The United Nations' recognition of climate refugees: a call for the reform of refugee law

L Louw-Nel

orcid.org 0000-0001-5469-3330

Thesis accepted in fulfilment of the requirements for the degree *Doctor of Laws* *in* *International Aspects of Law* at the North-West University

Promoter: Prof HJ Lubbe

Graduation: July 2024

ABSTRACT

Title: The United Nations' recognition of climate refugees: a call for international, regional and domestic legal reform

Key Terms: Refugees, refugee law, climate change, climate refugees, natural disasters, human rights, non-refoulement

Throughout history, people have been known to migrate internationally or nationally, voluntarily or compulsorily, temporarily or permanently, and regularly or irregularly for several political, social and economic reasons. There have always been several additional factors such as age and gender that have been known to influence movement. However, over the years the patterns and nature of migration has changed and in recent times the international community has been confronted by cross-border migration driven by the negative environmental effects caused by climate change. The increase in gas emissions have resulted in the earth's temperature increasing, with dire consequences for the environment. As these conditions and the events exacerbated, they affected the habitability of states and the human rights of communities, forcing people to abandon their homes in search of assistance and protection. In the event that people move internally in these circumstances, they are protected by law.

However, in the event that climate induced displacement is external, there is no corresponding framework that provides for the recognition and protection of these people. This leaves them vulnerable to human rights violations. This was practically illustrated by the matter of a Kiribati citizen who fled the island that is slowly disappearing due to rising sea levels to apply to New Zealand for refugee status. Based on the international and domestic requirements for qualification as a refugee, NZ denied his application and found that he did not fulfil the necessary requirements. The matter was appealed and was eventually heard by the United Nations Human Rights Committee, who found that the conditions on the island did threaten the

human rights of the applicant, more specifically the right to life. As a result, it was found that his return would violate the non-refoulement principle. With this, they recognised the existence of the category of climate refugees for the first time.

With this in mind, this study sought to determine whether the existing international, African regional and South African refugee law frameworks are sufficient to protect climate refugees or whether reform is required. In order to do so, this study identified these three legal frameworks and presented an in-depth analysis of its historical context and more specifically the elements of the definition of a refugee as provided for in law. The study further evaluated the application of these elements to climate refugees. It then arrives at an explanation of the term climate change and a practical illustration of the negative effect it has on the environment. The premise of this study is that climate change is a reality and that it results in the external displacement of people. Therefore, these people need international recognition and protection. Their recognition as refugees is indicative of the seriousness of the matter.

Against this background, the study finds that the existing refugee law frameworks are not sufficient to realise the rights of climate refugees as each framework presents its own weaknesses and shortcomings. This includes other types of frameworks such as human rights law, regional agreements, environmental law and soft-law measures. Furthermore, it includes the extension of existing frameworks by adopting protocols.

The study proposes the formation and adoption of a unique treaty that can provide for the international recognition and protection of climate refugees, and which is strengthened by the implementation of local and regional measures. It is suggested that the framework incorporates a proper and comprehensive definition of a climate refugee and that it provides for the implementation of measures such as acceptance, assistance, responsibility, adaptation, prevention and relocation. The study makes a contribution in that it identifies a gap in the existing refugee law frameworks and it

investigates the numerous solutions that have been proposed. This culminates in certain recommendations that may investigated in more depth in the future.

ACKNOWLEDGEMENTS

It is undeniable that a PhD is a tough, lengthy and lonely journey that presents numerous challenges and tests that can only be resolved with immense focus, determination, self-endurance, control and most importantly, a solid support system. My support system without a doubt included several people who have played a pivotal role in my life by providing continuous support and by reminding me to remain focused. Without them, the completing of this degree would have been impossible.

I would like to express my sincerest gratitude to my study leader for his constant professional advice, assistance, direction, suggestions, and patience. His continuous support and inspiration definitely helped me to complete this adventure. I thank him for constantly influencing me to prosper and to improve my research abilities. He has been part of my research journey since the start of my master's degree and it is a privilege to have worked with him.

To my husband and best friend, **Schalk Nel**, I am extremely grateful to him for always being there as I travelled through a realm of emotions and for giving motivational speeches when I was almost ready to give up. Your never-ceasing encouragement, complete consideration, patience and willingness to listen, especially over weekends and during late evenings, is much appreciated.

To my parents **Elize and Leslie,** and my brothers **Charl and Jacques**, I am so blessed and fortunate to have such an amazing family that has been such an integral part of my life, and especially this journey. Thank you for all your love and support and for persistently reminding me to remain enthusiastic, positive and to always believe in myself and my work. You have constantly encouraged me to pursue my dreams and to stay true to myself.

A special thanks to the **North-West University** and the **Faculty of Law** for their financial and administrative support and assistance throughout this process.

Also, the completion of this study would of course not have been possible without the support, check-ins, concern and acts of kindness of my **friends**. Although you were always there to share in the celebrations, you never failed to amaze me when I was struggling.

