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Is Climate Displacement in Legal Limbo?

An examination of the protection of climate migrants in
international refugee and climate change law

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Summary

This thesis examines international legal protection for persons displaced across borders due to climate change. Rapid climate change and escalating climate threats are projected to displace up to 2.1 billion people, roughly 25% of the global population, by 2050. This impending mass migration crisis necessitates an evaluation of the existing legal framework for climate migrants and displaced persons.

The study examines the Refugee Convention, UNFCCC, Kyoto Protocol, and Paris Agreement, which constitute key legal instruments in refugee and climate change law. The interpretation and analysis of the conventions are informed by reports, publications, and decisions from United Nations bodies as well as academic and legal literature. The study indicates that a revised refugee definition could provide protection for certain groups displaced by climate change under the Refugee Convention. The UNFCCC obliges the Parties to consider climate change in their migration policies. The Paris Agreement in its entirety is interpreted with respect to the rights of migrants and vulnerable groups and includes binding provisions that can be interpreted as requiring Parties to take actions and introduce policies with regards to persons displaced due to climate change.

This thesis concludes that a new treaty regulating protection for persons internationally displaced due to climate change is one of the feasible solutions, given the lack of political will to establish national or regional regulations. However, this process may be protracted due to the politically sensitive nature of migration and climate change in the international community. Regional and national solutions are therefore preferable. Initiatives exist to establish such cooperation, inspiring future regulation of climate displacement.

Sammanfattning

Denna uppsats redogör för det folkrättsliga regelverket som tillerkänner personer som tvingats migrera på grund av klimatförändringar skydd. Snabba klimatförändringar och eskalerande klimathot förväntas tvinga upp till 2,1 miljarder människor, ungefär 25 % av världens befolkning, till flykt år 2050. Denna annalkande massmigrationskrisen gör att en utvärdering av det befintliga rättsliga skyddet för klimatmigranter och -tvångsförflyttade personer är lämplig.

Studien undersöker Flyktingkonventionen, Klimatkonventionen, Kyotoprotokollet och Parisavtalet, vilka utgör de centrala rättsliga instrumenten inom internationell klimat- och flyktingrätt. Konventionerna tolkas och analyseras med hjälp av rapporter, publikationer och beslut från FN:s organ samt akademisk litteratur. Studien konstaterar att en reviderad flyktingdefinition kan ge upphov till skydd för vissa grupper som tvingas fly på grund av klimatförändringar i enlighet med Flyktingkonventionen. Klimatkonventionen förpliktar parterna att beakta klimatförändringar i sin migrationspolicy. Parisavtalet tolkas i sin helhet med beaktande av migranternas och sårbara gruppers rättigheter. Vidare innehåller Parisavtalet bindande bestämmelser som kan tolkas som att de ålägger parterna att vidta åtgärder och införa rättsligt skydd för personer som tvingas flytta på grund av klimatförändringar.

I uppsatsen dras slutsatsen att en ny konvention som reglerar skydd för personer som fördrivs mellan länder på grund av klimatförändringar är den mest genomförbara lösningen på grund av brist på politisk vilja att etablera nationella eller regionala föreskrifter. Att etablera internationellt bindande instrument är dock en långdragen process, inte minst på grund av den politiskt känsliga naturen av frågor som berör migration och klimatförändringar. Regionala och nationella alternativ är därför att förespråka. Initiativ för att etablera sådant internationellt samarbete finns, vilka inspirerar framtida lagstiftning för att hantera klimatmigration.

Abbreviations

ETF	Enhanced Transparency Framework
ETR	Ecological Threat Register
GHG	Greenhouse Gas
ICCPR	International Covenant on Civil and Political Rights
IDPs	Internally Displaced Persons
IEP	Institute for Economics and Peace
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
LT-LEDS	Long-Term Low GHG Emission Development Strategies
NDCs	Nationally Determined Contributions
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

Introduction

1.1 Background

Climate change is the number one cause of migration and displacement worldwide today and was the cause of displacement for around 21.5 million people every year since 2010.¹ A number with the potential to increase to 2.1 billion by 2050, encompassing about 25 % of the world's population.² Climate change exacerbates the vulnerability of already vulnerable groups, such as refugees and internally displaced persons (IDPs),³ while worsening conditions in areas already affected by natural disasters and conflict. According to the United Nations High Commissioner for Refugees (UNHCR) most people displaced by climate change remain in their own countries as IDPs while just a small number migrate to other countries. About 90 % of refugees originate from countries facing the highest ecological threat levels and have low resilience and adaptation possibilities, which also host about 70 % of IDPs as well as refugees displaced due to violence and conflict.⁴

The Institute for Economics and Peace (IEP) state in their Ecological Threat Register (ETR) press release from 2020 that climate change poses a serious threat to global peace and security as the lack of access to food and water increases, potentially leading to conflicts and civil unrest. The countries facing the largest climate threats are predicted to see significant increases in population, whilst already struggling with adaptation, resources, unrest, and poverty. Climate change also increases the frequency and severity of weather-related

¹ UNHCR, 'Displaced on the frontlines of the climate emergency' (2021) <<https://storymaps.arcgis.com/stories/065d18218b654c798ae9f360a626d903>> accessed 12 May 2023.

² Institute for Economics & Peace, 'Ecological Threat Register Press Release' (9 September 2020) Available at: <www.economicsandpeace.org/wp-content/uploads/2020/09/Ecological-Threat-Register-Press-Release-27.08-FINAL.pdf> (IEP) 1.

