHG emissions of all world countries - 2019 Report*, EUR 29849 EN, Publications Office of the European Union, Luxembourg (2019).

⁵⁰ Ibid – (in Mton of CO₂ for 2018) Kiribati (0,03); Papua New Guinea (3,92); Samoa (0,13); Solomon Islands (0,13); Tonga (0,12); Vanuatu (0,08); and Fiji (1,32).

⁵¹ McAdam, Loughry 2009 (n 46).

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

recognise as well that many islanders have contacts abroad and that mobility is a historical pattern in many Pacific countries⁵⁶.

The IPCC Fifth Assessment Report (2014) (AR5) reaffirmed the level of vulnerability of small islands to climate and non-climate stressors, considering their physical characteristics⁵⁷. The AR5 mentions that it is nonetheless complicated to distinguish observed and projected impacts of climate change on small islands. Besides, all small islands do not face the same climate change risks. AR5 affirms that adaptation will vary from the different island regions and between countries in the same areas; thus, the diversity of potential response must be integrated into adaptation planning⁵⁸. Different conditions require different solutions.

2.1.3 Climate change and migration

These consequences are affecting people's everyday life. The land becomes barren and unable to fertilise; food and water are not sufficiently available; droughts and extreme weather events become more and more frequent. These can lead people to flee their habitat against their will, to settle somewhere where they can have access to food or escape the numerous natural disasters, for example. Like in Pacific island states, some areas of the globe are becoming progressively uninhabitable because of the effects of climate change; thus, people leave their land.

It is nonetheless challenging to attribute changes on Pacific island states to climate change. The causation between human action and variations in temperatures can be hard to establish; thus, it is hard to justify and give a legal ground to climate change-driven migration. Paradoxically, if the Pacific Islands States were to disappear or become uninhabitable through slow-onset changes in the environment, migration would be the leading solution for adaptation.

People deciding on migrating to another territory for environmental reasons raises questions concerning their status. As explained previously, this essay will not cover internal

⁵⁶ Ibid.

⁵⁷ 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) 2.3.1 – 67.

⁵⁸ Ibid, 3.3 – 19.

displacement where an abundant literature already exists on the subject⁵⁹. I will thus only analyse the situation for international environmental displacement where the subject crosses an international border.

In international law, the status of refugees has been developed in the context of post-World War II, thus linked with a strict justification of the need to migrate. According to the UNHCR, a refugee is a person who has been forced to flee his or her country because of persecution, war or violence⁶⁰. This definition is inspired by Article 1 of the Refugee Convention, which, as we will see later, does not include environmental aspects to the definition of a refugee.

Different reasons are leading to climate change induced migration, and it is more often the result of multiple factors intertwined (social, political, economic). It is in practice difficult to isolate those factors from the climate change aspect. Also, there is a blurred line between *slow* and *sudden* changes in climate. Sea-level rise increases the risk of tropical storms, for example, and if extreme weather events are recurrent, it makes a territory more and more hostile over time⁶¹. Climate change also influences and can exacerbate violence in areas where people are forced to compete for natural resources⁶², but as well over management of migration⁶³. Also, international conflicts can arise over the management of migration, or over the financial compensation of countries responsible for climate change to the countries which are affected⁶⁴.

⁵⁹ See e.g. UN High Commissioner for Refugees (UNHCR), *Guiding Principles on Internal Displacement* (22 July 1998); African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 'Kampala Convention'* (23 October 2009); Global Protection Cluster (GPC), *Handbook for the Protection of Internally Displaced Persons* (June 2010).

⁶⁰ UNHCR Hong Kong, *Refugee Q&A* <<https://www.unhcr.org/hk/en/about-us/faq-of-refugees>> (accessed 2 February 2020).

⁶¹ Julie-Anne Richards, Simon Bradshaw, *Uprooted by Climate Change, Responding to the growing risk of displacement*, Oxfam International (2017) 5.

⁶² *Ibid.*

⁶³ Christina Voigt, *Chapter 12: Security in a 'Warming World': Competences of the UN Security Council for Preventing Dangerous Climate Change in Security: A Multidisciplinary Normative Approach*, Cecilia M. Bailliet (ed.), (2009) 291.

⁶⁴ *Ibid.*

When food and water are scarce, people are left with no other choice than to flee to survive. Nonetheless, when people flee while crossing international borders on climate change-related grounds, there is a need to determine under which regime of international law these people fall. Are there references to environmental consequences on migration in international law? How does international law define climate change induced migrants?

2.2 Gaps in the international legal framework

Legal instruments exist to protect refugees and asylum seekers. However, these instruments fail to mention climate change induced displacement. I will review the legal instruments component of the international legal framework concerning the protection of climate induced migrants. The urgency of the situation keeps on increasing, and there is a need to look for legal solutions allowing protection to climate change induced migrants.

2.2.1 The Refugee Convention

The main legal instrument in international law protecting refugees is the Refugee Convention⁶⁵ adopted by the UNGA. According to the Preamble of the Refugee Convention, it uses a human rights approach to the protection of refugees, more specifically in the first two paragraphs: *'the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, [...] considering that the United Nations has [...] manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.'*⁶⁶ The human rights approach to the Refugee Convention appears to grant a broad scope for the protection of refugees. Indeed, according to the UNHCR, the Convention a cornerstone text which defines the term of 'refugee', outlines the rights of the displaced and set legal obligations of States to protect them⁶⁷. However, while reading the text of the Convention, one can notice that the definition of refugee is quite strict, only concerning specific categories of displaced persons.

Article 1(A) gives an exhaustive list of requirements to the recognition of the refugee status. It involves firstly a well-founded fear of persecution, where there is a reasonable pos-

⁶⁵ UNGA 1951 (n 47).

⁶⁶ Ibid (emphasis added).

⁶⁷ UNHCR, *The 1951 Refugee Convention* <<https://www.unhcr.org/1951-refugee-convention.html>> (accessed 20 October 2019).

sibility of abuse. A view has been adopted around the definition of being persecuted as requiring ‘*evidence of a sustained or systemic denial of human rights demonstrative of a failure of state protection.*’⁶⁸ The definition is linked with the next criterion, which is the failure of State protection, either by unwillingness or inability. The Convention includes reasons at the source of the persecution enabling the recognition of the refugee status. These Convention grounds are ‘*nationality, race, religion or membership of a particular social group or political opinion*’ according to Article 1A(2). To be recognised as a refugee, there is also the need to be outside the country of nationality. Besides, there is a criterion of inability or unwillingness to return to the country of nationality, owing to the fear of being persecuted. The ‘fear’ is, in practice, hard to assess since it is subjective and specific to each individual. It could, in theory, include persons who leave their home country due to climate change, thus unwilling or, in some cases, unable to return due to a fear of being ‘persecuted’. However, the challenge resides in whether considering environmental degradation as ‘persecution’ in the sense in which it is used in the Refugee Convention⁶⁹. There is also a need to link such persecution to one of the grounds set out in the Convention. It means that environmentally induced displacement falls outside the scope of the Refugee Convention and its additional protocol⁷⁰.

The latter was adopted in 1967⁷¹ which deleted all notions to the geographical and temporal limits set in the Refugee Convention, while not adding an environmental dimension to the text.

Although the Preamble of the Refugee Convention set to protect refugees under international law, this instrument does not include the protection of climate change induced migrants. The criteria recognising refugee status listed in the Refugee Convention revolve around the historical events at the end of the Second World War. They were developed in a context intertwined and affected by historical reasons, which led to a refugee crisis in Europe.

⁶⁸ James C. Hathaway, and Michelle Foster. *The Law of Refugee Status*. 2nd ed. Cambridge: Cambridge University Press (2014) 14.

⁶⁹ Joanna Apap, *The Concept of ‘Climate Refugee’: Towards a Possible Definition*, European Parliamentary Research Service (2019) 2.

⁷⁰ Ibid.

⁷¹ UN General Assembly, *Protocol Relating to the Status of Refugees*, United Nations, Treaty Series, vol. 606, (1967) 267.

A simple read-through of the Convention shows that there are no links to environmental aspects nor its consequences on migration. Climate change induced migration has increased drastically in the last decade, even so on the international scale. In 1951, climate change induced displacement was not on the international agenda and was not a major global issue. Thus, geopolitical and scientific context can explain why there are no mentions of climate induced migration in the Refugee Convention. Nowadays, we have a much better understanding of the science around climate change with a possibility to apprehend future consequences of global warming.

There could be interpretations of the convention that would allow environmentally displaced persons more protection. For instance, the principle of non-refoulement⁷² is recognised in treaty law at the article 33 of the Refugee Convention. However, the principle is also recognised in the Convention Against Torture (1984)⁷³, as well as other international and regional treaties, showing its broad application. According to the article 33 of the Refugee Convention, the principle of non-refoulement applies where ‘*no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*’⁷⁴ The principle of non-refoulement, in the convention, is applied to the convention grounds as well as the existence of the fear of being persecuted. These criteria are giving a frame of application to the principle of non-refoulement, which in the context of the Refugee Convention, has a limited scope of use. Since the Refugee Convention does not recognise climate change as ‘persecution’, climate change induced migrants do not qualify for refugee status in light of the principle of non-refoulement according to the Refugee Convention and consequently, are not granted with the benefits of the refugee status⁷⁵.

