



FACULTY OF LAW
Lund University

Rui Johnson Petri

Climate Change, Displacement and Human Rights

The Principle of *Non-Refoulement* and the Right to Life in the Context of
Climate Change

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws Program
30 Higher Education Credits

Supervisor: Jessica Almqvist

Semester of Graduation: Fall Semester 2020

ABSTRAKT

Migration är en oundviklig och betydande konsekvens av klimatförändringar. Varje år tvingas millioner människor lämna sina hem i kölvattnet av katastrofer och fler väntas migrera i takt med att klimatförändringar ökar i frekvens och magnitud. Det saknas dock rättsliga mekanismer för att gripa an klimatrelaterad migration. Därmed syftar uppsatsen till att kritiskt undersöka i vilken utsträckning principen om *non-refoulement* i samband med rätten till liv kan skydda människor som flyr på grund av klimatförändringar. Genom att analysera den internationella flyktingsregimen, drar uppsatsen slutsatsen att det finns ett rättsligt vakuum vad gäller klimatrelaterad migration. Mot denna bakgrund framstår den internationella regimen för mänskliga rättigheter som ett alternativt, komplementärt skydd genom principen om *non-refoulement* och rätten till liv. Uppsatsen analyserar tre scenarier i vilka en kränkning av rätten till liv kan ge upphov till *non-refoulement* förpliktelser. Den drar slutsatsen att *non-refoulement* erbjuder visst skydd för klimatmigranter, men att vissa begränsningar hindrar principen från att aktualiseras. Dels är tröskeln för en kränkning av rätten till liv mycket hög, dels anses inte gradvisa hot som härrör från långsam klimatförändring vara tillräckligt överhängande. Ett antal åtgärder föreslås för att förbättra och stärka principen om *non-refoulement*. Uppsatsen undersöker även huruvida klimatmål, så kallad 'climate change litigation,' kan utveckla och utvidga skyddet för klimatmigranter. Analysen visar att klimatmål kan skapa formella regleringar, samt generera nödvändiga normativa förändringar kring klimatrelaterad migration. Fram till att det internationella samfundet antar nya, bindande instrument för att skydda individer som flyr på grund av klimatförändringar, argumenterar uppsatsen att klimatmål och domstolar är en plats där vårt fokus borde vara.

Nyckelord: klimatrelaterad migration, principen om *non-refoulement*, mänskliga rättigheter, rätten till liv, climate change litigation

Antal ord: 19 618

ABSTRACT

Millions of people are displaced annually due to environmental stress and degradation, causing them to move in prospects of a sustainable livelihood. However, given the lack of mechanisms and systems to provide legal protection for displaced individuals, the future of such migrants is uncertain. Using a human rights-based approach, this thesis critically examines whether the principle of *non-refoulement* based on the right to life protects individuals displaced across borders by the impacts of climate change. Through an analysis of the international refugee regime, the thesis concludes that a legal lacuna exists due to difficulty conceptualizing climate change-related movement within the refugee definition. As such, complementary protection under the human rights regime by the principle of *non-refoulement* in light of the expanding protection on the right to life emerges as a possible alternative. The thesis conducts an in-depth analysis of three scenarios in which a violation of the right to life may trigger *non-refoulement* obligations. While a path for protection is identified, it is arguably more theoretical than practical. Two obstacles — a high threshold for establishing a violation of the right to life and the concept of ‘imminence’ — constrict the utility of the principle of *non-refoulement*, especially in the context of slow-onset environmental degradation. These challenges are critically analyzed, which generates several pathways to enhance and strengthen protection. Recognizing these limitations, the thesis examines the potential contribution of climate change litigation in developing and expanding the law. The findings show that in addition to formal regulatory effects, litigation can generate normative shifts necessary for change. Until the international community adopts new, binding instruments to protect individuals displaced by climate change, the thesis concludes that climate change litigation is one place where our focus should be.

Keywords: climate change-related displacement, the principle of *non-refoulement*, human rights, right to life, climate change litigation

Word count: 19 618

ACKNOWLEDGEMENTS

Completing this thesis would not have been possible without the privilege of receiving the support and encouragement one can wish for. Therefore, I would like to take this opportunity to give thanks to those who made this thesis possible.

To begin with, I would like to thank my supervisor, Jessica Almqvist, for her invaluable support, comments and critique in taking this thesis from humble beginnings into the completed work it is today. Her availability and advice have been crucial for the writing process, as well as my personal growth as an aspiring human rights advocate.

On a personal note, the boundless support and encouragement I have received from my parents over the years has taught me to persevere and keep on going, even when things seemed more murky than clear. Without them, completing my degree and finishing this thesis would not have been possible.

Stockholm, January 2021

TABLE OF CONTENTS

Abstrakt.....	1
Abstract.....	2
Acknowledgements.....	3
List of Tables	6
List of Abbreviations	7
1 Introduction.....	9
1.1 Climate Change — A Multifaceted Reality.....	9
1.2 Purpose and Research Question.....	11
1.3 Previous Research and Contribution of the Thesis.....	12
1.4 Delimitations.....	13
1.5 Methodology and Material	14
1.6 Structure of the Thesis	16
2 The Broader Context of Climate Change and Human Mobility	18
2.1 Introduction.....	18
2.2 The Impacts of Climate Change	18
2.3 Conceptualizing Climate Change-Related Displacement.....	20
2.4 Concluding Remarks	23
3 Avenues of International Protection	25
3.1 Introduction.....	25
3.2 The Refugee Convention in the Context of Climate Change	25
3.3 Complementary Protection under Human Rights Law.....	28
3.3.1 Human Rights and Climate Change	29
3.3.2 The Principle of <i>Non-Refoulement</i>	31
3.3.3 Protecting Individuals Displaced by Climate Change.....	33
3.4 Concluding Remarks	36

4	The Principle of <i>Non-Refoulement</i> and the Right to Life in the Context of Climate Change	37
4.1	Introduction.....	37
4.2	Meeting the Admissibility Requirements	38
4.3	Substantiating a ‘Real Risk of Irreparable Harm’	39
4.3.1	Situations of General Violence	40
4.3.2	Threats to Socioeconomic Rights	42
4.3.3	Overpopulation and Sea-level Rise	44
4.4	Limitations and Challenges	45
4.4.1	An Unreachable Threshold?	45
4.4.2	‘Imminence’ and Slow-Onset Environmental Degradation	47
4.5	Climate Change Impacts as Cruel, Inhuman or Degrading Treatment?	51
4.6	Concluding Remarks	52
5	Climate Change Litigation — A Strategic Next Step?	56
5.1	Introduction.....	56
5.2	Current Developments on Climate Change-Related Displacement.....	57
5.3	The Turn to Climate Change Litigation.....	59
5.3.1	A Brief Survey of Key Cases.....	60
5.3.2	Understanding Potential Impacts	61
5.4	Concluding Remarks	64
6	Findings and Conclusions.....	66
	Bibliography	68
	Treaties and Other Instruments.....	77
	Table of Cases.....	78

LIST OF TABLES

Table 1. Typology for climate change-related drivers of migration	21
Table 2. Effects of climate change on human rights	30
Table 3. Thresholds engaging the principle of <i>non-refoulement</i> in the context of climate change owing to a risk to the right to life.....	53

LIST OF ABBREVIATIONS

CAT	Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment
COP	Conference of the Parties
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HR Council	United Nations Human Rights Council
HRC / Committee	United Nations Human Rights Committee
I-ACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IDMC	International Displacement Monitoring Centre
ILC	International Law Commission
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
Nansen Initiative	Nansen Initiative on Disaster-Induced Cross-Border Displacement
NAPA	Kiribati National Adaptation Program of Action
OCHA	Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the High Commissioner of Human Rights
Refugee Convention	1951 Convention Relating to the Status of Refugees
SIDS	Small Island Developing States
UN	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme

UNFCCC

United Nations Framework Convention on
Climate Change

UNHCR

United Nations High Commissioner for Refugees

1 INTRODUCTION

1.1 CLIMATE CHANGE — A MULTIFACETED REALITY

Climate change-related displacement — the forced movement of individuals and communities due to the adverse effects of climate change — is one of the most pressing and potentially existential challenges of the twenty-first century. The impacts of climate change are experienced globally and are “reshaping irrevocably migration patterns on all continents.”¹ As recent as November 2020, the United Nations High Commissioner for Refugees (UNHCR) Special Advisor on Climate Action stated that:

Climate change is the defining crisis of our time and its impacts are unevenly weighted against the world’s most vulnerable people. Displaced and stateless people are among those in greatest need of protection.²

While the reason to migrate is multicausal and complex, climate change should not be underestimated as a “threat multiplier” and an “objective and autonomous” factor in the decision to move.³ The Internal Displacement Monitoring Centre (IDMC) estimates that, in 2019, weather-related hazards triggered approximately 24.9 million displacements in 140 countries, of which 23.9 million were weather-related, including extreme temperatures, droughts, floods, and storms.⁴ Research shows that without ambitious climate action and disaster risk reduction, “the number of people affected by climate change (...) could almost double by 2050.”⁵ Small Island Developing States (SIDS) are among the most vulnerable to the effects of climate change. The Intergovernmental Panel on Climate Change (IPCC), an international scientific body organized to assess the risks of climate change, has stated that

¹ IOM, ‘Climate Change and Migration in Vulnerable Countries: A snapshot of least developed countries, landlocked developing countries and small island developing states’ (2019) 1.

² Tim Gaynor, ‘Climate change is the defining crisis of our time and it particularly impacts the displaced’ (UNHCR, 20 November 2020) <www.unhcr.org/news/latest/2020/11/5fbf73384.html> accessed 9 December 2020.

³ Isabel Borges, *Environmental Change, Forced Displacement and International Law: From Legal Protection Gaps to Protection Solutions* (Routledge 2018) 18.

⁴ IDMC, ‘GRID 2020: Global Report on Internal Displacement’ (April 2020) 4.

⁵ International Federation of the Red Cross, ‘The Cost of Doing Nothing’ (Geneva 2019) 5.

due to rising sea-levels, low-lying island states will increasingly experience adverse impacts, such as submergence, coastal flooding, and coastal erosion.⁶ If sea-levels rise by one meter by 2100, many islands could become completely uninhabitable, displacing tens of thousands.⁷

In recent years, there has been increasing political recognition of the need to address the impacts of climate change on human mobility.⁸ Processes such as climate change adaptation and mitigation measures, disaster preparedness, and disaster risk reduction form part of an evolving global policy awareness.⁹ However, these steps might not suffice when climate change impacts force individuals to migrate across borders. The complexity of human mobility in this context stretches the prevailing conception of displacement. The 1951 Convention Relating to the Status of Refugees (Refugee Convention) does not recognize the status of people displaced by the adverse effects of climate change.¹⁰ To this end, the human rights regime emerges as a possible avenue for protection as the effects of climate change threaten the enjoyment of human rights.¹¹ In the recently published decision *Teitiota v. New Zealand*, the UN Human Rights Committee (HRC) explicitly recognized that climate change impacts *per se* on the right to life in the country of origin might trigger states' *non-refoulement* obligations.¹² The current head of the UNHCR described the decision as meaning that:

(...) if you have an immediate threat to your life due to climate change, due to the climate emergency, and if you cross the border and go to another country, you should not be sent back because you would be at risk of your life, just like in war or in a situation of persecution.¹³

The UN Office of the High Commissioner for Human Rights (OHCHR) heralded the case as a “historic” decision that “opens [the] door to climate

⁶ IPCC, 2014: *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* [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds)] (Cambridge University Press 2014) [hereinafter *Climate Change 2014: Synthesis Report*] 17.

⁷ IPCC, 2014: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Barros, V.R., C.B. Field, D.J. Dokken, M.D. Mastrandrea, K.J. Mach, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.)] (Cambridge University Press 2014) [hereinafter *Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part B*] 1618.

⁸ IOM, ‘Climate Change and Migration in Vulnerable Countries’ (n 1) 7.

⁹ *ibid* 8.

¹⁰ Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press 2012), 50-51; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

¹¹ UNHCR, ‘Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters’ (1 October 2020) para 2.

¹² *Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016 (7 January 2020) [hereinafter *Teitiota v. New Zealand*].

¹³ Luke Baker, ‘World needs to prepare for “millions” of climate refugees – UN’ (*Financial Post*, 21 January 2020) <<https://financialpost.com/pmn/business-pmn/world-needs-to-prepare-for-millions-of-climate-refugees-un?r>> accessed 9 December 2020.

change asylum cases.”¹⁴ However, as the facts in the case did not meet the “high threshold” for proving that a real risk of a violation of the right to life existed, the decision generates several legal questions.¹⁵ What kind of protection, if any, are they entitled to? In the event of cross-border displacement due to climate change, can the principle of *non-refoulement* accommodate protection for the affected individuals? If so, under what circumstances? These questions warrant further analysis, which the present thesis will attempt to discern and critically examine.

1.2 PURPOSE AND RESEARCH QUESTION

A groundswell of international instruments over the past decades has recognized the nexus between climate change and displacement. Notably, the HRC’s decision in *Teitiota v. New Zealand on non-refoulement* and the evolving interpretations of the right to life have advanced contemporary scholarship on the legal protections owed.¹⁶ This thesis seeks to critically examine the principle of *non-refoulement* and how the so-called ‘slow violence’ of climate change is understood in that context.¹⁷ The right to life is used as a point of departure, although other, interlinked rights are also considered since human rights are indivisible, interdependent, and interrelated.¹⁸ While several international and regional bodies have recognized that the adverse effects of climate change threaten the right to life, no court to date has found a violation of the right in non-removal cases. It is precisely this discrepancy and the ambition to critically analyze it, more in-depth than has been achieved so far, that constitutes the thesis’ purpose. In order to achieve the outlined aim, the thesis is guided by the following research question:

Under what circumstances and to what extent might the principle of *non-refoulement* based on the right to life protect individuals displaced across borders by the impacts of climate change?

¹⁴ OHCHR, ‘Historic UN Human Rights case opens door to climate change asylum claims’ (OHCHR, 21 January 2020 <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482&LangID=E> (accessed 8 October 2020).

¹⁵ *Teitiota v. New Zealand*, para 7.3.

¹⁶ *Teitiota v. New Zealand*; See Jefferi Hamzah Sendut, ‘Climate Change as a Trigger of Non-Refoulement Obligations under International Human Rights Law’ (*EJIL:Talk*, 6 February 2020), <www.ejiltalk.org/climate-change-as-a-trigger-of-non-refoulement-obligations-under-international-human-rights-law/> accessed 6 November 2020; Jane McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (2020) 114:4 *American Journal of International Law* 708.

¹⁷ Coined and defined by Rob Nixon as “a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all.” See Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2011) 2.

¹⁸ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 (A/CONF.157/24 [Part I]), Chapter III.

The following four sub-questions help to target the research:

1. How is the relationship between climate change and human mobility conceptualized? (Chapter 2)

The first sub-question mandates an exploration of what propels movement in the context of climate change to understand the depth and breadth of human mobility and how to formulate an adequate international legal response.

2. How is climate change-related displacement addressed within the international refugee regime and what is the complementary function of the international human rights regime in this context? (Chapter 3)

Addressing the applicability of the Refugee Convention — the cornerstone of the international protectionary framework — is an essential starting point in the context of climate change-related displacement in order to shed light on protection limits and potential gaps. This leads to a critical examination of the international human rights regime's function in this context and its potential for future developments.

3. Under what circumstances do states have *non-refoulement* obligations under the right to life in the context of climate change? (Chapter 4)

The third sub-question constitutes the core analysis of the thesis. It seeks to understand the specific obligations states have under the principle of *non-refoulement* based on the right to life. The recent case *Teitiota v. New Zealand* guides the analysis of the threshold for a violation of the right to life and the 'real risk' test for assessing the harm feared.

4. What is the potential contribution of climate change litigation in developing the law on the protection of individuals displaced by climate change? (Chapter 5)

The final question examines climate change litigation as a potential pathway for developing the law on climate change-related displacement, including the principle of *non-refoulement* in conjunction with the right to life.

1.3 PREVIOUS RESEARCH AND CONTRIBUTION OF THE THESIS

Since the 1980s, the relationship between migration and climate change has earned growing attention because of its political sensitivity, humanitarian

significance, and high degree of complexity.¹⁹ Over the years, the literature on the topic has proliferated, with research coming to different and contrasting results about the number of people that migrate due to climate change and the very nature of the phenomenon, among other things.²⁰ Recognizing the Refugee Convention's conceptual limitations to address climate change-related displacement, scholars have long pointed out the capacity of the principle of *non-refoulement* under human rights law to protect people fleeing the impacts of climate change.²¹ Despite scholarly work on *non-refoulement* within the human rights regime, including "Climate Change, Forced Migration and International Law" by McAdam and the report "International Law and Sea-Level Rise: Forced Migration and Human Rights" by McAdam, Burson, Kälin and Weerasinghe, the principle as inferred by the right to life has received less focused attention.²² This thesis aims to contribute to existing scholarship by conducting an in-depth and critical examination of the principle in light of the expanding protection of the right to life. By doing so, the thesis hopes to illuminate key considerations and pathways for determining whether a person seeking refuge from the adverse effects of climate change may be offered protection.

1.4 DELIMITATIONS

The thesis focuses on the principle of *non-refoulement* as inferred by the right to life. This is a conscious choice, mainly stemming from the lack of detailed research on its scope in conjunction with non-removal claims. The analysis primarily focuses on the right to life as enshrined at the international level in Article 6 of the ICCPR.²³ Other international and regional sources, such as the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights, and the American Convention on Human Rights, are not considered in the thesis although they constitute essential legal standards. However, it is necessary to note that states also have *non-refoulement*

¹⁹ The first recognition within the UN system of the phenomenon was by Essam El-Hinnawi. See Essam El-Hinnawi, 'Environmental Refugees,' UNEP <<https://digitallibrary.un.org/record/121267>> accessed 8 October 2020.

²⁰ See Hugo Graeme, 'Environmental Concerns and International Migration' (1996) 30 *International Migration Review* 105; Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010); Dimitra Manou et al. (eds), *Climate change, migration and human rights: law and policy perspectives* (Routledge 2017); Giovanni Sciacaluga, *International Law and the Protection of "Climate Refugees"* (Palgrave Macmillan 2020); More recently, the potential of human rights obligations in providing a basis for state responsibility has begun to garner more detailed attention, see Margarethe Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing 2020).

²¹ McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement' (n 16) 709.

²² McAdam, *Climate Change, Forced Migration and International Law* (n 10); Jane McAdam et al., 'International Law and Sea-Level Rise: Forced Migration and Human Rights' (Fridtjof Nansen Institute Report No. 1 2016); See also: Eman Hamdan, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Brill 2016).

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

obligations in conjunction with the substantive right not to be subjected to torture, inhuman or degrading treatment. The thesis only briefly deals with this subject. As such, sources of interpretation for the principle of *non-refoulement* in this context, including the Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment (CAT) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR), are dealt with only in passing.

The risk assessment conducted in *non-refoulement* claims is similar regardless of the substantive right. Therefore, the thesis analogously considers the European Court of Human Rights' (ECtHR) interpretation of *non-refoulement* under the prohibition against torture in Article 3 of the European Convention of Human Rights (ECHR) since its case-law is the most developed on this matter.²⁴

Both sudden-onset disasters, such as flooding, windstorms, or mudslides, and slow-onset environmental degradation, including long-term effects caused by rising sea-levels, or salinization of groundwater and soil, can propel migration based on climate change-related harm and trigger the principle of *non-refoulement*.²⁵ However, the thesis focuses on the latter. Sudden-onset events often result in temporary or protracted displacement.²⁶ In contrast, slow-onset environmental degradation is more likely to cause permanent displacement due to longer-lasting or potentially irreversible damage to the environment.²⁷ Slow-onset processes may trigger pre-emptive migration in anticipation of climate impacts, potentially creating distinct human rights protection needs under different areas of international law, which the thesis aims to investigate.