³ IOM, 'Key Migration Terms' <www.iom.int/key-migration-terms> accessed 12 May 2023, Internally Displaced Persons (IDPs).

⁴ UN News, 'Climate change link to displacement of most vulnerable is clear: UNHCR' (22 April 2021) <<https://news.un.org/en/story/2021/04/1090432>> accessed 12 May 2023.

natural disasters such as storms, droughts, floodings, and earthquakes, potentially displacing 1.2 billion people by 2050 if they continue to occur at the same rate as in the past few decades.⁵

In addition to the environmental impacts and extreme weather events, climate change adversely affects mental and physical health. Extreme heat waves have increased along with the mortality rates in affected regions. Food- and water-borne diseases as well as vector-borne diseases are spreading and increasing in number, affecting both human and animal populations. The Intergovernmental Panel on Climate Change (IPCC) highlights the impact of climate change on mental health, including the effects of “increasing temperatures, trauma from extreme events, and loss of livelihood and culture”.⁶

Scientists have identified climate change hot spots and categorised regions and countries based on their level of ecological threats and societal resilience. According to the ETR, the 19 countries facing the highest number of threats the next 30 years – including Pakistan, Ethiopia, and Iran – account for 25 % of the world’s population. Even smaller natural disasters and ecological shocks in these countries could cause mass displacement. In contrast, Europe and North America, exhibit high resilience and face fewer ecological threats. Developed countries like Sweden, Norway, Ireland, and Iceland, along with 12 others, face no threats.⁷ The people displaced from high threat-countries will need to relocate, and as entire countries face the effects of climate change the proportion of people seeking safety across borders will increase drastically.

The IPCC states that vulnerability of ecosystems and humans are interdependent. The short-term survival of both depends more on exposure and vulnerability than greenhouse gas (GHG) emissions. Socioeconomic development, including migration, inequality, and urbanization, exacerbates future climate risks. Ecosystems’ vulnerabilities are strongly influenced by human activities

⁵ IEP (n 2).

⁶ IPCC, ‘Synthesis Report of the IPCC Sixth Assessment Report (AR6) Longer Report’ (IPCC 2022) 16.

⁷ IEP (n 2) 1-2.

such as consumption patterns, production, and use of land and water. As ecosystems degrade, the human population is strongly negatively affected. Adaptation and sustainable human development can mitigate many near-term risks.⁸

One adaptive measure involves regulating displacement and migration due to climate change and can reduce the risk of displacement in the future. The UN Human Rights Committee established in 2020 that climate change induced harm will cause cross border migration and trigger international obligations to protect displaced individuals.⁹ To manage this, the IPCC advocates for international cooperation to enhance “institutional adaptive capacity and sustainable development”, minimising risks of displacement and improving the choices available to displaced persons.¹⁰ They also highlight the necessity of policy interventions to remove barriers and hurdles for vulnerable groups and expand safe, orderly and regular migration. Given the current political development regarding climate change and refugees in for example Europe, single countries or regional organisations are unlikely to take prompt action. The international community must act now to prevent an unimaginable global catastrophe. As the UN High Commissioner for Refugees Filippo Grandi warns: “Waiting for disaster to strike is not an option.”¹¹

1.2 Purpose and Research Questions

The purpose of this thesis is to investigate the current international legislation regarding persons displaced due to climate change within the fields of international migration and environmental – or climate change – law. This thesis also discusses where and how potential legal protection for climate migrants could be established. To fulfil this purpose, the following questions are addressed:

⁸ IPCC (n 6) 62-63.

⁹ HRC, *Ioane Teitiota v. New Zealand* (7 January 2020) UN Doc CCPR/C/127/D/2728/2016 (*Teitiota v New Zealand*) para 9.11.

¹⁰ IPCC (n 6) 75.

¹¹ UNHCR, ‘Data reveals impacts of climate emergency on displacement’ (22 April 2021) <www.unhcr.org/us/news/stories/data-reveals-impacts-climate-emergency-displacement> accessed 12 May 2023.

1. To what extent does current international legislation include protection for persons displaced across borders due to climate change? What are the underlying reasons for their inclusion or exclusion?
2. What are some potential future legislative solutions to establish international legal protection for climate migrants and displaced persons?

1.3 Delimitations

This thesis focuses on the relationship between forced migration across borders and climate change. The impact of climate change on IDPs is not analysed. This thesis considers the international treaties on refugees and climate change and excludes human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) due to spatial limitations. The relationship between climate displacement and the right to a healthy environment is a topic appropriate for future research. Because of the lack of international decisions on the topic, this thesis only includes one case over which the UN Human Rights Committee provided a non-binding decision. Questions relating to division of responsibility are not included, nor is the establishment of tangible suggestions for amendments or additions to existing treaties.

1.4 Methodology and Material

To fulfil the purpose of this thesis and answer the research questions, the legal dogmatic method is employed. This method aims to establish the existing law, *de lege lata*, based on a strict set of legal sources – international conventions and international customary law as primary sources; general legal principles, judicial decisions, and legal doctrine as secondary sources – listed in Article 38 of the ICJ Statute. The interpretation of these sources follows the guidelines set forth in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT).¹²

¹² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31-33.