⁷² *Non-refoulement* comes from the French *refouler*. *Refoulement* refers to the reconduction to the border of individuals who have entered a State illegally or the refusal of admission in the territory to those who have not valid documentation.

⁷³ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations (10 December 1984).

⁷⁴ Article 33 of the Refugee Convention.

⁷⁵ E.g. Articles 17, 18 and 19 of Convention are related to employment and facilitate the integration of refugees in the work environment of the State of refuge; article 22 allows refugees access to public education and facilitates the recognition of school certificates.

2.2.2 The United Nations High Commissioner for Refugees

The United Nations High Commissioner for Refugees (UNHCR) has as a function to provide international protection for refugees as well as providing durable solutions to their problems, according to the Statute of the Office of the UNHCR⁷⁶. The solutions include voluntary repatriation or integration into a national community of the country of refuge.

The UNHCR focuses on an approach of integration of practices nationally and regionally⁷⁷. By using this methodology, the responses are more adapted to the specificities of each situation, according to the organisation. There is little if not binding materials upon States. The Nansen Initiative follows the same lines: its objectives are to develop elements of protection of internationally displaced persons in the context of disaster by consensus between interested governments⁷⁸ (see later).

The UNHCR is mostly concerned with internal environmental migration. Indeed, the UNHCR played a central role in the development of the Guiding Principles on Internal Displacement⁷⁹. The UNHCR has a limited role concerning the development and strengthening of law or soft law related to international climate change displacement. In some cases, the UNHCR intervenes on the ground as an operation response to disaster displacement⁸⁰.

The UNHCR also has a role in raising awareness around issues concerning climate change and migration. This role has increased with the last decade with the issuing of several research papers on climate change and displacement over the previous decade⁸¹.

⁷⁶ UNGA, *Statute of the Office of the United Nations High Commissioner for Refugees*, A/RES/428(V) (14 December 1950).

⁷⁷ UNHCR, *UNHCR, The Environment & Climate Change: An Overview (Updated Version)*, (2015) 7.

⁷⁸ *Ibid*, 10.

⁷⁹ UNHCR, *Climate Change and Disaster Displacement: An Overview of UNHCR's Role* (2017) 9.

⁸⁰ *Ibid*, 7.

⁸¹ See e.g. UNHCR, *Environmental refugees: myth or reality?* (2001); UNHCR, *Forced Displacement in the Context of Climate Change: Challenges for States Under International Law* (2009); UNHCR, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches* (2012).

To sum up, UNHCR helps regionally and nationally through disaster response but does not have a real influence on the international legal framework. Nonetheless, the UNHCR helped to create some soft law developments, for example, with the Nansen Initiative.

2.2.3 The Paris Agreement and the United Nations Framework Convention on Climate Change

The UNFCCC entered into force in 1994 and has now near-universal membership, with 197 members⁸² as well as being a legally binding international agreement. These countries who have signed the convention are called Parties to the Convention. Its central role is to prevent ‘dangerous’ human interference with the climate system⁸³. The Conference of the Parties (COP) meets every year as the supreme decision-making body of the Convention⁸⁴ and where all parties are represented.

In that framework, the COP16 adopted the ‘Cancún Agreements’, a set of COP decisions which are not legally binding. The Cancún Agreements mention an adaptation component where one of its main objectives is to ‘*assist the particularly vulnerable people in the world in adapting to the inevitable impacts of climate change by taking a coordinated approach to adaptation*’⁸⁵. This objective can be interpreted as adapting to climate change-induced migration by finding solutions. To further this interpretation, the outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action (LCA)⁸⁶ under the Convention at paragraph 14(f) ‘*invites all Parties to enhance action on adaptation under the Cancún Adaptation Framework*’⁸⁷, taking into account their common but differentiated responsibilities

⁸² UNFCCC, *What is the UNFCCC?*, <<https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change>> (accessed 7 February 2020).

⁸³ Ibid.

⁸⁴ UNFCCC, *Conference of the Parties*, <<https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop>> (accessed 7 February 2020).

⁸⁵ UNFCCC, *Intro to Cancun Agreements*, <<https://unfccc.int/process/conferences/the-big-picture/milestones/the-cancun-agreements>> (accessed 7 February 2020).

⁸⁶ The LCA was ‘*established as a subsidiary body under the Convention to conduct a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome to be presented to the COP for adoption*’. UNFCCC, *AWG-LCA bodies page*, <<https://unfccc.int/awg-lca-bodies-page>> (accessed 7 February 2020).

⁸⁷ The **Cancun Adaptation Framework** has been adopted under the Convention to enhance adaptation on adaptation, through for instance international cooperation, in order to reduce vulnerability and build resilience in

and respective capabilities [...] by undertaking, inter alia, the following: Measures to enhance understanding, coordination and cooperation with regard to climate change-induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels' ⁸⁸. Parties thus recognised climate change-induced displacement and migration as a situation that requires attention and solutions.

The Paris Agreement⁸⁹ (PA) was adopted by the 21st Conference of the Parties (COP) to the UNFCCC in 2015 and entered into force in 2016. This text itself does not mention migration due to climate change. Nonetheless, the Preamble of the Agreement acknowledges '*[...] that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on [...] migrants [...]*'⁹⁰. The Paris Agreement is a legally binding international treaty with binding and non-binding provisions.

One of the main tools of the PA is the Nationally Determined Contributions (NDCs), which represent the mitigation⁹¹ action that a State party can take. It is found in the article 4.2 of the PA: '*each Party shall prepare, communicate, and maintain successive nationally determined contributions NDCs that it intends to achieve*'⁹². The use of the word 'shall' gives a binding dimension to the NDCs, which State Parties must prepare. However, their execution by State parties can be more challenging to achieve. Every five years, each country is expected to submit an updated NDC showing a continuous progression. NDCs show the commitments of the States to fight climate change effects. One-fifth of the States Parties to the UNFCCC referred to migration in their submissions as well as strengthened these commit-

developing countries as well as vulnerable countries which are Parties. UNFCCC, *Cancun Agreements*, <<https://unfccc.int/process/conferences/pastconferences/cancun-climate-change-conference-november-2010/statements-and-resources/Agreements>> (accessed 7 February 2020).

⁸⁸ Decision 1/CP.16, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1, paragraph 14(f) (emphasis added).

⁸⁹ Paris Agreement, United Nations Treaty Collection (8 July 2016).

⁹⁰ Preamble of the PA.

⁹¹ According to the UNEP, '*Climate Change Mitigation refers to efforts to reduce or prevent emission of greenhouse gases*' (UNEP, *Mitigation*, <<https://www.unenvironment.org/explore-topics/climate-change/what-we-do/mitigation>> (accessed 7 February 2020)).

⁹² Article 4.2 PA (emphasis added).

ments at the PA⁹³. According to the IOM, out of the 162 INDCs submissions to the UNFCCC before COP21, 33 submissions refer to migration⁹⁴, e.g. in Kiribati INDCs. There is the mention of the *‘increase in conflict and stress due to loss of property and land and forced migration’*. As a solution, *‘population and resettlement’* is mentioned in the *‘aim to reduce the vulnerability of Kiribati to increasing physical risks caused by climate change by establishing host country agreements to government-sponsored and self-sponsored emigration to resettle I-Kiribati overseas and assist the inevitable migration of the population, due to climate change as and when this eventually arrives’*⁹⁵. References to migration is encouraging on the national scale showing a growing interest in migration issues related to climate change.

In addition to mitigation, the PA gives a framework for climate change adaptation in the article 7. Indeed, the State parties recognise the importance to enhance their adaptive capacity to ensure the limit of global temperature rise set in the article 2, as well as the importance of adaptation to contribute to sustainable development⁹⁶. Also, the PA recognises that adaptation measures must be adopted in a national, regional and local context⁹⁷, with emphasising the urgent situation in developing countries which are more vulnerable to climate change effects⁹⁸. Adaptation measures must be country-driven, but also inclusive (gender, minority groups, indigenous people)⁹⁹. While being country-driven, the PA highlights the importance of international cooperation. The Agreement recalls the Cancun Agreement Framework concerning international cooperation in diverse areas (amongst other: sharing information and science; strengthening institutional arrangements; strengthening knowledge on climate change; assisting developing countries; improving the effectiveness of the adapta-

⁹³ Ibid

⁹⁴ IOM, *Migration in the Intended Nationally Determined Contributions (INDCs) and Nationally Determined Contributions (NDCs)* (2016) 6.

⁹⁵ Ibid.

⁹⁶ Article 7.1 PA.

⁹⁷ Article 7.2 PA.

⁹⁸ Ibid.

⁹⁹ Article 7.5 PA.

tion actions)¹⁰⁰. Furthermore, the article 7 implements adaptation communications from State parties¹⁰¹ reviewed by a global stocktake on their accuracy and effectiveness¹⁰².