1.5 METHODOLOGY AND MATERIAL

The thesis primarily employs the legal dogmatic method to conduct a doctrinal analysis of the existing international legal protection of individuals displaced by climate change *de lege lata*. The purpose of legal dogmatics is to obtain “a coherent picture of the law” by employing descriptive, logical, and normative steps.²⁸ At a practical level, the method involves “the careful reading and comparison of appellate opinions with a view to identify ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holding, and otherwise exercising the characteristic skills of legal analysis.”²⁹ Primary and secondary sources are

²⁴ McAdam, *Climate Change, Forced Migration and International Law* (n 10) 55.

²⁵ Walter Kälin, ‘Conceptualising Climate-Induced Displacement’ in Jane McAdam, *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 85.

²⁶ OHCHR, ‘The Slow onset effects of climate change and human rights protection for cross-border migrants’ (22 March 2018) UN Doc A/HRC/37/CRP.4, para 17.

²⁷ *ibid.*

²⁸ Aleksander Peczenik, ‘A Theory of Legal Doctrine’ (2001) 14 *Ratio Juris* 75, 79.

²⁹ Suzanne Egan, ‘The doctrinal approach in international human rights law scholarship’ in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (Routledge 2018) 25.

interpreted using several legal reasoning techniques, including *deductive* reasoning from one or more legal rules to reach a logically coherent conclusion and *inductive* reasoning from a series of cases to generate a general principle or rule.³⁰ If it is not clear that a legal principle applies to a particular set of facts, a process of reasoning by *analogy* may be used whereby one examines similar cases that apply a specific rule and analyzes whether the case under consideration would be treated similarly.³¹

The thesis' legal analysis is based on a reading of relevant primary and secondary sources within international law. According to Article 38 of the Statute of the International Court of Justice, the three main sources of international law are international treaties, international customs, as evidence of a general practice accepted as law, and the general principles of law. The same provision identifies judicial decisions and 'the teachings of the most highly qualified publicists' as subsidiary means for determining the law. For the purpose of the thesis, the Refugee Convention and the ICCPR constitute the primary sources. Relevant decisions and interpretations by human rights treaty bodies, particularly the HRC, are surveyed as subsidiary means for determining the law. Regional case-law from the ECtHR and the ECHR is also consulted as it is the most developed concerning the principle of *non-refoulement*.³² Other secondary sources, including documents by international bodies, such as the International Organization for Migration (IOM), OHCHR, and UNHCR, are also considered in the legal analysis. The role of legal doctrine is vital for critically examining the principle of *non-refoulement* and the right to life in the context of climate change. Non-legal doctrine is also consulted in a heuristic way to shed light on conflicting understandings of core concepts. However, it does not affect the legal conclusions made in the thesis. Additional sources, such as news and media, illustrate the broader context of climate change and migration and inform the analysis.

The legal dogmatic method is combined with a human rights-based approach. This approach examines climate change-related displacement from "an anthropocentric point of view" and considers the adverse impacts of climate change on individuals rather than on states or the environment in general.³³ It stresses states' obligations to take measures to prevent and address human rights violations.³⁴ As the human rights framework is an internationally agreed-upon expression of the minimum conditions that every individual should enjoy, it creates "a common legal framework with legally binding obligations for states and legally enforceable entitlements and rights for individuals."³⁵ However, it is important to acknowledge the human rights regime's inherent limitations. The regime is "plagued by divergent

³⁰ Egan, 'The doctrinal approach in international human rights law scholarship' (n 29) 25.

³¹ *ibid.*

³² McAdam, *Climate Change, Forced Migration and International Law* (n 10) 55.

³³ Jolanda van der Vliet, 'Climate Refugees' — A legal mapping exercise' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' — Beyond the Legal Impasse* (Routledge 2018) 17.

³⁴ *ibid.*

³⁵ *ibid* 17-18.

conceptions of human rights,” and the procedures that substantive human rights law depends on for implementation are often weak.³⁶ For instance, UN human rights treaty bodies’ decisions are not legally binding, although they are regarded as “authoritative” and contain “persuasive statements of principle.”³⁷ It is essential to recognize the risk of viewing the facts of one claim, such as in *Teitiota v. New Zealand*, as representative of all, many, or the most pressing of cases requiring legal intervention when — as with this thesis — the focus is on the particular legal outcome of an international body.

Finally, the thesis utilizes a *de lege ferenda* perspective while discussing possible solutions to identified challenges and surveying potential pathways for improving protection for individuals displaced by climate change. However, as identified above, a careful approach must be taken when evaluating whether UN human rights treaty bodies’ decisions indicate a rule of *lex lata* or *lex ferenda*. As Forsythe points out, one should adopt a critical stance to the nature of international law as an essentially decentralized system, in which the concept of legal obligation is not necessarily clear-cut, and, in contrast to domestic law, by no means easily enforced.³⁸

1.6 STRUCTURE OF THE THESIS

The thesis is divided into six chapters. Following the introductory chapter, *Chapter 2* presents a brief overview of the adverse effects of climate change. It also emphasizes the difficulty in conceptualizing the relationship between climate change and human mobility and its consequences for a legal response to climate change-related displacement.

Chapter 3 analyzes international refugee law and confirms the leading opinion that the Refugee Convention does not apply in cases of climate change-related displacement. The analysis contextualizes the complementary role of international human rights law in protecting people in this context. It also illustrates how and why human rights law extends the protection concept by independently creating grounds for *non-refoulement* and whether it encompasses individuals displaced by climate change.

Chapter 4 critically examines the principle of *non-refoulement* based on the right to life. The analysis is conducted against the backdrop of *Teitiota v. New Zealand*, as well as the broader jurisprudential development in this context. The chapter also identifies and discusses limitations and challenges that constrict the utility of the principle of *non-refoulement*, especially in the context of slow-onset environmental degradation

³⁶ Egan, ‘The doctrinal approach in international human rights law scholarship’ (n 29) 31.

³⁷ *ibid* 32.

³⁸ David Forsythe, ‘Human Rights Studies: On the Dangers of Legalistic Assumptions’ in Fons Coomans, Fred Grünfeld and Menno T. Kamminga (eds), *Methods of Human Rights Research* (Cambridge: Intersentia 2009) 59, 62.

Chapter 5 looks beyond existing protection regimes and investigates the contribution of climate change litigation in developing the law, including the principle of *non-refoulement*, on climate change-related displacement.

Finally, *Chapter 6* summarizes the findings and presents conclusions in relation to the thesis' purpose and research question.

2 THE BROADER CONTEXT OF CLIMATE CHANGE AND HUMAN MOBILITY

2.1 INTRODUCTION

The notion that the effects of anthropogenic climate change impact human mobility is not new. As early as 1990, the IPCC's First Assessment Report observed that the most considerable impact of environmental change could be on "migration and resettlement outside the national boundaries."³⁹ While the interlinkages between human mobility and climate change are increasingly being acknowledged, scholars have conceptualized the nexus between the two in different ways. There exists a myriad of labels to describe individuals who move due to climate change, including 'environmental refugees,' 'climate refugees,' and 'climate change-related displacement.' However, these labels do not denote legal categories recognized under international law.⁴⁰ Rather, they conceptualize the 'issue' in different ways within a particular normative framework. As such, there is no clear definition of who would fall within the relevant protected category, nor a broad consensus on the nexus between climate change and mobility.⁴¹

This chapter aims to outline the phenomena of climate change, migration, and displacement. It will give a brief overview of the adverse effects of climate change on the environment to understand its influence on migration and the particular plight of SIDS, such as the island of Kiribati. Thereafter, it will examine and conceptualize the relationship between climate change and human mobility by drawing on a typology by Walter Kälin.

2.2 THE IMPACTS OF CLIMATE CHANGE

The IPCC has stated that the "[w]arming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over

³⁹ IPCC, J.T. Houghton, G.J. Jenkins, and J.J. Ephraums (eds), *Climate Change: The IPCC Scientific Assessment* (Cambridge University Press 1990) 289.

⁴⁰ IOM, 'IOM Outlook on Migration, Environment and Climate Change' (2014) 21.

⁴¹ Beatriz Felipe Pérez, 'Beyond the Shortcomings of International Law' in Simon Behrman (ed), *'Climate Refugees' – Beyond the Legal Impasse?* (Routledge 2018) 214.

decades to millennia.”⁴² Anthropogenic greenhouse gas emissions are “extremely likely to have been the dominant cause of the observed warming since the mid-20th century.”⁴³ The IPCC estimates that the global average temperature has increased by 0.85°C between 1880 and 2012 and that, without robust mitigation policies, these temperatures will increase from 3.7 to 4.8°C by 2100.⁴⁴ The effects of greenhouse gas emissions impact human societies and will intensify as emissions continue to escalate.⁴⁵ Observed climate system changes include warming of the atmosphere and ocean, reducing snow and ice, and rising sea-levels.⁴⁶ These impacts are likely to be unevenly distributed and may exacerbate social stressors. Changes in the climate system also pose adverse risks for human and natural systems through, *inter alia*, food production and biodiversity.

The IPCC’s findings in the Fifth Assessment Report suggest that global warming’s main effects are related to water stress, both in terms of quantity and quality.⁴⁷ Many regions will be affected by a reduction of water availability, particularly in the tropics, the Mediterranean and Middle Eastern regions, and the southern areas of Africa and Latin America.⁴⁸ These regions are experiencing changes in the climate system, such as droughts, desertification, and heatwaves. By contrast, northern areas, such as the Arctic, are experiencing water reduction through the melting, thawing, and disappearance of snow, ice, and glaciers.⁴⁹ Water availability may increase in other regions due to the shrinking of glaciers, contributing to sea-level rise throughout the 20th century.⁵⁰ Due to a large amount of insular coastline, low-lying coastal areas and atoll islands will increasingly experience adverse impacts such as coastal flooding and coastal erosion.⁵¹ The total submersion of a country may be unprecedented to date, but it is by no means impossible. Most small island states have an average elevation of a few meters above sea-level and are particularly vulnerable in this respect.⁵²

⁴² IPCC, *Climate Change 2014: Synthesis Report* (n 6) 2.

⁴³ *ibid* 4-5.

⁴⁴ *ibid* 8.

⁴⁵ *ibid* 10.

⁴⁶ *ibid* 2.

⁴⁷ IPCC, 2014: *Climate Change 2014: Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects* [Field, C.B., V.R. Barros, D.J. Dokken, K.J. Mach, M.D. Mastrandrea, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.)] (Cambridge University Press 2014) [hereinafter *Climate Change 2014: Contribution of Working Group II, Part A*] 14 ff.

⁴⁸ Kälén, ‘Conceptualising Climate-Induced Displacement’ (n 25) 84.

⁴⁹ Arctic Climate Impact Assessment, *Impacts of a Warming Arctic: Arctic Climate Impact Assessment* (Cambridge University Press 2004), 10-11; IPCC, *Climate Change 2014: Synthesis Report* (n 5) 80.

⁵⁰ IPCC, *Climate Change 2014: Synthesis Report* (n 6) 42.

⁵¹ IPCC, *Climate Change 2014: Contribution of Working Group II, Part A* (n 47) 17.

⁵² *ibid*, 53; UNDP, ‘Small Island nations at the frontline of climate action’ (UNDP, 18 September 2017) <www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/09/18/small-island-nations-at-the-frontline-of-climate-action-.html> accessed 14 December 2020.

2.3 CONCEPTUALIZING CLIMATE CHANGE-RELATED DISPLACEMENT

The relationship between climate change and human mobility is complicated. There are theoretical challenges involved in establishing clear causality between climate change and displacement, primarily because the choice to migrate is “always determined by a complex set of factors.”⁵³ Furthermore, movement in response to environmental and climate change is a normal human adaptation strategy.⁵⁴ Throughout history, populations have migrated for various reasons, including political, ethnic, and religious oppression, economic downturn, and demographic pressure.⁵⁵ Beyond general considerations, individual circumstances and inclinations also play a role that no theory can fully account for.⁵⁶

An individual can be pushed to migrate for various reasons, including climatic, environmental, economic, demographic, social, or psychological factors. In turn, the same factor can have different effects depending on the person it affects. Environmental degradation exacerbates existing vulnerabilities due to political, social, economic, cultural, and demographic factors and acts as a threat multiplier by intensifying a disaster’s effects.⁵⁷ For example, wealthier families living in a coastal area affected by sea-level rise may be able to make the physical changes that would allow them to remain. In contrast, more impoverished families may have no choice but to migrate.⁵⁸ Poverty can also make it impossible for those affected by climate change to move. Therefore, it is inherently fraught to speak of climate change as the sole cause of increased human mobility.

Due to the complex and multicausal nature of migration, there are methodological difficulties in projecting climate change-related displacement. The IPCC has stated that there is “low confidence” in quantitative projections of mobility changes.⁵⁹ Notwithstanding, an in-depth study of Kiribati by the UN University found that a staggering ninety-four percent of households have been affected by environmental degradation over the preceding decade.⁶⁰ Twenty-three percent of migrants in Kiribati cited climate change as a reason for migration decisions. More than 70 percent of

⁵³ Sciaccaluga, *International Law and the Protection of “Climate Refugees”* (n 20) 28; Vikram Kolmannskog and Lisetta Trebbi, ‘Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps’ (2010) 92 *International Review of the Red Cross* 713, 715.

⁵⁴ McAdam, *Climate Change, Forced Migration, and International Law* (n 10) 1.

⁵⁵ Benoît Mayer, *The Concept of Climate Migration: Advocacy and its Prospects* (Edward Elgar Publishing 2016) 8.

⁵⁶ *ibid.*

⁵⁷ McAdam, *Climate Change, Forced Migration and International Law* (n 10) 16.

⁵⁸ Elizabeth Ferris, ‘Governance and climate change-induced mobility: International and regional frameworks,’ in Manou et al. (eds), *Climate Change, Migration and Human Rights* (Routledge 2017) 12.

⁵⁹ IPCC, *Climate Change 2014: Contribution of Working Group II, Part A* (n 47) 20, 73.

⁶⁰ Robert Oakes et al., ‘Climate Change and Migration in the Pacific: Links, Attitudes and Future Scenarios in Nauru, Tuvalu and Kiribati’ (United Nations University Institute for Environment and Human Security 2015).

Kiribati households stated that migration would be a likely response if climate change impacts worsen.⁶¹ However, only a quarter of the respondents had the financial means to do so. The study in Kiribati demonstrates several issues, two of which are immediately obvious. First, that migration due to the effects of climate change is a current reality and is likely to increase in the future as conditions worsen. Second, as noted by Kibreab, that the impact of climate change on human movement are “spatially and socially differentiated.”⁶²

Bearing in mind the challenges above, the thesis draws on a typology on climate change-related displacement by Walter Kälin. While typologies are artificial and cannot fully account for variations, the following is a useful starting point for understanding the relationship between climate change and migration.⁶³ It sets out five scenarios that can trigger displacement.

Table 1. A typology for climate change-related drivers of migration⁶⁴

Cause of movement	Climate change impact	Nature of movement
Sudden-onset disasters	Flooding, storms, mudslides caused by heavy rainfalls	Mainly temporary, internal displacement. ⁶⁵
Slow-onset environmental degradation	Rising sea levels, increased salinization of groundwater and soil, flooding, thawing of permafrost, droughts, and desertification	May prompt ‘voluntary’ migration as a way to adapt to the changing environment. ⁶⁶
‘Sinking’ island states (a special case of slow-onset disasters)	Rising sea levels affecting their low-lying typology	Island states may disappear entirely, thereby displacing the entire population. ⁶⁷
Designated high-risk zones	Environmental dangers, e.g., flooding or mudslides	Both permanent and temporary planned relocation. ⁶⁸
Unrest that disturbs public order, violence, or even armed conflict	May be triggered, at least partially, by a decrease in essential resources.	Internal displacement and cross-border displacement. ⁶⁹

Based on this often-cited typology, the thesis focuses on the second and third categories of environmental conditions: slow-onset environmental

⁶¹ Oakes et al., ‘Climate Change and Migration in the Pacific: Links, Attitudes and Future Scenarios in Nauru, Tuvalu and Kiribati’ (n 60).

⁶² Gaim Kibreab, ‘Climate Change and Human Migration: A Tenuous Relationship?’ (2009) 20 *Fordham Environmental Law Review* 357, 377.

⁶³ Kälin, ‘Conceptualising Climate-Induced Displacement’ (n 25) 84-92.

⁶⁴ Based on Kälin, ‘Conceptualising Climate-Induced Displacement’ (n 25) 84-92; OCHA, IDMC and NO, ‘Monitoring Disaster Displacement in the Context of Climate Change: Findings of a Study by the UN Office for the Coordination of Humanitarian Affairs and the Internal Displacement Monitoring Centre’ (September 2009) 5.

⁶⁵ McAdam, *Climate Change, Forced Migration and International Law* (n 10) 18.

⁶⁶ Kälin, ‘Conceptualising Climate-Induced Displacement’ (n 25) 85.

⁶⁷ *ibid* 90.

⁶⁸ *ibid* 91.

⁶⁹ *ibid* 92.

degradation and the special case of ‘sinking islands’ (see Table 1). However, it does not downplay other environmental or sociological aspects. As previously discussed, the relationship between climate change and human mobility is fraught with conceptual challenges. Nevertheless, conceptualizing climate change-related displacement is, as argued by McAdam, important as any potential legal response is predicated on the nature of the movement.⁷⁰ The following section aims to delineate various motivations to move due to climate change and examine their implications for an international response.

Under the auspice of the Refugee Convention, the current international protection regime is predicated on the idea of “forced exile” from a state and the responsibility of other states’ to extend legal protection if a particular individual engages the principle of *non-refoulement*.⁷¹ Human movement is theorized as a continuum with forced migration at one end and voluntary movement at the other. This dichotomy is especially complex when it comes to movement in the context of climate change.⁷² In particular, slow-onset environmental impacts that occur gradually over time, such as sea-level rise, pose a challenge to the traditional understanding of ‘forced’ migration. As mentioned in Section 2.3, many people voluntarily choose to migrate as an adaptive strategy owing to inherent vulnerabilities, socioeconomic factors, or the lack of prospects of a sustainable livelihood. However, this kind of migration would fall under the category of ‘voluntary movement’ and not qualify for international protection under existing international law. As a result, only a handful of people fleeing environmental degradation will seemingly qualify for international protection, although it remains unclear under which circumstances. The question remains after what point, or corresponding environmental degradation, should such migration be considered forced? Or, whether the delineation between ‘forced’ and ‘migration’ matters for the purpose of international protection. These questions are some of the main challenges to conceptualizing climate change-related displacement under existing international law and will be discussed further in Chapter 3.

Empirical studies show that people fleeing environmental disasters only travel short distances and that the majority of environmentally displaced people remain in their country or near the border (see Table 1)⁷³. However, there is evidence that the impacts of climate change cause longer distance movement.⁷⁴ For example, when slow-onset hazards that have built up over

⁷⁰ McAdam, *Climate Change, Forced Migration and International Law* (n 10) 5.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ Christel Cournil, ‘The inadequacy of international refugee law in response to environmental migration’ in Benoît Mayer and Francois Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law* (Elgar 2017) 104.

⁷⁴ Jane McAdam and Marc Limon, ‘Human Rights, Climate Change and Cross-Border Displacement: the role of the international human rights community in contributing to effective and just solutions’ (Universal Rights Group, August 2015) 15; Nansen Initiative on Disaster-Induced Cross-Border Displacement, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’ (December 2015) Vol I, paras 36-37.

years reach an emergency phase within a short period of time “people may see no other option than to seek food and assistance abroad.”⁷⁵ The lack of responsive capacity may also influence the choice to migrate across international borders. Given their low-lying geography, many SIDS face complete submersion, which threatens their inhabitants’ very livelihoods and leaves many with no choice but to seek refuge outside their country.⁷⁶ A key point to note is that even if the land is not submerged, “it may not be suitable for human habitation.”⁷⁷ The gradual impacts of slow-onset climate change may render areas of land uninhabitable over time. For instance, salinization of water and land may jeopardize freshwater supplies and agricultural land fertility, which affects food and water security.⁷⁸ In such cases, internal migration may not be a viable option. This poses an especially complicated challenge to potential international responses, which Chapter 4 addresses.