TABLE OF CONTENTS

ABSTRACT.....i

ACKNOWLEDGEMENTS iii

LIST OF ABBREVIATIONS..... ix

CHAPTER 1 1

INTRODUCTION 1

1.1 Background 1

1.2 Problem statement 5

1.3 Research question 10

1.4 Aim and Objectives 10

1.5 Assumptions 12

1.6 Hypothesis 13

1.7 Research methodology 13

1.8 Scope and limitations 13

1.9 Outline of study 14

CHAPTER 2 16

THE INTERNATIONAL LEGAL FRAMEWORK FOR MIGRANTS AND REFUGEES: HISTORICAL DEVELOPMENT AND CONTEMPORARY CHALLENGES 16

2.1 Introduction 16

2.2 The development of international migration law 20

2.3 Climate change and disaster displacement 27

2.4 The development of the international refugee law framework .. 30

2.5 The elements that define a refugee 36

2.5.1 Well-founded fear of persecution for reasons of... 37

2.5.2 Race, religion and nationality 42

2.5.3 Membership of a particular social group 42

2.5.4 Political opinion 45

2.5.5 Outside the country of nationality 47
2.5.6 Unable or unwilling to avail of the protection of home country 48

2.5.7 Stateless persons outside their country of former habitual residence 48

2.6 The application of the definitional elements of a refugee to climate change and disaster displacement 50

2.7 The principle of non-refoulement 55

2.8 Conclusion 59
CHAPTER 3 63

THE AFRICAN REGIONAL LEGAL FRAMEWORK FOR MIGRANTS AND REFUGEES: HISTORICAL DEVELOPMENT AND CONTEMPORARY CHALLENGES 63

3.1 Introduction 63

3.2 The development of African regional migration law 66

3.3 Climate change and disaster displacement on the African continent 74

3.4 The development of the African regional refugee law framework 76

3.5 The definitional elements of a refugee under African regional law 88

3.5.1 Disruption of public order 88

3.5.2 Compelled to leave and seek protection abroad 90

3.6 The application of the African and Latin American regional definitional elements of a refugee to climate change and disaster displacement 97

3.7 Conclusion 104
CHAPTER 4 108

THE SOUTH AFRICAN LEGAL FRAMEWORK FOR MIGRANTS AND REFUGEES: HISTORICAL DEVELOPMENT AND CONTEMPORARY CHALLENGES 108

4.1 Introduction 108

4.2 The development of South African migration law 111
4.3 Climate change and disaster displacement in South Africa 117

4.4 The development of the South African refugee law framework 119

4.4.1 The South African Refugees Act and its Regulations 122

4.4.2 The South African Refugees Amendment Act and its Regulations 134

4.5 Insufficiencies in the South African refugee law 141

4.6 Conclusion 153
CHAPTER 5 157

CLIMATE CHANGE AND THE RECOGNITION OF CLIMATE REFUGEES .. 157

5.1 Introduction 157

5.2 Climate change 160

5.2.1 The development of instruments to address climate change 160

5.2.2 Extreme weather events and natural disasters exacerbated by climate change 167

5.3 Lack of legal protection for climate refugees 174

5.4 Recognition of climate refugees by the UN 186

5.5 Conclusion 192
CHAPTER 6 195

THE LEGAL PROTECTION OF CLIMATE REFUGEES BY MEANS OF EXISTING FRAMEWORKS VERSUS A UNIQUE FRAMEWORK 195

6.1 Introduction 195

6.2 Protecting climate refugees under existing law 197

6.2.1 Refugee law extended 199

6.2.2 Regional documents 200

6.2.3 Human rights law 202

6.2.4 State Responsibility 205

6.2.5 Environmental law 206

6.2.6 Other local and regional initiatives and frameworks 207

6.2.7 Problems with existing law 208

6.3 Establishing a unique legal framework for climate refugees 214

6.3.1 Creating a new instrument 215

6.3.2 Expanding existing conventions 223

6.3.3 Regional and soft law measures 226

6.3.4 Problems with a unique legal framework for climate refugees 230

6.4 Challenges..... 232

6.5 Conclusion 237

CHAPTER 7 240

CONCLUSION 240

7.1 Introduction 240

7.2 Key findings 249

7.3 Conclusion and recommendations..... 255

BIBLIOGRAPHY 260

Literature..... 260

Case law 274

Legislation 277

International instruments 277

Government publications 281

Internet sources 281

Other literature sources 321

LIST OF ABBREVIATIONS

ACF	African Climate Foundation
ACHPR	African Commission on Human and People's Rights
ACSS	African Center for Strategic Studies
AEC	African Economic Community
AFP	Agence France Presse
AHMR	African Human Mobility Review
AHRLJ	African Human Rights Law Journal
AHRY	African Human Rights Yearbook
AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
ANU URJ	All Nation University Undergraduate Research Journal
APV	Asian Pacific Viewpoint
AU	African Union
AUMPFA	African Union Migration Policy Framework for Africa
BBC	British Broadcasting Corporation
CC	Constitutional Court
CCES	Center for Climate and Energy Solutions
CCR	Constitutional Court Review
CDC	Center for Disease Control

CDR	Common But Differentiated Responsibilities
CEN-SAD	Community of Sahel-Saharan States
CERI	Center for International Relations Studies
CFR	Council on Foreign Relations
CHR	Commission of Human Rights
CJIELP	Colorado Journal of International Environmental Law and Policy
CJIL	Chicago Journal of International Law
CJR	Canada's Journal on Refugees
CLR	Commonwealth Law Reports
COP	Conference of Parties
CPRD	Center for Participatory Research and Development
CRRF	Comprehensive Refugee Response Framework
DG	Director-General
DHA	Department of Home Affairs
DLR	Dominion Law Reports
DRC	Democratic Republic of the Congo
DSSA	Department Statistics South Africa
EC	European Commission
ECOWAS	Economic Community of West African States
EEA	European Environment Agency
EELJ	Environmental and Earth Law Journal
EJF	Environmental Justice Foundation
EJPT	European Journal of Political Theory
ELR	Environmental Law Review
EMM	Essentials of Migration Management

ESLR	Edinburgh Student Law Review
EU	European Union
FAO	Food and Agriculture Organization
FAQ	Frequently Asked Questions
FCA	Federal Court of Appeals
FFWA	Fletcher Forum of World Affairs
FJIL	Florida Journal of International Law
FMR	Forced Migration Review
FMS	Female Genital Mutilation
GA	General Assembly
GCF	Green Climate Fund
GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Climate Refugees
GEP	Global Environmental Politics
GG	Government Gazette
GIELR	Georgetown International Environmental Law Review
GILJ	Georgetown Immigration Law Journal
GN	General Notice
GRID	Global Report on Internal Displacement
HCA	High Court of Australia
HELR	Harvard Environmental Law Review
HRC	Human Rights Commission
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDMC	International Displacement Monitoring Centre
IDP	Internally Displacement People
IEP	Institute for Economics and Peace
IFRC	International Federation of Red Cross
IGAD	Intergovernmental Authority for Development
IGCR	Intergovernmental Committee for Refugees
IJGLS	Indiana Journal of Global Legal Studies
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILO	International Labour Organization
IM	International Migration
IML	International Migration Law
IMR	International Migration Review
INS	International and Naturalisation Service
IOM	International Organisation for Migration
IPCC	Intergovernmental Panel on Climate Change
IRO	International Refugee Organization
IRO	International Refugee Office
IRO	International Refugee Organisation
IRRC	International Review of the Red Cross
ISIL YBIHRL	Indian Society of International Law Year Book of International Humanitarian and Refugee Law