This thesis goes beyond a purely descriptive approach by incorporating critical analysis and normative argumentation to suggest alternative interpretations of the law, also known as *de lege ferenda* reasoning, which can be included in the legal dogmatic method.¹³ It draws on supplementary secondary sources to support these interpretations, extending beyond the traditional boundaries of the legal dogmatic method. The legal dogmatic method is thus complemented by the legal analytical method, which allows for an analysis of the law informed by diverse source materials, including non-legal sources from fields such as human geography and climatology. It enables critical analysis of the current and future implications of the law, naturally integrating *de lege ferenda* reasoning.¹⁴

This thesis has its base in the analysed treaties and relies upon decisions by the Conferences of the Parties (COP) to the conventions along with reports and publications from UN bodies, academic articles, and legal literature to interpret the meaning of the provisions and inform the discussion. Although only the decisions by the COPs are legally binding on the Parties, decisions and reports from UN bodies carry authoritative weight in shaping the discussion and interpretation of the provisions.

1.5 Terminology

The terminology within the field of international migration can be ambiguous and terms are often used interchangeably. For the purpose of this thesis, the frequently used terms are defined as follows.

The term *migrant* is:

An umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons.¹⁵

¹³ N. Jareborg, 'Rättsdogmatik som vetenskap' (2004) SvJT 1-10.; A. Peczenik, 'Juridikens Allmänna Läror' (2005) SvJT 250.

¹⁴ C. Sandgren, *Rättsvetenskap för uppsatsförfattare* (3rd edn, Norstedts Juridik 2015) 45-47.

¹⁵ A. Sironi, C. Bauloz, and M. Emmanuel (eds.), 'Glossary on Migration' (34th edn, International Organization for Migration 2019) 132.

Displaced persons are individuals who are or have been:

forced or obliged to flee or to leave their homes or places of habitual residence, either across an international border or within a State, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters.¹⁶

A *refugee* is 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 [...], is unable or, owing to such fear, is unwilling to return to it.¹⁷

Climate migration is a subcategory of environmental migration where environmental changes are caused by climate change. Climate migration can be forced, or be, for example, an adaptation measure. Climate migration is:

The movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border.¹⁸

1.6 Overview of Existing Research

In the field of migration and displacement due to climate change, many researchers have examined the complexities of the relation between climate change and other causes of migration as well as climate displacement for communities and larger groups, including planned relocation as an adaptation strategy for climate change.¹⁹ This thesis focuses on the protection available

¹⁶ Sironi, Bauloz, and Emmanuel (eds.) (n 15) 55.

¹⁷ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2); Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol) art 1.2.

¹⁸ Sironi, Bauloz, and Emmanuel (eds.) (n 15) 31.

¹⁹ See eg. T. Faist and J. Schade (eds.) *Disentangling Migration and Climate Change* (Springer 2013) chs 3, 7-8; D. Manou et al. (eds.) *Climate Change, Migration and Human Rights* (Routledge 2018) chs 6, 8-10.

for individual climate migrants based on the Refugee Convention and the UNFCCC with its subsequent Kyoto Protocol and Paris Agreement. While there is research available on the interpretation of the refugee definition in the Refugee Convention, research regarding climate migrants in the UNFCCC, Kyoto Protocol, and Paris Agreement is more limited. Most research regarding climate displacement conclude that international regulation regarding protection of persons displaced due to climate change is necessary and offer various approaches and solutions.²⁰ The collected research indicates an urgency and a vexation that no international solution has been established.

The international community relies heavily on reports and studies conducted by intergovernmental and non-governmental organisations including the International Organization for Migration (IOM), the Internal Displacement Monitoring Centre, the IEP, and the IPCC, as well as United Nations bodies such as the United Nations High Commissioner for Human Rights (UNHCHR) and the UNHCR.

1.7 Structure

Chapter 2 of this thesis analyses the Refugee Convention and the possibility to include protection of climate migrants in the interpretation of its provisions. In this chapter, a decision by UN Human Rights Committee and legal research and doctrine are presented in aid of interpretation. In the subsequent chapter, Chapter 3, three conventions relating to climate change are accounted for and their provisions for protection of climate migrants are analysed based on an HRC resolution, COP decision, UN publications, and the preambular paragraphs of the conventions. The subsequent chapter, Chapter 4, discusses the reasons behind the lack of binding international documents for protection for climate migrants and displaced persons. The thesis is concluded in Chapter 5, the last chapter.

²⁰ See for example L. Westra, *Environmental justice and the rights of ecological refugees* (Earthscan 2013) app 3.

Climate Migrants and International Refugee Law

2.1 The Refugee Convention

The Convention relating to the Status of Refugees (Refugee Convention) regulates the basic minimum rights and internationally guaranteed legal protection of refugees – one of the most vulnerable groups in the world. The most important principle codified in the Refugee Convention is the principle of non-refoulement, which prohibits the expulsion or return of a refugee to a country where their life or freedom is threatened.²¹ The Refugee Convention limits the definition of a refugee to persons who've left their countries due to events occurring before 1 January 1951, and due to events occurring either in Europe or in Europe and elsewhere as of the declaration of the respective Parties. The 1967 Protocol relating to the Status of Refugees expands the definition by removing the limitation in time and geography of displacement inducing events.²²

2.1.1 The Refugee Definition

As established in chapter 1.4, a refugee is a person who has left the country of their nationality or habitual residence and is either unwilling or unable to return due to well-founded fear of persecution. The Refugee Convention's Article 1A lists the internationally recognised reasons for fear of persecution, namely race, religion, nationality, membership of a particular social group or political opinion.²³ In order to be categorised as a refugee, well-founded fear of persecution is required. This requirement is strongly linked to fears produced by the actions of individuals, groups, organisations, states, and other actors, and cannot be fulfilled solely based on a fear of natural disasters and

²¹ Refugee Convention, art 33.