2.4 CONCLUDING REMARKS

Cross-border migration due to the effects of climate change is a current reality. However, the relationship between climate change and displacement remains fraught with complexities. A wide range of scenarios, as evidenced above, can be encompassed under the phenomenon ‘climate change-related displacement.’ Each type of scenario described above involves different pressures and impacts, which will affect the time, speed, and size of the movement. Thus, there is no uniform terminology that adequately describes people who move in response to adverse impacts of climate change and considers factors and motives such as socioeconomic status or inherent vulnerabilities.

On the one hand, a narrow description risks being too restrictive by potentially excluding individuals facing displacement in particular circumstances, such as slow-onset environmental degradation. On the other hand, a broad definition risks ‘watering down’ the severity of certain environmental harm, such as small island states in danger of complete inundation. This illustrates the need for a dynamic understanding of the nexus between climate change and human mobility that embraces its multifaceted nature.

Despite these challenges, conceptualizing human mobility in the context of climate change is arguably necessary for the legal categorization of, and, in turn, protection of individuals displaced by its impacts. As observed above,

⁷⁵ Nansen Initiative on Disaster-Induced Cross-Border Displacement, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’ (n 74) para 36.

⁷⁶ IPCC, *Climate Change 2014: Contribution of Working Group II, Part A* (n 45), 13; Bill Frelick, ‘It Is Time to Change the Definition of Refugee’ (*Human Rights Watch*, 28 January 2020) <www.hrw.org/news/2020/01/28/it-time-change-definition-refugee> accessed 28 October 2020.

⁷⁷ McAdam et al., ‘International Law and Sea-Level Rise: Forced Migration and Human Rights’ (n 22) para 15.

⁷⁸ *ibid.*

migration due to slow-onset environmental degradation presents a particular challenge. If rising sea-levels gradually completely deteriorate the environment or submerge an entire island, individuals may voluntarily migrate because of the expectation that their homes will become uninhabitable. At this point, pre-emptive movement does not qualify for international protection under existing international law. However, the choice to move under such circumstances, despite containing a degree of decision-making, could, arguably, be considered forced in the sense that individuals are left with no option but to migrate. Looking ahead, the existing dichotomy of forced and voluntary movement necessitates a critical discussion on what forces people to move across borders due to climate change impacts and how it should be categorized.

3 AVENUES OF INTERNATIONAL PROTECTION

3.1 INTRODUCTION

While the connection between migration and climate change is widely acknowledged, albeit not uniformly conceptualized, the legal and political solution to address climate change-related displacement remains, as will be argued, unsatisfactory. The term ‘climate change refugee’ frequently surfaces to describe people who leave their homes due to the adverse impacts of climate change. However, this label is a “misnomer” as legal practitioners and scholars generally argue that people who move due to environmental factors do not fall within the refugee definition in the Refugee Convention.⁷⁹ Recognizing the Convention’s conceptual limitations, legal scholars have long pointed out the capacity of the principle of *non-refoulement* under human rights law to protect this group of people.⁸⁰ Exploring this avenue is especially relevant considering that, as will be argued, climate change impacts have adverse consequences for human rights.

This chapter will address the limitations and challenges of applying international refugee law in the context of climate change-related displacement. By doing so, protection gaps become clearer. It will continue by analyzing the human rights implications of climate change and examine whether the international human rights regime may offer protection for people displaced by climate change through the principle of *non-refoulement*.

3.2 THE REFUGEE CONVENTION IN THE CONTEXT OF CLIMATE CHANGE

The logical place to start is the Refugee Convention, which, together with its 1967 Additional Protocol, constitutes the main international instrument aimed at protecting refugees. The Convention was developed in the mid-twentieth century to protect individuals who were displaced and unable to

⁷⁹ Counil, ‘The inadequacy of international refugee law in response to environmental migration’ (n 73) 86.

⁸⁰ McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 709.

avail themselves of their governments' protection in the aftermath of the Second World War.⁸¹ The international refugee regime protects several fundamental rights related to "the most basic aspects of the refugee experience, including the need to escape, to be accepted, and to be sheltered."⁸² A cornerstone of the regime is the prohibition against *non-refoulement*, which prevents the forcible return to a country of persecution.⁸³ To receive international protection, one must qualify as a refugee. Article 1A(2) of the Refugee Convention defines a 'refugee' as a person who:

(...) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁸⁴

The Refugee Convention has proven to be "remarkably adaptable to new circumstances."⁸⁵ However, international refugee law does not encompass persons displaced across borders by the effects of climate change, even though "they may find themselves in a refugee-like situation."⁸⁶ Several obstacles make it difficult to argue that the refugee definition encompasses people displaced by climate change-related impacts.

First, while adverse climatic effects are harmful, and in some cases, fatal, they will generally not satisfy the requirement of 'persecution.' The primary problem lies in identifying a persecutor in the context of climate change. The Convention definition, along with case law and academic commentary interpreting the scope of the Convention, requires the source of harm to emanate from a human actor.⁸⁷ Traditionally, the persecutor is defined as a state agent, but this has been extended to identifiable non-state entities.⁸⁸ Despite the scientific evidence that anthropogenic greenhouse gas emissions are the primary cause of global warming, it will be "virtually impossible" to establish a chain of causality between governmental action or inaction and

⁸¹ Vikram Kolmannskog, 'Climates of Displacement' (2008) 26 *Nordisk Tidsskrift for Menneskerettigheter* 302, 311.

⁸² James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 94.

⁸³ Article 33 of the Refugee Convention.

⁸⁴ Article 1A(2) of the Refugee Convention.

⁸⁵ Ferris 'Governance and climate change-induced mobility: International and regional frameworks' (n 58) 14.

⁸⁶ Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches' (UNHCR Division of International Protection, February 2012), 31; McAdam, *Climate Change, Forced Migration and International Law* (n 10) 50.

⁸⁷ Adrienne Anderson et al., 'A Well-Founded Fear of Being Persecuted.. But When?' (2020) 42 *Sydney Law Review* 155, 158.

⁸⁸ IOM, 'IOM Outlook on Migration, Environment and Climate Change' (n 40) 23.

subsequent climate change impacts.⁸⁹ However, where a state's response to disaster fails to meet the needs of marginalized groups, such a situation "could give rise to persecution within a Convention meaning and open the door to refugee status."⁹⁰ This is a legally *arguable* exception to the general rule that individuals moving due to climate change-related reasons will not meet the refugee status criteria. Nevertheless, this is rarely argued and has, so far, not given rise to refugee status.⁹¹

Second, even if climate change-related harm could be characterized as persecution, the conduct must also be discriminatory. Persecution alone does not suffice. Therefore, a further challenge would be attributing the persecution to one of the five protection grounds established in the Refugee Convention. As there is no explicit reference to climate change, environmental degradation, or natural disasters, individuals seeking protection would need to establish discrimination based on 'race, religion, nationality, membership of a particular social group or political opinion.' Establishing such causality in the context of climate change proves difficult as the impacts of climate change are considered "largely indiscriminate, rather than tied to particular characteristics" and affect individuals and communities irrespective of their background or beliefs.⁹²

Many researchers have advocated for an allegorical interpretation of the refugee definition to encompass individuals displaced across borders due to climate change-related impacts. Some have suggested the recognition of 'environmental persecution' through a progressive reading of the requirement of 'persecution.'⁹³ Others have argued that policy and decision-makers need to be aware of the "deeply social nature of disasters, within which existing patterns of discrimination and marginalization are exacerbated."⁹⁴ Taking note of these interpretations, the UNHCR recently issued a publication discussing the Refugee Convention's potential application in the context of climate change.⁹⁵ Therefore, it should not be dismissed automatically as the law may change in the future.

In the present, however, given the difficulty of satisfying two essential elements of the refugee definition in the case of climate change-related displacement, such individuals will not readily fall within the Refugee Convention's scope. As illustrated in Chapter 2, the decision to migrate due

⁸⁹ Kälin and Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches' (n 86) 31.

⁹⁰ Miriam Cullen, 'Disaster, Displacement and International Law: Legal Protections in the Context of a Changing Climate' (2020) 8 *Politics and Governance* 270, 272.

⁹¹ *ibid.*

⁹² McAdam and Limon, 'Human Rights, Climate Change and Cross-Border Displacement: the role of the international human rights community in contributing to effective and just solutions' (n 74) 16.

⁹³ Christopher Kozoll, 'Poisoning the Well: Persecution, the Environment, Refugee Status,' (2004) 15(2) *Colorado Journal of Environmental International Law* 271.

⁹⁴ Matthew Scott, 'Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change' (2016) 35 *Refugee Survey Quarterly* 26, 28.

⁹⁵ UNHCR, 'Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters' (n 11).

to climate change impacts is multicausal. When individuals ‘flee’ due to adverse climate change impacts, they might have made a voluntary decision. However, the situation may be such that the adverse climatic effects have given them no option but to migrate, such as in the case of rising sea-levels. This arguably causes displacement but does not readily fit into the dichotomy of ‘forced’ and ‘voluntary’ movement.

In determining the legal status of climate change displaced persons within international law, it is essential to consider not only objective characteristics but also their perception of themselves. For instance, the people of Tuvalu and Kiribati have, as noted by McAdam and Loughry, rejected the refugee label due to concomitant negative connotations, including a sense of helplessness and lack of dignity that contradicts their strong sense of pride.⁹⁶ The former President of Kiribati powerfully stated that:

We don't want to lose our dignity. We're sacrificing much by being displaced, in any case. So we don't want to lose that, whatever dignity is left. So the last thing we want to be called is 'refugee.' We're going to be given as a matter of right something that we deserve, because they've taken away what we have.⁹⁷

For many SIDS, the refugee label, even as a merely descriptive term, is preemptive and, at worst, offensive. This aspect is vital to consider as it does not feel morally right to force the refugee label onto individuals who see it as degrading and refuse to be considered as such.

The Refugee Convention was not drafted with environmental degradation in mind. There does not seem to be enough political momentum to overcome the existing hurdles to apply the convention in this context or to develop a new Convention on the protection of ‘climate refugee.’ Furthermore, the label itself is contested by several individuals to whom it would potentially apply. It is undeniable that individuals displaced by climate change must be protected. However, the Refugee Convention, at this point, is not the place to afford it.

3.3 COMPLEMENTARY PROTECTION UNDER HUMAN RIGHTS LAW

While environmentally displaced persons have limited or practically no protection under the Refugee Convention, there does not exist a complete lacuna within international law.⁹⁸ Those displaced by climate change may find protection from the obligations deriving from human rights law under

⁹⁶ Jane McAdam and Maryanne Loughry, ‘We aren’t refugees’ (*Inside Story*, 30 June 2009) <<https://insidestory.org.au/we-arent-refugees/>> accessed 21 December 2020.

⁹⁷ Anote Tong (2009) in McAdam, *Climate Change, Forced Migration and International Law* (n 10) 41.

⁹⁸ Susan F. Martin, ‘Towards an extension of complementary protection?’ in Benoît Mayer and Francois Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law* (Edward Elgar 2017) 449.

the principle of *non-refoulement*, which focuses on the existence of harm rather than the reasons for it.⁹⁹ According to Kolmannskog, the “human rights approach differs from general forced migration law by focusing on needs rather than cause.”¹⁰⁰ He argues that rather than getting caught in the “eternal debate” about “how forced or voluntary movement is (...) a partial solution to the normative gap may be found in broader human rights law pondering the possibility, permissibility, and reasonableness of return.”¹⁰¹ To ascertain whether individuals displaced by climate change are encompassed by the framework, the following section will analyze the relationship between human rights and change and the principle of *non-refoulement*.

3.3.1 HUMAN RIGHTS AND CLIMATE CHANGE

There is a strong link between the environment, climate change, and human rights as the adverse impacts of climate change are widely recognized as threatening human rights’ effective enjoyment.¹⁰² The specific human rights affected by climate change include, *inter alia*, the right to life, adequate food, water, and the highest attainable standard of physical and mental health. Droughts and water shortages affect agriculture through declines in crop yield, which impacts food security and leads to increased malnutrition, subsequently impacting the right to food and life.¹⁰³ Flooding also risks displacing coastal communities in low-lying areas, thereby affecting their housing, life, health, and property rights.¹⁰⁴ In addition, extreme weather events are threatening lives across the globe, induced and exacerbated by climate change, including “heat waves, floods, droughts, wildfires, water-borne and vector-borne diseases, malnutrition and air pollution.”¹⁰⁵

This link has also been recognized by the UN Human Rights Council (HR Council) and its special procedures, and international bodies, including the Conference of the Parties to the United Nations Framework Convention for Climate Change (UNFCCC).¹⁰⁶ A significant milestone was the Malé

⁹⁹ UNHCR, ‘Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters’ (n 11), para. 21; Borges, *Environmental Change, Forced Displacement and International Law: From Legal Protection Gaps to Protection Solutions* (n 3) 147

¹⁰⁰ Kolmannskog, ‘Climates of Displacement’ (n 81) 316.

¹⁰¹ *ibid*, 312-316; Kolmannskog and Trebbi, ‘Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps,’ (n 53) 724.

¹⁰² Margarethe Wewerinke-Singh, ‘Remedies for Human Rights Violations Caused by Climate Change’ (2019) 9 *Climate Law* 224, 226.

¹⁰³ Kolmannskog, ‘Climates of Displacement’ (n 81) 306.

¹⁰⁴ John Knox, ‘Climate Change and Human Rights Law’ (2009) 20 *Virginia Journal of International Law* 163, 170.

¹⁰⁵ McAdam et al., ‘International Law and Sea-Level Rise: Forced Migration and Human Rights’ (n 22) para 29.

¹⁰⁶ See, *inter alia*, OHCHR, ‘Report of the Independent Expert on Issues of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Preliminary Report’ (24 December 2012) UN Doc A/HRC/22/43, paras. 18, 19 and 34; OHCHR, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights,’ (15 January 2009) UN Doc A/HRC/10/61, para 3.

Declaration on the Human Dimension of Global Climate Change, adopted by SIDS representatives in 2007.¹⁰⁷ The Declaration was the first intergovernmental statement that explicitly recognized that climate change has “clear and immediate implications for the full enjoyment of human rights.”¹⁰⁸ As early as 2008, the HR Council adopted the first resolution on climate change and human rights. It expressed concern that “climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.”¹⁰⁹ Following up on the resolution, the OHCHR published a report on climate change and human rights, which included a summary table of climate change impacts on human rights (see Table 2).¹¹⁰ Although the affected rights are addressed separately, all impacts of climate change could affect the right to life, such as the lack of safe drinking water or the lack of adequate housing.¹¹¹

Table 2. Effects of climate change on human rights¹¹²

Climate Change Impacts	Examples of Affected Rights
Extreme weather events, such as hurricanes or cyclones	Right to life
Increased food insecurity and risk of hunger	Right to adequate food, the right to be free from hunger
Increased water stress	Right to safe drinking water
Stress on health status	Right to the highest attainable standard of health
Sea-level rise and flooding	Right to adequate housing

In 2009, the HR Council adopted another resolution focusing on the disproportionate impact of climate change on people in vulnerable situations. The resolution recalled the adverse impacts of climate change on a wide range of human rights, including “the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination.”¹¹³ In 2012, the HR Council appointed a Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy environment. Together with other special procedures, like the Special Rapporteur on human rights of migrants, they have issued multiple reports on the effects of climate change

¹⁰⁷ Small Island Conference, Malé, Maldives, 13 – 14 November 2007, Malé Declaration on the Human Dimension of Global Climate Change (14 November 2007).

¹⁰⁸ *ibid.*

¹⁰⁹ HR Council, ‘Resolution 7/23: Human Rights and Climate Change’ (28 March 2008).

¹¹⁰ OHCHR, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights’ (n 106) Annex.

¹¹¹ HRC, ‘General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ (30 October 2018) UN Doc CCPR/C/GC/26, para. 26 [hereinafter General Comment No. 36].

¹¹² OHCHR, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights’ (n 106) Annex.

¹¹³ HR Council, ‘Resolution 10/4: Human Rights and Climate Change’ (25 March 2009).

on human rights under their mandates.¹¹⁴ In 2014, over twenty Special Rapporteurs and other independent experts issued a joint letter on the implications of climate change for human rights:

A safe, clean, healthy and sustainable environment is indispensable to the full enjoyment of human rights, including rights to life, health, food, water and housing, among many others (...) There can no longer be any doubt that climate change interferes with the enjoyment of human rights recognized and protected by international law.¹¹⁵

The connection between human rights and the environment has also long been acknowledged within international environmental law. According to the 1972 Stockholm Declaration “[b]oth aspects of man’s environment, the nature and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.”¹¹⁶ The 2015 Paris Agreement was a crucial development in the relationship between human rights and climate change, as it was the first multilateral environmental agreement to acknowledge the link between climate change and human rights explicitly.¹¹⁷ The preamble provides that all states “should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights.”¹¹⁸ While many were disappointed to see the human rights reference hidden away in the preamble, the reference represents the evolving relationship between climate change and human rights.¹¹⁹

3.3.2 THE PRINCIPLE OF *NON-REFOULEMENT*

At the international level, the principle of *non-refoulement* is expressly recognized in human rights treaties such as the CAT.¹²⁰ In addition, most regional and international human rights treaties, including the ICCPR and ECHR, have been construed by their respective monitoring bodies as

¹¹⁴ OHCHR, ‘Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (n 106); UNGA, ‘Report of the Special Rapporteur on the Human Rights of Migrants’ (13 August 2012) UN Doc A/67/299.

¹¹⁵ OHCHR, ‘A new climate change agreement must include human rights protections for all’ (17 October 2014) <www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf>.

¹¹⁶ Stockholm Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972) printed in ILM (1972) 1416.

¹¹⁷ David R. Boyd, ‘Mandate of the Special Rapporteur on human rights and the environment: Statement on the human rights obligations on climate change, with a particular focus on the right to life’ (October 25 2018) <www.ohchr.org/Documents/Issues/Environment/FriendsIrishEnvironment25Oct2018.pdf>, para 17.

¹¹⁸ UNFCCC, Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/10/Add1, preamble.

¹¹⁹ Benoît Mayer, ‘Human Rights in the Paris Agreement’ (2016) 6 Climate Law 109, 116.

¹²⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3 [hereinafter CAT].

inferring an implicit prohibition of *non-refoulement*.¹²¹ Together, they form a system of complementary protection designed to address the situation of individuals who fall outside the Refugee Convention's scope but who cannot be removed by virtue of the principle of *non-refoulement*.

The implicit duty of *non-refoulement* is anchored in the theory of positive obligations and forms part of states' obligations to prevent violations in order to ensure the effective enjoyment of the fundamental rights at stake.¹²² The principle prohibits removing a person from a place of safety to a place where they risk violations of, *inter alia*, the right to life and the right not to be subjected to torture or cruel, inhuman, or degrading treatment or punishment.¹²³ While not necessarily the only rights that entail a *non-refoulement* obligation, they are the two that are "clearly recognized" within international law as giving rise to such a duty.¹²⁴ Unlike most other human rights, which permit balancing interests, they are absolute and widely recognized as *jus cogens* norms.¹²⁵

As previously mentioned, the prohibition against *refoulement* is present in both the international refugee regime and the international human rights regime. While the former offers its legal basis, the normative development of human rights law has considerably reinforced, consolidated, and broadened the principle of *non-refoulement* as "a fundamental tool of protection" through the development of several key differences.¹²⁶ First, the rights-based principle of *non-refoulement* operates without restrictions on the personal scope. The provision is not subordinated to the five grounds of persecution required by the refugee definition under the Refugee Convention. Instead, *refoulement* is prohibited when a person can substantiate a risk of any qualifying type of harm, either prohibited by treaty or by customary international law.¹²⁷ Second, contrary to the Refugee Convention's territorial scope, human rights law encompasses any person, regardless of migration status, as it applies wherever a State exercises jurisdiction or effective control.¹²⁸

¹²¹ Vincent Chetail, *International Migration Law* (Oxford University Press 2020) 196; See also: UN Committee on the Rights of the Child (CRC Committee) 'General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) UN Doc CRC/GC/2005/6, para 27; UN Committee on the Elimination of Discrimination Against Women (CEDAW) 'Communication No 33/2011 concerning MNN v Denmark' in 'Decision adopted by the Committee at its fifty-fifth session 8–26 July 2013' (15 August 2013) UN Doc CEDAW/C/D/33/2011, para 8.10.

