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**No State, No Protection – Exploring the Legal Protection
For Environmentally Displaced Persons**

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Abstract

Klimatförändringar har stor inverkan på människors liv och millioner tvingas bort från sina hem på grund av det. De flesta forskare är idag överens om att vi människor bär en stor skuld till att vår levnadsstandard medför sådana miljömässiga konsekvenser. Om inte kraftigare åtgärder införs kommer situationen förvärras. Uppsatsens syfte är att undersöka om existerande juridiska dokument kan användas för att skydda klimatfördrivna människor, och ifall dessa inte ger tillräckligt skydd, ge grunderna för hur ett sådant skulle se ut. En hypotes, ett extremfall antas där frågan om detta skydd är tillräckligt appliceras på invånare i länder som riskerar att försvinna till följd av klimatförändringarna. Med stöd av metoden innehållsanalys utforskas det faktiska skyddet utifrån ett kritiskt perspektiv. Resultatet visar att klimatfördrivna människor både saknar skydd och försätts i en terminologisk gråzon som är oroväckande. Varken FNs flyktingkonvention eller konventionen för statslösa tillgodoser klimatfördrivna människors rättigheter. Inte heller kan doktrinen om "skyldigheten att skydda" erbjuda ett skyddsnät. Däremot visar uppsatsen på möjligheten att existerande bitar ur varje text skulle kunna användas för att ligga till grund för en särskild konvention för sådana klimatflyktingar.

Climate change has adverse impact on people's lives and millions are forced away from their habitual residence because of it. Most experts agree that our standard of living is to blame for such environmental consequences. If not stronger measures are introduced; the situation will deteriorate. The purpose of this essay is to explore if existing legal instruments can be used to protect environmentally displaced persons, and if these instruments fail to do so, provide the basic grounds for how such an instrument should be construed. A hypothesis, or worst-case scenario is assumed in which the question whether the existing legal protection is sufficient, applies on people living in low-lying island states that risk disappearing. With support from the methodology of content analysis the existing legal protection is explored from a critical perspective. The results shows that environmentally displaced persons both lack protection and are put in a terminological grey zone. Neither the UN refugee convention nor the convention for stateless persons fulfill environmentally displaced person's rights. The doctrine on the responsibility to protect equally fails to provide a safety net. However, the essay reveal that existing pieces from each text could be used to provide a foundation for a special climate refugee convention for these environmentally displaced persons.

Keywords: Climate change, displacement, environmentally displaced persons, legal protection, responsibility to protect, disappearing states, climate refugees.

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Abbreviations

AU	African Union
EDP	Environmentally Displaced Person
EU	European Union
R2P	Responsibility to Protect
UN	United Nations
UNHCR	United Nations Human Rights Council

1. Introduction

Migration because of climate change is a survival strategy. For some, fleeing from sudden changes in the environment may be the only realistic option to stay alive. For others, migrating from areas affected by drought or floods may be a precautionary act more than an imminent threat of survival. Similarly, some people welcome the term “climate refugee” while others reject it because of its victimizing implications on those affected by environmental changes. Further, environmental migration is often just the tip of the iceberg and covers complex dynamics¹. What makes people move from an unsustainable environment is not only the direct life-threatening situation, but also underlying causes such as food insecurity, water scarcity, pollution etc.

Experts and researchers grade environmental migrants by their incentives to move and faced threat level, from “environmentally motivated” to “environmentally forced” and “environmental refugees”². Although people may have to move as a last resort, their capabilities to do so vary significantly. Specifically, people in poorer countries tend to be affected worse by climate change than people who come from richer countries³. Scientists largely agree that the human induced build-up of greenhouse gas will worsen without limitations, further escalating climate change and hydro-metrological disasters. Despite this knowledge, environmentally displaced people (EDPs), climate refugees or environmental migrants are not included in the international convention relating to the status of refugees by the UN⁴. Nor does the European Union (EU) include them⁵. The legal protection of climate refugees is therefore unclear. This essay aims to analyze whether the current juridical instruments could be used or adjusted to protect climate refugees or if not, what elements should a special climate refugee convention consist of. The African Union (AU) endorse that the term “refugee” applies to persons who are forced to leave their

¹ Hugo, Graeme. Climate Change – Induced Mobility and the Existing Migration Regime in Asia and the Pacific. In *Climate Change and Displacement: Multidisciplinary Perspectives*, McAdam, Jane (ed). Oxford: Hart Publishing, 2010, p. 11.

² Ibid, p. 13.

³ McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 1-2.

⁴ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 U.N.T.S. 137, Art 1A(2).

⁵ Council Directive (EC) 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Art 2(c).

habitual residence, owing to “events seriously disturbing public order in either part or in whole”⁶. This ground for being a refugee might be interpreted to include environmental caused migration.

1.1 Purpose and Question of Issue

The anthropological effect on the earth has long been disputed as temporary and irrelevant. Critics to global warming have asserted the planet’s natural cycles as the cause for irregularities in the weather system but recently those have become fewer and more quiet. It is now clear that there are comprehensive scientific data to support the evidence for a human footprint causing significant and serious disturbances in the climate. The implications of our industrial revolution and mass production reduces natural resources and increases emissions of greenhouse gases which in turn thickens the atmosphere. Global warming is now a reality and we have begun to experience the consequences of our change in behavior. The earth is responding with it’s own changes in weather, affecting millions of people globally each year. Climate agreements such as the famous Kyoto Protocol are intended to reduce our emissions but have insofar failed to protect us from our self-made problem. Instead, when the effects of climate change strike poorly protected people we turn to the law for help. The purpose of this essay is to analyze whether the current juridical instruments could be used to protect environmentally displaced persons. The question of issue is articulated below.

- *If the current juridical instruments cannot provide protection for environmentally displaced persons, what elements should a special climate refugee convention consist of?*

This essay will first provide a background to climate change and provide a scientific basis for the chosen subject. Then an examination of the conventions for refugees and stateless persons will be performed along with a more explorative examination of the R2P-doctrine. All three of these primary sources will be put into context with environmentally displaced persons and the group of people living in low-lying island

⁶ Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June, 1974) 1001 U.N.T.S 45, Art 1(2).

states. The method of content analysis will later be applied to the theoretical approach that the existing legal instruments (the conventions) and the R2P-doctrine are insufficient in providing adequate protection for people living in low-lying island states. Finally, a discussion will provide the basis for a specified EDP-instrument, which seeks to create a debate regarding better protection for environmentally displaced persons.

1.3 Primary and Secondary Sources

The essay's primary source consists of the R2P-doctrine and two legal instruments. The legal instruments are The Convention Relating to the Status of Refugees and The Convention Relating to the Status of Stateless Persons. These conventions were chosen because of their relevance to the purpose of this essay and especially for exploring which human rights protection can be offered for environmentally displaced persons if their state disappears. While the refugee convention is only intended for those covered by the legal term refugee, the stateless convention turns to anyone regarded as stateless. In the event of cross-national environmental displacement these conventions may provide an answer regarding the available human rights' protection for those in flight. The R2P-doctrine is on the other hand a more liberal choice of source and must be further explained. The doctrine can be viewed as a guidebook for when states may interfere within another state with the purpose of protecting the people in it. It's founded upon the idea that all states have an responsibility to protect citizens of an unable or unwilling state. The responsibility to protect includes "other man-made catastrophes" which in my opinion also entails the risk of displacement due to climate change⁷.