Article 8 of the PA gives a framework for loss and damage linked to climate change. In the context of Article 8 of the PA, the Agreement included the development of a task force to ‘*develop recommendations for integrated approaches to avert, minimise and address displacement related to the adverse impacts of climate change*’¹⁰³. The COP thus established the Task Force on Displacement (TFD) at the article 8 of the Paris Agreement¹⁰⁴. The TFD is operated by the Executive Committee (ExCom) of the Warsaw International Mechanism for Loss and Damage (WIM), entrusted by the COP¹⁰⁵. However, the report of the COP from the PA ‘*agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation*’¹⁰⁶. One could argue that this paragraph attenuates the effect and actions of the WIM. However, the report is not legally binding since it was not adopted by the PA but only by COP. Nonetheless, there is an ambiguous approach to loss and damage related to climate change by the UNFCCC, may be linked with a reluctance from State parties to commit.

In 2018, the TFD presented its recommendations to the COP24 in 2018. The COP then welcomed the proposals and extended the mandate of the TFD which now helps WIM in an advisory role, concerning the ‘*enhanced cooperation and facilitation concerning human mobility, including migration, displacement, and planned relocation*’¹⁰⁷.

COP25 took place in Madrid in December 2019 where a review of WIM was performed. The outcome of the negotiations gives two main objectives to State parties: the ‘*ur-*

¹⁰⁰ Article 7.7 PA.

¹⁰¹ Article 7.10 PA.

¹⁰² Article 7.14 PA.

¹⁰³ Report 1/CP.21 on the Adoption of the Paris Agreement FCCC/CP/2015/10/Add.1 (2016) para 49.

¹⁰⁴ Ibid paragraph 3, ‘*Parties should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change*’.

¹⁰⁵ UNFCCC, *Task Force on Displacement* <<https://unfccc.int/wim-excom/sub-groups/TFD#eq-1>> (accessed 7 February 2020).

¹⁰⁶ Report 1/CP.21 (n 103) para 51.

¹⁰⁷ UNFCCC (n 105).

gent, scaled up, new and additional finance for addressing loss and damage' and the enhancing of '*institutional arrangements for facilitating action and support to address loss and damage*'¹⁰⁸. The governance of WIM is a polarising subject, opposing developing and developed countries. Developing countries mainly support the idea that the UNFCCC and the PA processes should maintain to govern work on loss and damage¹⁰⁹. However, most developed countries would rather see the work on loss and damage solely under the PA¹¹⁰.

The fundamental question of governance in matters of loss and damage was not resolved during the COP25: COP25's work on loss and damage gave good results, but it still needs to be developed further, where other COPs will need to include loss and damage in their agendas.

The PA is an international agreement which is complete concerning all aspects of climate change: mitigation, adaptation and loss and damage. The Agreement includes guidance and rules for State parties to follow concerning all those aspects. However, other than these remote links with climate change induced migration, the Paris Agreement does not directly tackle environmental displacement in its articles. It recognised that climate change is affecting human lives, while mentioning migrants, without ever taking concrete binding measures for States parties to apply. We can nonetheless argue that climate change induced migration is a part of adaptation to climate change effects.

2.2.4 Other governance initiatives

Other than primary sources of law and governmental organisations constituting the international legal framework, other governance initiatives have treated climate change induced migration, merely on a voluntary, non-legally binding basis.

2.2.4.1 *The Global Compact for Safe, Orderly and Regular Migration*

The Global Compact for Safe, Orderly and Regular Migration (or GCM) is a non-legally binding global agreement prepared under the patronage of the UN. It adopts a common

¹⁰⁸ Dawn Pierre-Nathoniël, Linda Siegele, Le-Anne Roper, Inga Menke, '*Loss and Damage at COP25 – a hard fought step in the right direction*' (20 December 2019).

<<https://climateanalytics.org/blog/2019/loss-and-damage-at-cop25-a-hard-fought-step-in-the-right-direction/>> (accessed 4 May 2020).

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

approach to international migration. It was adopted by 162 countries in December 2018 in Marrakech during the International Conference on the GCM¹¹¹. The GCM promotes values of human rights, non-discrimination, responsibility-sharing as well as recognises the importance of international cooperation regarding migration issues.

The GCM comprises 23 objectives to improve the managing of migration at all levels. Three of those objectives explicitly target climate change migration. First, the objective n°2 of the GCM is to ‘*minimise the adverse drivers and structural factors that compel people to leave their country of origin*’¹¹². This objective recognises that slow-onset environmental degradation and climate change impacts are drivers of migration and thus should be eliminated through ‘*resilience and disaster risk reduction, climate change mitigation and adaptation*.’¹¹³ Through this objective, the GCM gives a comprehensive list of possible responses to address drivers of environmental migration, such as disaster preparedness, disaster risk reduction, facilitation of population movement¹¹⁴. Also, the text recognises that adaptation and mitigation to climate change must be prioritised in the country of origin to minimise the drivers of migration¹¹⁵.

Second, the objective n°5 is to ‘*enhance availability and flexibility of pathways for regular migration*’ and includes climate change as well¹¹⁶. By recognising that, in some cases, the return of migrants might not be possible, the GCM recognises the importance of strengthening the natural migration pathways as migration management tools (for example visa options or planned relocation).

Finally, the last objective including climate change migration is objective n°23, which sets to ‘*strengthen international cooperation and global partnerships for safe, orderly and*

¹¹¹ France Diplomacy, *Migration – Intergovernmental Conference on the Global Compact for Safe, Orderly and Regular Migration (Marrakech, 10-11 December 2018)* <<https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/news/events-2018/article/migration-intergovernmental-conference-on-the-global-compact-for-safe-orderly>> (accessed 16 February 2020).

¹¹² UNGA, Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/RES/73/195 (Dec. 19, 2018) 9.

¹¹³ Ibid, Objective 2, 18.b – 9.

¹¹⁴ Ibid, 18.j – 10.

¹¹⁵ Ibid, 18.i – 10.

¹¹⁶ Ibid, Objective 5, 12.

*regular migration.*¹¹⁷ Indeed, for the GCM, international cooperation, as well as regional cooperation, are essential to address the environmental drivers of migration.

The GCM represents an achievement in terms of global governance et management of international migration. It is still a non-legally binding instrument, but the fact that the international agenda, through the auspices of the UN, places more and more interest into climate migration is a step in the right direction to fill the gaps of international law.

2.2.4.2 *The Nansen Initiative*

In October 2012, the governments of Norway and Switzerland launched the Nansen Initiative on Disaster-Induced Cross-Border Displacement (or Nansen Initiative) to build consensus among States on building principles concerning the protection of cross-border migrants caused by natural catastrophes including climate change, as well as to set a plan for future action that can fit in existing domestic, regional and international structures¹¹⁸. The objective of the initiative was and is not to create a new convention or to create soft law. Different States lead it through a bottom-up consultative process with the involvement of several stakeholders, states and civil society organisations¹¹⁹. The Initiative originally sprouted up from the Cancun Outcome Agreement previously mentioned where States recognised climate change-induced migration as an adaptation challenge¹²⁰.

The Nansen Initiative engaged in regional consultations with governments and civil societies from regions that are mainly affected by disaster-induced cross-border displacement (the Horn of Africa, the Pacific, Southeast Asia)¹²¹. These consultations were held to create and build knowledge on disaster displacement from the most affected.

In 2015, after the regional consultations, an *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disaster and Climate Change*¹²² (Protection

¹¹⁷ Ibid, Objective 23, 32.

¹¹⁸ The Nansen Initiative, <<https://www.nanseninitiative.org>> (accessed 17 February 2020).

¹¹⁹ Ibid.

¹²⁰ UNFCCC (n 85).

¹²¹ The Nansen Initiative (n 118).

¹²² The Nansen Initiative Protection Agenda is available at

Agenda) was supported by 109 Governments¹²³. The Protection Agenda provides various tools of policy options and recommendations for governments and policymakers¹²⁴. The process behind the Initiative is to develop three pillars: (1) international cooperation, (2) a standard of treatment of affected people regarding their admission, stay or status, and (3) operational responses such as funding, responsibility of international humanitarian actors, for example¹²⁵.

Even though the objectives of the Nansen Initiative are ambitious regarding the protection and recognition of climate change induced refugees, it seems not to have a strong influence on decision-makers. It operates outside of the UN's system, where most of the decisions and debates take place. A broader organisational structure of more than 10 States would give more weight to the Initiative.

2.2.4.3 The Model International Mobility Convention

The Model International Mobility Convention (or Mobility Convention) was finalised in April 2017 at Columbia University, New York. A Commission of academics and specialists has developed the Convention in the fields on migration, human rights, national security, labour economics, and refugee law¹²⁶. The Convention gives a framework for international mobility, reaffirms the rights of mobile persons as well as the responsibilities of States¹²⁷. The Mobility Convention is not legally binding: being the work of scholars and academics, this text can be valued as a 'soft-law' instrument, showing the direction of thought of scholars in the field of international migration. The Convention is open for signature but has only been signed by private persons, not States.

<https://disasterdisplacement.org/wpcontent/uploads/2014/08/EN_Protection_Agenda_Volume_I_-low_res.pdf> (accessed 17 February 2020).

¹²³ The Nansen Initiative Global Consultation Conference Report, Geneva 12-13 October 2015 (December 2015) 59.

¹²⁴ The Nansen Initiative (n 118).

¹²⁵ The Nansen Initiative Report (n 123).

¹²⁶ Columbia University in the City of New York, Model International Mobility Convention (MIMC) <<https://mobilityconvention.columbia.edu/about>> (accessed 17 February 2020).

¹²⁷ Ibid.