¹²² Chetail, *International Migration Law* (n 121) 196.

¹²³ McAdam, *Climate Change, Forced Migration and International Law* (n 10) 55.

¹²⁴ *ibid.*

¹²⁵ *ibid.* 53.

¹²⁶ Chetail, *International Migration Law* (n 121) 196.

¹²⁷ Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning on the Relations between International Refugee Law and International Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration, Collected Courses of the Academy of European Law* (Oxford University Press 2014) 37.

¹²⁸ UNHCR, 'Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps' (23 April 2018) UN Doc A/HRC/38/21, para 45.

An important difference between the principle of *non-refoulement* and the right to asylum from persecution is legal status. The principle infers a negative obligation on states to not return an individual, but not, referring to the refugee law regime, a positive obligation to admit an individual into the territory or grant asylum. However, Goodwin-Gill and McAdam note that, in situations of mass influx, granting ‘asylum’ can be used “in the narrow sense of a durable or permanent solution (...) against the exercise of jurisdiction by the State of origin.”¹²⁹ They argue that:

[a] receiving State called upon to grant ‘asylum’ to large numbers may well demur; admission is more likely to be facilitated by reference to the norm of *non-refoulement* and to its manifestation as refuge or protection in the dynamic sense, through time, pending arrangements for whatever solution is appropriate to the particular problem.¹³⁰

Drawing on this argument, the political and legal reality of the mass influx of individuals moving due to climate change impacts is that states have not undertaken and, if the political impasse remains, perhaps might not undertake an obligation to grant asylum to these persons. In this respect, the principle of *non-refoulement* is a “core element” that both promotes admission and protection and simultaneously emphasizes “the responsibility of nations at large to find the solutions.”¹³¹ However, compliance with human rights law and, in turn, the rights-based principle of *non-refoulement* is subject to routine international scrutiny by monitoring bodies, although their views do not directly bind states.¹³² As such, implementation of human rights norms, such as the principle of *non-refoulement*, remains an inherent limitation.

3.3.3 PROTECTING INDIVIDUALS DISPLACED BY CLIMATE CHANGE

From the investigation in Sections 3.3.1 and 3.3.2, it seems that individuals displaced by climate change might be encompassed by the human rights framework and, in turn, the principle of *non-refoulement*. The theory of positive obligations requires states to actively take steps to respect, protect, and fulfill human rights.¹³³ As it is internationally recognized that climate change impacts threaten the effective enjoyment of human rights, addressing climate change-related movement “within a broader human rights matrix” may be useful, especially in relation to forced migration due to slow-onset degradation.¹³⁴ For instance, all five categories of movement due to climate

¹²⁹ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd Edition, Oxford University Press 2007) 343.

¹³⁰ *ibid* 344.

¹³¹ *ibid*.

¹³² Christopher Caskey, ‘Non-Refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection’ (2020) 26 *Global Migration Research Paper*, 5.

¹³³ OHCHR, ‘The Slow onset effects of climate change and human rights protection for cross-border migrants’ (n 26) para 36.

¹³⁴ McAdam, *Climate Change, Forced Migration and International Law* (n 10) 38.

change impacts, identified in the typology in Section 2.3, are encompassed by the human rights framework. The prohibition of *refoulement*, as a negative obligation not to subject persons to a violation, “must be understood as sitting at the furthest, and most accessible end of this scale.”¹³⁵ This has also been suggested at the international level. At the 2011 Nansen Conference, the importance of human rights principles and the prohibition of *non-refoulement* were highlighted as a possible protection framework for those displaced across borders not falling under the refugee protection regime.¹³⁶ The applicability of the principle of *non-refoulement* in the context of climate change has also long been recognized by the UNHCR, which has stated that:

[i]t could implicitly ensure additional protection to persons displaced by the consequences of climate change who do not qualify as refugees.¹³⁷

In order to engage the principle of *non-refoulement* in the context of environmental degradation, one must establish a nexus between the adverse impacts of climate change and the enjoyment of a right protected by a treaty provision or customary international law.¹³⁸ It is the risk of rights being violated in the present and future, rather than the past, that is crucial in determining protection needs.¹³⁹

The adverse effects of climate change impact multiple human rights. The right to life and the right to be free from inhuman, degrading, or cruel treatment seem especially significant in this context. The HRC has previously recognized that the right to life and the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment may provide a “basis for future claims for admission or non-return, based on the harm a migrant might be subject to in the country of origin because of the adverse impacts of climate change.”¹⁴⁰ This was explicitly acknowledged in *Teitiota v. New Zealand*, which concerned a Kiribatian national who sought protection in New Zealand. The applicant argued that his return to Kiribati would imperil his right to life, given that sea-level rise was endangering lives and livelihoods there, including through lack of drinkable water, contributing to a rise in generalized violence due to pressure on resources.¹⁴¹ Although no violation was found, the Committee recognized, for the first time, that:

(...) without robust national and international efforts, *the effects of climate change* in receiving states may expose individuals to a

¹³⁵ Caskey, ‘Non-Refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection’ (n 132) 7.

¹³⁶ Kälén and Schrepfer, ‘Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches’ (n 86) 25.

¹³⁷ UNHCR, ‘Forced Displacement in the Context of Climate Change: Challenges for States under International Law’ (20 May 2009).

¹³⁸ Chetail, *International Migration Law* (n 121) 197.

¹³⁹ Kolmannskog and Trebbi, ‘Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps’ (n 53) 726.

¹⁴⁰ OHCHR, ‘The Slow onset effects of climate change and human rights protection for cross-border migrants’ (n 26) para 67.

¹⁴¹ *Teitiota v. New Zealand*, para 2.1.

*violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states.*¹⁴²

Although both the right to life and the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment are recognized as entry points to trigger the principle of *non-refoulement* in the context of climate change, previous claims in this context have mainly been raised in relation to the former, either alone or in conjunction with the right to life.¹⁴³ For instance, Chetail argues that the threshold of ‘a generalized situation of violence of sufficient intensity’ may be met where “natural disasters and climate change seriously disturb public order.”¹⁴⁴ While recognizing the possibility of qualifying climate change harm under the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, the thesis focuses on the effects of climate change as a driver of harm to the right to life.

The right to life is recognized as the “supreme right” to which enjoyment is a prerequisite for all human rights.¹⁴⁵ The impacts of environmental degradation have been closely linked to the right to life, with the HRC expressly recognizing that it constitutes one “of the most pressing and serious threats” to its enjoyment.¹⁴⁶ This is especially pressing considering, as observed in Chapter 2, the high confidence of “risk of death (...) in low-lying coastal zones and small island developing states and other small islands due to storm surges, coastal flooding and sea-level rise.”¹⁴⁷ The HRC has also highlighted that states’ failure to prevent, mitigate, or remedy life-threatening harms from environmental degradation or change (within national borders or effective control) could theoretically constitute a violation of the right to life.¹⁴⁸ The HRC has noted that the duty to respect and ensure the right to life precludes states from removing persons to a territory where there are grounds for believing that their rights under Article 6 of the ICCPR would be violated.¹⁴⁹ In *Teitiota v New Zealand*, the Committee explicitly stated that forcibly returning a person to a place where their life would be at risk due to the adverse effects of climate change *per se* could potentially violate the right to life.¹⁵⁰ Thus, complementary protection may be a partial solution to

¹⁴² *Teitiota v. New Zealand*, paras 9.10-11 (emphasis added).

¹⁴³ See Matthew Scott ‘Natural Disasters, Climate Change and *Non-Refoulement*: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?’ (2014) 26 *International Journal of Refugee Law* 404; Kolmannskog and Trebbi, ‘Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps’ (n 53).

¹⁴⁴ Chetail, *International Migration Law* (n 121) 26.

¹⁴⁵ HRC, ‘General Comment No. 36’ (n 111) para. 2; Christopher Caskey, ‘Non-Refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection’ (n 132) 15.

¹⁴⁶ HRC, ‘General Comment No. 36’ (n 111) para 62.

¹⁴⁷ IPCC, 2014: Summary for Policymakers, in: *Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014) 13.

¹⁴⁸ HRC, ‘General Comment No. 36,’ (n 111) para 62.

¹⁴⁹ *ibid*, para 30.

¹⁵⁰ *ibid*.

addressing the legal lacuna in international protection and prevent the deportation of individuals who suffer life-threatening consequences due to adverse climate change. While the jurisprudence in this area is not (yet) developed, such claims are ripe for future litigation and warrant analysis, which the following chapter will examine in-depth.

3.4 CONCLUDING REMARKS

The Refugee Convention has not succeeded in adapting to climate change's realities and its subsequent consequences on migration. Following this legal lacuna in the refugee law regime, the international human rights regime emerges as a possible avenue for protecting individuals displaced by climate change due to the broad acknowledgment that the effects of climate change threaten human rights. A significant limitation is that complementary protection under human rights law does not automatically confer a right to remain, whether it is through a right to be granted permanent residence or acquire new nationality, unlike the Refugee Convention, but rather prohibits returning an individual to the country of origin. Notwithstanding, the principle of *non-refoulement* may be a solution in the medium-term, especially considering the particular risk of inundation faced by small island states and that, despite notable efforts, a legal gap remains. In this sense, the principle may serve as the basis for promoting admission and protection for individuals displaced by climate change while simultaneously upholding the discretionary aspect of a State's right in the matter of asylum as a permanent solution. Although complementary protection under the human rights regime is an appealing avenue, one still has to examine whether it might be more illusory than practical.

4 THE PRINCIPLE OF *NON-REFOULEMENT* AND THE RIGHT TO LIFE IN THE CONTEXT OF CLIMATE CHANGE

4.1 INTRODUCTION

While *Teitiota v. New Zealand* confirmed that the principle of *non-refoulement* and the right to life might protect individuals displaced by climate change, it remains the only case in which the Committee has applied the principle in this context.¹⁵¹ This makes the case “an outlier,” but also an especially detailed contribution to understanding the developing jurisprudence on the scope of the principle of *non-refoulement* as it pertains to the right to life.¹⁵² In particular, the decision in question guides how the ‘real risk’ test applies to the right to life in relation to adverse climate change.¹⁵³ As formulated by one commentator:

(...) it seems a window has been opened in international law for the legal protection of those having to migrate due to catastrophic results of climate change.¹⁵⁴

This chapter will examine under what circumstances and when states have *non-refoulement* obligations under the right to life, including the right to a dignified life, in the context of climate change and, in particular, slow-onset environmental degradation. A doctrinal analysis will be conducted, which begins by assessing the admissibility requirements for a claim under the ICCPR and continues by examining the threshold for substantiating a violation of the right to life. The analysis will also discuss identified shortcomings, as well as possible pathways to improve access to protection under the principle of *non-refoulement*. The chapter will focus on the right to

¹⁵¹ McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 713; See *Robert Judge v Canada*, CCPR/C/78/D/829/1998 (13 August 2003) para 10.10.

¹⁵² McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 713.

¹⁵³ Jefferi Hamzah Sendut, ‘Climate Change as a Trigger of Non-Refoulement Obligations under International Human Rights Law’ (n 16).

¹⁵⁴ Simon Behrman and Avidan Kent, ‘Prospects for Protection in Light of the Human Rights Committee’s Decision in *Teitiota v New Zealand*,’ (2020) *Polish Migration Review*, Forthcoming <<https://ssrn.com/abstract=3653088>> accessed 14 October 2020, 1.

life as enshrined in Article 6 of the ICCPR, but will also draw on other sources, including Article 2 of the ECHR.

4.2 MEETING THE ADMISSABILITY REQUIREMENTS

Article 1 of the Optional Protocol to the ICCPR provides that the Committee considers complaints from individuals who claim to be victims of a violation by that state party of any of the rights outlined in the Covenant.¹⁵⁵ For a person to claim to be a victim, he or she must be “actually affected.”¹⁵⁶ This requirement was further elaborated in the case *Aalbersberg v. The Netherlands*, in which the Committee stated that “he or she must show either that an *act or an omission* of a state party has adversely affected his or her enjoyment of such right, or that such an effect is *imminent*.”¹⁵⁷ The requirement of imminence in *non-refoulement* claims based on the right to life “primarily attaches to the decision to remove the individual.”¹⁵⁸ In other words, the assessment of ‘an imminent harm’ relates to the country of origin’s conditions, to which the individual risks removal. In *Teitiota v. New Zealand*, the Committee found that the impacts of climate change on Kiribati’s habitability met the requirement of imminence. The conditions in Kiribati did not concern a “hypothetical future harm,” but a “real predicament” caused by a “lack of potable water and employment opportunities, and a threat of serious violence due to land disputes.”¹⁵⁹ As this was the first time the Committee found a *non-refoulement* claim in the context of climate change to be admissible, it is unclear whether the climate change impacts in Kiribati represent the admissibility threshold as such or if it fell within a threshold that could potentially be lower.

Given the “uncertain timescales about when climate change impacts will be the most severe” and the “constantly evolving situation for human adaptation and resilience,” it will be challenging to determine a tipping point when the requirement of imminence is met. However, definite proof of harm is not necessary. The “possibility of a risk that serious harm *may* ensue is sufficient to warrant protection.”¹⁶⁰ Based on this, claims that the impacts of climate change violate rights in the Covenant and that this effect is *imminent* will most likely succeed, especially in cases in which climate change adversely affects habitability.

¹⁵⁵ Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹⁵⁶ See *EP v Colombia*, CCPR/C/39/D/318/1988 (1990), para 8.2, “An individual, or a group of individuals, can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she, or they, are actually affected.”

¹⁵⁷ *Aalbersberg v The Netherlands*, CCPR/C/87/D/1440/2005 (12 July 2006), para 6.3.

¹⁵⁸ *Teitiota v New Zealand*, para 8.5.

¹⁵⁹ *ibid.*

¹⁶⁰ McAdam, *Climate Change, Forced Migration and International Law* (n 10) 87 (emphasis added).

4.3 SUBSTANTIATING A ‘REAL RISK OF IRREPARABLE HARM’

In order to trigger states’ *non-refoulement* obligations, the threat to the right to life must reach a certain level of severity. According to General Comment No. 31, which sets out *non-refoulement* obligations under the ICCPR, state parties are prohibited from removing an individual:

where there are *substantial grounds for believing that there is a real risk of irreparable harm*, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.¹⁶¹

The Committee has noted that “there is a high threshold” for reaching the standard of proof of ‘substantial grounds’ for believing that the individual faces a ‘real risk of irreparable harm.’¹⁶² Unlike the Refugee Convention, which itself provides the test for international refugee law, namely, a ‘well-founded fear of being persecuted,’ there does not exist an exact test for determining the substantive content of a ‘real risk of irreparable harm.’ Commentators have tended to criticize the ‘irreparable harm’ criterion for its indeterminacy, but the courts do not employ the requirement as an independent standard.¹⁶³ In practice, the *non-refoulement* obligations derived from the ICCPR are implied from other primary obligations, such as the right to life.¹⁶⁴

In the case *Portillo v. Cáceres*, the HRC recognized, for the first time, the existence of a connection between environmental protection and the right to a life with dignity.¹⁶⁵ More importantly, the Committee made it clear that states must take all appropriate measures to address the general conditions of society that may give rise to threats to the right to life and that this may include “pollution of the environment.”¹⁶⁶ Referring to its decision in *Portillo v. Cáceres*, the Committee noted in *Teitiota v. New Zealand*, that “the obligation of state parties to respect and ensure the right to life extends to *reasonably foreseeable threats and life-threatening situations* that can result

¹⁶¹ HRC, ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 12 (emphasis added).

¹⁶² See HRC, *X. v. Denmark* (12 May 2014) UN Doc CCPR/C/110/C/2007/2010, para 9.2; *Teitiota v. New Zealand*, para 9.3.

¹⁶³ Başak Çalı, Cathryn Costello and Stewart Cunningham, ‘Hard Protection through Soft Courts? *Non-Refoulement* before the United Nations Treaty Bodies’ (2020) 21 *German Law Journal* 255, 367; See Michelle Foster, ‘*Non-Refoulement on the basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Law*’ (2009) 2 *New Zealand Law Review* 257.

¹⁶⁴ Adrienne Anderson et al, ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ (2019) 68 *International and Comparative Law Quarterly* 111, 120.

¹⁶⁵ *Portillo Cáceres v Paraguay*, CCPR/C/126/D/ 2751/2016 (9 August 2019) para 7.3.

¹⁶⁶ *ibid*, para 7.4.

in loss of life.”¹⁶⁷ The Committee clarified that the right to life might be imperiled by a range of scenarios including:

1. Generalized violence, such as that resulting from overcrowding or private land disputes.¹⁶⁸
2. Threats to socioeconomic rights, including lack of access to water and food insecurity.¹⁶⁹
3. Overpopulation and intense flooding resulting in breaches of sea walls, impacting enjoyment to the right to a life with dignity.¹⁷⁰

The following section conducts a critical analysis of the threshold for a ‘real risk of irreparable harm’ in order to understand the circumstances when the principle of *non-refoulement* is triggered. The outlined three scenarios are dealt with separately for clarity, but, in many cases, the analysis overlaps, which should be kept in mind.

4.3.1 SITUATIONS OF GENERAL VIOLENCE

The risk to the right to life “must be personal in nature and cannot derive merely from the general conditions in the receiving State.”¹⁷¹ Only in “the most extreme cases” may a general situation of violence constitute a real risk to the right to life.¹⁷² Despite the broad acknowledgment that the conditions in Kiribati were dire and deteriorating, the Committee stated that the applicant had not established that his conditions were significantly worse than anyone else on the island.¹⁷³ In other words, there did not exist a specific risk to him, but rather a general risk faced by all inhabitants of Kiribati. Therefore, the applicant failed to show that he faced a personal and reasonably foreseeable risk of a threat to his life due to violent acts resulting from a situation of generalized violence.

This criterion presents a real problem for potential claimants in the context of climate change, as it is precisely a phenomenon that affects communities in general, rather than specific individuals. It is, as noted by Behrman and Kent, “difficult to imagine a case where an individual or defined group within a geographic area will experience the effects of climate change in ways that go beyond general considerations.”¹⁷⁴ One type of situation where this may arise is when relative poverty might lead to widely disproportionate and

¹⁶⁷ *Teitiota v. New Zealand*, para 9.4; Ginerva Le Moli, ‘The Human Rights Committee, Environmental Protection and the Right to Life’ (2020) 69 ICLQ 735, 747.

¹⁶⁸ *Teitiota v. New Zealand*, para 9.7.

¹⁶⁹ *ibid.*, paras 9.8–9.

¹⁷⁰ *ibid.*, para 9.10.

¹⁷¹ HRC, ‘General Comment No. 36’ (n 111) para 30.

¹⁷² *ibid.*

¹⁷³ *Teitiota v New Zealand*, para 9.4.

¹⁷⁴ Simon Behrman and Avidan Kent, ‘The Teitiota Case and the limitations of the human rights framework’ (2020) 75 Questions of International Law 25, 35.

discriminatory impacts on poorer segments of the population.¹⁷⁵ However, this may not be relevant when entire countries, such as Kiribati, risk being submerged. Behrman and Kent argue that:

(...) an insistence on demonstrating a greater risk of harm than the general population will create an insuperable barrier to many who currently face the sharp end of climate change such as low-lying Pacific island nations.¹⁷⁶

The exception to the personal requirement is where general conditions are so extreme that they pose a severe risk to life.¹⁷⁷ According to the Committee, the present conditions in Kiribati did not reach this threshold. In response to the claim that the increasing scarcity of habitable land led to violent land disputes that produced fatalities, the Committee held that the applicant had referred only to sporadic incidents of violence. In effect, a very high threshold was adopted, requiring a level of severity such that the only reasonable interference was that anyone who may be at risk of experiencing life-threatening circumstances, which will be difficult to demonstrate in the context of climate change since, as previously mentioned, it is a phenomenon that affects communities in general. A similar threshold has been articulated in the ECtHR case-law in relation to Article 3 of the ECHR on the prohibition against torture.¹⁷⁸ According to Maneggia, the threshold equates to “a declaration of inhabitability.”¹⁷⁹ However, the two dissenting Committee members expressed concern over the high threshold.¹⁸⁰ One member argued in his dissent that “[w]hereas the risk to a person expelled or otherwise removed, must be personal – not deriving from general conditions, except in extreme cases, the threshold should not be too high and unreasonable.”¹⁸¹ Thus, there is a possibility of a more accommodating interpretation of the exception, which has some support within the Committee, as shown by the two dissenting opinions.