²² UNHCR, 'The 1951 Refugee Convention' <www.unhcr.org/uk/about-unhcr/who-we-are/1951-refugee-convention> accessed 12 May 2023.

²³ Refugee Convention, art 1A(2); 1967 Protocol, art 1.2.

environmental changes. Climate change has to give rise to human actions that amount to a fear of persecution for an individual to be classified as a refugee.²⁴

There is however emerging research on the definition of refugee in the Refugee Convention. Matthew Scott argues that a fear of persecution stems from the individual's experience of being persecuted. An experience that ultimately originates in discrimination understood as structural violence in the form of serious denials of human rights,²⁵ often caused by vulnerabilities from historical and contemporary social structures and processes.²⁶ Scott asserts that, for the interpretation of *persecution*:

serious denials of human rights in “natural” disaster situations that appear to be “nobody’s fault” are instead understood as reflecting a condition of existence in which discrimination is a contributory cause of (a real chance of being exposed to) serious denials of human rights demonstrative of a failure of state protection.²⁷

Employing this interpretation of the refugee definition, which according to Scott is correctly established in accordance with the VCLT and superior to the current interpretation introduced in 1991 as it more closely reflects the ordinary meaning of the terms,²⁸ provides opportunity for climate displaced persons to receive protection as climate refugees under the Refugee Convention. Persons that face “direct and intentional infliction of serious harm” by individuals, groups, or the state because of climate change already fulfil the requirements for refugee status.²⁹ Scott maintains that internationally displaced persons that have a well-founded fear that they would face discrimination based on race, religion, nationality, membership of a particular social group or political opinion contributing to “serious denials of human rights demonstrative of a failure of state protection” if returned to their home state do fall

²⁴ See the discussion on national jurisprudence in M. Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press 2020) 48-87.

²⁵ M. Scott, *Refugee Status Determination in the Context of ‘Natural’ Disasters and Climate Change: A Human Rights-Based Approach* (PhD thesis, Lund University 2018) 325-326; Scott, *Climate Change, Disasters, and the Refugee* (n 24) 28-31.

²⁶ Scott, *Climate Change, Disasters, and the Refugee* (n 24) 16-28.

²⁷ Scott, *Refugee Status Determination* (n 25) 334.

²⁸ Scott, *Refugee Status Determination* (n 25) 338, 263-267; M. Scott, *Climate Change, Disasters, and the Refugee* (n 24) 93-95.

²⁹ Scott, *Refugee Status Determination* (n 25) 338.

under the scope of the refugee definition.³⁰ This relies on the assumption that adverse effects of climate change are failures of state protection.³¹ It is important to note, however, that many groups of climate migrants remain outside this more generous interpretation of the refugee definition.

2.1.2 The Principle of Non-Refoulement

The Refugee Convention grants refugees certain rights not awarded to other non-citizens, such as the right not to be expelled and not to be punished for irregular entry into the territory of a Party.³² In addition to these rights, the principle of non-refoulement forbids the expulsion of a refugee to a country where they would face threats to their life or freedom based on their race, religion, nationality, membership of a particular social group or political opinion.

Although displacement from climate change is not interpreted as a direct cause of refugee classification under the Refugee Convention, the UN Human Rights Committee stated that climate change can activate the principle of non-refoulement in their non-binding decision in the case of *Teitiota v. New Zealand* in September 2020.³³ If climate change and/or natural disasters cause a person to leave their country, they are not to be returned if essential human rights such as the right to life would be at risk.³⁴ This conclusion is in line with the refugee definition interpretation established by Scott. Notably, the decision discusses the lawfulness of return under the ICCPR due to its listing of human rights including the substantive issue of the right to life. As the principle of non-refoulement is codified in the Refugee Convention the decision should also be applicable in relation to it, although, as the Committee states, the similar obligation under Article 6 of the ICCPR may be broader.³⁵ The Committee states that a “real risk of irreparable harm” has to exist and that

³⁰ Scott, *Refugee Status Determination* (n 25) 338-339.

³¹ Scott, *Climate Change, Disasters, and the Refugee* (n 24) 87.

³² Refugee Convention, art 32 and 31.

³³ *Teitiota v New Zealand* (n 9).

³⁴ UNHCR, ‘UN Human Rights Committee decision on climate change is a wake-up call, according to UNHCR’ (24 January 2020) <www.unhcr.org/news/briefing-notes/un-human-rights-committee-decision-climate-change-wake-call-according-unhcr> accessed 12 May 2023.

³⁵ *Teitiota v New Zealand* (n 9).

this risk has to be imminent or likely as well as personal to the individual seeking refuge,³⁶ which differs from the requirement of a well-founded fear of persecution in the Refugee Convention.

To exemplify, the Committee states that climate change more often poses a threat to younger and future generations, and current generations as they age, due to difficulty handling heat and dealing with food scarcity and water loss. Even if there is a guarantee that an island country will be under water some-time during this century, it cannot be determined when the sea level rise will occur and thus not that the person seeking refuge themselves has a direct risk of loss of life. According to the UN Human Rights Committee, the non-refoulement principle is actualised for inhabitants of countries facing immediate threat to life due to uninhabitable weather events or rising sea levels that cause salination of ground water in the cases where the public authorities cannot support its people with clean drinking water, and loss of land where there's no possibility of relocation as the same threat applies to all the land.³⁷

2.1.3 Summary

To conclude this section, climate change can give rise to the right to protection under the Refugee Convention if the internationally displaced individual has a well-founded fear of persecution by their home state or individuals living there stemming from the adverse effects of climate change. Likewise, the principle of non-refoulement established in Article 33 may be activated by climate threats and climate change induced disasters, if they give rise to serious threats to an individual's human rights. After a change in the accepted interpretation of the refugee definition, the experience of being persecuted could also be based on the failure of the state to effectively ensure the individual's human rights in the face of climate change.