The Mobility Convention is exciting even though not legally binding since it sets out cumulative rights. Indeed, over 213 articles, the Convention start by *‘establishing the minimum rights afforded to all people who cross state borders as visitors, and the special rights afforded to tourists, students, migrant workers, investors, and residents, forced migrants, refugees, migrant victims of trafficking and migrants caught in countries in crisis’*¹²⁸. The large variety of situation represented in the Mobility Convention makes it unique and unprecedented. All these different groups are thus brought together under a single framework.

The Mobility Convention also fills the gaps in international law mentioned earlier. Widely inspired by the diverse international instruments on migration such as the Refugee Convention or the ICCPR, the article 125 of the Convention gives a plural definition of ‘forced migrant’, one of them being *‘Any person who, owing to the risk of suffering serious harm, is compelled to leave her or his State of origin, or in the case of a stateless person, her or his State of former habitual residence’*¹²⁹. Further, the Convention adopts a broad interpretation of the ‘serious harm’ criteria as *‘consists of a threat to an individual’s physical survival, which is external to her or him, or threats of torture or inhuman or degrading treatment or punishment or arbitrary incarceration, such as may arise during indiscriminate violence, severe international or internal armed conflict, environmental disaster, enduring food insecurity, acute climate change, or events seriously disturbing public order’*¹³⁰. This interpretation of the ‘serious harm’ criteria is broader than any other international instrument of migration so far. It enables climate change-induced migrants to be recognised as ‘forced migrants’ by this Convention, which also gives them rights (international protection as international refugee status, access to courts, administrative assistance, identity papers...).

The Mobility Convention wishes for a greater protection of all mobile persons. Even though this text is only a project led by academics, it is a great tool to imagine how could the current international protection regime be improved. This Convention points out the legal gaps that migrants face today by presenting a right-based approach to mobility.

The Mobility Convention can, however, appear a bit too far from reality and where States stand concerning international migration. It is a unique project that human rights de-

¹²⁸ Ibid.

¹²⁹ MIMC Article 125.1(a) 66.

¹³⁰ MIMC article 125.1(d) 67.

fenders can support, but the most sceptics of us may highlight the fact that it might be too 'utopic' to implement. The Convention is strong and grants so much protection in theory, but it is unfortunately far from being implemented in practice.

Although all these instruments and texts are focusing on climate change and its consequences, none of them grant protection to climate change-induced migrants in international law. There is a legal vacuum in this area where no real, long-lasting solutions are implemented in international law. There is thus a need to develop and implement international legal protection for refugees on the grounds of climate change.

3 Case study: Pacific island states and New Zealand

Pacific island states are particularly affected by climate change impacts, pushing a movement of migration to neighbouring countries. New Zealand has been historically a destination of choice for Pacific islanders and still is today for climate change induced migration.

3.1 The influence of Pacific islanders on New Zealand's immigration policy

New Zealand is a developed country which is located in the south-west Pacific. Considering its location, its economy, and development, New Zealand has been a migration destination for Pacific Islanders throughout its contemporary history. Indeed, migration from the Pacific increased in the 1960s and 1970s¹³¹. In 1976, New Zealand was home to almost 65,700 Pacific people (2,1 per cent of the total population)¹³². The economic crisis in the 1970s saw a decrease of migration due to strict immigration policy¹³³. Nonetheless, since the mid-1990s, the Pacific population has continued to grow in New Zealand. By the 2006 Census, Pacific people were making up to 6,9 per cent of the population, according to the government of New Zealand¹³⁴.

Pacific islanders' streams influence the legal migration pathways which were developed in the country. For example, there are five possible categories to apply to enable permanent settlement¹³⁵. From those, two are explicitly targeting Pacific islanders (The *Pacific Access Category*¹³⁶ And the *Western Samoan Scheme*). There is also the *International Humanitarian Migration*¹³⁷ which is linked with the Refugee Convention and the 1967 Protocol since New Zealand is a signatory to both texts. All the permanent migration channels are either targeted to Pacific islanders, or at least can be used by Pacific islanders to relocate to New Zea-

¹³¹ NZ.Stat, *Demographics of New Zealand's Pacific Population*, <http://archive.stats.govt.nz/browse_for_stats/people_and_communities/pacific_peoples/pacific-progress-demography/population-growth.aspx> (accessed 24 February 2020).

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Graeme Hugo, *Chapter 2: Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific*. In Jane McAdam (Ed.). *Climate Change and Displacement: Multidisciplinary Perspectives* (2010) 33.

¹³⁶ Ibid.

¹³⁷ Ibid.

land. The fact that some of the *permanent* migration channels are specific for some nationalities (both the Pacific Access Category and the Western Samoan Scheme) show how vital Pacific islanders are to New Zealand's immigration.

The different existing visas are not necessarily readily available to climate change displaced people but can be made so with relatively little change (even though it would require a high level of cooperation and commitment by the governments administering the immigration system). Nonetheless, McAdam maintains that such modifications of existing channels of migration is more objectively achievable than the introduction of a new migration regime¹³⁸.

New-Zealand is one of the destinations historically chosen by migrants from Pacific island states to settle down. As a result, and in light of the relatively recent climate change awareness, New Zealand has seen climate litigation flourish by Pacific islanders wishing to settle down based on environmental grounds.

3.2 The Ioane Teitiota case at the Human Rights Committee

Ioane Teitiota is a citizen of the Republic of Kiribati national who was living in New Zealand. He is a married Kiribati national who, before he emigrated to New Zealand with his wife in 2007, was unemployed relying on subsistence agriculture and fishing¹³⁹. Being concerned about increasing coastal erosion and intrusion of saltwater onto the land during high tides, as well as being aware of the debate around climate change, the author appellant and his wife emigrated to New Zealand in 2007 where they got three children¹⁴⁰.

His application for refugee status in New Zealand was rejected by a refugee and protection officer, and Teitiota appealed against the decision. After he exhausted all national remedies, he filed an individual communication to the Human Rights Committee (or HRC) claiming that New Zealand violated his right to life under the Article 6 of the ICCPR by removing him to the Republic of Kiribati in September 2015¹⁴¹. The Committee may consider

¹³⁸ Ibid.

¹³⁹ AF (Kiribati) [2013] NZIPT 800413, New Zealand: Immigration and Protection Tribunal (25 June 2013) para 40.

¹⁴⁰ Ibid.

¹⁴¹ Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication n°2728/2016, (7 January 2020).

individual communications alleging violations of the rights outlined in the ICCPR by States parties to the First Optional Protocol to the ICCPR. The latter has entered into force in New Zealand in 1989.

The decision commented by the Committee is the decision of 25 June 2013 from the Immigration and Protection Tribunal of New Zealand (the Tribunal).

First, the decision recalls the facts concerning the Republic of Kiribati. The different problems brought up by the author are linked with these issues. The Committee notes the problems of over-population and limited infrastructure development, especially in the area of sanitation¹⁴². The Committee also recognises the worsening of these problems by the effects of environmental events (both sudden and slow onset)¹⁴³. Nonetheless, the Committee acknowledges that the government of the Republic of Kiribati is taking action to remedy the problems as much as it can.

The author does not wish to return to Kiribati because of both the pressures of overcrowding and sea-level-rise. For him, there is a problem of land availability and overpopulation upon return¹⁴⁴. According to the author, this situation is widely experienced by people throughout the Republic of Kiribati, and where the government is powerless to act on.

The basis of this case (and all New Zealand immigration law) is the Immigration Act of 2009 (or the Act). It gives a legal basis for New Zealand to meet its responsibilities under the Refugee Convention, the CAT, and the ICCPR¹⁴⁵.

3.2.1 The Refugee Convention

The author claims, to the Immigration and Protection Tribunal, that he can be granted refugee status according to the Refugee Convention. However, the Tribunal concluded that the appellant was not facing a real risk of being persecuted if returned to Kiribati. Other national instances found the same result upon the different appeals of the author.

¹⁴² AF (Kiribati) (n 139) para 39.

¹⁴³ Ibid.

¹⁴⁴ Ibid, para 41.

¹⁴⁵ New Zealand Immigration, *Immigration Law* <<https://www.immigration.govt.nz/about-us/policy-and-law/legal-framework-for-immigration>> (accessed 26 February 2020).

Firstly, according to the Tribunal, New Zealand refugee law jurisprudence applies the *Hathaway concept* of ‘being persecuted’¹⁴⁶ as the ‘*sustained or systemic violation of core human rights, demonstrative of a failure of state protection*’. The persecution also rests on human agency for the Tribunal¹⁴⁷ even though it is possible that ‘*environmental degradation, whether associated with climate change or not, can create pathways to the Refugee Convention or protected person jurisdiction.*’¹⁴⁸ In that case, the problems the author brought up are faced by the whole population in general, with no discrimination¹⁴⁹. According to the Tribunal, there is no evidence that the environmental conditions that he faced or likely to encounter upon return are so harsh that he or his family will risk their lives¹⁵⁰.

If they were facing a risk regarding the right to food, amounting to a ‘real risk of starvation’¹⁵¹ according to the Tribunal, it could give a right to protection. There is, however, still a need for the discriminatory aspect of the risk¹⁵².