The secondary material, applied to resolve my question of issue, is divided into books, academic papers and institutional documents. The books provide a foundation of information and basic knowledge on the subject of climate change and displacement. They also explore conceptual challenges to the linkage between EDPs and existing legal instruments. The academic papers are updated contributions to the latest research of environmental displacement and show where the discourse is

⁷ International Commission on International and State Sovereignty. The Responsibility to Protect. Report/International Commission on International State Sovereignty. Ottawa: International Development Research Centre, December 2001, p. 34.

heading. The institutional documents provide scientific data about the phenomenon climate change and legal documents such as treaties and conventions. This trinity of secondary material has been carefully selected with regard to relevance, usability and contribution. They all contribute significantly to the purpose of this essay, each with its own perspective.

1.4 Limitations

The effects of climate change can be discussed in various aspects but this essay's primary concern is the protection of environmentally displaced persons from climate change. EDPs is a descriptive term which in this essay will be asserted to individuals, or groups of individuals who cross, or intend to cross, an internationally recognized border due to adverse affects of climate change. In contrast to EDPs, the vast majority of movement because of climate change is domestic but they will not be the focus for this essay since they primarily benefit from the protection of their respective government. Moreover, they also have more lengthy protection through the UN guidelines for Internally Displaced Persons (IDPs).

The subject of climate change is enormous due to the amount of research being done. This is of course of great value, but it also means that one must dlimit the subject into a manageable size. For instance, the focus on legal protection for displaced persons has been limited to three specific entities that I analyze and explore. It allows me to dedicate more efforts into the depth of each entity rather than a shallow exploration from a wider scope. The displaced persons I seek protection for is the group of people who live in low-lying island states and more specifically the island states of the Maldives, Kiribati and Tuvalu. These three states are amongst those most vulnerable to environmental changes because of their geographical location and low height and the risk of becoming submerged makes these states extreme cases of climate change. A solution for the protection of these populations could mean that all EDPs will be protected.

2. Theory and Method

2.1 Theoretical approach

Academic discussions have long focused on how to label those migrating from the effects of climate change, overshadowing the more important work on how to effectively protect environmentally displaced persons. Despite extensive research about climate change and the nexus to human displacement, the legal protection has not caught up. There are some international legal instruments, which might be applied on EPDs, and two of those (The Refugee Convention and the Statelessness Convention) along with the R2P-doctrine will provide the primary sources in this essay. I chose the legal instruments because of the active debate about them and because they are the best existing chance of protection for the relevant group since there is no international legal instrument protecting environmentally displaced persons.

The R2P-doctrine is unsurprisingly, a less frequent alternative for protection of EDPs. The doctrine has not been linked to the protection of EDPs and was originally intended as a measurement for when a humanitarian intervention can be launched for the protection of civilians in a third state. However, my intention is to apply some of the core elements in this doctrine to the context of EDPs. I strongly believe that fundamental ideas expressed in the doctrine can be harmoniously integrated with EDPs. The theoretical approach is nonetheless founded in that existing legal instruments and the R2D-doctrine does not provide adequate protection for environmentally displaced persons. The Norwegian human rights lawyer Vikram Kolmannskog has reached the same conclusion. He writes that “*there is no established international law, policy or practice on cross-border relocation and resettlement*”⁸ in the context of climate change and displacement. The absence of a clear and fully applicable international legal framework to respond to people displaced by climate change underscores the importance of renewed efforts to design new legal instruments suitable for the protection of environmentally displaced persons⁹. The theoretical foundation, on which this essay is based upon, calls for

⁸ Kolmannskog, Vikram. The Point of No Return: Exploring Law on Cross-Boarder Displacement in the Context of Climate Change. *Refugee Watch*, vol. 34, December (2009), p. 30-31.

⁹ McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 187.

better protection of environmentally displaced persons. Although there is a UN guideline for the protection of the so-called internally displaced persons' (IDP) rights, legal instruments do not protect EDPs as a group.

2.2 The Refugee Convention

The current legal instruments on the status of refugees and stateless persons seem inadequate in guaranteeing protection for EDPs. Jane McAdam, Professor of Law and author of several books within the field of climate change and displacement calls international refugee law “*a cumbersome framework for addressing flight from climate-related impact*”¹⁰. She points out that international refugee law was designed for a different context and that most of its components are too narrow to cover environmentally displaced persons. The Convention provides specific grounds of who might count as a refugee (see chapter 4.1) excluding EDPs from the protection therein. A part of the problem lies in the impossibility of identifying a persecutor within the context of climate change. McAdam writes that persecution “*entails violations of human rights that are particularly serious, either because of their inherent nature or because of their repetition*”¹¹. In order to acquire refugee status, one must prove that the perceived persecution is due to one of the grounds, namely race, religion, nationality, membership of a particular social group or political opinion. Without sufficient evidence for persecution, one will not meet the requirements set out, and moreover, not benefit from the protection of the Convention. Mr. Kolmannskog claims that elements of persecution and discrimination have been found in natural disasters, particularly in the aftermath of the 2004 tsunami¹². However, it is unlikely that this would suffice for receiving refugee status.

2.3 Statelessness Convention

Within the discourse of EDPs can a particular group be extracted; people living in low-lying island states. This purely descriptive group of people can in this essay be articulated as the peoples of the Maldives, Kiribati and Tuvalu who are at risk of becoming stateless due to the physical submergence of their state and the territory

¹⁰ Ibid, p. 50.

¹¹ Ibid, p. 42.

¹² Kolmannskog, Vikram. The Point of No Return: Exploring Law on Cross-Boarder Displacement in the Context of Climate Change. *Refugee Watch*, vol. 34, December (2009), p. 32.

they inhabit. Experts disagree on whether the submergence of territory will lead to the loss of statehood and disappearance of the state; it has never happened before and international law have not foreseen this. There is also uncertainty about if there will ever be such a case of sinking states, but since part of this essay is concerned of the human rights for these populations after the disappearance of their state, I have assumed a perspective that this will occur. The perspective entails an attempt to clarify the necessary elements for a state in the legal sense and aim to analyze what protection is available for the specified group within the Statelessness Convention. The perspective that I share with McAdam is that the Statelessness Convention's ability to protect people displaced from low-lying island states is "*far from adequate*"¹³. This is further agreed by Kolmannskog who claim that the "*sinking island citizens would not be protected because the definition is premised on the denial of nationality... rather than through the disappearance of a state altogether*"¹⁴.

2.4 R2P-doctrine

The R2P-doctrine is founded upon the idea that states may interfere within another state's domestic affairs when it fails to protect the citizens. The doctrine challenges the well-established notion of state sovereignty; that is the notion describing all states as equally sovereign with a national freedom¹⁵. The main concern of the doctrine in this essay entails the protection of people's human rights when the state itself is unable to fulfill its obligations, primarily in cases where the state becomes submerged. The philosophy behind this context is simple. A low-lying island state that slowly becomes submerged is unable to protect its citizens due to obvious reasons. It cannot solely prevent the state from sinking and the citizens cannot relocate within the territory since the whole land areal will disappear. However, states can with united efforts protect the populations through preventive, reactive and rebuilding actions. These are the core elements applied to the context of EDPs, the responsibility to prevent, the responsibility to react and the responsibility to rebuild.

¹³ McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 159.

¹⁴ Kolmannskog, Vikram. The Point of No Return: Exploring Law on Cross-Boarder Displacement in the Context of Climate Change. *Refugee Watch*, vol. 34, December (2009), p. 31.

¹⁵ International Commission on International and State Sovereignty. *The Responsibility to Protect*. Report/International Commission on International State Sovereignty. Ottawa: International Development Research Centre, December 2001, p. 23.