ISSJ	International Social Science Journal
JRC	Joint Research Centre
JTM	Journal of Travel Medicine
KZN	KwaZulu-Natal
LDD	Law Democracy and Development
LJIL	Leiden Journal of International Law
MJIL	Michigan Journal of International Law
MPF	Migration Policy Framework
MSF	Medecins Sans Frontieres
MULR	Monash University Law Review
NASA	National Aeronautics and Space Administration
NIH	National Institute of Health
NILR	Netherlands International Law Review
NO	Nomio Officio
NOAA	National Oceanic and Atmospheric Administration
NPR	National Public Radio
NRC	Norwegian Refugee Council
NWF	National Wildlife Federation
NWU	North-West University
NY	New York
NYIL	Netherlands Yearbook of International Law
NYUELJ	New York University Environmental Law Journal

NZ	New Zealand
NZSC	New Zealand Supreme Court
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PAC	Pacific Access Group
PACOE	Parliamentary Assembly of the Council of Europe
PDD	Platform on Disaster Displacement
PSA	Political Studies Association
QUT LR	Queensland University of Technology Law Review
RAED	Arab Network for Environment and Development
RCDA	Revista Catalana de Dret Ambiental
REDD+	Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
RI	Refugees International
RO	Reception Offices
RRO	Refugee Reception Office
RSA	Republic of South Africa
RSD	Refugee Status Determination
RSDO	Refugee Status Determination Officer
RSILLR	Research Society of International Law (Law Review)
RSQ	Refugee Survey Quarterly
SA	South Africa

SACN	South African Cities Network
SADC	Southern African Development Community
SAPL	South African Public Law
SC	Security Council
SCA	Supreme Court of Appeal
SCCCL	Sabin Centre for Climate Change Law
T	Transvaal Provincial Division
TFD	Task Force on Displacement
UC	University of California
UCILR	University of California Irvine Law Review
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCCC	United Nations Climate Change Conference
UNCCL	United Nations Climate Change Learning
UNDESA	United Nations Population Division of the UN Department of Economic and Social Affairs
UNDP	United Nations Development Programme
UNDRR	United Nations for Disaster Risk Deduction
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly

UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee
UNICEF	United Nations Children's Fund
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNRIC	United Nations Regional Information Center for Western Europe
UNRRA	United Nations Relief and Rehabilitation Administration
UNSC	United Nations Security Council
UNSWLRS	University of New South Wales Law Research Series
UNTC	United Nations Treaty Collection
UNU-EHS	United Nations University Institute for Environment and Human Security
USA	United States of America
USAID	United States Agency for International Development
VCLT	Vienna Convention on the Law of Treaties
WAEP	World Agency for Environmentally Displaced Persons
WBGU	Wissenschaftlicher Beirat der Bundesregierung Globale Umweltveränderungen (The German Advisory on Global Change)
WCHC	Western Cape High Court
WFED	World Fund for the Environmentally Displaced
WFEDP	World Fund for Environmentally Displaced Persons
WHO	World Health Organization
WILJ	Wisconsin International Law Journal

WIM	Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts
WMO	World Meteorological Organisation
WUJLP	Washington University Journal of Law and Policy
WW	World War
WWA	World Weather Attribution

CHAPTER 1

INTRODUCTION

Climate Refugees[1]

You will not find much signs of life where crops or grass can't grow
Where rain refuse to fall death comes painful and slow
The survivors become climate refugees
In camps where millions live in hopes for visas to Lands overseas
But in the camps many for years must stay
And can only daydream of places far away
Grow old and die in utter poverty
How sad and tragic for many life turns out to be
Circumstance of place of birth beyond us to explain
You will not find much signs of life in places starved of rain
Only insects crawl on the bare and sun baked ground
And no signs of life for miles and miles around
And the people who survived the famine weakened by hunger and disease
Live in the crowded camps of climate refugees

1.1 Background

Throughout history, people have been known to voluntarily or forcefully and temporarily or permanently migrate internally or internationally in a regular or irregular manner. There are several economic, political and social causes that drive movement and there are numerous factors such as age and gender that influence migration. Over the last decade, the international community has been facing arduous new challenges due to displacement and migration caused by climate change and the events it causes or exacerbates. [2] Although the international community has adopted several instruments to address the issue of climate change,[3] gas emissions were reported to be at their highest in 2022.[4] It is well established that this has an immense negative

[1] Duggan 2009 https://poemhunter.com.

[2] See 5.2 for an explanation of the term climate change.

[3] See 5.1 for a discussion on the different instruments that have been adopted by the international community in response to climate change.

[4] UN 2022 https://news.un.org.

effect on the environment.[5] Effects are visible as some countries for example experienced intense heat waves over the past year and recorded some of the warmest temperatures in history.[6] Extreme temperatures and a lack of precipitation have caused droughts[7] in several regions, leading to famine[8] and water and food scarcity.[9] It has also created the ideal circumstances for uncontrollable wildfires to start and to spread fast, which has caused destruction and severe damage to land.[10] The Institute for Economics and Peace (IEP) indicated in the 2020 Ecological Threat Register that the rise in temperatures is leading to a rise in "ecological threats such as resource scarcity and natural disasters which in return can lead to humanitarian emergencies".[11] On the other hand, some countries have been experiencing heavy rain fall, which has resulted in flooding and even mudslides. There has also been an increase in the frequency and intensity of natural disasters such as cyclones, typhoons and hurricanes. All of these conditions have resulted in insect plagues and disease outbreaks, limited water and food resources,[12] destruction, death and displacement.