Also, according to the Tribunal, the risk of being persecuted must be well-founded under Article 1A(2) of the Convention¹⁵³. Well-founded can be justified when there is a ‘*real, as opposed to a remote or speculative, chance of [occurrence]*’ of the harm¹⁵⁴. In that case, the Tribunal notes that even if there are tensions over land and violence in Kiribati, there is no evidence that he will be facing violence¹⁵⁵. On account of food difficulties raised by the author, the Tribunal disagrees and concludes that it does not amount to the impossibility to grow crops. Thus, the Tribunal found that there is a risk of persecution and that there are no Convention grounds in the first place, hence the refugee status being declined.

Moreover, all the national instances of New Zealand, considered that the Refugee Convention was not the solution to the problem of the appellant. The High Court of New Zea-

¹⁴⁶ AF (Kiribati) (n 139) para 53.

¹⁴⁷ Ibid, para 54.

¹⁴⁸ Ibid, para 55.

¹⁴⁹ Ibid, para 75.

¹⁵⁰ Ibid, para 74.

¹⁵¹ Ibid, para 68.

¹⁵² Ibid.

¹⁵³ Article 1A(2) of the Refugee Convention.

¹⁵⁴ AF (Kiribati) (n 139) para 53.

¹⁵⁵ Ibid, para 72.

land, in that case, confirmed that *‘the Refugee Convention is not an available avenue for [economic and environmental] migrants or refugees.’*¹⁵⁶

However, even if the refugee status is declined in that case, the interpretation ‘persecution’ by the Tribunal is more comprehensive than what is usually understood under the 1951 Refugee Convention. Indeed, as mentioned previously, the Tribunal found that facing a *‘real risk of starvation’* can amount for *‘being persecuted’*¹⁵⁷. This interpretation is thus giving a broader scope to persecution than the strict human agency condition. It is even explicitly said by the Tribunal that the *‘requirement of some form of human agency does not mean that environmental degradation, whether associated with climate change or not, can never create pathways into the Refugee Convention or protected person jurisdiction’*¹⁵⁸. For the Tribunal, persecution can have a broader meaning than what is included in the Refugee Convention.

Furthermore, the Tribunal states 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.’*¹⁵⁹ This amounts as a case by case assessment of the protected status. Concerning environmental change, there are no set rules for the recognition of protection, yet. The lack of set-rules can be beneficial since migration based on environmental grounds is recent, and a case by case analysis can enable a well-adapted response to a currently evolving situation. However, without set rules that national and international courts can follow, their interpretations and assessments can change with time. Hence, displaced persons asking for protection on environmental grounds can experience legal insecurity.

Nonetheless, the Tribunal sets that in any case, there is a legal criterion for displaced persons asking for protection on environmental grounds¹⁶⁰. It is that the claimant must establish that the breach of a human right was in the past but also amounts future risk, meaning a *‘real chance of a sustained or systemic violation of a core human right demonstrative of a*

¹⁵⁶ *Ioane Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment*, [2013] NZHC 3125, New Zealand: High Court (26 November 2013) para 44.

¹⁵⁷ *AF (Kiribati)* (n 139) para 68.

¹⁵⁸ *Ibid*, para 55.

¹⁵⁹ *Ibid*, para 64.

¹⁶⁰ *Ibid*, para 65.

*failure of state protection which has sufficient nexus to a Convention ground*¹⁶¹. The fact that the Tribunal uses ‘sufficient’ gives more possibilities to the claimant. Indeed, the breach of a human right must be linked enough to a Convention ground; it does not have to be a ‘*strict nexus to convention ground*’. Some freedom can be taken with the Convention grounds. For example, one could argue that the ‘nationality’ Convention ground could be used by low-lying island States who are facing sea-level rise, which affects a whole territory, thus a whole nation.

Even if New Zealand and the Committee do not recognise this case as amounting protection, they both delivered a broader interpretation of the Refugee Convention criteria.

3.2.2 The ICCPR and the right to life

The Committee, in its decision of January 2020, only considers the Tribunal and its conclusions focusing on the ICCPR and the right to life. The Tribunal indeed concluded that the appellant did not face a real risk of being persecuted if returned, and did not point any omission or action by the Government of Kiribati that might indicate a risk that the appellant would be deprived of his life with the scope of the Article 6 of Covenant¹⁶², where the risk of violation must have been imminent, at least ‘likely to occur.’¹⁶³ Here, according to the Tribunal, the risk was laying ‘*only in the realm of conjecture of surmise considering the status of climate change*’, it was not in breach of Article 7 of the Covenant. There was no evidence that ‘*the government of Kiribati was failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it could*’¹⁶⁴.

The appellant filed a complaint to the Committee that New Zealand violated his right to life under the Covenant.

¹⁶¹ Ibid.

¹⁶² UN Human Rights Committee (HRC), Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016 (7 January 2020) para 2.9.

¹⁶³ Ibid.

¹⁶⁴ Ibid, para 2.10.

To answer, the Committee first recalls the paragraph 12 of the General Comment n°31¹⁶⁵ on ‘*the nature of general legal obligations posed on States parties to the Covenant*’, referring more precisely to ‘*the obligation of State parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as contemplated in the Articles 6 and 7 of the Covenant.*’¹⁶⁶ This risk must be personal; it cannot derive only from the general conditions of the receiving State, and the threshold for providing substantial grounds to establish a real chance of irreparable harm exists is very high¹⁶⁷. These articles can remind us of the principle of *non-refoulement* in international refugee law. However, it is broader here since it protects all persons, even those who are not entitled refugee status¹⁶⁸.

Later, the Committee confirms that the protection of the right to life includes the implementation of positive measures by States parties¹⁶⁹. The General Comment n°36 of the Committee¹⁷⁰ maintains that the right to life is also the right to live with dignity¹⁷¹. The junction of the right to life with the right to live with dignity enables a broadened interpretation of the risk of harm. Indeed, risk can thus be a ‘*reasonably foreseeable and life-threatening situation that can result in loss of life.*’¹⁷² The General Comment n°36, paragraph 62 covers ‘*environmental degradation, climate change and unsustainable development*’ as a situation of risk since they ‘*constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.*’¹⁷³

Both the Committee and the Tribunal allows the possibility that climate change effects can provide a basis for protection¹⁷⁴. According to these two institutions, the protection on

¹⁶⁵ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13) (26 May 2004).

¹⁶⁶ HRC (n 162) para 9.3.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid, para 9.4.

¹⁷⁰ UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, CCPR/C/GC/35 (3 September 2019).

¹⁷¹ HRC (n 162) para 9.4.

¹⁷² Ibid.

¹⁷³ HRC GC no. 36 (n 170) para 62.

¹⁷⁴ HRC (n 162) para 9.6.

climate change effects grounds would stem from the complicated relationship between ‘*natural disasters, environmental degradation, and human vulnerability to those disasters and degradation.*’¹⁷⁵

According to the Tribunal, climate change effects can provide a basis for protection in two scenarios. The first is where the climate change effects are dealt with in a discriminative way, where ‘*natural disasters provide evidence of a political weighting of state response in which the recovery needs of marginalised groups are sometimes not met.*’¹⁷⁶

The other scenario is where climate change effects pose threats to security and induce in violence, armed conflict and insecurity¹⁷⁷. The tribunal gives the example of when ‘*environmental degradation is used as a direct weapon of oppression against an entire section of the population.*’¹⁷⁸

In both situations, the criterion of discrimination against a group (linked to a Convention ground) is present. These examples are also intrinsically linked with the right to life at the article 6 of the ICCPR.

However, in that case, the Tribunal did not find that the author was facing a risk of arbitrary deprivation of his life upon return to Kiribati¹⁷⁹.

The author countered this argument in his complaint to the Committee by highlighting that land disputes in Kiribati lead to violence and sometimes, deaths¹⁸⁰. For the Committee, the threshold of violence is not met: only situations of general violence of sufficient intensity are considered to create a real risk¹⁸¹. In that case, the Committee noted the absence of situation of general conflict in the Republic of Kiribati as well as the non-discriminatory feature of the violence since it is a general risk faced by all individuals¹⁸².

¹⁷⁵ AF (Kiribati) (n 139) para 57.

¹⁷⁶ Ibid, para 58.

¹⁷⁷ Ibid, para 59.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ HRC (n 162) para 9.7.

¹⁸¹ Ibid.

¹⁸² Ibid.

Another argument made by the author of the complaint regarding the breach of the right to life upon return was the lack of access to potable water¹⁸³. However, this argument is rejected by the Committee, which says that there is no evidence to prove that potable water is *'inaccessible, insufficient or unsafe to produce a reasonably foreseeable threat to health.'*¹⁸⁴

Also, the author points out that upon return, he probably will be deprived of means of subsistence since *'no crops can grow'* on his island¹⁸⁵. For the Committee, this argument is not valid because of a lack of information and proof. There is a need for evidence that the author and his family would be exposed to *'a situation of indigence, deprivation of food and extreme precarity that could threaten his life.'*¹⁸⁶

Finally, the author feared a risk to his right to life because of the problem of overpopulation in the Republic of Kiribati, combined with recurrent flooding and breaches of sea-walls¹⁸⁷. The author points out scientific conclusions that *'Kiribati will be inhabitable in 10 to 15 years.'*¹⁸⁸ For the Committee, international and national efforts are essential to limit the effects of climate change on the rights of life of individuals under Articles 6 and 7 of the Covenant¹⁸⁹. It triggers thus non-refoulement obligations of sending states¹⁹⁰. The fact that there is a risk of submersion underwater of whole countries goes against the right to life¹⁹¹.