They should be applied with greatest concern for human security – their physical safety, economic and social well-being and respect for their dignity, value and human rights¹⁶.

3. Methodology

3.1 Content Analysis

Content Analysis is an empirically grounded method with which one can seek valid knowledge or practical support for actions by analyzing data¹⁷. There is a variety of different types of content analysis but the specific analysis used hereinafter developed by Klaus Krippendorff can be identified by six specific features. Firstly, texts have only reader-dependent qualities and are therefore subjective¹⁸. Secondly, a text always has multiple meanings and will be interpreted differently depending on the analysis. Thirdly, the meaning of a text does not need to be shared and should not be subjected to a single homogeneous reading. Fourthly, a content of a text speak to something besides the given text and they invoke feelings and cause behavioral changes. Fifthly, a text has a meaning, which is relative to a specific context, discourse or purpose. As noted by Mr. Krippendorff “*messages always occur in particular situations, texts are read with particular intents, and data are informative relative to the particular problems*”¹⁹. Sixthly, the analyst (me) will be demanded by the nature of the text to draw particular inferences to their chosen context – they ??? inform someone.

These features do not only represent a specific kind of content analysis, but will also serve as tools for the analyst to reflect upon while engaging in the activity of content analysis. The starting point is always to select a text, or parts of a of text. In this essay, that starting point was the selection of the Convention Relating to the Status of Refugees, the Convention Relating to the Status of Stateless Persons and the R2P-doctrine. They have been selected for their relevance to the research question and are intended to provide the best possible foundation for the answer to the research

¹⁶ Ibid, p.31.

¹⁷ Krippendorff, Klaus. *Content Analysis: An introduction to Its Methodology*. 2. Ed. California: Sage Publications, 2004, p. xix-xx.

¹⁸ Ibid, p. 22.

¹⁹ Ibid, p.24.

question. The methodology in selecting texts was to identify the most useful sources with highest level of relevance within the context of climate change and displacement requiring pre-requisite knowledge and careful research.

A context is always someone's construction and I have constructed a context within the sphere of climate change and displacement, namely the case of disappearing (or sinking) low-lying island states and EDPs. Within this context, the content analysis is later applied through analytical constructs with the intent to explain how the texts are connected to the possible answer to my research question and under which circumstances these correlations could change²⁰. Analytical constructs generally take the form of "if-then" statements, which guides the analyst from the text to the answer to the research question via inferences. The type of inferences used in content analysis is known as "abductive inferences". Abductive Inferences can be described as conclusions drawn from the combination of context and knowledge²¹. For example, one might date a text from the choice of words used within it. The whole model of methodology used in my analysis can be explained in using the following guide (below) from Mr. Krippendorff's book "Content Analysis – An Introduction to its Methodology"²². As in all academic methodologies, the content should be possible to validate in principle. The point of doing this is to prevent analyst's from pursuing research questions that allow no empirical validation or that the results lack backing²³.

- A body of text, which is the available data.
- A research question that the analyst seeks to answer by examining the body of text.
- A context of the analyst's choice within which to make sense of the body of text.
- An analytical construct that operationalizes what the analyst knows about the context.
- Inferences that are intended to answer the research question, which constitute the basic accomplishment of the content analysis.
- ~~Validating evidence~~, which is the ultimate justification of the content.

²⁰ Krippendorff, Klaus. *Content Analysis: An introduction to Its Methodology*. 2. Ed. California: Sage Publications, 2004, p.35.

²¹ Ibid, p.37.

²² Ibid, p.30.

²³ Ibid, p.39.

3.2 Disposition

Academics have long been addressing climate change from different aspects, scientific, sociologic, economic, philosophical and many more. This essay is however focused around the legal aspect of climate change protection and how that can be improved for future environmentally displaced persons. The disposition throughout this essay is simple; it begins with the technical academic requirements wherein the theoretical and methodical approach is explained. These chapters contain the limits through which the essay is produced. Starting with the headline “The Convention Relating to the Status of Refugees”, the informative section will separately address each legal instrument within the case of EDPs and sinking-state context. The point of this section is to provide relevant knowledge to the reader, and to articulate the problem of legal protection for EDPs. The next chapter is centered on an analysis of the legal instruments in their capacity to protect EDPs. This section aims to answer the question of purpose and fulfill the purpose of this essay. Finally, a constructive discussion will gather the most central pieces for creating adequate protection for EPDs. The goal is not to provide the reader with a complete legal instrument but rather to create the framework itself. The framework can hopefully guide future academics and professionals in their pursuit to solve the critical problem of protection for environmentally displace persons.

4. Background, Information and Conceptualization

4.1 The Convention Relating to the Status of Refugees

In the aftermath of the Second World War, it became clear how extensively people had been targeted and persecuted because of inherent traits and membership of a particular social or political group. The scope of the attacks and persecution, which was particularly grim, led to the Convention Relating to the Status of Refugees (CRSR) and was adopted by UN member states in 1951²⁴. The convention stipulated

²⁴ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 U.N.T.S. 137, p. 2 (see Introductory note).

a single definition of the term “refugee” and set out five grounds to count as one. Focusing on the protection of people from political and racial persecution, climate change and environmental migration was left out. The convention identifies a refugee as any person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”²⁵. This means that for someone to be counted as a refugee, four criteria must be met²⁶. Firstly, the refugee-seeking person’s fear must be serious and believed to be with the intent of inflicting bodily- or mental harm. Persecution means in this case the particularly serious human rights violations, either because of their inherent nature or their repetition²⁷. Secondly, the persecution must be on account of one of the five stipulated grounds (race, religion, nationality, membership of a social group or political opinion). Thirdly, the government of that person must be unable or unwilling to protect it’s citizen. Fourthly, the refugee-seeking person must have crossed an internationally recognized boarder.

The refugee convention contains a specific protection for refugees whom have entered a contracting state. It is a prohibition on the state party, stipulated in article 33, to expel or return a refugee “in any manner whatsoever” to another country where his life or freedom could be threatened because of the five grounds²⁸. This prohibition, commonly known as the principle of non-refoulement, is one of the cornerstones in refugee law.

The Refugee convention is constructed from an individualistic perspective where there is a defined victim and perpetrator. Moreover, it is built to demand accountability for an act of discrimination on, race, religion, nationality, membership of a particular social group or political opinion²⁹. A part from cases of persecution,

²⁵ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 U.N.T.S. 137, Art 1A(2).

²⁶ McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 44.

²⁷ Ibid, p. 43.

²⁸ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 U.N.T.S. 137, Art 33.

²⁹ McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 44.

climate change does not have specified perpetrators with clear faces, nor individual victims who can prove their well-founded fear of persecution. The citizens of low-lying island states cannot prove beyond reasonable doubt that their governments are responsible for the climate change that raises the sea level and floods their land repeatedly. This is because there is no single perpetrator when it comes to climate change. It is collective problem in nature where all states and all peoples are commonly responsible for- and victims of, the environmental degradation of our planet. The goal to identify a responsible perpetrator may be a viable method in the context of refugees, but not in the field of climate change. This is one of two reasons why placing environmentally displaced persons beneath the “refugee umbrella” will undermine the work to combat climate change. The second reason will be discussed in the following chapter.