³⁶ *Teitiota v New Zealand* (n 9) 9-10.

³⁷ *Teitiota v New Zealand* (n 9).

Climate Migrants and international Climate Change Law

3.1 The UNFCCC

The United Nations Framework Convention on Climate Change (UNFCCC) recognises that there is an issue regarding climate change, even if there is scientific uncertainty, and aims to limit GHG emissions and concentrations in the atmosphere to avoid dangerous man-made climate changes. The UNFCCC places the highest responsibility for GHG reduction on the largest polluters – the industrialised countries that belong to the Organization for Economic Cooperation and Development (OECD), the so-called Annex I countries. These countries also agree to share technology and support developing countries' climate change adaptation activities with financial aid, and a grant and loan system was set up through the Convention. A system of regular reporting was set up for all Parties to the UNFCCC after adoption, including an annual inventory of GHG emissions for Annex I countries. The UNFCCC focuses on GHG emissions and economic adaptation measures, although the focus in its first few years was on mitigation rather than adaptation.³⁸

3.1.1 The Provisions

The Preamble of the UNFCCC affirms that climate change responses and social development should be integrated and coordinated.³⁹ Additionally, in Article 1 of the UNFCCC, a list of definitions is provided. The first term listed is *adverse effects of climate change* which is defined as:

changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.⁴⁰

³⁸ UNFCCC, 'What is the United Nations Framework Convention on Climate Change?' <<https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change>> accessed 13 May 2023.

³⁹ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 31 ILM 849 (UNFCCC) preambular paragraph 21.

⁴⁰ UNFCCC (n 39) art 1.1.

Adverse effects are thus those that significantly negatively impacts human health and welfare as well as socioeconomic systems. Displacement has huge negative impacts on the socioeconomic standing of individuals and communities and have negative effects on the mental and physical health and overall quality of life of displaced persons.⁴¹ It follows that this definition of adverse effects of climate change can be interpreted to include displacement.

Article 3.3 of the UNFCCC stipulates that Parties should mitigate the adverse effects of climate change through comprehensive policies and measures. Although this provision focuses more on GHG emissions and the environmental effects of climate change, it could also be interpreted extensively as an encouragement to adopt policies to regulate climate migration and create a system to deal with its effects on both individuals and host countries.

Article 4 states the obligations of the Parties, which include taking climate change into consideration in the review, redrafting, and adoption of social policies as well as promoting socio-economic research relating to climate change and researching social consequences of response strategies and adaptation measures. It also obliges states to cooperate in the exchange of legal and socio-economic information related to climate change as well as social consequences of response strategies.⁴² The first of these provisions could potentially be interpreted as obliging states to take climate change into account in their immigration and refugee regulations. Social consequences of response strategies can include displacements and migration if the strategies are unable to mitigate the effects of climate change enough to provide safe living conditions for individuals, communities, and populations.

In support of the interpretations of the provisions of the UNFCCC above, the following is highlighted. The OHCHR and the Human Rights Council (HRC)

⁴¹ WHO, 'Mental health and forced displacement' (31 August 2021) <www.who.int/news-room/fact-sheets/detail/mental-health-and-forced-displacement> accessed 29 April 2023; C. Cazabat, and L. Yasukawa, 'Unveiling the cost of internal displacement: 2021 Report' (Internal Displacement Monitoring Centre 2021) 6.

⁴² UNFCCC (n 39) art 4.1(f)-(h).

promote the link between human rights and climate change, as well as adopting a human rights-based approach in policymaking and climate action.⁴³ Through the HRC resolution 10/4, the HRC establishes that the adverse effects of climate change directly and indirectly affect the enjoyment of human rights, and more severely for vulnerable groups.⁴⁴ This resolution was noted in decision 1/CP.16 by the Conference of the Parties (COP) in 2010.⁴⁵ In the same decision, the COP invited the Parties to enhance adaptation actions by undertaking “[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels”.⁴⁶

3.1.2 Summary

To summarise, the UNFCCC does not explicitly mention migration or displacement. Instead, climate change’s effects on communities and individuals as well as state responsibilities related to them must be inferred. Such an interpretation has been established by the UN and the COP, and informed the contents of the two agreements adopted under the UNFCCC.

3.2 The Kyoto Protocol

The Kyoto Protocol is the first international agreement under the UNFCCC. It operationalises the UNFCCC by setting reduction targets for Annex I-countries and obliging them to report on progress. The initial combined reduction target is a 5 % reduction below 1990 levels from 2008-2012. The Doha Amendment introduced a second commitment period lasting 2013-2020, with a minimum 18 % reduction.⁴⁷ The Kyoto Protocol introduced a market for emission permit trading and established a “rigorous monitoring, review and

⁴³ OHCHR, ‘Integrating human rights at the UNFCCC’ <www.ohchr.org/en/climate-change/integrating-human-rights-unfccc> accessed 18 May 2023 .

⁴⁴ HRC Res 10/4 (25 March 2009) UN Doc A/HRC/RES/10/4.

⁴⁵ Decision 1/CP.16 ‘Report of the Conference of the Parties on its sixteenth session’ (15 March 2011) FCCC/CP/2010/7/Add.1, preambular paragraph 7.