However, the Committee considers that the timeframe given by scientist of 10 to 15 years provides plenty of time for the Republic of Kiribati, together with the assistance from the international community, to take measures to protect (or even relocate) its population¹⁹².

¹⁸³ Ibid, para 9.8.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid, para 9.9.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid, para 9.10.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid, para 9.11.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid, para 9.12.

Accordingly, the Republic of Kiribati is deemed already taking actions to reduce the effects of climate change earlier in the case¹⁹³.

Given all the above, the Committee thus found that the Tribunal gave an individualised assessment to the case and that New Zealand did not breach Article 6(1) of the Covenant.

This case is a big step towards a recognition and better protection of environmental migrants since the Committee allows that environmental degradation can be a ground for protection. This finding, however, does not apply here because there is not enough proof. All the arguments and the answers given by the Committee show that the case is declined based on a matter of nuances, scales, and thresholds. The justifications not to find a breach of the right to life seem a bit far-fetched and thin.

On the one hand, the burden of proof falls solely on the appellant and not on the plaintiff. It is a bit unreasonable that a private person with limited funds must prove that a State fails to act, or that there is a risk for his life upon return. These demands are also related to the conditions on the island, maybe asking for scientific proofs.

On the other hand, from this case, we can ask ourselves: what is the engaging factor in allowing protection on climate change grounds? It seems like for the Tribunal and the Committee, extreme natural catastrophe or death are qualifying as allowing factors. It seems counterproductive: the Committee reviews the right to life under the ICCPR, but demands for proof of real risk, maybe deaths, to prove said-risk.

Though the case is very recent and opens new possibilities, no rules whatsoever have been set regarding how to interpret and apply the opinion of the Committee. However, this opinion, as well as the outcome of the case, are promising and show that there is indubitably a better understanding of the new phenomenon regarding climate change migration. However, there needs to be clarifications on the rules, the conditions and the possibilities of the protection on the grounds of climate change.

¹⁹³ Ibid.

Equally important, the opinion is contested by the very members of the Committee who do not agree on the outcome of the case. This shows the interest and controversy surrounding this subject.

3.2.3 Committee members' dissenting opinions

Two individual opinions of Committee members are available in addition to the communication from the Committee, one from Vasilka Sancin¹⁹⁴ and another from Duncan Laki Muhumuza¹⁹⁵. Both are communicating reservations concerning the decision of the Committee. Sancin judges that the burden of proof should fall under the State party to demonstrate that safe drinking water is available in Kiribati, thus complying with its duty to *'protect life from risks arising from known natural hazards.'*¹⁹⁶ On the other hand, Laki Muhumuza judges that the burden of proof asked by the State Party to the appellant concerning the establishment of a real risk and danger of arbitration of life was too high¹⁹⁷. Furthermore, Laki Muhumuza raises concerns about the *'threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.'*¹⁹⁸

These two dissenting opinions are showing that the protection of environmental migrants is highly debated, even internally, at the highest institutions protecting human rights. There is nonetheless an evolution and a growing awareness of the matter. In essence, the views adopted here by the Committee are very recent and show a clear step forward for environmental migrants. The dissenting opinions show an even greater possibility

There is a dichotomy between environmental and climate migrants. Both are not protected under the Refugee Convention and sometimes can be confounded. Indeed, there is a growing debate around the different standard of living in both the sending and receiving countries, with generally more developed receiving countries. Many arguments can be seen as economic ones by the appellant or are interpreted that way by national authorities.

¹⁹⁴ HRC (n 159), Individual Opinion of Committee Member Vasilka Sancin (dissenting).

¹⁹⁵ Ibid, Individual Opinion of Committee Member Duncan Laki Muhumuza (dissenting).

¹⁹⁶ Dissenting opinion (n 194), para 5.

¹⁹⁷ Dissenting opinion (n 195), para 1.

¹⁹⁸ Ibid, para 3.

New Zealand is very reluctant to give a broad interpretation of the Refugee Convention, even though environmental disasters can create pathways. Nonetheless, the threshold to trigger to do so is very high, almost entirely impossible to reach without any proven fatalities.

The dissenting opinions of the Committee members show the unbalance between what is asked to trigger a violation of the right to life and what is happening. There should not be a requirement of previous deaths to justify a real harm to the right to life; it would accordingly be unproductive and inconsistent from human rights protection bodies.

New Zealand is not the only country to be reluctant to recognize environmental refugees¹⁹⁹, showing a semblance of State practice. Thus, if national action is not the solution to grant more protection of environmental refugees, what else could step in?

¹⁹⁹ See e.g. Australia, *RRT Case No. 0907346*, [2009] RRTA 1168, Australia: Refugee Review Tribunal (10 December 2009).

4 Solutions to be developed granting protection of climate change induced migrants

The gap left in international law regarding the protection of climate change induced migrants will be addressed in this section, through the consideration of solutions brought up by scholars, debates between academics as well as interpretation of developments of customary international law.

4.1 Amending the Refugee Convention

Since climate change induced migration is a legal problem that needs a solution, scholars and academics have highly debated the possibility to amend the Refugee Convention to include climate change-related migrants. The different options would be to create a new asylum status for climate change induced migrants or to include climate change in the idea of persecution or ‘harm’ in the sense of the convention for recognition of refugee status. Therefore, amending the Refugee Convention can appear as the most straightforward way to provide more protection for climate change migrants. Indeed, the Convention includes access to the judicial system, access to public education, and the right to work for recognized refugees. Also, the Convention is already implemented in 146 countries. Additionally, one can argue that the UNHCR, who already protects displaced persons by wars or conflicts, could protect those displaced by climate change on the same basis²⁰⁰.

However, there is a broad opinion amongst scholars that amending the Refugee Convention is not the right way to tackle the legal problem linked with climate change-related migration²⁰¹. Despite the advantages that amending the Refugee Convention can bring, it will likely meet hard critics. One of them is the fear that amending the treaty will decrease and ‘devalue the current protection for refugees’²⁰². The current system of protection of refugees is already overwhelmed, and opening the definition of refugee will likely add to the existing pressure.

²⁰⁰ Philip Warren (n 10) 2124.

²⁰¹ Philip Darren, Bonnie Docherty, Tyler Gianni, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, Harvard Environmental Law Review (2009) 349, 361.

²⁰² See e.g. Sumudu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications for International Law*, 27 Wis. International Law Journal 607 *passim* (2009).

There is a resistance from sovereign States to adopt a broader definition of the status of refugee. The different labels linked with displacement, such as ‘migrant’, ‘refugee’, or ‘asylum seekers’ are all meaning bearing. For the UNHCR (more specifically Adrian Edwards) and many other organizations and scholars, the label ‘refugee’ should only be used in cases linked with the Refugee Convention and its Protocol²⁰³. Therefore, a refugee is someone fleeing, not by choice, by fear of being persecuted and not being able to return²⁰⁴. On the other hand, according to Edwards, the label ‘migrant’ designates people who flee by choice mainly to improve their lives and where the return is possible²⁰⁵. These differences of meaning are also present in the media and national politics.

Consequently, the word ‘refugee’ is charged with the responsibilities that the Refugee Convention imposes on States (right to education, provide identity papers, access to courts...). Since the refugee status is available in case of war or violence, to broaden its definition to climate change would increase the pressure on States which would inevitably have to welcome more people at their borders. There is also the fear that broadening the definition of refugee to climate change would lead countries to *‘make access to asylum programs even more difficult, inhibiting all potential applicants, not just [environmentally displaced persons], from qualifying for asylum.’*²⁰⁶ To complicate the general access to asylum programs would thus lead to a worsening of the situation.

The political lecture of the situation around the migrant’s crisis in the Mediterranean Sea confirms that some European countries are already under pressure. Vast migrant camps in Greece or Italy already show the difficulty with which countries deal with a massive influx of displaced persons.

²⁰³ UNHCR, Adrian Edwards, *UNHCR viewpoint: ‘Refugee’ or ‘migrant’ – Which is right?* (11 July 2016).

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Philip Dane Warren (n 10) 2125.

4.2 Adapting regional migration policies

An alternative to amending the Refugee Convention can be found in adapting regional migration policies. Hugo points out that it would be easier to change local migration policies rather than amending or even creating new international migration instruments²⁰⁷.

Indeed, adapting regional instruments to climate change induced migration can lead to a better adaptation to specific situations in each region, where climate migration and its consequences can vary profoundly. For example, solutions to climate migration might not be the same in the Pacific where entire territories are threatened by sea-level rise, then in the Middle East or Africa where droughts are one of the main migration drivers.

Moreover, the adaptation of regional migration instruments would be easier to implement than in a global context since fewer countries are involved in the decision-making process, thus encountering less opposition. As well, regional context enables an assessment well adapted to the region, which is hardly achievable at the global scale.

Regional instruments also include cultural differences between countries²⁰⁸. Cultural integrity can be preserved when those displaced, for example, from small island states, have a say in their relocation²⁰⁹. The respect of culture might seem futile or superficial in comparison with a severe problem such as mass displacement due to climate change. However, cultural integrity is intrinsically linked to the principle of self-determination^{210, 211}, an essential principle of international law. People who are displaced should, thus, have a voice (at least through their government) on a relocation destination that suits them, their economic, social and cultural development.