4.2 The Heterogeneous term “Climate Refugee”

There are several different terms for describing human beings who are forced to leave their residence due to serious changes in the environment. The choice of wording is relevant because it both explains the specific context in focus and sets the tone in a discourse. Terms such as environmental migration, environmentally displaced persons (EPDs) and climate-related movement are only a few of many existing terms with a slightly varied meaning. Migration implicates a degree of decision making in the timing and location of movement³⁰. When describing movement in response to a sudden extreme weather event, displacement is the more common term. However, “climate refugee” is probably the most well known. Journalists often use this descriptive term although this, in reality, is a misuse of its actual meaning. A refugee is someone who is crossing an internationally recognized border and has a well-founded fear of persecution³¹. A climate refugee has generally no fear of persecution, but fear instead the effects of severe changes in the environment. However, McAdam notes that there have been attempts to argue that environmental impacts are so harmful as to amount to persecution, but these have not been long lived because no

³⁰ McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 6.

³¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 U.N.T.S. 137, Art 1A(2).

discriminatory elements were found³². Moreover, as David Hodgkinson, Tess Burton, Heather Anderson and Lucy Young concludes; including EDPs within the refugee convention would risk devaluing the current protection for refugees³³. Furthermore, Angela Williams argue that attempts to extend the definition of a refugee would lead to an enormous increase in the number of refugees³⁴.

It is important to enhance the underlying identity that comes with the word refugee. Although people, who are at the greatest risk of being affected by the climate change, are eager to put the climate debate on the agenda, many reject the negative notion of being passive victims that is accompanied with the term climate refugee³⁵. For the people of pacific island states such as Kiribati and Tuvalu, the label climate refugee invokes a sense of helplessness and a lack of dignity, which they find contradictive to pacific pride. In reality, migrating from ones habitual residence is highly demanding and requires resilience and endurance in tough conditions.

Movement because of changes in the environment is a truly complex mechanism, where the weather is only one of several factors correlating with many more. When discussing migration due to slow onset environmental changes such as raised water levels, people whose livelihood depends most on natural resources for their subsistence are those facing the greatest risk and the least protection³⁶. Decisions to move or to stay are often impacted by the current socio-economic situation, concerning food and work availability, where environmental changes function as triggers rather than the sole cause. This is typically the case when a geographical area is affected by slow onset disasters, meaning the environmental degradation of an area resulting in reduced water availability, desertification, recurrent flooding or increased salinity in coastal zones³⁷. Slow onset disasters can induce people to move although no imminent threat to their lives exist (“voluntary” migration) but may lead to forced displacement and become permanent if the area continues to be uninhabitable over time. A part from slow onset disasters, hydro-meteorological disasters usually result

³² McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 43.

³³ Anderson, Heather, Burton, Tess, Hodgkinson, David, Young, Lucy. The Hour When The Ship Comes In: A Convention for Persons Displaced by Climate Change. *Monash University Law Review*, vol. 36 no. 1 (2010), p. 76.

³⁴ Williams, Angela. Turning the Tide: Recognizing Climate Change in International Law. *Law & Policy*, vol. 30 no. 4 (2008), p. 509.

³⁵ Penz, Peter, International Ethical Responsibilities to Climate Change Refugees In *Climate Change and Displacement: Multidisciplinary Perspectives*, McAdam, Jane (ed). Oxford: Hart Publishing, 2010, p. 152.

³⁶ Bennett, Jon, Webber, Michael In *Climate Change and Displacement: Multidisciplinary Perspectives*, McAdam, Jane (ed). Oxford: Hart Publishing, 2010, p. 39.

³⁷ McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 18-19.

in forced displacement during a short period of time in a limited area. Events such as flooding, hurricanes, typhoons, cyclones, mudslides and tsunamis are common in this category. A more serious form of climate change is the risk of disappearing small island states due to rising sea levels. Small island states in the Pacific may be in danger of becoming uninhabitable because of global warming, which in turn causes melting of sea ice and glaciers. The consequences could possibly be devastating for islands such as the Maldives, Kiribati and Tuvalu³⁸. Forced and permanent displacement is the most likely scenario if these islands disappear.

4.3 Disappearing States, Statelessness and Relocation

“Among the various environmental problems that cause the displacement of people from their habitats, none rivals the potential effects of sea level rise as a result of human-induced changes in the earth’s climate”³⁹

Lately, the climate change discourse has become aware of a possible consequence of climate change, the disappearance of the entire territory of a state. The Intergovernmental Panel on Climate Change (IPCC) determines that the earth is warming up, the linear warming trend for the last 50 years is twice that compared to the same over 100 years⁴⁰. The increase in average temperature occurs all over the globe but is greater in the northern latitudes. This has serious effects on the hydrological system such as the enlargement and increased number of glacial lakes, raised water temperatures and changes in ice cover, salinity and circulation⁴¹. Much of these consequences can be derived from anthropogenic activity with increased greenhouse gas (GHG) emissions⁴². Since the emissions of GHGs largely have been emitted unequally and disproportionately between countries, the Rio Declaration on Environment and Development recognized that states bear common but differentiated responsibilities towards a sustainable future⁴³. Notably, developed states bear the

³⁸ UN High Commissioner for Refugees. Climate Change and Statelessness: An Overview. Report/United Nations High Commissioner for Refugees. Bonn, June 2009, p. 1.

³⁹ Gibson, Chris, McNamara, Karen Elisabeth. We do not want to leave our land: Pacific Ambassadors at the United Nations resist the category of climate refugees. *Geoforum*, vol. 40 no. 3 (2009), p. 478.

⁴⁰ Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Climate Change 2007: Synthesis Report. Synthesis Report/IPCC. Geneva, November 2007, p. 30.

⁴¹ Ibid, p. 31-32.

⁴² Ibid, p. 39.

⁴³ UN General Assembly. Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I), 1992, (see principle 7).

greatest burden due to their greater environmental impact. The various effects of climate change will be felt differently depending on the geographical location (some areas and regions are more vulnerable), the readiness of the concerned state and its people (implemented response programs and similar actions) and the financial and technical capacities to respond to the changes. Less affluent states and their citizens are likely to suffer worse than richer states when climate change occurs. Small island states are particularly exposed for raised water levels and increased salinity because of their low elevation⁴⁴. An acute problem to people in the small island states of Kiribati and Tuvalu in terms of relocation is the insufficiency of fresh water and increased salinization of the soil. This has direct consequences on the food availability for the people on those islands and might lead to “voluntary” migration. However, faced with the possibility of sinking, their state could cease to exist.

During the seventh International Conference of American States in 1933, the Convention on Rights and Duties of States defined a state by four elements of statehood: a defined territory, a permanent population, an effective government and the capacity to enter into relations with other states⁴⁵. The capacity to enter into relations with other states is basically an indication of sovereignty. All of these criteria are necessary for a state to come into existence and the loss of these could mean that a state cease to exist. For instance, the criterion of a permanent population means that it cannot be transitory⁴⁶. While a big proportion of the population can live outside the state and still function, the migration of the whole population outside of the territory would inevitably lead to the loss of that criterion and at some point, the loss of statehood. However, it should be noted that while all four criteria are necessary in order to form a state, the lack of all four does not immediately result in the end of a state⁴⁷. The explanation for this is can be found in cases of “failed states” that have continued to exist for a period even when had objectively failed. The legal status of states entails recognition of either de facto or de jure statehood⁴⁸. De facto recognition means that a state’s existence is provisional and depends on the

⁴⁴ Duong, Tiffany T.V. When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law. *University of Pennsylvania Journal of International Law*, vol. 31 no. 4 (2010), p. 1241.

⁴⁵ Convention on the Rights and Duties of States, (signed 26 December 1933, entered into force 26 December 1934) 49 Stat. 3097 Treaty Series 881, Art 1.

⁴⁶ McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 131.

⁴⁷ McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 128-129.