By the end of 2022, the Internal Displacement Monitoring Centre (IDMC) reported that more than 30 million people have been displaced as a result of natural disasters.[13] Displacements caused by natural disasters are commonly internal. The United Nations

[5] IPCC Working Group II contribution to the Sixth Assessment Report paras 1.2.2, 6.5.4 and 15.6.4; see also UN 2022 https://news.un.org.

[6] CCES date unknown https://www.c2es.org/content/heat-waves-and-climate-change/. See 5.2 for an analysis of the negative effects of climate change on the environment and the natural disasters that have been occurring more frequently and more intensely in modern days.

[7] JRC 2023 https://joint-research-centre.ec.europa.eu.

[8] Ighobor date unknown https://un.org; see also NASA 2022 https://earthobservatory.nasa.gov; see also Hasanne and Ghelani 2023 https://aljazeera.com.

[9] WHO date unknown https://who.int; see also UN date unknown https://www.un.org/en/climatechange/science/climate-issues/water.

[10] Borunda 2020 https://nationalgeographic.com; The Visual and Data Journalism Team 2020 https://bbc.com; see also UNEP Spreading like wildfire: The rising threat of extraordinary landscape fires.

[11] IEP Ecological threat register 2020: Understanding ecological threats, resilience and peace 2-3.

[12] Turral, Burke J and Faurès Climate change, water and food security 5.

[13] IDMC 2023 https://internal-displacement.org; see also IDMC 2023 https://reliefweb.int. See 2.3, 3.3 and 4.3 for a discussion on climate change and disaster displacement on international, African regional and South African level.

(UN) Guiding Principles for Internal Displacement makes comprehensive provision for the protection of internally displaced persons.[14]

However, there are no provisions for cases where people cross borders to escape the negative effects of climate change.[15] This is mainly because climate change was not recognised as a sole driver of external displacement until very recently.[16] This category of displaced persons is not formally recognised and they therefore do not receive sufficient legal protection. They are forced to rely on humanitarian assistance[17] and in some instances they receive no assistance at all. This was practically illustrated by the case of the island of Tuvalu, which requested assistance for its citizens from Australia and New Zealand (NZ) as the island has been negatively affected by the effects of rising sea levels due to climate change.[18] It is further illustrated by the case of Mr Teitiota, who fled from the disappearing island of Kiribati and applied to the NZ High Court in 2015 for refugee status based on the fact that climate change has made the island uninhabitable.[19] In both instances the requests were denied,[20] exposing the people involved to human rights violations.

In 2018, the Global Compact on Refugees once again portrayed climate change as an element that acts with other factors to drive movement.[21] It was only later in 2020 that

---

[14] UN Guiding Principles on Internal Displacement (1998).

[15] Mayer 2011 CJIELP 26; see also McAdam 2020 AJIL 712. Those who are internally displaced as a result of the negative effects of climate change are protected by existing frameworks such as the UN Guiding Principles on Internal Displacement (1998) and the Kampala Convention (2012); see also d'Orsi and Naldi 2022 IRRC 1030; see also d'Orsi 2023 https://theconversation.com.

[16] Thompson 2019 https://unhcr.org; Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 4, 10.

[17] Brown Migration and climate change 13-14.

[18] Balesh 2015 EELJ 86.

[19] Su 2020 https://climatechangenews.com; UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand 2728/2016 CCPR/C/127/D/2728/2016. See 5.4 for a comprehensive analysis of the facts and outcome of the case of Mr Teitiota and his family in Chapter 5.

[20] Su 2020 https://climatechangenews.com; UN Human Rights Committee Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand 2728/2016 CCPR/C/127/D/2728/2016; see also Balesh 2015 EELJ 86.

[21] UNHCR 2018 https://unhcr.org; see also McDonnell 2018 https://npr.org. [22] Thompson 2019 https://unhcr.org (emphasis added).

the UN Human Rights Committee (UNHRC) recognised that disasters in themselves can drive external displacement.[22] Based on this, the UNHRC decided in January 2020 that a person cannot be returned to the country they originated from if their life was threatened by the negative effects of climate change.[22] The UN High Commissioner for Refugees (UNHCR) went so far as to state that if people sought protection abroad in instances where their lives are threatened by climate change, they have to be treated as if they were fleeing due to fear of persecution.[23] The Commissioner[24] also emphasised the importance of the observance of the nonrefoulement principle.[25]

Although this decision could in principle be regarded as a victory for climate refugees, its implementation could be problematic. The reasons are critically analysed in this study.[26] These include the lack of a universally accepted definition of a "climate refugee", high numbers of refugees, the limited resources and capabilities of receiving states and, in some instances, a lack of political will to accommodate refugees. Furthermore, there is a gap in the existing refugee law framework as it does not provide for the qualification, recognition and protection of this category of refugees. For these reasons, it is difficult and in some instances impossible to uphold refugee law in these circumstances, resulting in a call for refugee law reform or the creation and adoption of a new treaty that specifically caters for climate refugees.[27] In order to determine if such reform is necessary, this study considers the international refugee law

---

[22] Su 2020 https://climatechangenews.com; UN Human Rights Committee Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand 2728/2016 CCPR/C/127/D/2728/2016. See 5.4 for an explanation on the reasoning of the UNHCR to reach such an outcome.

[23] Su 2020 https://climatechangenews.com. There is no general definition of "persecution", but the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status determines that "...a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution".

[24] Article 33(1) of the 1951 Refugee Convention recognises the non-refoulement principle by stating that "no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

[25] Su 2020 https://climatechangenews.com; UN Human Rights Committee Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand 2728/2016 CCPR/C/127/D/2728/2016. 7 January 2020.

[26] See 6.2.7 and 6.3.4 for a discussion on the problems with existing law and unique legal frameworks for climate refugees.

[27] See 6.2 and 6.3 for an evaluation of the different legal arguments in respect of reformation.

frameworks,[28] specifically those of Africa and Latin America,[29] and South Africa (SA).[30] The exploration starts with an overview of the historical context of these instruments to explain which events have contributed to the development and adoption of these instruments and their provisions.