The *Teitiota* decision may, albeit inexplicitly, have pointed towards a relaxation of the requirement of the individual nature of the harm. In the decision, the Committee quoted the judgment of *Sufi and Elmi v. United Kingdom*, which concerned the requirement of individualized harm.¹⁸² This is interesting considering that the ECtHR stated in this judgment that where the direct and indirect actions of State and non-state actors are seen as the predominant cause of a humanitarian crisis, notwithstanding aggravations by

¹⁷⁵ Behrman and Kent, ‘The Teitiota Case and the limitations of the human rights framework’ (n 174) 35

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ See, *inter alia*, *NA. v. United Kingdom*, Application no. 25904/07 (Judgment of 17 July 2008) para 115 [hereinafter *NA. v. United Kingdom*].

¹⁷⁹ Amina Maneggia, ‘Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or ‘Responsibility to Protect’? The Teitiota Case Before the Human Rights Committee’ (2020) 14 *Diriti Umani e Diritto Internazionale* 635, 641.

¹⁸⁰ *Teitiota v New Zealand*, Annex 1 and 2.

¹⁸¹ *ibid.*, Annex 2, para 3.

¹⁸² *ibid.*, para 9.7; *Sufi and Elmi v. United Kingdom*, Application nos. 8319/07 and 11449/07 (28 June 2011) [hereinafter *Sufi and Elmi v. United Kingdom*].

natural phenomena such as drought, a less demanding threshold test to trigger a *non-refoulement* obligation should be applied.¹⁸³ One could argue that the humanitarian crisis due to the impacts of climate change are mainly a result of the direct and indirect actions of states. In addition, seeing as the Committee countenanced that generalized phenomena, such as climate change-related sea-level rise, may generate additional generalized risks to a dignified life of such foreseeability and seriousness as to be “personal” to any individual it affects, this may suggest a move towards greater acceptance of claims based on a general environmental situation.¹⁸⁴ That being said, the Committee has not explicitly expressed a development in this direction, nor has it demonstrated this in any particular decision.

4.3.2 THREATS TO SOCIOECONOMIC RIGHTS

The innovation of the *Teitiota* decision is encapsulated in the Committee’s holding that the effects of climate change *per se* may violate the right to life, requiring protection from *refoulement*.¹⁸⁵ The Committee recognized that the gravity of “the risk of an entire country becoming submerged under water” meant that “the conditions of life in such a country may become incompatible with *the right to life with dignity* before the risk is realized.”¹⁸⁶ By recognizing that the right to life entails an entitlement to certain living conditions, the Committee acknowledged the binding force of the rights’ economic and social components. Previously, it was unclear whether the legal obligation to respect the right to life required states to ensure access to basic economic and social entitlements. This ambiguity was mainly a consequence of the Committee’s language in General Comment No. 36 concerning the economic, social, and cultural dimensions of a dignified life.¹⁸⁷ *Teitiota v. New Zealand* dispels this ambiguity. The binding obligation to protect life under Article 6 of the ICCPR requires states to ensure access to basic economic and social entitlements, including the right to water and food.

However, as indicated in the preceding section, the threshold of a violation is very high. Concerning the lack of potable water in Kiribati, the Committee held that the applicant had to show that “the supply of fresh water is *inaccessible, insufficient or unsafe*.”¹⁸⁸ With respect to difficulties in growing crops, the applicant had to show that “he would be exposed to a situation of *indigence, deprivation of food, and extreme precarity*.”¹⁸⁹ Two Committee

¹⁸³ *Sufi and Elmi v. United Kingdom*, paras 281–292; Scott, ‘Natural Disasters, Climate Change and Non-Refoulement’ (n 143) 415.

¹⁸⁴ Maneggia, ‘*Non-Refoulement* of Climate Change Migrants: Individual Human Rights Protection or ‘Responsibility to Protect’? The *Teitiota* Case Before the Human Rights Committee’ (n 179) 639; Çalı, Costello and Cunningham, ‘Hard Protection through Soft Courts? *Non-Refoulement* before the United Nations Treaty Bodies’ (n 163) 383.

¹⁸⁵ Hamzah Sendut, ‘Climate Change as a Trigger of Non-Refoulement Obligations Under International Human Rights Law’ (n 16).

¹⁸⁶ *Teitiota v. New Zealand*, paras 9.11-12 (emphasis added).

¹⁸⁷ See HRC, ‘General Comment No. 36’ (n 111) para 26.

¹⁸⁸ *Teitiota v. New Zealand*, para 9.8 (emphasis added).

¹⁸⁹ *ibid*, para 9.9 (emphasis added).

members contested this. In his dissent, Duncan Laki Muhumuza stated that the threshold ascertained by the majority was “too high and unreasonable:”

In my view, the author faces a real, personal and reasonably foreseeable risk of a threat to his right to life as a result of the conditions in Kiribati. The considerable difficulty in accessing fresh water because of the environmental conditions, should be enough to reach the threshold of risk, without being a complete lack of fresh water. There is evident significant difficulty to grow crops.¹⁹⁰

The majority of the Committee argued that the applicant had not established that he and his family were exposed to unsafe drinking water.¹⁹¹ The Committee relied on the report by the climate change researcher John Corcoran, particularly the section that stated that “60 percent of the residents of South Tarawa obtained fresh water from rationed supplies provided by the public utilities board.”¹⁹² This may not reach the minimum standard for the right to access to water, including availability, accessibility, affordability, and safety.¹⁹³ Committee member Vasilka Sancin formulated this concern in her dissent and questioned whether “the notion of potable water should be equated with safe drinking water.”¹⁹⁴ Sancin pointed out that “water can be designated as potable, while containing microorganisms dangerous for health.”¹⁹⁵ Indeed, the evidence presented before the Committee was that at least one of the children had suffered a severe blood disorder due to drinking contaminated water, which was not disputed by the state party.¹⁹⁶ For instance, Corcoran stated that there was no surface fresh water on Kiribati as the rate of water extraction from freshwater sources had exceeded the rate of its replenishment through the percolation of rainwater and waste contamination had contributed to freshwater pollution.¹⁹⁷

It is laudable that the decision identifies the effects of climate change, in and of themselves, as creating the conditions in which protection may be granted based on the principle of *non-refoulement*. However, the threshold is maintained at a far too acute level to have a concrete application. The decision appears to suggest that for a breach of Article 6 of the ICCPR in these circumstances drinking water must be undrinkable, rather than risky, and there must be a complete failure of crops, rather than a decline. This indicates that in order to be granted protection against return to the country of origin its environmental condition has to be so severe that people live below a minimum subsistence level. As pointed out by Behrman and Kent, “by the time the conditions are such that the threshold is met, it is more likely that the extreme scarcity of potable water, of cultivable land, of general precarity, will

¹⁹⁰ *Teitiota v. New Zealand*, Annex 2, para 5.

¹⁹¹ *ibid*, Annex 1, para 3.

¹⁹² *ibid*, para 2.4.

¹⁹³ HRC, ‘Report of the Special Rapporteur on the human rights to safe drinking water and sanitation: Progressive realization of the human rights to water and sanitation’ (8 July 2020) UN Doc A/HRC/45/10, paras 32–42.

¹⁹⁴ *Teitiota v. New Zealand*, Annex 1, para 3.

¹⁹⁵ *ibid*.

¹⁹⁶ *ibid*, para 9.8.

¹⁹⁷ *ibid*, para 2.4.

have created conditions of violence and conflict.” However, as illustrated in Section 4.3.1, exceptions to the personal requirement are only made in ‘extreme cases’ and — at this point — climate change does not reach this threshold.

4.3.3 OVERPOPULATION AND SEA-LEVEL RISE

Finally, in relation to the assertion that the applicant faced a risk to his right to life because of overpopulation and increasing flooding, the Committee noted that both sudden-onset events and slow-onset processes could induce harm.¹⁹⁸ It explicitly stated that “given that the risk of an entire country [becoming] submerged is such an ‘extreme risk,’ the conditions of life may become incompatible with the right to life with dignity before the risk is realized.¹⁹⁹ While accepting the claim that sea-level rise would likely render Kiribati uninhabitable, the Committee stated that the timeframe of ten to fifteen years:

could allow for intervening acts (...) with the assistance of the international community, to take affirmative measures to protect and, where necessary relocate its population.²⁰⁰

As such, a key consideration in the ‘real risk’ test pertains to the will and capacity of governments to respond to and mitigate alleged environmental harms caused by climate change. The Committee noted that the Government of Kiribati was already taking steps to address the effects of climate change by adopting the 2007 National Adaptation Program of Action (NAPA). However, the Committee did not interfere with the assessment conducted by the state authorities, nor did it assess the sufficiency of the measures taken by the Kiribatian authorities:

Based on the information made available to it, the Committee is not in a position to conclude that the assessment of the domestic authorities that the measures taken by the Republic of Kiribati would suffice to protect the author’s right to life under article 6 of the Covenant was clearly arbitrary or erroneous in this regard, or amounted to a denial of justice.²⁰¹

The Committee relied entirely on the state party’s arguments, *inter alia*, that “there was no evidence that (...) the Government of Kiribati had failed to take programmatic steps to provide for the basic necessities of life, in order to meet its positive obligation to fulfill the author’s right to life.”²⁰² Therefore, climate change-related harms were not considered sufficiently ‘present’ or the applicant not ‘in danger’ due to the potential for intervening adaptive measures by the government of Kiribati — in effect, the Committee endorsed a ‘wait and see’ approach. As McAdam argues, “this reasoning requires

¹⁹⁸ *Teitiota v. New Zealand*, para 9.11.

¹⁹⁹ *ibid*, paras 9.10-11.

²⁰⁰ *ibid*, para 9.12.

²⁰¹ *ibid*.

²⁰² *ibid*, para 9.6.

scrutiny.”²⁰³ While disaster risk reduction and mitigation plans are essential for addressing climate change at large, they do not necessarily negate the risk to life posed by impacts of climate change. This reasoning will be developed more in detail below.

4.4 LIMITATIONS AND CHALLENGES

From the analysis of the three scenarios, a legal path for protection by the principle of *non-refoulement* emerges where environmental degradation due to climate change creates a real, personal risk to an applicant’s enjoyment of the right to life (see Table 3). However, as observed above, certain limitations remain. This section critically examines two main challenges— the high threshold required for establishing a violation of the right to life (Section 4.4.1); and the concept of imminence in the context of slow-onset environmental degradation (Section 4.4.2) — and proposes pathways to enhance and strengthen protection.

4.4.1 AN UNREACHABLE THRESHOLD?

The threshold for a violation of the right to life is, as argued in Sections 4.3.1 – 4.3.3, very high. It arguably contradicts the purpose of the right to life, namely, to safeguard the right to enjoy a life with dignity. According to case-law, the threat to the right to life must be personal and cannot derive merely from the general conditions in the receiving state. However, climate change-related displacement is hardly ever ‘personal in nature’ and, by definition, will almost always derive from general conditions. Furthermore, the exceptionally high threshold set in relation to socioeconomic threats seemingly implies that individuals are expected to endure a low-quality environment until it reaches a point of destitution. Recalling the standard upheld by the Committee, that “state parties may violate Article 6 even if such threats and situations do not result in loss of life,” it should arguably be enough that individuals face significant difficulty in accessing fresh water and growing crops, without being inaccessible, insufficient, or unsafe, or impossible.²⁰⁴ Even if deaths are not occurring with such regularity required by the Committee, it should arguably not mean *per se* that the threshold has not been reached. As one of the dissenting members argued:

[i]t would be counterintuitive to the protection of life, to wait for death to be very frequent and considerable; in order to consider the threshold of risk as met.²⁰⁵

McAdam states that “while this very high threshold might have been appropriate had only one of the elements been present,” it is “too high when

²⁰³ McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of *Non-Refoulement*’ (n 16) 718.

²⁰⁴ *Teitiota v. New Zealand*, paras 9.8–9.9.

²⁰⁵ *Ibid*, Annex 2, para 5.

a range of rights are impacted.”²⁰⁶ A cumulative risk assessment may be more appropriate, which, as observed above, has been followed in human rights *non-refoulement* jurisprudence.²⁰⁷ This approach is also used within international refugee law for determining a ‘well-founded fear.’ In refugee law, an individual may have a well-founded fear of being persecuted on account of one or several less severe risks that, when assessed cumulatively, can reach the threshold for the requirement of persecution.²⁰⁸ According to the UNHCR’s guidelines on determining refugee status:

an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin), In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds.”²⁰⁹

In the non-removal case *Sufi and Elmi v. United Kingdom*, the ECtHR held that the conditions in the country of origin were “sufficiently dire to amount to treatment reaching the threshold of Article 3 of the Convention” based on a cumulative assessment of the access to food, water, and shelter.²¹⁰ In 2016, the Nansen Initiative on Disaster-Induced Cross-Border Displacement (Nansen Initiative), a state-led consultative process with multi-stakeholder involvement, stated that the principle of *non-refoulement* under human rights law in the context of climate change-related displacement:

could perhaps apply, *mutatis mutandis*, to such situations, especially if the *cumulative conditions* in those countries amounted a threat to life or cruel, inhuman or degrading treatment.²¹¹

There is no reason why such a cumulative test could not be extrapolated to assessing harm for *non-refoulement* in the human rights context — as a lesser, complementary form of protection, it should demand a lower threshold for substantiating a violation. Had the Committee followed such an approach in *Teitiota v. New Zealand*, it is possible that a cumulative assessment of the affected rights, including the right to water, food and livelihood, would have met the threshold of a real risk to the right to a life with dignity.

²⁰⁶ McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 714.

²⁰⁷ *ibid.*

²⁰⁸ Matthew Scott, *Climate Change, Disasters and the Refugee Convention* (Cambridge University Press 2020) 109.

²⁰⁹ UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (1979, reissued 2019) UN Doc HRC/1P/4/ENG/REV.4, para 53.

²¹⁰ *Sufi and Elmi v. United Kingdom*, paras 291-292.

²¹¹ Nansen Initiative on Disaster-Induced Cross-Border Displacement, ‘Protection for Persons Moving Across Borders in the Context of Disasters: A Guide to Effective Practices for RCM Member Countries’ (November 2016) 12 n 15 (emphasis added).

4.4.2 ‘IMMINENCE’ AND SLOW-ONSET ENVIRONMENTAL DEGRADATION

The second challenge, and perhaps lynchpin of the Committee’s refusal to find favor of the *non-refoulement* claim in the *Teitiota* case, is that the timescale for Kiribati to become completely uninhabitable is ten to fifteen years. This was considered too far into the future to establish an *imminent* threat to life. A *future* risk, although well-founded, does not constitute a violation of the right to life within international human rights law.²¹² For this reason, the Committee concluded that the applicant did not face “a real, personal and reasonably foreseeable risk to his right to life.”²¹³ The assessment of ‘foreseeability’ — the *likelihood* of the harm manifesting — poses an obstacle to qualifying slow-onset environmental degradation as a threat to the right to life. This is mainly because the impacts of such degradation are progressive and gradual, which allow for intervening measures to quell the severity of harm.²¹⁴ Insofar as there is further gloss on the meaning of a reasonably foreseeable real risk, the notion of ‘imminence’ is often invoked as the level of severity required to trigger states’ *non-refoulement* obligations.²¹⁵ For instance, the Committee stated that “the imminence of any anticipated harm in the receiving state influences the assessment of the real risk faced by the individual.”²¹⁶ Therefore, even though the severity of the harm determines a need for protection, it is, as McAdam notes, necessarily interrelated with the harm’s timing:

The ability of existing legal mechanisms to respond to climate-related movement—through complementary protection in particular—would depend on the point in time at which protection is sought, based on the severity of the *immediate* impacts on return.²¹⁷

This raises the question of whether it is possible or appropriate to identify a basis on which an international protection application can be rejected if the harm feared by the applicant is likely to manifest over the longer term? At the outset, human rights law does not require individuals to establish that they face an imminent risk of harm if removed.²¹⁸ Rather, the substantive assessment turns on whether there is a *real risk*, not on the *certainty* of the harm feared. Notwithstanding, the Committee appears to have attempted to identify risks that could reasonably eventuate in the present, while excluding those grave risks which, while reasonably foreseeable today, would not eventuate until years in the future. This implies that the risk assessment focuses on the intensity of climate change impacts already felt in the present,

²¹² Sciaccaluga, *International Law and the Protection of “Climate Refugees”* (n 20) 162.

²¹³ *Teitiota v New Zealand*, para 9.4.

²¹⁴ *ibid*, para 9.12

²¹⁵ Anderson et al, ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ (n 164) 120.

²¹⁶ *Teitiota v New Zealand*, para 8.5.

²¹⁷ Jane McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’ (2011) PPLA/2011/03, Division of International Protection, United Nations Commissioner for Refugees, 50.

²¹⁸ McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 720.

i.e., the imminence of a threat, rather than the, arguably, inevitability of future threats. The nature of slow-onset environmental degradation does not easily fit into this reasoning. Adverse effects of climate change develop over time, thereby posing a threat to life by gradually rendering the environment uninhabitable.

An analogy can be made to the potential use of nuclear weapons, which, in addition to posing a threat to life directly, constitutes an indirect threat by contaminating the environment with radiation.²¹⁹ Similarly, the adverse impacts of climate change, for instance, salt-water intrusion into freshwater supplies, could be interpreted as a threat to life based on the severity and extent of the harm.²²⁰ However, in each case, the severity and extent of the harm feared has not reached the threshold for a violation of the right to life.²²¹ This seems counterintuitive to the obvious risk that both phenomena pose to the right to life, suggesting that there are inherent limitations imposed by the existing interpretation of ‘foreseeability’ in the context of slow-onset harm.

In *Teitiota v. New Zealand*, the conclusion that the adverse effects of climate change were not ‘reasonably foreseeable’ was mainly due to potential intervening adaptive measures, despite numerous reports showing that these measures had not yet been implemented.²²² In effect, the Committee endorsed a ‘wait and see’ approach by giving significant deference to future governmental intervention. This conclusion is debatable given that, as recognized in the UNHCR Guidelines on armed conflict and violence, “the possibility of intervening measures does not necessarily negate the need for international protection, especially when the trajectory of harm is moving in a clear direction.”²²³ Mere speculation about future events is very different from situations when there is “sound scientific evidence weighing strongly in favor of particular outcomes.”²²⁴ In this regard, it is instructive to consider the IPCC assessments of the likelihood of certain future climate change risks that could affect displacement. According to the IPCC:

- There is *high confidence* that low-lying areas are at risk from sea-level rise, which will continue for centuries even if global mean temperature is stabilized.²²⁵
- It is *virtually certain* that global mean sea-level rise will continue for many centuries beyond 2100.²²⁶

²¹⁹ McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’ (n 215) 19.

²²⁰ *ibid.*

²²¹ Anderson et al, ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ (n 164) 126.

²²² See *Teitiota v. New Zealand*, para 9.11.

²²³ Anderson et al, ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ (n 164) 133.

²²⁴ McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 718-719.

²²⁵ IPCC, *Climate Change 2014: Synthesis Report* (n 6) 16.

²²⁶ *ibid.* 15.