⁴⁸ <http://www.justice.gov.tr/e-journal/pdf/LW7081.pdf> (see explanation in the list of references).

government's current control of the state, whereas the de jure recognition means that a state has fulfilled all criteria and has the full and absolute legal status. According to international law, a state can be dissolved by absorption (by another state), through merger (with another state) and dissolution (with the emergence of successor states)⁴⁹. Moreover, a state has never ceased to exist due to disappearance. Due to this unprecedented situation, there is no manual for handling a potential disappearance of a state.

Alike a state losing its status and international recognition, citizens of a state also lose their status when the state disappears. Since aliens do not enjoy the same rights as citizens, it is crucial to make sure that nationals of a sinking state do not become stateless⁵⁰. In the Convention Relating to the Status of Stateless Persons, a person is defined as stateless when he or she "is not considered as a national by any state under the operation of its law"⁵¹. The Convention, however, does not apply to persons "receiving protection or assistance from organs of agencies of the United Nations"⁵² or to persons recognized "as having the rights and obligations which are attached to the possession of the nationality"⁵³. Being recognized as a national in a state is a fundamental human right, and the deprivation of one's nationality is a violation of article 15 of the Universal Declaration of Human Rights (UDHR)⁵⁴. Surprisingly, there is no correlative duty for states to confer nationality. If a state would become uninhabitable and submerged, such as the small island states of the Maldives, Kiribati and Tuvalu may be, their governments would not be able to fulfill their obligations towards the citizens in the respective state. A state's population could then be considered either de jure stateless (see definition above) or de facto stateless (a formal but in practice ineffective nationality)⁵⁵. In cases of ambiguity where it is unclear whether a state exists or not, the United Nations Human Rights Council (UNHCR) has the mandate to determine the state's population as de facto

⁴⁹ McAdam, Jane, Disappearing States, Statelessness and the boundaries of International Law In *Climate Change and Displacement: Multidisciplinary Perspectives*, McAdam, Jane (ed). Oxford: Hart Publishing, 2010, p. 152.

⁵⁰ Westra, Laura. *Environmental Justice & The Rights of Ecological Refugees*. London: Earthscan, 2009, p. 111.

⁵¹ Convention Relating to the Status of Stateless Persons, (entered into force 6 June 1960) 360 U.N.T.S. 117, Art 1(1).

⁵² Ibid, Art 2(i).

⁵³ Ibid, Art 2(ii).

⁵⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR), Art 15(1,2).

⁵⁵ McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 140.

stateless⁵⁶. The same body also has the mandate to prevent and reduce statelessness. As far as possible, de facto stateless persons shall be treated as de jure stateless so that they can acquire an effective nationality.

4.4 State Responsibility vs. The R2P-doctrine

*“ Climate change will invariably affect all countries to some degree, but its impacts are predicted to fall largely and disproportionately on the developing world. Smaller island nations will likely be the hardest hit, as they will literally shrink in size until they are engulfed completely by the oceans that surround them ”*⁵⁷

This section will attempt to clarify the burden of responsibility towards nationals whose small island state becomes uninhabitable and submerged. For the purpose of this task, a worst-case scenario is considered wherein the Pacific small island states of the Maldives, Kiribati and Tuvalu become fully submerged. Also consider that these states, due to the submergence, disappear and the people on them become stateless. The relevant question of issue would then be, where does the responsibility to guard the human rights of the displaced citizens lie?

The islands of the Maldives, Kiribati and Tuvalu are three states that have received great attention for their vulnerable geographical location and risk of becoming submerged. The Maldives is composed of 1,200 small coral islands and has an average altitude of about one meter above sea level⁵⁸. Kiribati consists of 33 coral atolls and has an average altitude of about two meters above sea level⁵⁹. Tuvalu is comprised of nine island atolls with an altitude ranging from one to five meters above sea level⁶⁰. All three states are particularly interesting in this context since their exposed location makes them a symbol for disappearing states. During the tsunami of 2004, the Maldives (located south of India) was almost fully submerged for a short

⁵⁶ McAdam, Jane. *Climate Change, Forced Migration, and International Law*. New York: Oxford University Press, 2012, p. 141.

⁵⁷ Duong, Tiffany T.V. When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law. *University of Pennsylvania Journal of International Law*, vol. 31 no. 4 (2010), p. 1241.

⁵⁸ Park, Susin. Climate Change and the Risk of Statelessness: The situation of Low-lying Island States. Report/Division on International Protection United Nations High Commissioner for Refugees. Geneva, May 2011, p. 1.

⁵⁹ Risse, Mathias. The Right to Relocation: Disappearing Island Nations and Common Ownership of the Earth. *Ethics & International Affairs*, vol. 23 no. 3 (2009), p. 281.

⁶⁰ Williams, Angela. Turning the Tide: Recognizing Climate Change in International Law. *Law & Policy*, vol. 30 no. 4 (2008), p. 515.

period of time⁶¹. Since then, 80 of the islands have been flooded by tidal surges. The citizens of Tuvalu have similar experiences from high tides and floods, which have increased dramatically from once a year to frequently battering the islands from November through March⁶².

All states are responsible of ensuring all individuals' human rights within their territory⁶³. However, when a state dissolves and the citizens of that state are forced to relocate, their government may not be able to fulfill its duties. It will be difficult for the citizens to demand their rights from a sunken state, but they might be able to demand it from another. States has a responsibility towards every human being to respect their basic human rights, not only their own citizens⁶⁴. The International Commission on Intervention and State Sovereignty (ICISS) proposed a similar principle in their report on "the Responsibility to Protect" (R2P)⁶⁵. The doctrine was founded upon the idea that states have a responsibility to protect its on citizens, and when they failed to do so, that responsibility becomes a task for the international community. Although generally being a measuring stick for how and when states should respond to grave human rights violations by another state towards its citizens, core elements of the doctrine is also applicable to assisting relocating citizens from a dissolving state due to climate changes. The three pillars, on which the doctrine relies, can be copied into the discourse on climate change in terms of how to respond appropriately to cases of sinking states. The responsibility to prevent entails the need of addressing the root causes as well as direct causes of any man-made crisis that puts a population at risk⁶⁶. It also calls for development assistance, international support for local initiatives and human rights. To initiate the mechanism of prevention, three conditions need to be met. The first one entails knowledge about the situation and the

⁶¹ Park, Susin. Climate Change and the Risk of Statelessness: The situation of Low-lying Island States. Report/Division on International Protection United Nations High Commissioner for Refugees. Geneva, May 2011, p. 9.

⁶² Duong, Tiffany T.V. When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law. *University of Pennsylvania Journal of International Law*, vol. 31 no. 4 (2010), p. 1247.

⁶³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art 2(1).

⁶⁴ Oliver, Selma. A New Challenge to International Law: The Disappearance of the Entire Territory of a State. *International Journal on Minority and Group Rights*, vol. 16 no. 2 (2009), p. 213.

⁶⁵ International Commission on International and State Sovereignty. *The Responsibility to Protect*. Report/International Commission on International State Sovereignty. Ottawa: International Development Research Centre, December 2001, p. 10.

⁶⁶ *Ibid*, p. 13.

risks tied to it, called “early warning”⁶⁷. The second one demands understanding of the policy measures needed to make a difference, this is called “preventative toolbox”. The third and final condition calls for willingness to apply those measures, called “political will”. The responsibility to react calls for response to situations of compelling human need with appropriate measures, whereas the responsibility to rebuild urges other states to provide full assistance with recovery, reconstruction and reconciliation⁶⁸.