1.2 Problem statement

Following the world wars of the early twentieth century, the international arena came to value the protection of human rights. They adopted important instruments to safeguard these rights, such as the Convention Relating to the Status of Refugees

(1951 Refugee Convention) and its Protocol Relating to the Status of Refugees (1967 Protocol). These instruments provide for the recognition and protection of refugees and contain a comprehensive definition of a refugee. Chapter 2 analyses the provisions of the aforementioned instruments and the elements and application of the definition of a refugee. Such an analysis of the characteristics and elements of the definition of a refugee is important as these are the requirements that should be met to qualify as a refugee. The definition is examined with specific application to the category of climate refugees. By applying the provisions of the international refugee law framework to climate refugees, it is possible to determine whether the existing framework is valid, suitable and appropriate to protect climate refugees or whether reform is required. Within the African context, it is of utmost importance to investigate the applicability of the Organization for the African Union (OAU) Convention Governing

the Specific Aspects of Refugee Problems in Africa of 1969 (1969 OAU Convention) to

[28] See Chapter 2 for the international legal framework for migrants and refugees, with specific reference to the historical context and the application of the framework to climate change displacement as a contemporary challenge.

[29] See Chapter 3 for the African legal framework for migrants and refugees, with specific reference to the historical context and the application of the framework to climate change displacement as a contemporary challenge. Reference is also made to the Latin American position in this chapter as it incorporates an extended definition of a refugee in order to cater for the problems on this continent.

[30] See Chapter 4 for the SA legal framework for migrants and refugees, with specific reference to the historical context, amendments and possible application to climate refugees.

climate refugees. This is considered in Chapter 3.

In addition to the elements contained in the international definition, the 1969 OAU Convention also provides for the protection of people fleeing due to "events disrupting public order in either a part or the whole of his/her country of origin or nationality".[31] Although the main discussion in Chapter 3 centres on Africa, reference will also be made to the Cartagena Declaration on Refugees (1984 Cartagena Declaration), which applies to refugees in Latin America. The 1984 Cartagena Declaration has absorbed the extended definition of a refugee, as Latin America, similar to Africa, was forced to adopt laws that could cater for the unique problems they face. Chapter 3 examines the approaches of these regions to refugees and analyses the extended definition of a refugee as provided for by these instruments. As with the international position, the definition determines the requirements that should be met to be recognised as a refugee in Africa and Latin America. The extended definition is also examined by specifically applying the elements to the category of climate refugees. This discussion reveals whether climate refugee and climate issues can be included within the auspices of this extended definition.[32] The 1969 OAU Convention presents its own interpretative and application limitations and challenges, which are also evaluated in this chapter. Chapter 3 also examines the African human rights system and other regional instruments as possible solutions for the problem.

As SA ratified the 1951 Refugee Convention and its 1967 Protocol in 1995 and the 1969 OAU Convention in 1996, SA's response to refugees is examined in Chapter 4.[33]

Prior to this ratification, the restrictive provisions contained in the Aliens Control Act 96 of 1991 were applied to refugees. One of these provisions determined that all noncitizens were regarded as foreigners who needed a permit to reside in SA, in the absence of which they would be regarded as illegal aliens.[34] Persons who applied for

[31] Biermann and Boas 2010 GEP 73.
[32] Biermann and Boas 2010 GEP 73.
[33] Wood 2014 IJRL 562.
[34] Section 23 of the Aliens Control Act 96 of 1991.

asylum or refugee status received a residence permit subject to conditions and limitations only valid for a certain period.

The South African government had to reconsider the treatment of refugees in view of the prominent place that international law and regional law started to occupy in the domestic legal system after 1994 when the Constitution of the Republic of South Africa, 1996 (Constitution) was adopted. The South African government subsequently adopted the South African Refugees Act in 1998.[35] This Act gave special recognition to refugees and afforded them the same protection as guaranteed in the international and regional provisions. In line with the regional position, the Act provides for an extended definition of a refugee and recognises the principle of non-refoulement.

In 2008, 2011 and 2017, however, certain controversial amendments to this Act were proposed and later adopted in January 2020.[36] To give effect to these amendments, Regulations were published by the Department of Home Affairs in 2018.[37] In essence, these amendments have complicated the application for asylum by stipulating stringent and additional requirements to qualify as a refugee in SA. It has limited the rights that were ordinarily afforded to refugees under the South African Refugees Act. Dugard acknowledged in 2008 that SA could not fulfil its obligations towards refugees under international and regional refugee law.[38] The current position in SA seems to exacerbate the situation because the amendments remove refugees' rights to basic primary education and basic health services. This despite basic guarantees in this regard offered by, among others, the Universal Declaration of Human Rights (UDHR)[40] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

A comparison of the position of refugees before and after amendment of the Act in SA can reveal whether the amendments comply with international law and are constitutional, or whether SA is in breach of its international and regional obligations.

[35] South African Refugees Act 130 of 1998.
[36] South African Refugees Amendment Act 11 of 2017.
[37] Regulations to the South African Refugees Amendment Act (2020).
[38] Dugard et al International Law 533. [40]
Article 1 of the 1948 UDHR.

It indicates that SA moved from the Aliens Control Act that initially did not provide for refugees, to embracing the welcoming international and regional position by adopting the South African Refugees Act, but then regressed by adopting the restrictive amendments. Chapter 4 argues that given its history, its democracy, the modern-day challenges faced by numerous African peoples, and the important role SA plays in Africa, SA should rather be expanding than confining its laws.[39] Although these amendments do not directly address climate refugees, an analysis of the current South African refugee position can help determine whether SA has the political will to recognise, protect and accommodate refugees in general, and ultimately a specific category such as climate refugees.