- There is *very high confidence* that climate change is projected to increase risks in urban areas for people, assets, economies and ecosystems, including from heat stress, storms and extreme precipitation, inland and coastal flooding, landslides, air pollution, drought, water scarcity, sea-level rise and storm surges. These risks are amplified for those lacking essential infrastructure and services or living in exposed areas.²²⁷

Turning to refugee law, Anderson et al. argue that “the high degree of likelihood expressed in each finding above would certainly meet the well-founded fear threshold in refugee law.”²²⁸ In refugee law, protection may be warranted even where “there is only a ten percent chance of harm, provided that the risk to the individual is plausible,” and, as argued by McAdam, the scientific predictions “go well above a ten percent risk.”²²⁹ Nevertheless, the Committee considered that the ten to fifteen years Kiribati had to mitigate the effects of sea-level rise meant that the applicant’s right to life was not at risk. The decision set a threshold that is arguably higher than what has been applied in other contexts. In cases involving long-term drivers of risk, such as healthcare and conflict, courts have been willing to afford applicants a long-term assessment of their predicament and extend the ‘benefit of the doubt’ for potential, but uncertain, mitigating factors.²³⁰ Recalling a State’s obligation not to remove an individual where there are *substantial grounds* for believing that there is a real risk of irreparable harm, the scientific certainty of foreseeable adverse climate change impacts arguably substantiates this risk.

The bind is that the scientific findings also support a ‘wait and see’ approach to climate change impacts on migration. The IPCC has stated that “[i]nnovation and investments in environmentally sound infrastructure and technologies can reduce greenhouse gas emissions and enhance resilience to climate change” and that “[t]ransformations in economic, social, technological and political decisions and actions can enhance adaptation and promote sustainable development.”²³¹ However, in the context of a *non-refoulement* claim, “future mitigation and adaptation possibilities remain speculative and uncertain.”²³² There is no certainty that such measures, when implemented, would be sufficient. In cases where climate change adaptation and mitigation efforts are underway, environmental and socioeconomic considerations may affect a State’s ability to cope with further changes to the climate.

²²⁷ IPCC, *Climate Change 2014: Synthesis Report* (n 6) 16.

²²⁸ Anderson et al, ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ (n 164) 134.

²²⁹ McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 719.

²³⁰ Anderson et al, ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ (n 164) 128, 131.

²³¹ IPCC, *Climate Change 2014: Synthesis Report* (n 6) 20, 25.

²³² Anderson et al, ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ (n 164) 135.

A relevant example is NAPA, which has identified population growth, deterioration of coastal zones, coral reefs, fisheries, fresh groundwater and health, as well as difficulty in enforcing land use management strategies as particular challenges to implementation.²³³ Therefore, mitigation measures “do not detract from the current trajectory of climate change impacts.”²³⁴ Drawing by analogy to the well-founded fear test in refugee cases, Anderson et al. state that “the focus is not on the *certainty* of harm, but whether there is a real *risk* of it.”²³⁵ A mere possibility of intervention of *potential* mitigating developments may not be sufficient to reduce an existing real risk to the right to life.²³⁶ As formulated by one dissenting member:

New Zealand’s action is more like forcing a drowning person back into a sinking vessel, with the “justification” that after all there are other voyagers on board. Even as Kiribati does what it takes to address the conditions; for as long as they remain dire, the life and dignity of persons remains at risk.²³⁷

An unsatisfying limitation of the decision in *Teitiota v. New Zealand* is the Committee’s failure to specify where the tipping point lies. On the one hand, it would have been inappropriate to set a definite timeframe considering the multicausal nature of climate change-related displacement (see Chapter 2). Moreover, *non-refoulement* claims are based on a case-by-case assessment. Regardless, the particular context of slow-onset environmental degradation highlights the difficulty of pinpointing a specific time frame to assess potential harm. As Anderson argues, “it is likely impossible and inappropriate to attempt to devise with any precision a time frame that delimits the scope of inquiry.”²³⁸ Each case must be assessed on its own merits.

On the other hand, individuals at risk should not have to wait until they are on the brink of death to receive protection from other states. While slow-onset environmental degradation presents particular challenges, assessing an individual’s need for protection from adverse impacts of climate change that induce displacement should rest on uniform principles within international refugee law and international human rights law, albeit with sufficient flexibility to respond to different factual contexts. Considering the certainty that Kiribati will become completely uninhabitable within the coming ten to fifteen years, those facing the most immediate effects of climate change should not pay the price for a ‘wait and see’ approach, especially when there is no clear legal basis.

²³³ Saber Salem and Armin Rosencranz, ‘Climate Refugees in the Pacific’ (2020) 50 Environmental Law Report 10540, 10543-10544.

²³⁴ Anderson et al, ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ (n 164) 135.

²³⁵ *ibid*, 175; Jane McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 719.

²³⁶ McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non- Refoulement’ (n 16) 719.

²³⁷ *Teitiota v. New Zealand*, Annex 2, para 6.

²³⁸ Anderson et al, ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ (n 164) 135.

4.5 CLIMATE CHANGE IMPACTS AS CRUEL, INHUMAN OR DEGRADING TREATMENT?

As briefly noted in Chapter 3, the principle of *non-refoulement* includes an obligation not to return individuals where they risk torture or cruel, inhuman, or degrading treatment or punishment. Existing jurisprudence does not expressly limit such treatment to positive acts or omissions.²³⁹ Therefore, a relevant and interesting question is whether dire conditions resulting from adverse climate change, such as in *Teitiota v New Zealand*, could amount to a violation of this provision as enshrined in Article 7 of the ICCPR?

In order to trigger the principle of *non-refoulement* in conjunction with Article 7, the risk must, similar to the requirements for a violation of the right to life, reach a certain minimum level of severity. Although the issue was not addressed in *Teitiota v. New Zealand*, the Committee formulated a similar threshold to that of an Article 6 claim:

a real risk of irreparable harm such as that contemplated by Article 6 and 7 (...) must be personal, (...) cannot derive merely from the general conditions in the receiving State, except in the most extreme cases, and (...) there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.²⁴⁰

As in a claim under Article 6, a key consideration for an assessment under Article 7 would likely have been what capacity the Kiribatian government had to respond to the alleged harms.²⁴¹ However, the particular question for an Article 7 claim would have been whether Kiribati's conditions could be said to amount to cruel, inhuman, or degrading treatment. This is important considering the express recognition by the Committee that the effects of climate change in receiving states may expose individuals to a violation of their rights under Article 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states.²⁴² The closest documented effect of climate change that equates to ill-treatment, as noted by Caskey, is the issue of forced evictions, which the Committee has found can reach the standard for a violation.²⁴³ Therefore, following this line of reasoning, and the argument that such treatment does not require a positive act, the principle of *refoulement* could be triggered when an applicant can substantiate a real risk of increased land salinization forcing them to leave their home or of rising temperatures causing retreat from an area.²⁴⁴

²³⁹ HRC, 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (19 March 1992) UN Doc HRI/GEN/Rev.9, para 4.

²⁴⁰ *Teitiota v. New Zealand*, para 9.3.

²⁴¹ McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement' (n 16) 716.

²⁴² *Teitiota v. New Zealand*, para 9.11.

²⁴³ Caskey, 'Non-Refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection' (n 132) 12; HRC, 'Concluding Observations of the on the second periodic report of Israel' (21 August 2003) UN Doc CCPR/CO/78/ISR, para 16.

²⁴⁴ Caskey, 'Non-Refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection' (n 132) 12.

Turning to regional jurisprudence in this context, the ECtHR has acknowledged that return to circumstances of serious destitution or dire humanitarian conditions may amount to cruel, inhuman, or degrading treatment in some cases.²⁴⁵ For instance, in *Sufi and Elmi v. United Kingdom*, the Court found that the conditions in the country of origin were “sufficiently dire to amount to treatment reaching the threshold of Article 3 of the Convention” based on a cumulative assessment of the access to food, water, and shelter.²⁴⁶ According to McAdam, the Committee “might have moved towards the European line of reasoning,” by considering the act of removal itself as a “crucial element in the chain of events,” could amount to inhuman or degrading treatment were it to result in a person’s most basic human rights being severely violated.²⁴⁷

Although the ECtHR’s approach has focused on a situation of widespread violence or distinguishing features, the Court has signaled it is open to *other* distinguishing features, on a case-by-case basis, which may place an individual at risk of treatment contrary to Article 3 of the ECHR.²⁴⁸ The Court noted in *NA. v United Kingdom* that the assessment must be made on “the basis of all relevant factors which may increase the risk of ill-treatment,” and that “due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively [...] may give rise to a real risk.”²⁴⁹ The Court later found in *Tarakhel v. Switzerland* that “living conditions” may meet this threshold.²⁵⁰ As observed in Section 4.3.2, the Committee recognized that the right to life requires states to ensure access to basic economic and social entitlements. Therefore, the approach of balancing both the situation in the country of origin and distinguishing features offers potentially “one of the most favorable entry points” for qualifying impacts of climate change under the principle of *non-refoulement*.²⁵¹

4.6 CONCLUDING REMARKS

The *Teitiota* decision illustrates a legal path for protection for individuals displaced by climate change by the principle of *non-refoulement*. A clear victory is the admission of the case before the Committee, which cements that climate change has adverse effects on individuals’ lives and livelihoods. This confirmation is essential. It creates a possibility for individuals displaced by

²⁴⁵ McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 716.

²⁴⁶ *Sufi and Elmi v. United Kingdom*, paras 291-292.

²⁴⁷ McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 716.

²⁴⁸ Caskey, ‘Non-Refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection’ (n 132) 13.

²⁴⁹ *NA. v. The United Kingdom*, para 130.

²⁵⁰ *Tarakhel v. Switzerland*, Application No. 29217/12 (4 November 2014), paras 111, 122.

²⁵¹ Caskey, ‘Non-Refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection’ (n 132) 14.

climate change to enjoy the protection provided by the principle of *non-refoulement*, thereby effectively prohibiting deportation to their country of origin. In terms of substance, the decision confirmed that climate change impacts may reach the necessary threshold for a violation of the right to life (see Table 3) if environmental degradation creates a real, personal risk to an applicant’s enjoyment of the right to life. Therefore, another person in another geographical location may already have a valid claim on the case’s rationale.

Table 3. Thresholds engaging the principle of *non-refoulement* in the context of climate change owing to a risk to the right to life

Claim	Threshold
Generalized violence	Substantial grounds that the risk to the right to life is personal in nature and does not derive merely from the general conditions in the receiving State. A general situation of violence only constitutes a real risk of irreparable harm in the most extreme cases. ²⁵²
Threats to socioeconomic rights, including lack of access to water and food insecurity	Lack of access to water: Sufficient information to indicate that the supply of freshwater is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death. ²⁵³ Food insecurity: A real and reasonably foreseeable risk that the author would be exposed to a situation of indigence, deprivation of food, and extreme precarity that could threaten his right to life, including to a life with dignity. ²⁵⁴
Overpopulation and intense flooding resulting in breaching of sea walls	Sea level rise that renders a territory inhabitable, without the possibility of intervening acts by the State, or the international community, to protect and relocate the population where necessary. ²⁵⁵

On the face of it, the evolution of the principle of *non-refoulement* in light of the expanding protection of the right to life addresses what is perhaps one of the most significant gaps in the international regulatory framework on climate change-related displacement — the right to remain. Between the protection afforded by the international refugee regime and the international human rights regime, the latter appears to be the most accessible to individuals displaced by climate change. While the human rights regime does not grant asylum, protection by the principle of *non-refoulement* in conjunction with

²⁵² *Teitiota v. New Zealand*, para 9.7.

²⁵³ *ibid*, para 9.8.

²⁵⁴ *ibid*, para 9.9.

²⁵⁵ *ibid*, para 9.12.

the right to life in the context of environmental degradation is possible and could assist more people as climate change impacts intensify and trigger more significant cross-border displacement.

Despite the recognition that climate change impacts may trigger the principle of *non-refoulement*, there will likely be difficulties in establishing the requisite severity of harm, which is debatably too high or, as two dissenting members phrased it: unreasonable. The threshold seemingly requires a complete breakdown in the basic economic and social entitlements of the right to life. As the adverse effects of climate change have more severe impacts on individuals' human rights, future threats may reach this threshold. The urgency of the situation is already understood by the two dissenting Committee members, which illustrates that this shift might not be too far off. Simultaneously, the threshold is arguably too high when a range of rights is impacted. Therefore, adopting a cumulative approach to the risk assessment or lowering the threshold for a violation of the right to life in this context would be the most straightforward way to grant protection for individuals displaced by climate change.

The decision was left without prejudice to states' continuing responsibility to consider future deportation cases new and updated data on the effects of climate change. Thus, it may be used as a basis for future, more ambitious decisions that engage the principle of *non-refoulement*. As McAdam notes:

Cases such as Mr. Teitiota's enable the boundaries of existing law to be tested. They help to highlight legal gaps and uncertainties and stimulate the development of jurisprudence.²⁵⁶

Future decisions may use the case as a justification for dismissing the, arguably impossible, 'personal nature' requirement in the context of climate change. This may be the case with regard to coastal areas or low-lying islands at risk of submersion, or where there is already a fair degree of certainty regarding the progressive worsening of environmental conditions and socioeconomic factors due to climate change. Future cases may also accept that the environment has deteriorated to the point where the likelihood of intervening measures has been reduced, thereby qualifying as an 'extreme case' and nullifying the personal nature requirement. In this context, dire conditions in the country of origin due to climate change impacts may be qualified as a violation of the prohibition against torture and other cruel, inhuman, or degrading treatment, rather than the right to life. As observed above, the Committee may have moved towards the European line of reasoning that the act of removal itself is a crucial element in the violation of the right, although whether it adopts such an approach is yet to be seen.

A key challenge for the future is how to accommodate mitigating impacts of potential intervening measures within the 'real risk' test. As shown above, in situations where governments can implement further intervening measures,

²⁵⁶ McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement' (n 16) 720, 724.

the threat to the right to life due to climate change is not considered imminent. Suppose a threat is likely to manifest in the short-term. In that case, it may be easier for an individual to argue that they face a real risk of irreparable harm since there may be less opportunity for mitigating factors to intervene. In contrast, most attempts to rely on the principle of *non-refoulement* due to slow-onset environmental degradation will fail, as the threats, such as rising sea-levels, have not (yet) made the territory completely uninhabitable. In such cases, the Committee will likely afford state parties discretion to implement intervening measures, which, in turn, weaken the ‘immediacy’ of the climate change harms already felt.

This reasoning requires scrutiny. Although intervening measures are essential to address climate change and can affect real transformation, the analysis in Section 4.4.2 has shown that such actions do not necessarily negate the need for international protection. They remain speculative and arguably do not affect whether there is a real *risk* of a threat to the right to life, which is the required threshold for triggering the principle of *non-refoulement*. Mere speculation about future events is very different from situations when there is sound scientific evidence, such as the IPCC assessments, weighing strongly in favor of climate change outcomes on habitability. The UNHCR has adopted an approach that considers multiple potential consequences when assessing armed conflict and violence. Under this approach, the presence of multiple possibilities, each of which involves speculation, does not foreclose the possibility that protection is warranted. There is no direct barrier to applying a similar method analogously in non-removal claims. Rather, the real risk test’s flexibility under the principle of *non-refoulement* provides the necessary framework for decision-makers to assess claims. After all, it is not clear why states’ responsibility for violations of the right to life following *refoulement* should be limited to those occurring within an immediate or short-term period.

5 CLIMATE CHANGE LITIGATION — A STRATEGIC NEXT STEP?

5.1 INTRODUCTION

The limitations to the international refugee regime in the context of climate change and challenges of applying the principle of *non-refoulement* under the international human rights regime lead to the conclusion that perhaps climate change-related displacement should or could be addressed through other avenues. Looking beyond existing legal regimes, what should be the focus of the international community? An obvious possibility for continued research is to adopt a new treaty or amend the existing Refugee Convention to protect individuals displaced by climate change.²⁵⁷ While this is possible, it is arguably not probable. Amending the Refugee Convention to adequately address climate change-related displacement requires international cooperation and political will, which, at this point, does not exist. Therefore, this thesis examines a new strategy — one that in recent years “has been employed by communities and civil society organisations wishing to force progress in the fight against climate change” — the use of climate change litigation.²⁵⁸

The chapter will begin with a brief evaluation of the legal developments concerning climate change-related displacement. It will explain that despite notable efforts, a regulatory gap remains. Next, the chapter will investigate the potential contribution of climate change litigation in developing the law on protecting individuals displaced by slow-onset environmental degradation. Well-known climate change litigation cases will be discussed, in which individuals have sued their government for (in)action on climate change. As such, the chapter will investigate whether the use of litigation could provide answers to the plight of displaced individuals. Although the chapter will consider international, regional, and domestic jurisprudence, much of the analysis about the nature and scope of the right to life applies equally to all contexts.

²⁵⁷ Sciacaluga, *International Law and the Protection of “Climate Refugees”* (n 20) 55.

²⁵⁸ Simon Behrman and Avidan Kent, ‘Climate-induced migration: Will tribunals save the day?’ (2020) 2(2) Hong Kong Journal of Law and Public Affairs <<https://ssrn.com/abstract=3682504>> accessed 25 November 2020.

5.2 CURRENT DEVELOPMENTS ON CLIMATE CHANGE-RELATED DISPLACEMENT

The international regulation of migration in the context of climate change is a relatively new development.²⁵⁹ Up until 2010, the international community was mostly silent on the matter. In that year, member states to the UNFCCC recognized, for the first time, that climate change-related migration was an issue and called on the international community:

to enhance action on adaptation (...) by undertaking, *inter alia* (...) 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.²⁶⁰

This “unassumingly vague paragraph” ignited a process that, up until today, has arguably not matured into a substantial change in the regulatory framework on climate change, migration, and displacement.²⁶¹ Notwithstanding, there have been significant developments in this context. In 2012, the Nansen Initiative was launched by Switzerland and Norway, culminating in the 2015 Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change endorsed by 109 states.²⁶² The Protection Agenda presents states with useful guidelines and practices regulating climate change-induced migration that states can incorporate into their own laws and policies. These include disaster risk reduction measures, climate change adaptation plans, criteria for the term ‘cross-border disaster-displaced persons,’ and practices concerning human rights protection.²⁶³

Language on climate change and human mobility was subsequently included in non-binding instruments, including the Sendai Framework for Disaster Risk Reduction 2015–2030 and the International Law Commission (ILC) Draft Articles on the Protection of Persons in the Event of Disasters.²⁶⁴ Important non-binding declarations have also been adopted, such as the 2016 New York Declaration for Refugees and Migrants, the 2018 Global Compact for Refugees and the 2018 Global Compact for Safe, Orderly and Regular

²⁵⁹ Behrman and Kent, ‘Climate-induced migration: Will tribunals save the day?’ (n 258) 2.

²⁶⁰ COP, UNFCCC, ‘Report of the Conference of the Parties on its sixteenth session — Addendum — Part Two: Action taken by the Conference of the Parties’ (15 March 2011) UN Doc FCCC/CP/2010/7/Add.1, Decision 1/CP.16, para. 14(f).

²⁶¹ Behrman and Kent, ‘Climate-induced migration: Will tribunals save the day?’ (n 258) 2.

²⁶² Nansen Initiative on Disaster-Induced Cross-Border Displacement, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’ (n 74); Nansen Initiative on Disaster-Induced Cross-Border Displacement, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’ (December 2015) Vols I and II.

²⁶³ *ibid* 26, 28-29.

²⁶⁴ UNGA, Resolution 69/283, ‘Sendai Framework for Disaster Risk Reduction 2015–2030’ (23 June 2015) UN Doc A/RES/69/283.

Migration.²⁶⁵ The latter represents “states’ most detailed political commitments to date” on climate change-related displacement.²⁶⁶ According to Kälin, it was a “breakthrough” considering its “comprehensive inclusion of disaster- and climate change-related migration” and “sophisticated understanding of the disaster–migration nexus.”²⁶⁷ For instance, the Compact for Safe, Orderly and Regular Migration acknowledges that the commitment in Objective 21 may warrant *non-refoulement* in order to uphold the prohibition of forcible return of migrants in cases of a foreseeable risk of not only death, torture, and other cruel, inhuman and degrading treatment but also other irreparable harm.²⁶⁸ The latter arguably encompasses situations such as *refoulement* to low-lying SIDS that have become uninhabitable due to sea-level rise and other adverse impacts of climate change. However, the Compact “as a legally non-binding instrument” will “very much depend on the quality of the follow-up.”²⁶⁹ Therefore, it is important to view these developments for what they are — political declarations that mostly reconfirm what is already regarded as evident: individuals displaced by climate change impacts require protection. In terms of substance, they do not add much to the debate.