Now, let’s continue the worst-case scenario with the disappearing small island states of the Maldives, Kiribati and Tuvalu but with the R2P doctrine implemented. Consider that these states are slowly sinking, forcing thousands of people to relocate in other states. The repeatedly flooding of farmland and fresh-water sources makes it impossible to inhabit the islands and the three states are incapable to stop the slow onset disasters themselves. The R2P doctrine is favorable in this type of situation, where the international community could be called upon. Working for a three-folded solution, preventive, reactive and reconstructive, common efforts are what it takes if we are to change our destructive path. Preventive measures should include reducing our anthropological impacts on the environment, such as the codifying, ratifying and fulfilling of international agreements regulating our GHG emissions. Notably, there are already such agreements including the Kyoto Protocol of 1997⁶⁹. The Kyoto Protocol is due to expire at the end of 2012, which forced countries to reach a conclusion in Doha at the climate conference of 2012, during which the decision was made to prolong the Kyoto Protocol⁷⁰. However, this decision does not remove the current threat of the impacts from climate change. The preventive measures of international protocols and agreements must be supplemented with reactive efforts to respond to environmental migration. These should include humanitarian assistance including food and shelter as well as long-term actions of a reconstructive nature. Peoples facing statelessness because of sinking states will have nowhere to return once their habitual residence is gone and that is a collective challenge for the

⁶⁷ International Commission on International and State Sovereignty. *The Responsibility to Protect*. Report/International Commission on International State Sovereignty. Ottawa: International Development Research Centre, December 2001, p. 36.

⁶⁸ *Ibid*, p. 13.

⁶⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 U.N.T.S 148, Art 2.

⁷⁰ UN Framework Convention on Climate Change. Outcome of the work of the Ad hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol. Conference Report/United Nations Office. Geneva, December 2012, para 1(4).

international community. Although all nations are sitting variously close to the railing on board the sinking ship, the impacts of climate change is indeed a threat shared beyond borders.

4.6 Human Rights Law

The rise in sea level poses a serious threat both the existence of several small island states, and the consequences for their populations. This unprecedented situation will challenge the existing international laws and their scope. The problem of what will happen to the citizens of a disappearing state is unclear and must be explored so that when this futuristic situation occurs; there will be answers to this important question. Since existing laws have not foreseen an event like this, common sense will have to lead the way until the laws have caught up. This section will explore the legal support of which the effected populations can expect when their states become submerged. Human rights law is a branch of international law that is aimed at protecting human rights⁷¹.

All human beings have human rights, but the degree of protection available depends on the situation. For instance, nationals have more claimable rights than refugees' aliens or stateless persons. Although states are obligated to not violate anyone's human rights, but whether they have an obligation to actively protect their rights is debatable. Citizens of a future disappearing state are therefore exposed to the risk of having some of their rights forfeited in the event of becoming stateless. "Nationality is the only link between individuals and their rights, benefits and duties of international law, and therefore a stateless human being is an object of international law for whom no subject of international law is responsible"⁷². One can "have" rights, but if nobody can protect or fulfill them when they are violated they become meaningless. It is therefore of great importance to make sure that when a state disappears, it's citizens do not become stateless. Since people relocating from disappearing states are not granted the status of refugees only two viable options are left. They can either receive a new nationality or they can maintain their original nationality. Maintaining their original nationality is only optional if it can be

⁷¹ Oliver, Selma. A New Challenge to International Law: The Disappearance of the Entire Territory of a State. *International Journal on Minority and Group Rights*, vol. 16 no. 2 (2009), p. 215.

⁷² Ibid, p. 216.

connected to a functioning state. Given the situation of a disappearing state, however, it is less likely to imagine the continuous functioning of a submerged state even with a government in exile. Instead, let's turn to the former option. Gaining a new nationality is solely a matter for the receiving state. Since no state is obligated to grant anyone asylum (due to the principle of non-intervention in domestic matters) it basically comes down to the mercifulness of the receiving state⁷³. This creates a difficult obstacle for the guarantee of full protection and may very well lead to a situation where the receiving state consider them to be aliens. Becoming aliens in a new state would surely entail a very basic set of rights although not enough to provide them with adequate long-term protection.

Although human rights law consists of many rights and correlative obligations, there are four particular human rights that are of especially high claimability in the case of disappearing small island states. These basic rights are most pertinent to the states of the Maldives, Kiribati and Tuvalu and will be explored in the following order: the right to life, the right to health, the right to food and water and indigenous peoples' right to self-determination and cultural expression. The right to life is the most basic and important human right of all and is considered to be a non-derogatory right⁷⁴. Being a non-derogatory right means that even in times of emergency, no derogation is allowed. The risk of becoming submerged could clearly constitute as a violation of the right of life, regardless of the fact that most people will relocate to other states prior to the actual submergence. Findings by the IPCC concerning the future risks for human beings in small island states was released in a substantiated report in 2007, wherein it was noted that inhabitants in these states faced an "increased risk of deaths and injuries by drowning in floods"⁷⁵. A conclusion from this report should be that the inhabitants in small island states face more than just the risk of being slowly submerged, sudden-onset disasters such as tsunamis pose a whole different, more imminent and deadly threat to these populations. However, the peoples on small island states may also suffer from inadequate protection of their right to health.

⁷³ Oliver, Selma. A New Challenge to International Law: The Disappearance of the Entire Territory of a State. *International Journal on Minority and Group Rights*, vol. 16 no. 2 (2009), p. 217.

⁷⁴ Duong, Tiffany T.V. When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law. *University of Pennsylvania Journal of International Law*, vol. 31 no. 4 (2010), p. 1255.

⁷⁵ Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. *Climate Change 2007: Synthesis Report*. Synthesis Report/IPCC. Geneva, November 2007, p. 52.

The right to health is in this case not directly concerned with the rising sea levels, but of some of the effects caused by it. Due to the effects of climate change, projections estimate that there will be an increased risk of vector-borne diseases and famine threatening the health of people on small island states⁷⁶. In the Universal Declaration of Human Rights (UDHR), article 25 guarantees the “right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services”⁷⁷. Although giving a broadly definition of health in this human right instrument, the increased risk of various diseases should fit in within the scope of “health and well-being” granted in this article. Moreover, losely within this definition is also the right to food and water, a right intertwined with the right to health.

In human rights law, there are some rights that are particularly strongly cemented. They are recognized to be of such status that they are referred to as non-derogable, meaning that even in times of war or public emergency states may not derogate from them⁷⁸. These rights are also suggested to be part of jus cogens, although which rights qualifies into this category vary between different international instruments. Two of these special status rights are of high relevance to this essay: the right to life and the right to self-determination. The right to life is often seen as the most important and basic human right of all. It is both universal and obligatory and is enshrined in every human rights instrument⁷⁹. In the case of disappearing small island states, the right of life is crucial since rising sea level will make it less and less possible to continue their indigenous way of life. In the end, many thousands of people will be forced to relocate to other countries as their states becomes fully submerged. For many inhabitants on pacific islands, including Kiribati and Tuvalu, land has a very special meaning. It has been described as “possessing a sacred or spiritual quality, expressed in the mental attitudes of Marshallese when they think of

⁷⁶ Duong, Tiffany T.V. When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law. *University of Pennsylvania Journal of International Law*, vol. 31 no. 4 (2010), p. 1256.

⁷⁷ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR), Art 25(1).

⁷⁸ Oliver, Selma. A New Challenge to International Law: The Disappearance of the Entire Territory of a State. *International Journal on Minority and Group Rights*, vol. 16 no. 2 (2009), p. 218.