Climate change has been proven to affect the environment in such a manner that it affects the livelihoods of numerous communities. In an attempt to address the issue, the international community adopted among others the United Nations Framework Convention on Climate Change (UNFCCC), which sets obligations and assigns state responsibility for the mitigation and prevention of climate change and its effects.[40] These obligations include the implementation of measures to limit the use of gases and elements that cause and contribute to climate change.[41] The responsibilities of states in this regard were further extended and strengthened with the Cancun Agreements and the adoption of the Kyoto Protocol to the UNFCCC (Kyoto Protocol), the Doha Amendment to the Kyoto Protocol to the UNFCCC (Doha Amendment), as well as the Paris Agreement[42] by the Conference of Parties (COP).[43] Despite these efforts, the earth's temperature continues to rise, which is increasing the frequency and intensity of natural disasters as illustrated in Chapter 5. Such events have already forced people to leave their homes, making them vulnerable to human rights violations. Chapter 5

[39] Freedom house 2020 https://freedomhouse.org.

[40] Articles 2, 3 and 4 of the UNFCCC (1992).

[41] Article 3(3) of the UNFCCC (1992).

[42] Article 2(1) of the Paris Agreement (2015).

[43] Hereinafter referred to as COP. In terms of Article 7 of the UNFCCC, the COP is the body that was established to observe the application of the provisions of the UNFCCC.

illustrates this by examining the matter of Mr Teitiota and his family, as well as the UNHRC's approach to formally recognise the existence of climate refugees.

As there is no legal framework that specifically caters for the recognition and protection of climate refugees, several scholars and bodies have suggested approaches that can be used to address this issue. As is indicated in Chapter 6, some suggest that existing laws are sufficient to deal with this problem, while others suggest that existing laws should be extended or even that new laws be adopted to address this issue. The chapter evaluates the different legal arguments for using existing or creating new responses and the complications and restrictions related to the execution and application of these responses to the contemporary challenge of climate refugees.

While it can be argued that existing laws such as refugee law, regional instruments and human rights law can be effective in addressing climate refugees, it seems that their universal implementation is complicated by the existence of this new category of refugees. There is a possibility of too large of a gap in the traditional legal frameworks. The adoption of a new treaty as a response to climate refugees is therefore investigated in Chapter 6. There are, however, several altercates surrounding this response since it creates a wider scope for refugees and it establishes a higher standard of responsibility for member states. Some countries, especially those adjacent to the states who suffer natural disasters, might argue that they themselves are unable to take in refugees because they too are facing the consequences of climate change. Even if neighbouring countries are not experiencing natural disasters or ones that are not as severe as the country from which refugees are fleeing, the reality is that governments could be overburdened. They might not have the capacity and the resources to provide for and grant the necessary extensive protection required when a person qualifies for refugee status. As illustrated by the humanitarian crises caused by the arrival of millions of people escaping harsh conditions and conflict in countries in the Middle East at the

Turkey border, countries that experience such influxes require international and regional assistance and support to deal with these situations.[44]

The matter is complicated by the fact that there is no universally accepted term for those displaced by climate change. In Chapter 6, the range of terms used is analysed for the specific purpose of determining which elements are important to incorporate in the definition of a climate refugee. It will also assist in establishing which important provisions will have to be absorbed in a new treaty should the international community decide to adopt such an instrument. To address the concerns of states, the incorporation of mitigation and adaptation and the common but differentiated responsibilities (CDR) approach in a proposed new treaty is also investigated in Chapter 6. Even if a state is not affected by climate change, it does not mean that the particular state's carbon footprint has not contributed to climate change. The Draft

Convention on the International Status of Environmentally Displaced Persons and the Draft Convention for Persons Displaced by Climate Change are used in Chapter 6 as examples of the structure and provisions that a suggested new treaty should follow and contain.

1.3 Research question

In light of the above, this research attempts to answer the following research question: How should refugee law be reformed at the international, regional and South African domestic levels to accommodate the UN's recognition of climate refugees?

1.4 Aim and Objectives

The aim of this study is to determine how refugee law should be reformed at the international, regional and South African domestic levels to accommodate the UN's recognition of climate refugees.

[44] Kaya 2023 https://migrationpolicy.org.

In order to achieve this aim, the objectives of the study are to:

(a) investigate the history of international migration to explore the concept of migration, and the different types of migration, and the factors that influence international movement. The objective is also to identify the reasons that drive migration with specific reference to the challenges migration driven by climate change and its negative effects on the environment have for the international arena;

(b) identify and critically analyse the 1951 Refugee Convention and its 1967 Protocol with an emphasis on the elements of the definition, recognition and protection of refugees. This also entails the application of the elements of the international definition of a refugee to climate change displacement in order to determine whether the current framework is sufficient to cover this category of refugees or whether reform is required;

(c) examine of the history of migration in Africa and the factors that drive movement on the continent, with specific reference to the contemporary challenges of climate change and the resulting displacement;

(d) identify and critically analyse the 1969 OAU Convention, with an emphasis on the extended definition, recognition and protection of refugees and the extended definition as absorbed in the 1984 Cartagena Declaration. The ultimate purpose of the analysis of both these instruments is to apply the elements of the definition to climate change displacement in both Africa and Latin America to determine whether the present framework is adequate to cover this category of refugees or whether reform is required;

(e) explore the history of migration in SA, the factors that drive movement to and from the country, and the possible effect of climate change. The analysis examines the possibility that migration to and from SA can be influenced by climate change as the continent and the country is vulnerable to the negative effects of climate change on the environment;

(f) identify and critically analyse the domestic South African refugee law framework with an emphasis on the application of the provisions of the South African Refugees Act before and after amendment. The insufficiency of the local refugee law framework will also be investigated to determine whether SA follows a narrow approach to refugees and if the inclusion and protection of climate refugees likely;

(g) examine and explain the term climate change with specific reference to the international instruments that have been adopted in order to address this modern-day challenge. This discussion will be necessary for the identification and evaluation of the accepted term "climate refugees" as recognised by the UNHRC and to determine whether there is a sufficient legal protection for this category of refugees;

(h) investigate and analyse whether the current international, African regional and South African refugee law frameworks or other areas of law or documents are sufficient to provide for the recognition and protection of the category of climate refugees. This will assist in ultimately determining whether these frameworks can be amended or extended to cater for this contemporary challenge or whether reform or the adoption of a unique treaty is necessary.