Other essential legal developments include establishing a study group on Sea-Level Rise in International Law by the ILC in 2019.²⁷⁰ The mandate includes examining, among other things, applicable principles relating to “the protection of the human rights of persons displaced internally or that migrate due to the adverse effects of sea-level rise.”²⁷¹ However, the outcomes of the study group remain to be seen.

While the aforementioned developments have been essential by providing valuable blueprints and guidelines for negotiations and regulations on climate change-related displacement, they have not prompted a significant regulatory change. As observed in Chapter 3, one of the main legal frameworks — the Refugee Convention — has not adjusted in any meaningful way to address the plight of individuals displaced by the impacts of climate change. Although there are many amendment proposals, none of these have been adopted. In sum, the legal gap, as identified in this thesis, remains unchanged.

²⁶⁵ UNGA, Resolution 73/195, ‘Global Compact for Safe, Orderly and Regular Migration’ (11 January 2019) UN Doc A/RES/73/195; Resolution 73/151, ‘Global Compact on Refugees’ (17 December 2018) UN Doc A/RES/73/151; Resolution 71/1, ‘New York Declaration for Refugees and Migrants’ (19 September 2016) UN Doc A/RES/71/1, paras 1, 18, 43, 50.

²⁶⁶ McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 722.

²⁶⁷ Walter Kälin, ‘The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons’ (2018) 30(4) *International Journal of Refugee Law* 664, 665.

²⁶⁸ UNGA, Resolution 73/195, ‘Global Compact for Safe, Orderly and Regular Migration’ (n 264), objective 21, para 37.

²⁶⁹ Kälin, ‘The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons’ (n 267) 667.

²⁷⁰ International Law Commission (ILC), ‘Sea-level rise in relation to international law’ (2018) Rep. on the Work of its Seventieth Session, Annex B, UN Doc A/73/10.

²⁷¹ *ibid.*, para 17(vi).

5.3 THE TURN TO CLIMATE CHANGE LITIGATION

Due to the international political impasse and lack of legislative progress on the issue of climate change, there has been “widespread disillusionment” followed by a search for “new and more effective strategies that will lead to better results.”²⁷² Many environmental organizations and affected individuals have turned to international and national courts hoping that “whatever states were unable to agree on in political negotiations will be delivered through judicial evolution.”²⁷³ Climate change litigation has grown exponentially over the past three decades as a way of advancing or delaying effective action on climate change, of which human rights arguments are being used as support in an increasing number of cases.²⁷⁴

In March 2017, the United Nations Environment Programme (UNEP) stated that 654 climate change cases had been filed in the United States and over 230 cases in 23 other countries.²⁷⁵ As of July 2020, the total number of climate cases filed to date reached approximately 1 587, of which 36 countries were represented, in addition to eight regional or international jurisdictions.²⁷⁶ As formulated by Peel and Osofsky, “[c]ourtsrooms have become a key battleground in the public debate over climate change around the world.”²⁷⁷ It is difficult to pinpoint the full range of climate change litigation since “disputes over climate change span a wide range of substantive areas of law and judicial and quasi-judicial fora.”²⁷⁸ Claims include, but are not limited to, issues such as advancing climate policies, seeking damages for climate change and raising awareness.²⁷⁹ Most attempts have been unsuccessful as courts have been reluctant to develop the law on politically sensitive matters.²⁸⁰ Notwithstanding, a few success stories exist that have adjudicated cases despite their political implications, and, on rare occasions, even issuing operative decisions. Thus, the link between climate change and environmental and human rights continues to be crystallized through litigation at the national, regional, and international levels.

²⁷² Joana Setzer and Rebecca Byrnes, ‘Global trends in climate change litigation: 2020 snapshot’ (July 2020) Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

²⁷³ Behrman and Kent, ‘Climate-induced migration: Will tribunals save the day?’ (n 258) 5.

²⁷⁴ Setzer and Byrnes, ‘Global trends in climate change litigation: 2020 snapshot’ (n 272) 1.

²⁷⁵ UNEP, *The Status of Climate Change Litigation: A Global Review* (May 2017) 10.

²⁷⁶ Setzer and Byrnes, ‘Global trends in climate change litigation: 2020 snapshot’ (n 272) 4.

²⁷⁷ Jacqueline Peel and Hari M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015) 1.

²⁷⁸ Hari M. Osofsky and Jacqueline Peel, ‘The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?’ (2013) 20 *Environmental and Planning Law Journal* 303, 304.

²⁷⁹ Setzer and Byrnes, ‘Global trends in climate change litigation: 2020 snapshot’ (n 272).

²⁸⁰ Behrman and Kent, ‘Climate-induced migration: Will tribunals save the day?’ (n 258).

5.3.1 A BRIEF SURVEY OF KEY CASES

One of the earliest attempts to adjudicate human rights violations due to climate change impacts was the Inuit Petition before the Inter-American Court of Human Rights (I-ACtHR) in 2005. At the time, the link between the environment and human rights was not well-established, and the UNFCCC had not yet committed to addressing climate change-related displacement.²⁸¹ The petition argued that the rights to life and health were infringed due to the United States' acts and omissions.²⁸² The I-ACtHR ultimately rejected the claim due to insufficient evidence. Nevertheless, the case opened up an essential dialogue, or rather continued, a discourse on climate change and human rights.

Since the Inuit Petition, there has been a proliferation of climate change judgments. A landmark case is *Klimaatzaak Urgenda*, which was brought by the Urgenda Foundation, a Dutch citizens' platform for the transition to a sustainable society, against the Dutch government.²⁸³ The Foundation claimed that the government was legally obliged to reduce greenhouse gas emissions under its international obligations, including the right to life in Article 2 of the ECHR.²⁸⁴ According to the ECtHR's case-law, the right to life encompasses a positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction, in, *inter alia*, situations involving natural disasters.²⁸⁵ States must take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk.²⁸⁶ The Dutch Supreme Court held that climate change constituted an 'immediate risk' to the right to life of Dutch residents. Therefore, the government was obliged to uphold its greenhouse gas commitment to mitigate climate change.²⁸⁷

A few months after the judgment in *Klimaatzaak Urgenda*, the Lahore High Court in Pakistan ruled that the national government's delay in implementing its climate policy framework violated its citizens' fundamental rights.²⁸⁸ The High Court specified that the constitutional right to life "includes the right to a healthy and clean environment" and cited domestic and international legal principles.²⁸⁹ The verdict led to the establishment of a joint expert-

²⁸¹ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States 13-20 (7 December 2005).

²⁸² *ibid* 90.

²⁸³ *Urgenda Foundation v. Supreme Court of the Netherlands* (20 December 2019) ECLI:NL:HR:2019:2006 [hereinafter *Klimaatzaak Urgenda*].

²⁸⁴ Urgenda Foundation, 'Summons' (2015) para. 28; Urgenda Foundation, 'Landmark decision by Dutch Supreme Court' <www.urgenda.nl/en/themas/climate-case/> accessed 30 November 2020.

²⁸⁵ See, *inter alia*, *Kiliç v. Turkey*, Application no. 22492/93 (28 March 2000), para 62.

²⁸⁶ *Budayeva et al. v. Russian Federation*, Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (20 March 2008) para 149, 160.

²⁸⁷ *Klimaatzaak Urgenda*, paras 5.2.2, 5.8.

²⁸⁸ *Asghar Leghari v Federation of Pakistan and Others* (2015) W.P. No. 25501/2015, para 12 [hereinafter *Leghari v. Pakistan*].

²⁸⁹ *ibid*, paras 8, 12.

government commission on climate change to implement the policy framework effectively.²⁹⁰ In 2018, a landmark judgment was given by the Colombian Supreme Court in *Future Generations v. Ministry of Environment and Others*.²⁹¹ The case was brought by twenty-five young plaintiffs who argued that the Colombian government's failure to reduce the Amazon's deforestation violated their rights to food, health, life, water and a healthy environment.²⁹² The Supreme Court held that the “fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem.”²⁹³ Therefore, it ordered the government to formulate and implement action plans to address deforestation.

Pronouncements are awaited in other cases alleging climate-related violations of human rights. A petition pending before the Committee on the Right of the Child, lodged in 2019 by Greta Thunberg and fifteen other minors, may result in a detailed consideration of states' obligations towards children under international human rights law, a particularly vulnerable group in the context of climate change-related displacement.²⁹⁴ In 2019, a group of Torres Strait Islanders complained to the HRC against the Australian government. The complaint accuses the government of breaching fundamental rights, including the right to culture and the right to life, by failing to address climate change adequately.²⁹⁵ Numerous other cases are currently filed and pending worldwide, including in Pakistan,²⁹⁶ Germany,²⁹⁷ France,²⁹⁸ Uganda²⁹⁹ and Canada.³⁰⁰

5.3.2 UNDERSTANDING POTENTIAL IMPACTS

The two landmark cases *Klimaatzaak Urgenda* and *Leghari v. Pakistan*, are examples of when climate change litigation results in *direct* regulatory change through “a formal change in climate change law and policy.”³⁰¹ Such

²⁹⁰ *Leghari v. Pakistan*, para 25; Setzer and Byrnes, ‘Global trends in climate change litigation: 2020 snapshot’ (n 272) 24.

²⁹¹ *Future Generations v. Ministry of Environment and Others* (2018) 11001-22-03-000-2018-00319-01.

²⁹² *ibid.*

²⁹³ *ibid* 13.

²⁹⁴ Communication to the Committee on the Rights of the Child in the case of *Sacchi et al v Argentina et al* (13 September 2019); McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 16) 717.

²⁹⁵ Keina Yoshida and Joana Setzer, ‘The trends and challenges of climate change litigation and human rights’ (2020) 2 *European Human Rights Law Review* 140, 18.

²⁹⁶ See *Maria Khan et al. v. Federation of Pakistan et al.* (2018) W.P. No. 8960/2019.

²⁹⁷ *Friends of the Earth Germany, Association of Solar Supporters, and Others v. Germany* (December 2018).

²⁹⁸ *Notre Affaire à Tous and Others v. France* (December 2018).

²⁹⁹ *Mbabazi and Others v. The Attorney General and National Environmental Management Authority* (September 2012); *Center for Food and Adequate Living Rights et al. v. Tanzania and Uganda* (November 2020).

³⁰⁰ *La Rose v. Her Majesty the Queen* (October 2019).

³⁰¹ Peel and M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 277) 37.

cases “affect efforts to regulate climate change by altering the regulatory landscape, both in terms of who can regulate and what regulation can create.”³⁰² Another significant development of the law is related to causality. The problem of causality forms a barrier for any claim concerning states’ liability in the context of climate change-related displacement. To begin with, it is “difficult to establish a direct link between *specific* emissions polluted in/by any given state and the environmental damage that pushed a certain individual to leave their home.”³⁰³ Secondly, as observed in Chapter 2, it is hard to isolate climate change as the sole reason for migration as the decision to migrate is multicausal, and due to a combination of push-factors. The case *Klimaatzaak Urgenda* may offer guidance in this respect. The Supreme Court referred to the ‘no harm’ rule as a source for attributing responsibility:

Countries can be called to account for the duty arising from this principle. Applied to greenhouse gas emissions, this means that they can be called upon to make their contribution to reducing greenhouse gas emissions. This approach justifies partial responsibility: each country is responsible for its part and can therefore be called to account in that respect.³⁰⁴

In addition to formal and doctrinal changes in regulation, the requested remedies, such as emissions reduction or adaptation plans, will, if successful, also mitigate the push-factors that lead to climate-induced migration.³⁰⁵ For instance, while the Torres Strait Islanders claim does not concern migration directly, it addresses crucial issues that directly relate to climate change-related displacement. If the Committee decides on the merits, it may address some of the challenges identified in Section 4.4 in relation to the principle of *non-refoulement*, including whether climate change triggers life-threatening adverse impacts, such as the risks to food and water security, that reach the threshold for a violation.

Litigation is not only initiated to advance regulatory action but also to influence the public debate.³⁰⁶ According to Peel and Osofsky, climate change litigation can also incite *indirect* change through behavioral influence by “raising public awareness of the climate change problem or generating shifts in public opinion or social norms.”³⁰⁷ Climate change litigation, whether successful or not, “has important indirect influences on the regulatory landscape through the role it plays in shaping social norms, including public perceptions of climate change, accepted understandings of climate science, and views on the appropriate regulatory response.”³⁰⁸ The Inuit Petition is an example of this as it was intended to encourage climate

³⁰² Peel and M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 277) 37-38.

³⁰³ Behrman and Kent, ‘Climate-induced migration: Will tribunals save the day?’ (n 258) 8.

³⁰⁴ *Klimaatzaak Urgenda*, para 5.7.5.

³⁰⁵ Behrman and Kent, ‘Climate-induced migration: Will tribunals save the day?’ (n 258) 6.

³⁰⁶ Peel and M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 277) 221.

³⁰⁷ *ibid* 29, 47.

³⁰⁸ *ibid* 222.

change action and spread awareness of climate change and human rights.³⁰⁹ After such initial efforts, the HRC adopted several resolutions addressing the issue, including Resolution 7/23 in which it expressed concern that:

(...) climate change poses an immediate and far-reaching threat to people and communities worldwide and has implications for the full enjoyment of human rights.³¹⁰

Apart from inciting public debate, court decisions may contribute to legal developments within and across jurisdictions. In this regard, climate change litigation may carry significant transferable value. *Leghari v. Pakistan* has been referred to in multiple proceeding decisions and has influenced the arguments employed in these judgments.³¹¹ The success achieved through litigation, exemplified by *Klimaatzaak Urgenda*, has inspired similar litigation in various jurisdictions.³¹² For instance, in November 2020, the Conseil d'Etat in France ruled that the French government must justify that the greenhouse gas reduction path to 2030 can be achieved.³¹³

As many climate change cases are still pending, it is difficult to know if and how their outcomes will develop the law on climate change-related displacement. However, a “strategic litigation initiative around these matters should (...) provide the opportunity to test the actual scope of host-state protection obligations.”³¹⁴ The use of climate change litigation illustrates “its ability to incrementally develop the law against real-life scenarios.”³¹⁵ As illustrated in the Chapter 4, *Teitiota v. New Zealand* crucially developed the law by confirming that, in extreme cases, the impacts of climate change could impose a significant threat on the right to life. This confirmation is essential. It creates the possibility that individuals displaced by climate change may enjoy protection under the principle of *non-refoulement*, effectively prohibiting their deportation to the countries of origin. However, as shown in the same chapter, limitations and challenges exist, which arguably water-down the decision’s importance.

The turn to climate change litigation “reflect a growing movement by individuals who have been disproportionately impacted by climate change to rely upon international human rights conventions in an attempt to hold states

³⁰⁹ For an in-depth discussion see Hari M. Osofsky, ‘The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ (2006) 31 *American Indian Law Review* 675.

³¹⁰ HR Council, ‘Resolution 7/23: Human Rights and Climate Change’ (n 109).

³¹¹ See *Maria Khan et al. v. Federation of Pakistan et al.* (n 295); *Sheikh Asim Farooq v. Federation of Pakistan* (2017) W.P. No. 192069/2018.

³¹² Setzer and Byrnes, ‘Global trends in climate change litigation: 2020 snapshot’ (n 272) 6.

³¹³ *Commune de Grande-Synthe v. France* (November 2019).

³¹⁴ Matthew Scott, ‘A role for strategic litigation: Strategic litigation to protect individuals at risk can usefully support higher-level protection initiatives’ (2015) 49 *Forced Migration Review* 47, 47.

³¹⁵ *ibid* 48.

accountable.”³¹⁶ As identified in Chapter 4, a crucial challenge that will need to be addressed and developed in this context, especially in relation to migration due to slow-onset environmental degradation, is the definition of ‘immediacy.’ The Committee argued in *Teitiota v. New Zealand* that it was not necessary for action in the present, as it would still take ten to fifteen years until Kiribati became wholly inundated. In other words, the progressive and gradual threats emanating from slow-onset environmental degradation were not considered an imminent risk to the right to life. Interestingly, in *Klimaatzaak Urgenda*, the Supreme Court came to an opposite conclusion. The Supreme Court determined that a significant effort would have to be made in the present to reduce more significant risks in the future:

[t]he fact that this risk will only be able to materialise a few decades from now and that it will not impact specific persons or a specific group of persons but large parts of the population does not mean – contrary to the State's assertions – that Articles 2 and 8 ECHR offer no protection from this threat. (...) The mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken.³¹⁷

The two cases illustrate international human rights law’s “complex and multitudinous connection to time” and the preference for “a corporate conception of time” over “subjective experiences of time from the perspectives of individual victims of rights violations.”³¹⁸ As such, an important challenge in future climate change litigation cases will be ‘time’ itself and defining ‘immediacy’ in this context. Looking ahead, perhaps climate litigation has the potential of developing a jurisprudence that is more fine-tuned to the specific climate change impacts on the right to life. Notwithstanding, climate change litigation is, as observed in this chapter, a potential avenue for clarifying and developing key concepts, such as causality, immediacy and responsibility, in a way that might be helpful for international protection claims.

5.4 CONCLUDING REMARKS

While the international community is reluctant or unable to close the longstanding legal gap on the protection of individuals displaced by climate change, the current wave of climate change litigation may bring about at least some useful answers. The many pending cases indicate that scholars and states alike should pay closer attention to this space and, hopefully, await further developments. The power of courts is not necessarily in their binding decisions as many of the judgments mentioned above are not binding or are limited to a specific jurisdiction. However, successful and unsuccessful

³¹⁶ Elisa de Wit, Sonali Seneviratne and Huw Calford, ‘Climate change litigation update’ (*Norton Rose Fulbright*, February 2020) <www.nortonrosefulbright.com/en-knowledge/publications/7d58ae66/climate-change-litigation-update> accessed 12 December 2020.

³¹⁷ *Urgenda Foundation v the Netherlands*, paras 2.1, 5.6.2.

³¹⁸ Katheryn McNeilly, ‘Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change’ (2019) 28(6) *Social and Legal Studies* 817, 820.

decisions can help reshape and expand the understanding of specific issues, including states' responsibility to lower greenhouse gas emissions, as evidenced in *Klimaatzaak Urgenda* or the boundaries of the right to life as shown in *Leghari v. Pakistan*, which may have a significant consequence for the law on climate change-related displacement. As we move toward an increasingly uncertain climate future, we can expect hard choices to be made, and litigation is likely to play an essential role in airing different options available and reaching solutions on the best way forward. Until states overcome the current political stalemate, litigating the rights of individuals displaced by climate change in courts may serve as an important basis for starting a human rights dialogue over climate change-related displacement.

6 FINDINGS AND CONCLUSIONS

In this thesis, I have endeavored to examine the protection of individuals displaced by climate change. Following the legal lacuna left by the international refugee regime, the principle of *non-refoulement* in light of the expanding protection of the right to life under the human rights regime emerges as a complementary protectionary avenue. The findings show that states have *non-refoulement* obligations when there is a real, personal, and reasonably foreseeable risk of a threat to the right to life. As climate change impacts *per se* can violate the right to life, states are prohibited from returning an individual under such circumstances. While the principle of *non-refoulement* does not confer legal status or grant asylum, it could be a medium-term solution as climate change intensifies and triggers more cross-border displacement.

Even though the principle of *non-refoulement* encompasses individuals displaced by climate change, the possibilities of actually receiving protection in practice are slim. As observed in Chapter 4, the threshold for substantiating a *non-refoulement* claim in conjunction with the right to life is very high, which both enables and justifies derogations. The threshold seemingly requires a complete breakdown in habitability: fresh water must be inaccessible, insufficient, or unsafe and applicants must face a situation of indigence, deprivation of food, and extreme precarity. Many will be forced to migrate well before the environmental conditions reach these levels. Pathways for improving protection exist, including a cumulative assessment or re-thinking individual requirements, such as the personal scope, in the specific context of climate change. However, the existing threshold limits the principle's utility to protect persons displaced by climate change.