⁷⁹ Duong, Tiffany T.V. When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law. *University of Pennsylvania Journal of International Law*, vol. 31 no. 4 (2010), p. 1256.

the land as the very root of their worldly existence”⁸⁰. Losing their land would therefore be considered as losing a part of themselves and their belonging. Likewise, the right to self-determination is of great importance to Pacific islanders. Their way of life are inextricably tied to their geographic environment and the loss of land would also mean the loss of their history and agricultural and subsistence lifestyle. Along with their territory and its governance, their self-determination would arguably sink.

5. Analysis

This chapter will focus on analyzing whether the current judicial instruments could be used to protect the most vulnerable group of environmentally displaced persons; people living in low-lying island states. In doing so, the method of content analysis will be applied to the two conventions for refugees and stateless persons as well as the R2P-doctrine. Klaus Krippendorff’s type of content analysis will provide the appropriate tools for the deconstruction of-, and interpretation of the primary sources. The first option is the refugee convention, which has been recurrent as a plausible alternative in the protection of the so-called “climate refugees”. Following the refugee convention, the stateless convention is particularly relevant to the people migrating from sinking island states. The third option is more controversial in nature, the R2P-doctrine with its controversial application in the context of EDPs. However, as previously outlined, elements of this doctrine may very well be favorable to the case of people living in low-lying island states.

5.1 The Refugee Convention

The legal term refugee is sometimes combined with the phenomenon climate change to describe people who are forced to move because of serious changes in their environment (climate refugee). Although the term itself might be politically useful, it carries no legal weight and is misleading. The refugee convention has a very clear-cut definition of a refugee; one that does not include environmentally displaced persons neither climate refugees. Instead, its definition revolves around “a well-founded fear

⁸⁰ Campbell, John, Climate-Induced Relocation in the Pacific: The Meaning and Importance of Land In *Climate Change and Displacement: Multidisciplinary Perspectives*, McAdam, Jane (ed). Oxford: Hart Publishing, 2010, p. 61.

of persecution” on account of “ race, religion, nationality, membership of a particular social group or political opinion”. One of the most critical elements of this convention within the context of EDPs is what is understood as persecution. Advocates for the inclusion of EDPs within the convention has argued that impacts from climate change such as rising sea levels, coastal erosion and the increase sudden onset disasters would amount to persecution. Surely, the impacts of climate change are severe and sometimes deadly but there is no clear perpetrator to blame for the effects of climate change. Arguably, the developed states may be more responsible to some degree, but since all states emit pollutions and GHGs it would be almost impossible to single out countries that would be more or less responsible. In the context of climate change, the principle of common but differentiated responsibilities is a great example of inter-state agreements on important issues.

Climate refugee supporters have subjected the five grounds set forth in the refugee convention to interpretation. Citizens of sinking states who claim different treatment than their fellow citizens as a basis for receiving refugee status have not succeeded largely because they have failed to prove discrimination on account of one of the five grounds (race, religion, nationality, membership of a particular social group or political opinion). The plausible receiving countries have argued that all citizens face the same problems and that the forces of nature primarily are responsible for their problems. The lack of medicines and shortage of drinkable water also affect citizens indiscriminately and no apparent harm could be derived to their civil or political status. Furthermore, climate change is largely indiscriminate in the sense that it’s effects have impacts on countries across the globe. Some countries will be more affected than others because of geographic location but the phenomenon itself does not pick and choose based on nationality, physical traits or group belongings.

The rejection of including EDPs as climate refugees into the refugee convention comes in many forms. Peoples of pacific island states strongly oppose any attempt to be placed within the climate refugee term because of the perceived stigmatization that comes with it. Their opinion is that the term itself is coated with a distinctive sense of helplessness and lack of dignity, which further victimize people who migrate due to effects of climate change. This absolute perspective can possibly be derived from their strong and traditional sense of pacific pride. A proud people will likely feel diminished when their self-image is challenged by characteristics they do not recognize or accept. Moreover, their concern is that any restoration of the

anthropological-induced climate change should be because their rights have been violated and the obligation to fulfill them has failed. Naturally, small island states generally regard climate change as a developed-world caused phenomenon for which island states have become unfortunate victims. Blaming the developed countries may however not be too far away from the truth since their industrialization process and consumption pattern demands production which in turn causes great GHG emissions.

The refugee convention is, although not suitable for environmentally displaced persons, still a legal framework from which two specific ideas and intentions can be borrowed. The principle of non-refoulement is an example where the protection of vulnerable individuals wins over political reluctance. Applying the principle on environmental situations outside the originally intended scope would mean an extra layer of protection for migrants moving from sinking states. The importance of being accepted by a receiving state cannot be understated since the EDPs future survival and life today might depend on the mercifulness of a state. The definition of a refugee as someone who has crossed an internationally recognized boarder is the other element that should be inserted in a similar treaty for EDPs. Since relocation within a state's territory is only a domestic concern, such movement should not be subject for an international treaty on the assistance of EDPs. Moreover, people displaced due to natural or man-made disasters within a state territory already benefit protection through the UNHCRs Guiding Principles on Internal Displacement. Therefore, the primarily concern is for the protection of environmentally displaced people who will cross an internationally recognized boarder rather than national displacement. The refugee convention as formulated today does not provide protection for environmentally displaced people, nor was it intended to. The most persuasive evidence for the narrow scope of the definition refugee is the element of persecution and the five stipulated grounds that leaves no or little room for interpretation. Even if the convention would include environmentally displaced people, many reject being called refugee. However, the convention provides some interesting elements that can be used to compose a treaty or similar legal protection for environmentally displaced people, most notably the principle of non-refoulement and the definition as someone who has crossed an international boarder.

5.2 *Stateless Convention*

In the event of a sinking or disappearing state, there is no guidebook as to when the state will lose its statehood and its people will become stateless. Although there are generally agreed principles for what a state is (a defined territory, a permanent population, an effective government and the capacity to enter into relations with other states) it is usually more difficult to assert when a state does not exist. There have been cases where states objectively would have lost their state recognition but in reality continued to be recognized as a state. It is not always easy to determine whether a state exists in reality due to different interpretations of the four criteria of statehood. A sunken state could in practice have a government in exile, which for some time could be effective. In that case, the sunken state could enjoy its sovereignty more or less intact. Despite a state's continued sovereignty, its population would nonetheless need assistance and protection of their human rights which would be more difficult than maintaining diplomatic relations with other states.

The dilemma in the case of disappearing states and human rights for its populations is whether the state is recognized as a state or not and if it, in reality, can protect its people. The state can be unable to effectively function and for some time, still be recognized as a state de facto. This can have problematic consequences for the protection of its population since they might not qualify as stateless and therefore not receive the full protection from the Convention Relating to the Status of Stateless Persons. If they do not qualify as de facto or de jure stateless and their government in reality cannot protect them they become trapped in a legal grey zone. According to humanitarian law, states are obligated to protect everyone's human rights but it is unclear how actively a state must do so. Moreover, since disappearing small island states will not sink overnight, populations of those states may have to relocate long before the physical submergence of the territory due to tsunamis, cyclones or coastal erosion. In the interim, people will be most likely have to relocate while the physical territory of their state is above water leaving them with the only protection offered by human rights law. Since they cannot relocate within their country, they do not qualify as either IDPs or refugees (because of the narrow definition in CRSR). The UNHCR, which has the mandate to prevent and reduce statelessness, face an unprecedented situation in the event of disappearing states. People relocating from these states will need extensive assistance ranging from housing, medical care, food and water to

employment and schooling for a long period of time, possibly permanent. Furthermore, people whom are receiving protection or assistance from an UN organ do not qualify as stateless according to the Convention Relating to the Status Stateless Persons. This will leave thousands of people migrating from sinking states in a legal limbo where they cannot get protection from the convention because they receive assistance from the UN.