Quotas-like schemes to dispatch climate change migrants based on historical emission, for example, can constitute a fair solution²¹². However, Jane McAdam argued by explaining

²⁰⁷ Graeme Hugo (n 135), 33.

²⁰⁸ Phillip Dane Warren (n 10) 2135.

²⁰⁹ Ibid.

²¹⁰ ICCPR Article 1 '*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*'.

²¹¹ Philip Dane Warren (n 10) 2135.

²¹² Ibid.

that *'a protection-like response may not necessarily respond to communities' human rights concerns, especially those relating to cultural integrity, self-determination and statehood.'*²¹³

Nonetheless, detractors can emphasize that one problem with regional migration policies is that some regions would have a higher 'burden' than others. Some areas where developing countries are highly vulnerable to climate change effects already show today, and these would not be helped from developed countries, which have less vulnerability. There is a need for international cooperation, even in a regional assessment of the crisis.

In practice, two regional bodies have implemented their expansion of the Refugee Convention's definition. First, the Organization of African Unity²¹⁴ expanded the definition to people leaving their country of origin *'owing to external aggression, occupation, foreign domination or events seriously disturbing the public order in either part or the whole of his country of origin or nationality.'*²¹⁵ The other regional instrument is the Cartagena Declaration²¹⁶, a non-binding declaration between Central American countries. The text includes a broadened definition to the *'persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.'*²¹⁷

These two unique definitions include contexts where the 'public order' is disturbed. Here, climate-related disasters can implicitly tally with disturbing the public, thus giving some protection for climate change induced migrants, even though the protection was never explicitly intended²¹⁸.

²¹³ Jane McAdam, *Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*, International Journal of Refugee Law, Volume 23, Issue 1, (March 2011), 17.

²¹⁴ Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* ('OAU Convention'), 10 September 1969.

²¹⁵ OAU Convention Article 1(2).

²¹⁶ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (1984).

²¹⁷ Cartagena Declaration III.3.

²¹⁸ Phillip Dane Warren (n 10) 2123.

4.3 Case law and international organizations

More protection could be developed by both national and international case law as well as international organizations.

A way that could bring more protection to climate change induced migrants can sprout from recent case law. The case of Ioane Teitiota is not the only one of its kind, and many other small islanders used the same path to ask for more protection as climate-related displaced person²¹⁹.

Nevertheless, climate change litigation, in general, can also start to pave the way for more recognition and protection of climate change migration. In the last few years, climate change litigation thrived and developed in numerous areas. Some cases give great examples of possible exploitations to the climate migration cause. Primarily, climate change litigation rests upon States obligations and the standard of action for States.

The *Torres Strait Island* case is an example. The Torres Strait Islands are a group of low islands located north of Australia, between mainland Australia and Papua New Guinea²²⁰. Eight Torres Strait Islanders submitted a petition against the Australian government to the UN HRC. The plaintiffs allege that the government of Australia because it fails to address climate change, is violating their fundamental human rights under the ICCPR²²¹. Indeed, the islanders are asking Australia for more protection of the Torres Strait from climate change by, for example, funding adequate measures such as coastal defence, but mainly by reducing Australia's GHGs²²². The case has not been answered by the Committee yet. Even if the Committee finds a violation, there is no possibility to force Australia to comply with its obligations²²³, but it would be a great and unique example of States' responsibility in climate change effects.

The Marshall Islands Initiative to the International Court of Justice (ICJ) is another example. The Republic of the Marshall Islands files against the nine States in possession of the nuclear weapon (US, UK, France, Russia, China, India, Pakistan, Israel, and North Ko-

²¹⁹ See e.g. *AC (Tuvalu)*, [2014] NZIPT 800517-520, New Zealand: Immigration and Protection Tribunal, 4 June 2014; or *AD (Tuvalu)*, [2014] NZIPT 501370-371, New Zealand: Immigration and Protection Tribunal, 4 June 2014.

²²⁰ ClientEarth.

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid.*

rea)²²⁴ in 2014. The Marshall Islands claimed that all these governments were in breach of their obligations relating to nuclear disarmament under the Treaty on Non-Proliferation of Nuclear Weapons as well as customary international law²²⁵. From the nine nuclear-armed States, only UK, India and Pakistan accepted the compulsory jurisdiction of the ICJ where the judgements are binding on the parties²²⁶. However, the ICJ found that it did not have jurisdiction in the case based on the absence of a dispute²²⁷. Alternatively, if the judgement on the merits would have been issued, it would have been binding as whether states were required to engage in negotiations towards the abolition of nuclear weapons²²⁸.

It might seem odd to use a case about nuclear disarmament obligations to illustrate climate change obligations, but both are linked. Both are recognized to create real security risks, but they are not recognized as interfering with each other²²⁹. Climate change, as treated previously, can contribute to global insecurity. Global insecurity increases the chance of a nuclear weapon being used, for example²³⁰. Besides, from climate change sprouts extreme weather events in all parts of the world, leading to environmental degradation and possible instability of nuclear installations, threatening their security²³¹.

This case showed that the ICJ, with its binding power over States in contentious cases, can develop a new jurisprudence on climate change, changing their obligation and condemn breaches of said obligations. Obligations in the matter of climate change can be broadened to climate change migration. However, the problem of causality linking a State's responsibility in climate change and its effects on another vulnerable State remains.

The recent case of *Urgenda v. The Netherlands* is also an example, quite successful, illustrating a possible change in the standard of action for States. In essence, the Supreme Court

²²⁴ Jürgen Scheffran, John Burroughs, Anna Leidreiter, Rob Riet & Alyn Ware. *The Climate-Nuclear Nexus: Exploring the linkages between climate change and nuclear threats* (2015).

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. India; Marshall Islands v. United Kingdom).

²²⁸ Scheffran, Burroughs, Leidreiter, Riet & Ware, (n 224).

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

of the Netherlands declared that only to implement adaptation measures does not satisfy the State's duty of care. For the Court, mitigation (referring to all efforts made to reduce or prevent the emission of GHGs) is the only effective 'remedy'. The Netherlands has thus a duty to mitigate as quickly and as much as possible²³².

The basis of the action by Urgenda is the Oslo Principles on Global Climate Change Obligations.²³³ These principles were agreed by a group of international lawyers in 2015 and affirm that States are legally accountable for the emission of GHGs from their territories (based on tort law and human rights)²³⁴.

Furthermore, the Court discarded the argument that the limitation of Dutch emissions would only reduce global emission by a ludicrous number, diminishing the importance of such efforts. The Court said that '*it has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an increase in CO₂ levels in the atmosphere and therefore to hazardous climate change.*'²³⁵ This case is an excellent example of State's responsibility in their own GHGs and the effects it can have on the climate.

This type of litigation is nowadays abundant and has the potential to change the nature of States' obligations concerning climate change and thus, their human rights obligations linked with climate change. Indeed, national and international courts can develop a new practice forcing States to take more action to mitigate but as well to adapt to climate change. Litigation can then open to climate change migration where States can see their obligations increase in that matter.

Another development would be the progress of the UN Security Council's practice. Indeed, as discussed previously, climate change can lead to security issues²³⁶. Climate change

²³² *Urgenda v The Netherlands*, Supreme Court of The Netherlands, Civil Division Number 19/00135 (20 December 2019) paras. 4.73 - 4.75.

²³³ Oslo Principles on Global Obligations to Reduce Climate Change (2015).

²³⁴ Scheffran, Burroughs, Leidreiter, Riet & Ware, (n 224).

²³⁵ *Urgenda v The Netherlands* (n 230) para. 4.79.

²³⁶ Scheffran, Burroughs, Leidreiter, Riet & Ware, (n 224).

is widely considered as a threat multiplier exacerbating existing tensions and instabilities²³⁷. ‘*Environmentally-induced human migration*’ could be a ‘*conflict-prone impact of climate change*’, according to Christina Voigt²³⁸. Indeed, some future estimations predict millions of environmental migrants in the next decades²³⁹. Article 39 of the UN Charter²⁴⁰ sets out the function of the Security Council, which is to ‘*determine the existence of any threat to the peace, breach of the peace.*’²⁴¹ In the past, the Council used a broad interpretation of ‘threat to peace’, including refusal to act against terrorism or internal conflict²⁴². It means that threat to peace does not always amount to the use of force²⁴³. This is why, an even broader interpretation of Article 39 of the UN Charter could lead the Council to determine ‘*whether an environmental threat amounts to a threat to peace*’, or not²⁴⁴. Thus, the Security Council might find a new role in cases of environmental migration.

4.4 Evolution of customary international law

Customary international law is general practice accepted as law. In that case, practice refers to State practice which can be the action or omission of all organs and individuals attributable to the State. According to the International Law Commission (ILC), State practice must, however, be sufficiently widespread and representative²⁴⁵. It can be challenging to assess the reality of new international legal customs since States’ actions can diverge from their word.