Although slow-onset environmental degradation is a significant driver of migration, the current understanding of an 'imminent' threat within the 'real risk' test is fundamentally incompatible with its gradual and progressive nature. However, the argument that the possibility of intervening measures alleviates the immediacy of climate change harms requires scrutiny. While intervening measures are crucial for addressing climate change, there is no clear evidence that such action diminishes the *risk* of harm. Intervening measures remain speculative and, if implemented, often face practical challenges. Considering the certainty that many Pacific Islands, such as Kiribati, will become utterly uninhabitable within the coming decade, those facing the most immediate effects of climate change should not pay the price for a 'wait and see' approach.

The principle of *non-refoulement* as a protectionary avenue in the context of climate change-related displacement appears to be a promise of protection in the future: that the adverse impacts of climate change will — at some point — get sufficiently worse and engage *non-refoulement* obligations. This promise will be redeemed at some point. In the meantime, large and increasing numbers of people, like the applicant in the *Teitiota* case, are legally trapped in the already dire and worsening environmental degradation consequences. The impending submergence of small islands is an urgent reminder that the international community must address climate change-related displacement right now. The slower effects of climate change may not result in immediate destruction or disaster, but the ‘slow violence’ of environmental degradation invariably affects the lives and livelihoods of populations, many of whom have no choice but to migrate.

The magnitude of the challenges posed by climate change-related displacement cannot be boiled down to a simple solution. To effectively confront climate change-related displacement, there is a need to move beyond legal labels and holistically deduce specific, relevant norms from existing legal frameworks. The international refugee regime determines the kind of protection that should be offered displaced persons — the *what*. The international human rights regime determines whether a person requires protection based on the potential harm feared if returned to the place of origin — the *when*. Only when these two factors are cumulatively transplanted in an international response will the protection of individuals displaced by climate change become more effective.

How to develop such a response is left to be seen. Considering the current political impasse and lack of legislative progress, the recent turn towards climate change litigation as a strategy to develop and expand the law may be a potential avenue to affect change. In addition to resulting in formal regulatory changes, climate change litigation serves as a catalyst for indirect change by generating normative shifts. The blocked negotiations may change in the future and result in new, binding instruments that protect individuals displaced by climate change. Until they do, climate change litigation is one place where our focus should be. Courts are not always sympathetic to arguments for transformative changes, as observed in *Teitiota v. New Zealand*. However, in terms of allowing the issue of climate change-related displacement to be aired publicly, thoroughly, and forcefully, at least the courtroom doors are open.

BIBLIOGRAPHY

BOOKS AND CHAPTERS

- Borges I, *Environmental Change, Forced Displacement and International Law: From Legal Protection Gaps to Protection Solutions* (Routledge 2018)
- Chetail V, *International Migration Law* (Oxford University Press 2020)
- , ‘Are Refugee Rights Human Rights? An Unorthodox Questioning on the Relations between International Refugee Law and International Human Rights Law’ in R Rubio-Marin (ed), *Human Rights and Immigration, Collected Courses of the Academy of European Law* (Oxford University Press 2014)
- Cournil C, ‘The inadequacy of international refugee law in response to environmental migration’ in B Mayer and F Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law* (Elgar 2017)
- Cryer R, Hervey T and Sokhi-Bulley B, *Research Methodologies in EU and International Law* (Hart Publishing 2011)
- Egan S, ‘The doctrinal approach in international human rights law scholarship’ in L McConnell and R Smith (eds), *Research Methods in Human Rights* (Routledge 2018)
- Felipe Pérez B, ‘Beyond the Shortcomings of International Law’ in S Behrman (ed), *Climate Refugees – Beyond the Legal Impasse?* (Routledge 2018)
- Ferris E, ‘Governance and climate change-induced mobility: International and regional frameworks,’ in D Manou et al. (eds), *Climate Change, Migration and Human Rights* (Routledge 2017)
- Forsythe D, ‘Human Rights Studies: On the Dangers of Legalistic Assumptions’ in F Coomans, F Grünfeld and M T. Kamminga (eds), *Methods of Human Rights Research* (Cambridge: Intersentia 2009)
- Goodwin-Gill G and McAdam J, *The Refugee in International Law* (3rd Edition, Oxford University Press 2007)

- Hathaway J C, *The Rights of Refugees under International Law*, (Cambridge University Press 2005)
- Kälin W, ‘Conceptualising Climate-Induced Displacement’ in J McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010)
- Martin S, ‘Towards an extension of complementary protection?’ in B Mayer and F Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law* (Edward Elgar 2017)
- Mayer B, *The Concept of Climate Migration: Advocacy and its Prospects* (Edward Elgar Publishing 2016)
- McAdam J, *Climate Change, Forced Migration and International Law* (Oxford University Press 2012)
- Nixon R, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2011)
- Peel J and Osofsky H, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015)
- Sciaccaluga G, *International Law and the Protection of “Climate Refugees”* (Palgrave Macmillan 2020)
- Scott M, *Climate Change, Disasters and the Refugee Convention* (Cambridge University Press 2020)
- Simperingham E, ‘State responsibility to prevent climate displacement,’ in D Manou et al. (eds), *Climate Change, Migration and Human Rights* (Routledge 2017)
- van der Vliet J, ‘“Climate Refugees” — A legal mapping exercise’ in S Behrman and A Kent, *Climate Refugees’ — Beyond the Legal Impasse* (Routledge 2018)

JOURNAL ARTICLES

- Anderson A et al, ‘A Well-Founded Fear of Being Persecuted.. But When?’ (2020) 42 *Sydney Law Review* 155
- , ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ (2019) 68 *International and Comparative Law Quarterly* 111
- Behrman S and Kent A, ‘Prospects for Protection in Light of the Human Rights Committee’s Decision in *Teitiota v New Zealand*,’ (2020) *Polish Migration Review*, Forthcoming <<https://ssrn.com/abstract=3653088>> accessed 14 October 2020

- , ‘The Teitiota Case and the limitations of the human rights framework’ (2020) 75 *Questions of International Law* 25
- , ‘Climate-induced migration: Will tribunals save the day?’ (2020) 2(2) *Hong Kong Journal of Law and Public Affairs* <<https://ssrn.com/abstract=3682504>> accessed 25 November 2020
- Çalı B, Costello C and Cunningham S, ‘Hard Protection through Soft Courts? *Non-Refoulement* before the United Nations Treaty Bodies’ (2020) 21 *German Law Journal* 255
- Hunt A, ‘The Theory of Critical Legal Studies’ (1986) 6 *Oxford Journal of Legal Studies* 1
- Kibreab G, ‘Climate Change and Human Migration: A Tenuous Relationship?’ (2009) 20 *Fordham Environmental Law Review* 357
- Knox J, ‘Climate Change and Human Rights Law’ (2009) 20 *Virginia Journal of International Law* 163
- Kolmannskog V and Trebbi L, ‘Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps’ (2010) 92 *International Review of the Red Cross* 713
- Kolmannskog V ‘Climates of Displacement’ (2008) 26 *Nordisk Tidsskrift for Menneskerettigheter* 302
- Kozoll C, ‘Poisoning the Well: Persecution, the Environment, Refugee Status,’ (2004) 15(2) *Colorado Journal of Environmental International Law* 271
- Kälin W, ‘The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons’ (2018) 30(4) *International Journal of Refugee Law* 664
- Le Moli G, ‘The Human Rights Committee, Environmental Protection and the Right to Life’ (2020) 69 *International and Comparative Law Quarterly* 735
- M. Osofsky H and Peel J, ‘The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?’ (2013) 20 *Environmental and Planning Law Journal* 303
- Mayer B, ‘Human Rights in the Paris Agreement’ (2016) 6 *Climate Law* 109
- Maneggia A, ‘*Non-Refoulement* of Climate Change Migrants: Individual Human Rights Protection or ‘Responsibility to Protect’? The *Teitiota* Case Before the Human Rights Committee’ (2020) 14 *Diritti Umani e Diritto Internazionale* 635

McAdam J, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement,' (2020) 114:4 *American Journal of International Law* 708

——, and Limon M, 'Human Rights, Climate Change and Cross-Border Displacement: the role of the international human rights community in contributing to effective and just solutions' (Universal Rights Group, August 2015)

Peczenik A, 'A Theory of Legal Doctrine' (2001) 14 *Ratio Juris* 75

McNeilly K, 'Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change' (2019) 28(6) *Social and Legal Studies* 817

Salem S and Rosencranz A, 'Climate Refugees in the Pacific' (2020) 50 *Environmental Law Report* 10540

Scott M, 'Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change' (2016) 35 *Refugee Survey Quarterly* 26

——, 'A role for strategic litigation: Strategic litigation to protect individuals at risk can usefully support higher-level protection initiatives' (2015) 49 *Forced Migration Review* 47

——, 'Natural Disasters, Climate Change and *Non-Refoulement*: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 *International Journal of Refugee Law* 404

Wewerinke-Singh M, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 9 *Climate Law* 224

Yoshida K and Setzer J, 'The trends and challenges of climate change litigation and human rights' (2020) 2 *European Human Rights Law Review* 140

CONFERENCE PAPERS, WORKING PAPERS AND SCIENTIFIC REPORTS

Arctic Climate Impact Assessment, *Impacts of a Warming Arctic: Arctic Climate Impact Assessment* (Cambridge University Press 2004)

Caskey C, 'Non-Refoulement and Environmental Degradation: Examining the Entry Points and Improving Access to Protection' (2020) 26 *Global Migration Research Paper* (2020)

IDMC, 'GRID 2020: Global Report on Internal Displacement' (April 2020)

- , ‘GRID 2019: Global Report on Internal Displacement’ (May 2019)
- International Federation of the Red Cross, ‘The Cost of Doing Nothing’ (Geneva, 2019)
- IPCC, 2014: *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* (Core Writing Team, R.K. Pachauri and L.A. Meyer (eds)] (Cambridge University Press 2014)
- , 2014: *Climate Change 2014: Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects* [Field, C.B., V.R. Barros, D.J. Dokken, K.J. Mach, M.D. Mastrandrea, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.)] (Cambridge University Press 2014)
- , 2014: Summary for Policymakers, in: *Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014)
- , 2014: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Barros, V.R., C.B. Field, D.J. Dokken, M.D. Mastrandrea, K.J. Mach, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.)] (Cambridge University Press 2014)
- , J.T. Houghton, G.J. Jenkins, and J.J. Ephraums (eds), *Climate Change: The IPCC Scientific Assessment* (Cambridge University Press 1990)
- Kälin W and Nina Schrepfer, ‘Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches’ (UNHCR Division of International Protection, February 2012)
- McAdam J et al., ‘International Law and Sea-Level Rise: Forced Migration and Human Rights’ (Fridtjof Nansen Institute Report No. 1 2016)
- McAdam J, ‘Climate Change Displacement and International Law: Complementary Protection Standards’ (2011) PPLA/2011/03, Division of International Protection, United Nations Commissioner for Refugees
- Nansen Initiative on Disaster-Induced Cross-Border Displacement, ‘Protection for Persons Moving Across Borders in the Context of Disasters: A Guide to Effective Practices for RCM Member Countries’ (November 2016)

——, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’ (December 2015) Vol I

——, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’ (December 2015) Vol II

Oakes R et al, ‘Climate Change and Migration in the Pacific; Links, Attitudes and Future Scenarios in Nauru, Tuvalu and Kiribati’ (United Nations University Institute for Environment and Human Security 2015)

Setzer J and Byrnes R, ‘Global trends in climate change litigation: 2020 snapshot’ (July 2020), Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science

UNITED NATIONS DOCUMENTS

Boyd D, ‘Mandate of the Special Rapporteur on human rights and the environment: Statement on the human rights obligations on climate change, with a particular focus on the right to life’ (October 25 2018) <www.ohchr.org/Documents/Issues/Environment/FriendsIrishEnvironment25Oct2018.pdf>

COP, UNFCCC, ‘Report of the Conference of the Parties on its sixteenth session — Addendum — Part Two: Action taken by the Conference of the Parties’ (15 March 2011) UN Doc FCCC/CP/2010/7/Add.1, Decision1/CP.16

El-Hinnawi, E, ‘Environmental Refugees,’ UNEP <<https://digitallibrary.un.org/record/121267>> accessed 8 October 2020)

HRC, ‘General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ (30 October 2018) UN Doc CCPR/C/GC/26’

——, ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13

——, ‘Concluding Observations of the on the second periodic report of Israel’ (21 August 2003) UN Doc CCPR/CO/78/ISR

——, ‘General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)’ (19 March 1992) UN Doc HRI/GEN/Rev.9 (Vol. I)

HR Council, ‘Resolution 7/23: Human Rights and Climate Change’ (28 March 2008)

- , ‘Resolution 10/4: Human Rights and Climate Change’ (25 March 2009)
- ILC, ‘Sea-level rise in relation to international law’ (2018) Rep. on the Work of its Seventieth Session, Annex B, UN Doc A/73/10
- IOM, ‘Climate Change and Migration in Vulnerable Countries: A snapshot of least developed countries, landlocked developing countries and small island developing states’ (2019)
- , ‘Outlook on Migration, Environment and Climate Change’ (2014)
- OCHA, IDMC and NO, ‘Monitoring Disaster Displacement in the Context of Climate Change: Findings of a Study by the United Nations Office for the Coordination of Humanitarian Affairs and the Internal Displacement Monitoring Centre’ (September 2009)
- OHCHR, ‘The Slow onset effects of climate change and human rights protection for cross-border migrants’ (22 March 2018) UN Doc A/HRC/37/CRP.4
- , ‘A new climate change agreement must include human rights protections for all’ (17 October 2014) <www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf>
- , ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights,’ (15 January 2009) UN Doc A/HRC/10/61
- , ‘Report of the Special Rapporteur on the human rights to safe drinking water and sanitation, ‘Progressive realization of the human rights to water and sanitation’ (8 July 2020) UN Doc A/HRC/45/10
- Small Island Conference, Malé, Maldives, 13 – 14 November 2007, Malé Declaration on the Human Dimension of Global Climate Change (14 November 2007)
- Stockholm Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), printed in ILM (1972), 1416
- UNHCR, ‘Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters’ (1 October 2020)
- , ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (1979, reissued 2019) UN Doc HRC/1P/4/ENG/REV.4
- , ‘Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from

the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps’ (23 April 2018) UN Doc A/HRC/38/21

——, ‘Report of the Independent Expert on Issues of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Preliminary Report,’ (24 December 2012) UN Doc A/HRC/22/43

——, ‘Forced Displacement in the Context of Climate Change: Challenges for States under International Law’ (20 May 2009)

UNEP, *The Status of Climate Change Litigation: A Global Review* (May 2017)

UNFCCC, Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/10/Add1

UNGA, Resolution 73/195, ‘Global Compact for Safe, Orderly and Regular Migration’ (11 January 2019) UN Doc A/RES/73/195

——, Resolution 73/151, ‘Global Compact on Refugees’ (17 December 2018) UN Doc A/RES/73/151

——, Resolution 71/1, ‘New York Declaration for Refugees and Migrants’ (19 September 2016) UN Doc A/RES/71/1

——, Resolution 69/283, ‘Sendai Framework for Disaster Risk Reduction 2015–2030’ (23 June 2015) UN Doc A/RES/69/283

——, ‘Report of the Special Rapporteur on the Human Rights of Migrants’ (13 August 2012) UN Doc A/67/299

NEWS AND MEDIA

Baker L, ‘World needs to prepare for “millions” of climate refugees – UN’ (*Financial Post*, 21 January 2020) <<https://financialpost.com/pmn/business-pmn/world-needs-to-prepare-for-millions-of-climate-refugees-un?r>> accessed 9 December 2020

de Wit E, Seneviratne S and Calford H, ‘Climate change litigation update’ (*Norton Rose Fulbright*, February 2020) <www.nortonrosefulbright.com/en/knowledge/publications/7d58ae66/climate-change-litigation-update> accessed 12 December 2020

Frelick B, ‘It Is Time to Change the Definition of Refugee’ (*Human Rights Watch*, 28 January 2020) <www.hrw.org/news/2020/01/28/it-time-change-definition-refugee> accessed 28 October 2020

- Gaynor T, 'Climate change is the defining crisis of our time and it particularly impacts the displaced' (*UNHCR*, 20 November 2020) <www.unhcr.org/news/latest/2020/11/5fbf73384.html> accessed 9 December 2020
- Hamzah Sendut J, 'Climate Change as a Trigger of Non-Refoulement Obligations under International Human Rights Law' (*EJIL:Talk*, 6 February 2020) <www.ejiltalk.org/climate-change-as-a-trigger-of-non-refoulement-obligations-under-international-human-rights-law/> accessed 6 November 2020
- McAdam J and Loughry M, 'We aren't refugees' (*Inside Story*, 30 June 2009) <<https://insidestory.org.au/we-arent-refugees/>> accessed 21 December 2020
- OHCHR, 'Historic UN Human Rights case opens door to climate change asylum claims' (*OHCHR*, 21 January 2020) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482&LangID=E> accessed 8 October 2020
- UNDP, 'Small Island nations at the frontline of climate action' (*UNDP*, 18 September 2017) <www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/09/18/small-island-nations-at-the-frontline-of-climate-action-.html> accessed 14 December 2020
- Urgenda Foundation, 'Landmark decision by Dutch Supreme Court' <www.urgenda.nl/en/themas/climate-case/> accessed 30 November 2020

TREATIES AND OTHER INSTRUMENTS

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

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (adopted 4 November 1950, entered into force 3 September 1953, as amended by Protocol Nos. 11 and 14, entered into force 11 May 1994 and 1 June 2010 respectively) ETS 5; 213 UNTS 222

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

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

Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171

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

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 199, General Assembly Resolution 174 (II), 21 November 1947

Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 (A/CONF.157/24 [Part I]), Chapter III.

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

TABLE OF CASES

UN HUMAN RIGHTS TREATY BODIES

Aalbersberg v The Netherlands, CCPR/C/87/D/1440/2005 (12 July 2006)

Communication to the Committee on the Rights of the Child in the case of Sacchi et al v Argentina et al (13 September 2019)

EP v Colombia, CCPR/C/39/D/318/1988 (1990)

Portillo Cáceres v Paraguay, CCPR/C/126/D/ 2751/2016 (9 August 2019)

Robert Judge v Canada, CCPR/C/78/D/829/1998 13 August 2003)

Teitiota v. New Zealand, CCPR/C/127/D/2728/2016 (7 January 2020)

INTER-AMERICAN COURT OF HUMAN RIGHTS

Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States 13-20 (7 December 2005)

EUROPEAN COURT OF HUMAN RIGHTS

Budayeva et al. v. Russian Federation, Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (20 March 2008)

Kiliç v. Turkey, Application no. 22492/93 (28 March 2000)

NA. v. United Kingdom, Application no. 25904/07 (17 July 2008)

Sufi and Elmi v. United Kingdom, Application nos. 8319/07 and 11449/07 (28 June 2011)

Tarakhel v. Switzerland, Application No. 29217/12 (4 November 2014)

DOMESTIC CASES

Asghar Leghari v Federation of Pakistan and Others (2015) W.P. No. 25501/2015

Center for Food and Adequate Living Rights et al. v. Tanzania and Uganda (November 2020)

Commune de Grande-Synthe v. France (November 2019)

Friends of the Earth Germany, Association of Solar Supporters, and Others v. Germany (December 2018)

Future Generations v. Ministry of Environment and Others (2018) 11001-22-03-000-2018-00319-01

La Rose v. Her Majesty the Queen (October 2019)

Maria Khan et al. v. Federation of Pakistan et al. (2018) W.P. No. 8960/2019

Mbabazi and Others v. The Attorney General and National Environmental Management Authority (September 2012)

Notre Affaire à Tous and Others v. France (December 2018)

Sheikh Asim Farooq v. Federation of Pakistan etc. (2017) W.P. No. 192069/2018

Urgenda Foundation v Supreme Court of the Netherlands (20 December 2019) ECLI:NL:HR:2019:2006