1.5 Assumptions

This research relies on the following assumptions:

(a) Climate change is a reality and the global rise in temperatures is causing an increase in the frequency and intensity of natural disasters, which in turn results in, among other things, the external displacement of people.

(b) People who are externally displaced as a consequence of these circumstances have not been acknowledged by law until recently when the UNHRC recognised the existence of the category of climate refugees.

(c) The international refugee law framework recognises a person who flees his/her country due to a well-founded fear of being persecuted based on race, religion,

nationality, membership of a particular social group or political opinion as a refugee.

(d) International human rights law prohibits states from returning a person to his/her state if there is a possibility that the person will be subjected to human rights violations, including torture and persecution (non-refoulement principle).

(e) The non-refoulement principle is a rule of customary international law.

(f) The African and Latin American regional refugee law frameworks provide for an extended definition of a refugee by granting protection to persons fleeing their countries due to events that disturb or disrupt public order.

(g) The South African Refugees Act 130 of 1998 was amended in 2008, 2011 and 2017, which amendments were affected in January 2020, indicating that SA is following a restrictive approach to refugees by limiting rights that were previously guaranteed.

(h) There is a gap in the existing refugee law framework and the adoption of a unique treaty to deal with the recognition and protection of climate refugees is required.

1.6 Hypothesis

This study is based on the hypothesis that international, African regional and South African domestic refugee law and other legal frameworks are insufficient to cater for the recognition and protection of the category of climate refugees. Existing law will have to be improved by adopting and implementing a universally coordinated instrument that contains a suitable definition of a climate refugee and that provides for state obligations in relation to prevention, adaptation and mitigation of climate change. Cooperation during the application of such a unique instrument must also be enhanced and strengthened through the acceptance and enactment of complimentary regional agreements and soft law measures.

1.7 Research methodology

The study uses a literature study to answer the research question. Using this method, the material that is expected to be of greatest significance include primary sources such as legislation and case law, including international and regional legal instruments such as treaties, conventions, protocols and declarations. Literature also includes relevant secondary resources as background resources, including applicable textbooks, academic journals, as well as authoritative electronic resources. These resources are used to identify and assess the issues set out in the problem statement above and to answer the research question as expansively as possible.

1.8 Scope and limitations

This research is limited to a legal perspective on the concept of climate refugees as recognised by the UN. Therefore, this study primarily focuses on refugee law and international environmental law is only consulted and used by the author to enhance the argument that climate change is a reality, and that it is a driver for internal and external displacement, with the focus on external displacement. The scope of this study is limited to an analysis of refugee law, and climate change in itself is examined only as necessary to reach the objective of this study. Furthermore, this study is limited to the analysis of existing arguments on how to address this issue and identifying the different definitions of environmental or climate refugees that have already been established. The purpose of this analysis will be to identify the important elements that should be incorporated should a new treaty be adopted. The creation of a definition of a climate refugee and the establishing of a completely new instrument does not fall within the ambit of this study.

1.9 Outline of study

The study consists of seven chapters to answer the aforementioned research question. Chapter 1 provides and introduction to the study and outlines the problem statement and methodology. Chapter 2 examines the historical background and evolution of

international migration and refugee law. The concept of a refugee and the elements of the definition are explored with specific application to the contemporary category of climate refugees. Chapter 3 focuses on the extensive African regional migration and refugee law framework, which was specifically created to deal migrants and refugees on the continent. Reference is also made to the extended definition of a refugee contained in both the 1969 OAU Convention and the 1984 Cartagena Declaration, with specific application to the category of climate refugees. Thereafter, Chapter 4 considers the existing migration and refugee law framework implemented in South African domestic law, as well as the controversial amendments that had been adopted. It also deliberates on the insufficiency of South African refugee law to indicate that the inclusion and protection of climate refugees is highly unlikely.

Chapter 5 explains and investigates climate change and the legal frameworks that have been adopted by the international community to address this issue. It also examines the concept of a climate refugee as recognised by the UN, with specific reference to the existing circumstances in Tuvalu and Kiribati. Subsequently, Chapter 6 identifies the different approaches that have been proposed by several academic authors and institutions to address this modern-day issue. It examines the sufficiency of existing legal frameworks in respect of the inclusion and protection of climate refugees. In addition, it investigates the expansion of existing law as well as the adoption of a unique treaty to address this contemporary challenge. Based on this, this research identifies the important elements of a definition of a climate refugee and it proposes important provisions that should be contained in such a legal framework.
The last chapter offers a conclusion to the study and makes certain recommendations based on the background and facts presented in the other chapters.

CHAPTER 2

THE INTERNATIONAL LEGAL FRAMEWORK FOR MIGRANTS AND REFUGEES: HISTORICAL DEVELOPMENT AND CONTEMPORARY CHALLENGES

2.1 Introduction

The World Migration Report specified in 2022 that "Human migration[45] and mobility may well be age-old phenomena touching almost every society around the world. However, they have changed over time in important ways. Examining these shifts in scale, direction demography and frequency can help us understand how migration is evolving and can inform effective policies, programmes and operational responses on the ground".[46] In 2020, the Population Division of the UN Department of Economic and Social Affairs (UNDESA) recorded approximately 281 million international migrants, constituting about 3.6 percent of the global population.[47] In 2000 it was only 2.8 percent and in 1980 it was 2.3 percent.[48] Migration is described as a "complex issue"[49] as it can be internal or international, regular or irregular, temporary or permanent, and voluntary or forced in nature.[50] It is also influenced by many factors, such as age and gender for example,[51] and it can be driven by a variety of causes, such as conflict, politics and economics.[52]

Over the last few years, the international community has been facing arduous challenges due to migration as a result of environmental changes and disasters.[53]

---

[45] See 2.2 for an explanation of a migrant and migration in Chapter 2.

[46] Vitorino World Migration Report 2022 xii.