Concerning migration, in last resort, the principle of non-refoulement is a principle of international law which is considered as customary international law. This principle is part of the international customary law. In the General Conclusion n°25 of the Executive Committee of the UNHCR, the principle of non-refoulement is viewed as ‘*progressively acquiring the*

²³⁷ Christina Voigt, *Security in a ‘Warming World’: Competences of the UN Security Council for Preventing Dangerous Climate Change*, in: C. Bailliet (ed.) ‘Security: A Multidisciplinary Normative Approach’ (2009) 294.

²³⁸ Ibid, 29.

²³⁹ Norman Myers (n 2).

²⁴⁰ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI Chapter VII, Article 39.

²⁴¹ Ibid.

²⁴² Christina Voigt (n 237) 297.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ ILC, *Draft Conclusions on Identification of Customary International Law 2018*, part 3, conclusion 8.1.

*character of a peremptory rule of international law*²⁴⁶, arguing in favour of its *jus cogens*²⁴⁷ recognition. State practice also highlights a full and absolute application of the non-refoulement principle through abundant case law²⁴⁸. In contrary to the application of the principle by the article 33 of the Refugee Convention, the customary principle of non-refoulement applies to all persons, irrespective of their citizenship, nationality, statelessness, or migration status, and it applies wherever a State exercises jurisdiction or effective control, even when outside of that State's territory²⁴⁹. The principle applies to the entire international community, where the prohibition of refoulement is universal and non-derogable. From this, results in the fact that the principle of non-refoulement applies to climate change induced migration.

Here is a sensitive issue where climate change induced displaced persons cannot be sent back to a territory where they would face a threat to their life, while not being legally recognized as refugees. Are they bound to live in camps without any possibility to work or settle down? This situation raises an issue concerning the principle of non-refoulement, which grants high protection from human rights violations in refugee and international human rights law. The principle of non-refoulement does not allow enough protection for climate change induced migrants who find themselves stuck in the middle of a legal vacuum, in need of better recognition.

However, even with its utmost importance, some countries disrespected this principle when exercising extra-territorial pushbacks in the Mediterranean Sea. In other words, some sea patrols rejected boats with migrants on board before they could even reach the shores of the national territory, where it would not have been possible to return them to their country, due to the principle of non-refoulement²⁵⁰.

²⁴⁶ Executive Committee 33rd session, *General Conclusion on International Protection No. 25 (XXXIII)*. United Nations General Assembly Document No. 12A (A/37/12/Add.1) (1982).

²⁴⁷ According to the article 53 of the Vienna Convention on the Law of Treaties (1969), a norm of *jus cogens* is 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'.

²⁴⁸ See e.g. *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: ECHR (15 November 1996); *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: ECHR (28 February 2008).

²⁴⁹ Office of the High Commissioner for Human Rights, *The Principle Non-Refoulement Under International Human Rights Law*.

²⁵⁰ Tineke Strik, *Pushback policies and practice in Council of Europe member States, Report I Committee on Migration, Refugees and Displaced Persons*, 2.

It is arguable to consider how European States reacted to the migrant crisis in the Mediterranean Sea as representative to State practice and customary international law since it only concerns a small part of the international community. The principle of non-refoulement remains an important one both in refugee and humanitarian law, and States which pushed back migrants on the Sea was condemned by the international community²⁵¹.

Besides State practice, the word of international courts and international organizations can give a hint on the evolution of international customary law. As treated previously, the innovative *Teitiota case* at the HRC sparkles debates within the walls of the Committee; we can imagine that the very high threshold set by the Committee is not set in stone and can be lowered. A lowered threshold could allow humanitarian protection to climate and environmental migrants.

Even though the HRC is not a court, small clues can be interpreted as a drift in its legal interpretation of the ICCPR. The HRC can, indeed, use the legal vacuum surrounding the situation of climate change migration to strengthen its position and act as a ‘court’ and create new jurisprudence. In August 2019, the Committee issued its decision concerning a complaint made by a family of rural workers against Paraguay in the *Portillo Cáceres v Paraguay*²⁵² case. The plaintiffs alleged that Paraguay failed to control adequately large ‘agribusinesses’ in the area, thus leading to the widespread use of chemicals, resulting in a death and severe health problems in the neighbouring community²⁵³. The HRC found that Paraguay was in breach of the ICCPR Article 6 (the right to life) by failing to act following community members’ reports of physical symptoms associated with the chemicals and the death of Portillo Cáceres²⁵⁴. The Committee also found a breach of Article 7 (the right to private and family

²⁵¹ See e.g. ECtHR, Case of *Hirsi Jamaa and others v. Italy*, Judgment of 23 February 2012, Appl. No. 27765/09 (where the European Court of Human Rights found Italy in breach of Articles 3 (prohibition of ill-treatment), 4 (prohibition of slavery and forced labour) and 14 (prohibition of discrimination) of the European Charter on Human Rights by one of its pushback operations).

²⁵² *Portillo Cáceres v. Paraguay*, Communication No. 2751/2016, Views of 9 August 2019, UN Doc. CCPR/C/126/D/2751/2016.

²⁵³ *Ibid*, para 2.1.

²⁵⁴ *Ibid*, para 7.5.

life and home) because Paraguay failed to protect the environment victims rely on for their livelihood.²⁵⁵

It is the first time that the HRC recognized that environmental harms could undermine rights protected by the ICCPR²⁵⁶. This decision has the potential to strengthen the recognition of environmental protection as fully part of human rights protection.

In the near or far future, the HRC, or other institutions and treaty bodies might rise as leaders in environmental migration cases involving states.

4.5 De lege ferenda

Regarding the international legal framework around climate change-related migration, there is a clear conclusion that there is no real protection of climate change and environmental migrants in *de lege lata* (the law as it is today). There is thus a need to make their situation more legitimate and grant them more protection.

In my opinion, *de lege ferenda* (meaning the law as I would like to see changed) would be inspired by the Mobility Convention treated in Chapter 2. However, the Mobility Convention seems a bit far from reality, even undemocratic at times. Indeed, the lecture and understanding of the Convention are reserved to an elite that is already qualified in the field of human rights and refugee law. Also, the Convention looks hard to implement in practice considering the length and specification of some articles. It is nonetheless the most comprehensive text existent in the field of migration since it includes climate change induced migration.

There are already signs showing the effects of extreme weather events on Pacific island states, with threats to health and life in some cases. The debate around ‘human agency’ for the definition of persecution in the refugee status is shifting away the focus from the real problem. It is, as of today, too complicated to find a direct legal causal link between climate change and human action. It is thus counterproductive to focus on the *how*, we should instead focus on the *now*. Today, the fact is that people are being impacted, and rather gravely so that

²⁵⁵ Ibid, para 7.7.

²⁵⁶ International Justice Resource Center, *UN Human Rights Committee Recognizes Environmental Harm as Rights Violation* (22 August 2019) <<https://ijrcenter.org/2019/08/22/un-human-rights-committee-recognizes-environmental-harm-as-rights-violation/>> (accessed 3 March 2020).

they go through the process of using national litigation pathways to find protection. Even international organizations are being called upon to fill the legal gap. These legislative procedures ask for much time, dedication and money from private actors.

An evolution to lower the threshold of protection regarding the right to life by the HRC would be the most straightforward way to grant more protection to climate change migrants. The urgency of the situation is already understood by some members of the Committee, and the fact that there are dissenting opinions shows that the shift might not be too far away. It might take years, but I have hope that eventually, climate migration will be protected, and that States will have obligations towards climate change displaced persons.

5 Concluding remarks

The objective of the thesis was to address the possible gaps in international law regarding climate change induced migration, as well as providing insights and interpretations of evolving customary international law. The research questions guiding the assessment were the following: *is climate change induced displacement across borders addressed in international law or international customary law? If not, how can climate change induced displaced persons can be protected under international law?*

The analysis of the current situation through the international legal framework in Chapter 2 showed that there is indeed, as of today, no protection for climate change induced displaced persons in the international scale, even though the gravity of the situation in some regions, such as in the Pacific, requires legal solutions. This legal vacuum is dealt with by non-governmental initiatives, but they do not carry enough weight to make a real difference in practice.

Although no protection is currently available in international law for climate change induced migrants, there are hints on possible developments for protection. Recently, UN treaty bodies have admitted the possibility of a basis for protection on environmental grounds with, an unfortunately high threshold to meet. The subject of climate change-related migration is relatively new at the global scale and sparks off debates even within the UN on the admissibility of such request. Through flourishing climate litigation, the practice of the HRC as well as other institutions, and hints of developments in customary international law, some evolution towards a protection is slowly showing. The thesis supports the idea that the protection should be developed

However, the evolution of customary international law and the development of a protection framework will be a long process. Considering States' reluctance, the current global situation around refugees and migration, challenges to the procedural development of a protection mechanism for climate change induced migration persist. The terminology itself around 'climate change induced migration' is debated today. The lack of consistent terminology makes it difficult to obtain reliable data on climate change migration. Without data, climate change migration can be overwhelmingly underestimated, marginalizing one of the most vulnerable groups currently affected by climate change. That is why there is a need for a global consensus on terminology and status, enabling a better understanding of the subject, hopefully pushing forward climate change migration on the international agenda. As dis-

cussed in Chapter 4, regional initiatives might be more adapted than international ones; nonetheless, the protection of climate change induced migrants is required to build a sustainable future around the climate crisis ahead.

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<<https://www.unhcr.org/hk/en/about-us/faq-of-refugees>> (accessed 2 February 2020).