⁴⁶ Decision 1/CP.16 (n 45) para 14(f).

⁴⁷ Doha Amendment to the Kyoto Protocol (2015) FCCC/KP/CMP/2012/13/Add.1.

verification system”.⁴⁸ In terms of adaptation, the Kyoto Protocol facilitates technology development and deployment to increase climate change resilience and increases financing for the Adaptation Fund.

In Article 2.3, Annex I-countries are required to minimise adverse effects of climate change and their social and economic impacts on other Parties. The COP can “take further action [...] to promote the implementation of [...] this paragraph”.⁴⁹ The COP is also bound to take appropriate action based on the periodic reviews of the Kyoto Protocol, with regard to the current scientific information relating to climate change and relevant social information.⁵⁰ In addition to the mentioned articles, Article 13.4(a) of the Kyoto Protocol obliges the Parties to assess the environmental, economic, and social effects and cumulative impacts of the implementation measures taken by the Parties. The Parties are also required to assess their progress towards the objectives of the UNFCCC.

Articles 2.3, 9.1 and 13.4(a) could provide an opportunity for the Parties to consider the Annex I-Parties bound to act to minimise the displacement related effects of climate change in the countries experiencing the most severe environmental threats based on the assessments made by the Parties and the COP. If this interpretation is established, the COP is also able to oblige the Annex I-Parties to aid the Parties with the highest levels of threat from climate change to establish internal relocation schemes for impacted citizens and increase adaptation measures. This provision could also create an opportunity for facilitating international cooperation in creating international relocation schemes for the inhabitants of uninhabitable countries that are Parties to the Kyoto Protocol.

3.3 The Paris Agreement

⁴⁸ UNFCCC, ‘What is the Kyoto Protocol?’ <https://unfccc.int/kyoto_protocol> accessed 30 April 2023.

⁴⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force 16 February 2005) 37 ILM 22 (Kyoto Protocol) art 2.3.

⁵⁰ Kyoto Protocol (n 49) art 9.1.

The Paris Agreement unites all nations to “combat climate change and adapt to its effects”.⁵¹ It aims to limit global warming to a maximum of 2°C above pre-industrial levels. Like the Kyoto Protocol, the Paris Agreement strengthens international cooperation to provide financial, technical and adaptation support to developing countries and other countries facing high levels of climate threats.⁵²

Implementation of the Paris Agreement requires economic and social transformation based on “the best available scientific knowledge”.⁵³ The Parties follow a five-year cycle, starting in 2020, and submit their yearly “nationally determined contributions” (NDCs) outlining their climate action plans, including reduction of GHG emissions and increasing resilience. Each NDC is intended to surpass previous years’ actions and ambitions. Parties are also encouraged to establish “long-term low greenhouse gas emission development strategies” (LT-LEDS) for long term planning.⁵⁴ To track the implementation progress of the Parties, an enhanced transparency framework (ETF) was established. Starting in 2024, countries will report their climate actions, mitigation progress, adaptation measures, and support received and/or provided. The ETF includes international review procedures and feeds into a global stocktake assessing collective progress towards limiting temperature increase in accordance with the Paris Agreement.⁵⁵

3.3.1 The Preamble

In terms of the provisions including or possibly relating to climate displacement, the Paris Agreement sets out the following. The Preamble to the Paris Agreement states that the Parties should “respect, promote and consider their respective obligations on human rights, the right to health, the rights of indig-

⁵¹ UNFCCC, ‘The Paris Agreement’ <<https://unfccc.int/process-and-meetings/the-paris-agreement>> accessed 8 May 2023, What is the Paris Agreement?.

⁵² UNFCCC, ‘The Paris Agreement’ (n 51) How are countries supporting one another?.

⁵³ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) TIAS 16-1104 (Paris Agreement) 4th preambular paragraph.

⁵⁴ UNFCCC, ‘The Paris Agreement’ (n 51) How does the Paris Agreement work?.

⁵⁵ UNFCCC, ‘The Paris Agreement’ (n 51) How are we tracking progress?.

enous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development”.⁵⁶ This paragraph of the Preamble is not a binding provision and simply encourages the Parties to the Paris Agreement to fulfil their international, regional and national commitments in relation to the listed rights and groups, but it also provides context for the interpretation of the provisions.⁵⁷ Notable in the list is the emphasis on human rights, the rights of local communities, migrants, and people in vulnerable situations. Climate displacement will break apart local communities as their inhabitants are forced to leave their home area and most likely split apart from one another. As previously stated, climate change will produce an enormous number of migrants in the form of IDPs, refugees, and international migrants, as well as displace refugees already displaced by conflicts and wars. Refugees is an example of a group of people in a vulnerable situation.

3.3.2 The Provisions

In Article 7.2 of the Paris Agreement, it is stipulated that the:

Parties recognize that adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions, and that it is a key component of and makes a contribution to the long-term global response to climate change to protect people, livelihoods and ecosystems, taking into account the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change.⁵⁸

This paragraph determines that climate change adaptation is key to the future of humankind on earth, including its people and their livelihoods. It also emphasises that more aid and international cooperation is needed to lower the vulnerabilities experienced by the populations of the countries facing the highest levels of threats from climate change. This provision does not create an obligation for any of the Parties, but rather established that all Parties recognise this to be true. Such recognition may not on its own create obligations to act in a certain way, but it is this author’s firm belief that to recognise the

⁵⁶ Paris Agreement (n 53) 11th preambular paragraph.