The function of the international protection system is designed so that the full protection from the convention cannot be granted to people who are receiving temporary assistance from the UN, which in turn will make the temporary assistance permanent and the full protection unreachable. Although well intended, the convention on stateless persons does not provide adequate protection for the people who might become stateless. It is unclear whether the international community would recognize a state's disappearance in time for the convention to effectively protect the population.

5.3 *The R2P-doctrine*

The responsibility to protect citizens of other states when the own government is unable or unwilling to is primarily a last resort of humanitarian intervention. The idea that third-party states can violate another state's sovereignty by force (if necessary) is however not the proposal in this case. Instead, the application of this doctrine in cases of sinking states and displaced persons rather entail international humanitarian aid than a military intervention. There are several small island states that face serious challenges in protecting the human rights of their populations. Although these states are willing to protect their civilians, the challenges they face may be too great. The climate change is a great example of this. Without doubt, the adverse effects of climate change will force people across the globe from their original habitat, leaving them with little protection. Especially those who have to relocate from sinking states will need great help to be integrated outside their country's territory. The proposal at hand is therefore to extract specific elements from the R2P-doctrine and apply to the protection of EDPs. More specifically, the responsibility to prevent entails all necessary actions to reduce GHG-emissions, including the codification and fulfillment of climate agreements. The condition of early warning requires knowledge about the situation, which definitely exists in the sinking-states context. The

understanding of policy measures that can be implemented calls for a constructive dialogue between affected states and international organs. This is absolute crucial to the third condition of enabling political will. The gathering of information and knowledge about how climate change affects populations living on low-lying island states is decisive to the gathering of political will and is pre-requisite in the implementation of appropriate actions. The responsibility to react entails responsive actions to reduce and prevent statelessness, reception of EDPs, humanitarian aid and protection of human rights. The responsibility to rebuild would call for actions to grant citizenship, allow for permanent relocation of displaced persons and activate efforts to integrate newcomers.

The core principles of the R2P-doctrine are what make it useable for EDPs. The responsibility to protect people living on low-lying island states from becoming aliens without a nationality, dispersed over the globe is not science fiction. The responsibility to prevent climate change from displacing citizens of the Maldives, Kiribati and Tuvalu must be activated throughout the world in accordance with climate protocols. The responsibility to react to climate change and its adverse effects on human life is equally important and should not be viewed as any different from the state obligations towards human rights in all states. The responsibility to rebuild must be further explored since this will be crucial when the number of EDPs increase.

5.4 Analytical conclusion

Environmentally displaced persons do not benefit from any specific protection besides the general human rights obligations infringed upon states. There are several legal instruments that indicate protection for EDPs but the analysis of those, primarily the refugee convention and the statelessness convention, reveals that displaced peoples are in a legal grey zone. The refugee convention defines a refugee so explicitly and narrowly so that EDPs cannot be included. There have been suggestions for persecution from negative environmental impacts, but these were met with great skepticism since they didn't contain discriminatory elements. In reality, climate change strikes without distinction to race, religion, nationality, and membership of a particular social group or political opinion.

There is however elements of the refugee convention that would be useful for a new legal instrument focused on the protection of EDPs. Most significant is the

principle of non-refoulement. This principle emphasize that a State may not expel a refugee in any manner whatsoever to a country in which his life or freedom could be threatened. Although EDPs are not persecuted, their freedom and life is of equal concern and may very well be threatened by tsunamis, increased salinization, sea level rise or other effects of climate change.

The statelessness convention is another legal instrument that have been explored and analyzed. In the worst-case scenario of sinking states, the impression was initially that this could be applied to protecting EDPs. However, as this essay evolved and more information was processed it became clear that this would be problematic in two aspects. First, the question of if and when a state would lose its statehood due to the whole disappearance of its territory revealed a complicated political element. Typically, states do not disappear but if this would happen there is great disagreement amongst academics about when the actual loss of statehood would occur. There have been cases where states have been dissolved but still has continued to engage in international relations despite the loss of a statehood criterion. Even if a state would be internationally recognized as disappeared or dissolved, there would still be a remaining challenge for its citizens. The convention is so articulated that if a former citizen receives assistance or protection from a UN organ, the rights within the convention will not protect this person. These two features regarding statelessness formulate the inadequacy of the convention.

The R2P-doctrine was included in this essay as a protective wild card for EDPs. It is not intended to be put into context with climate change and do not explicitly offer protection for environmentally displaced persons. It can instead be argued that its purpose is to violate rather than assist, however I've found convincing backing for the concern and protection of human life within the doctrine. These backings have also been referred to in previous chapters.

The doctrine contains three important elements that I have claimed to be useful for the protection of EDPs. These are the principles of responsibilities to prevent, react and rebuild. They are fundamental for the whole doctrine and are repeatedly pronounced which is why I have attached great importance to them. I strongly claim that they can be used to create a legal framework for EDPs, but I doubt that the whole doctrine as intended and formulated today could convince states to protect people living in low-lying states. It would rather be more effective if extracted from its current context and applied in a specified legal framework for EDPs.

6. Discussion

Before I summarize this essay, my contributions to the discourse of protection for EDPs and reflect upon any shortcomings in my work, I will present the beginning of a protective framework for environmentally displaced persons. The proposed framework will be focused on how to appropriately protect EDPs as I have defined them earlier. The following premises define the framework:

- For the purpose of this framework, an environmentally displaced person is anyone who, due to the effects of climate change, is forced or motivated to migrate across an internationally recognized boarder and from the climate change? is exposed to danger to life, limb and health.
- Climate change has real impact on human lives and its effects are adverse. The protection of people from this phenomenon demands united and coordinated efforts from all states and across hierarchical structures.
- States are first and foremost responsible for fulfilling commitments aimed at reducing climate change, including preventive, reactive and rebuilding actions in accordance with human rights and international law. Any failure to realize these commitments domestically infers responsive actions by the international community to protect the population. The responsive actions do not entail any form of military intervention.
- If an environmentally displaced person enters a state's territory without permission, the state may under no circumstances expel the person to a state in which his life or freedom would be threatened.

This framework is intended to provide protection for all EDPs included in the definition above. It does not include internally displaced persons for the reason that there is already guiding principles covering them. It is built upon features from existing conventions, which have been extracted and put into a different context. Although this framework is rather simple and undeveloped, it shows that the pieces needed to protect EDPs already exist, but perhaps not where one would usually look. This framework should however not be viewed as an attempt to

create a legal instrument but rather as a conceptualization on the protection of EDPs.

This essay has sought to explore and analyze the current protection of environmentally displaced persons. In doing so, legal texts have been subject for analysis to determine whether the current international legal instruments can be used to protect EDPs. My result shows that they cannot protect this group. When I began my research on this subject I did not expect to discover how little legal protection there is for people who are forced out of their country due to the effects of climate change. I have learned that there is currently millions of stateless persons and this clearly reflect my result. The protection is inadequate and that needs to change. This essay has been confined to a very small amount of legal documents and this might affect the outcome of the result. However, the contribution I've made to the discourse of climate change can contribute to a more thorough investigation on the legal protection of the aforementioned group. I am still very much intrigued on how this protection can be improved. I therefore hope this subject could be brought to light by my research and wish for an international organization to explore this further.

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