⁵⁷ See VCLT, art 31-32.

⁵⁸ Paris Agreement (n 53) art 7.2.

magnitude of climate change, that adaptation is necessary, and that vulnerable countries and people need international aid is to accept that obligations will follow.

Adaptation actions should, according to Article 7.5 of the Paris Agreement, be based on concepts such as transparency, participation and equity and be based on knowledge from current science and indigenous and traditional communities. Such adaptation should be integrated into national, and perhaps regional and international “socioeconomic and environmental policies and actions”.⁵⁹ Regulation of migration on a national and regional basis likely fall under the socioeconomic policies and actions umbrella and should be revised or reintroduced with the growing issue of climate change induced migration in mind.

An important provision supporting this interpretation of Article 7.5 is the regulation of adaptation in Article 7.9(c) and (e), read considering climate change induced displacement, which state that:

Each Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions, which may include:

[...]

(c) The assessment of climate change impacts and vulnerability, with a view to formulating nationally determined prioritized actions, taking into account vulnerable people, places and ecosystems.

[...]

(e) Building the resilience of socioeconomic and ecological systems, including through economic diversification and sustainable management of natural resources.⁶⁰

The subparagraph (c) obliges the Parties to create policy and govern in a way that is mindful of the people and places more adversely affected by climate change. This should include communities and individuals within their own country and abroad that have been or will be displaced by climate change. The

⁵⁹ Paris Agreement (n 53) art 7.5.

⁶⁰ Paris Agreement (n 53) art 7.9(c) and (e).

provision more prominently highlights the need for policies to limit the increase in temperature and all other climate change related threats. The subparagraph (e) stipulates that the Parties should focus on building resilient systems and communities. Considering the vast number of climate migrants in the near future, this resilience needs to include the possibility to expand communities significantly in a short amount of time and create a sustainable reception procedure for migrants seeking refuge and safety in these communities. This is particularly important for the Parties facing lower threats from climate change, while those countries facing higher levels of threats need to focus on establishing resilience for relocation of communities and peoples within the country and setting up collaborations with other Parties for international relocation.

3.3.3 The Task Force on Displacement

In support of the increased focus on climate induced displacement in the Paris Agreement is the decision of adoption, which requests the establishment of the Task Force on Displacement (Task Force) to develop guides to “avert, minimize and address displacement related to the adverse impacts of climate change”.⁶¹ This is a result of the focus on loss and damage due to the adverse effects of climate change included in Article 8.1 of the Paris Agreement, which states that:

Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.⁶²

The Task Force introduced comprehensive recommendations that were annexed to the Report of COP24, which invites Parties and other actors to consider the recommendations “as appropriate”.⁶³ As with many non-binding international instruments, the recommendations are vague and, as exemplified

⁶¹ Decision 1/CP.21 ‘Report of the Conference of the Parties on its twenty-first session’ (29 January 2016) FCCC/CP/2015/10/Add.1, para 49.

⁶² Paris Agreement (n 53) art 8.1.

⁶³ Decision 10/CP.24 ‘Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts’ (19 March 2019) FCCC/CP/2018/10/Add.1, para 3.

by the use of “as appropriate” in paragraph 1(g)(i) and (vi), include consideration of national laws and policies.⁶⁴ As such, the recommendations may not have a large impact on the Parties unless the Party agrees with the recommendation, and even then, the recommendations do not include any measurable actions for evaluation.

3.3.4 Summary

To summarise, the Paris Agreement places larger emphasis on people, livelihoods, and social sustainability, and explicitly refers to the rights of migrants as well as climate change induced displacement. The Paris Agreement provides the base for international cooperation on the topic of climate displacement and establishes the Task Force on Displacement as a body that monitors and provides the Parties non-binding recommendations for the implementation of the Paris Agreement in relation to displacement and climate migration.

⁶⁴ Decision 10/CP.24 (n 63) Annex.

Reasons behind the current state of protection

As shown in the previous chapter, climate migrants and displaced persons do have a right to protection – at least to some extent – under the Refugee Convention, the UNFCCC, and the Paris Agreement. The subsequent question is then why there is such a lack of legal protection on an international level. Although it is difficult for one person to step into the minds of the legislating, interpreting, and implementing bodies of international law as to why the possible interpretation of the existing international legislation provided in chapter 2 is not currently accepted, and why no binding international legal protection of climate migrants has been established, one can theorise based on examples from reality.

As exemplified by the current accepted refugee definition from 1991 in chapter 2.1, the international legal community relies on old and sometimes outdated interpretations of legal instruments. Although 30 years is not a long time in the history of Earth, much has happened in the international sphere since the 90's. Globalisation and international migration has increased,⁶⁵ and so has the rate and effects of climate change.⁶⁶ To keep up with the rapid changes, international policy must evolve. Given the resistance from states to amend the Refugee Convention, relying on existing legal instruments may not be a sustainable solution.⁶⁷ It is known that establishing and adopting international treaties takes a long time – time that we do not have – and migration is a politically sensitive topic which may further prolong the drafting. There is, however, a growing number of draft conventions for the protection of climate migrants created by researchers within the legal field,⁶⁸ and this author agrees

⁶⁵ M. McAuliffe and A. Triandafyllidou (eds.) *World Migration Report 2022* (International Organization for Migration 2021) 23.

⁶⁶ IPCC (n 6) section 2.1.1.

⁶⁷ Manou et al. (eds.) (n 19) 16.

⁶⁸ See eg. M. Prieur et al. 'Projet de convention relative au statut international des déplacés environnementaux' (2008) 4 *Revue Européenne de Droit l'Environnement* 381, English translation in Westra (n 20) Annex 3; Manou et al. (eds.) (n 19) 16.

with the authors of such works that an international convention is the feasible solution due to the lack of political will and action of states.

As mentioned in the background in chapter 1.1, developed states are not inclined to open their borders to large numbers of migrants and refugees and thus unlikely to adopt satisfactory policies to manage the impending mass migration crisis. There is also widespread opposition for new discussions regarding the Refugee Convention due to fears of rejection of the convention itself.⁶⁹ Developed countries are unlikely to desire a broader interpretation of for example the refugee definition and their obligations towards climate migrants under the Refugee Convention,⁷⁰ the UNFCCC, or the Paris Agreement, as well as new obligations under new international treaties.

Atle Solberg, Head of the Secretariat of the Platform on Disaster Displacement, stated that “[s]tates in general are not really interested in having a global, binding framework on cross-border disaster displacement”, and that such legislation may not be the best solution as it may not encompass all circumstances and challenges faced by climate migrants and persons displaced from climate change.⁷¹ In addition, international legislation on climate displacement is hindered by the lack of knowledge regarding the extent to which climate change drives migration, and to which extent it is a compounding factor. This obstacle may decrease in the future as adverse effects of climate change increase and climate change becomes the obvious driver of migration. Another key factor is that climate migration currently occurs mainly within the territory of a state. The political incentive for international legislation may increase as the uninhabitability of areas spread to entire countries.⁷² It is important to note that international organisations advocate for policies for the protection of climate

⁶⁹ Manou et al. (eds.) (n 19) 16.

⁷⁰ Manou et al. (eds.) (n 19) 16.

⁷¹ M. Lavelle, ‘By 2050, 200 Million Climate Refugees May Have Fled Their Homes. But International Laws Offer Them Little Protection’ (2 November 2021) <<https://insideclimatenews.org/news/02112021/climate-refugees-international-law-cop26/>> accessed 19 May 2023.

⁷² Manou et al. (eds.) (n 19) 16.

migrants on all levels. Although the UN has adopted outcome documents, resolutions, and compacts on migration, displacement, and climate change,⁷³ these documents are non-binding and may not elicit the desired results from states or establish enough support to introduce international regulations.

There is a lack of political will to establish international climate displacement regulations, not only regarding climate displacement but climate change at large. As such, protections for climate displaced persons and climate migrants must be determined on a regional or national level.⁷⁴ One regional solution to the issue is the establishment of free movement agreements that facilitate ease of movement, as well as long term settlement elsewhere.⁷⁵ A problem with this solution is that it requires unwilling developed countries facing low levels of climate threats to establish such agreements with countries facing high levels of threats, usually less developed countries.

Some initiatives at the international level show promise, such as the Migrants in Countries in Crisis Initiative that highlights the responsibility of states persons migrate from in relation to the states where they settle. The Initiative is not established considering climate change, but as many disasters are caused by or exacerbated by climate change it supports climate migrants regardless. On the same topic – disaster displacement – is the state led Nansen Initiative that has offered a set of good state practices for addressing disaster displacement across borders. Both initiatives have gained the support of states, organisations, and academics, and can help shape future climate displacement policies on a regional and national level.⁷⁶ It is important to note, however, that no state receiving large numbers of migrants and displaced persons has established policies for the resettlement of persons displaced due to climate change.⁷⁷

⁷³ See for example UNGA, *The global Compact for Safe, Orderly and Regular Migration* (19 December 2018) UN Doc A/RES/73/195.

⁷⁴ Manou et al. (eds.) (n 19) 19.

⁷⁵ Lavelle (n 71).

⁷⁶ Manou et al. (eds.) (n 19) 22.

⁷⁷ Manou et al. (eds.) (n 19) 20-21.

Conclusion

The Refugee Convention does not explicitly provide protection for persons displaced due to climate change, although some climate migrants may fall within the scope of the definition if climate change is an underlying cause of persecution. The UNFCCC and the Kyoto Protocol do not address climate migration or displacement specifically. However, a decision adopted by the COP to the UNFCCC encourages inclusion of climate displacement in the Parties' mitigation and adaptation strategies, indicating that climate displacement is included in the provisions of the convention. The Paris Agreement includes one provision regarding migrants and displacement, respectively. The adoption decision establishes the Task Force on Displacement, highlighting the Paris Agreement's recognition of climate displacement and migration.

It is possible to offer protection to a larger number of climate displaced persons as climate refugees through a revised interpretation of the refugee definition in the Refugee Convention. However, this is not a sustainable solution. Another possibility is to introduce protection for persons displaced due to climate change in a treaty under the UNFCCC, with the encouragement for national and regional policy making outlined in the Paris Agreement. Yet, the UNFCCC primarily focuses on environmental aspects of climate change and has not yet produced a binding document assigning responsibility or establishing a framework for addressing mass migration caused by climate change.

To fill the current legislative gap, the establishment of a new convention specifically regulating the adverse effects of climate change for people worldwide may be the most suitable solution. Such a convention could comprehensively address displacement and migration due to climate change, possibly encompassing other environmental causes of migration as well. It is important to note that the process of adopting an international treaty is protracted, and a convention regulating the issue may not be finalised until the climate migration crisis becomes unmanageable. Regional and national solutions may therefore be the most feasible to avert the impending mass migration crisis. Initiatives have

been established to promote such solutions. Currently, however, there are no regional or national regulations for the protection of climate migrants.

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