[47] UNDESA 2022 https://un.org; see also Vitorino World Migration Report 2022 xii.

[48] UN date unknown https://www.un.org/en/global-issues/migration#.

[49] Vitorino World Migration Report 2022 xii.

[50] See 2.2 for an explanation on the types of migration.

[51] See 2.2 for a brief discussion on the factors that can influence migration.

[52] See 2.2 for a discussion of the reasons for migration.

[53] Siegfried 2023 https://unhcr.org. Also referred to as climate induced or environmental migration or displacement. See 2.3 for an explanation of these terms and see 5.4 for modern day examples of these conditions and events.

Climate change[54] has proven to intensify these events[57] and disasters have been occurring more frequently.[55] It was indicated in 2022 that "21.5 million people were forcibly displaced by weather-related events each year since 2008"[56] and that "climate migration is expected to surge in coming decades with forecasts from the IEP predicting that 1.2 billion people could be displaced globally by 2050 due to climate change and natural disasters".[57] The international community has committed to address problems that arise due to climate change by adopting several policies and instruments,[58] but until solutions are found, people will have to respond and adapt to the effects of climate by resolving to actions such as migrating.

Natarjan et al. reported in 2020 that the "majority of migrants (54.9%) lived within their region of origin".[59] As discussed below[60] and in Chapter 5,[61] when people migrate or are displaced internally as a result of climate change and its negative effects, they are protected by the laws of that jurisdiction. In contrast, people who are forced to cross borders under these circumstances do not enjoy the same protection. This is mainly because climate change was not recognised as a sole driver of migration until 2019.[62] This is practically illustrated by the case of Mr Teitiota[63] and his family, who fled the island of Kiribati to seek assistance and protection from NZ as his country was disappearing due to rising sea levels fuelled by climate change. Although NZ was of

[54] See 5.2 for an explanation of the concept of climate change. [57] NWF Climate change, natural disasters and wildlife 1.

[55] UN 2021 https://news.un.org/en/story/2021/09/1098662.

[56] UNHCR 2016 https://unhcr.org; see also McAllister 2022 https://zurich.com.

[57] IEP Over one billion people at threat of being displaced by 2050 due to environmental change, conflict and civil unrest; see also McAllister 2022 https://zurich.com.

[58] See 5.2 for an analysis of these instruments and their provisions.

[59] Natarajan, Moslimani and Lopez 2022 https://pewresearch.org.

[60] See 2.3 for a discussion of climate change and displacement as a result.

[61] See 3.5 for an analysis of the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2012) and 5.3 for a discussion on the UN Guiding Principles on Internal Displacement (1998).

[62] See 5.3 for a distinction between internal and external displacement due to climate change as well as a discussion on the recognition of climate change as a sole driver of migration. See also Thompson 2019 https://unhcr.org; Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 4, 10.

[63] See 5.3 and 5.4 for the facts and the outcome of Mr Teitiota's matter before the NZ courts and the UNHRC.

the opinion that Mr Teitiota did not qualify as a refugee,[64] the UNHRC recognised that a person cannot be returned to his country of origin if there is a possibility that his human rights, especially the right to life, is threatened or can be violated, [65] subsequently endorsing the application of the non-refoulement principle[66] under such circumstances. In response, the UNHRC also explicitly recognised the concept of "climate refugees".[67]

Even though climate-induced migrants are protected by human rights law in general, there are academic authors, bodies and organisations that advocate for a higher standard of protection.[68] However, the question remains whether those who are forced to cross borders in these circumstances qualify as refugees? In this regard some argue that the existing refugee law is sufficient to include this category of refugees, while others argue in favour of the creation of a sui generis treaty to address this issue.[69] The existing international refugee law framework[70] must be investigated to determine whether such reform is required. This includes analysing the historical context and development of this matter.

Refugee law initially developed with the atrocities and humanitarian crises following World War (WW) I and WW II in mind. These events required international focus on the protection of human rights. Numerous international instruments, such as the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and ICESCR among others, were adopted to safeguard and guarantee these important human rights.[71] These instruments extend these rights to all human beings, including all types

[64] Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 para 12.

[65] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 para 8.6.

[66] See 2.6 to understand the principle of non-refoulement.

[67] Su 2020 https://climatechangenews.com.

[68] Prange 2022 https://cfr/org.

[69] See 6.2 and 6.3 for an outline of the different arguments in this regard as well as an analysis of the different critique presented against these arguments.

[70] See 2.4 for an examination of the history and development of international refugee law.

[71] All human rights instruments are applicable and in this regard. A series of international human rights treaties and other instruments have been adopted since 1945 and have expanded the body of international human rights law. They include the International Convention on the Elimination of

of migrants. It also recognises a person's right to seek asylum. The UNHCR was established to ensure that this right is realised and it consequently drafted and adopted the 1951 Refugee Convention and its extended 1967 Protocol. These instruments contain a wide range of provisions that cater for the identification, recognition, inclusion and protection of refugees. Essentially, it also provides for the customary law principle of non-refoulement. This legal framework is important as the UNHCR indicated in 2023 that "we are now witnessing the highest level of displacement on record as more than 110 million individuals have been forcibly displaced worldwide as a result of persecution, conflict, violence or human rights violations".[72] Of these individuals, 5.4 million are asylum seekers and 35.3 million are refugees.[73]

The instruments mentioned above also provide a recognised definition of a refugee. Comprehensive deliberation on the definition and its elements was essential as the definitions now set the international requirements that should be met for such a higher standard of protection to apply. Therefore, the existing guidelines on the interpretation and application of the elements of the definition are examined in this chapter, with specific reference to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Handbook) and Guidelines on International Protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A92) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions (Guidelines), case law and other essential literature sources.[74] This theoretical analysis will allow for a better understanding of the international refugee law framework and, more specifically, the notion of a refugee. The main objective of this analysis is to establish whether the definition and its elements in their current form are broad enough to include the category of climate

All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989) and the Convention on the Rights of Persons with Disabilities (2006).

[72] UNHCR 2023 https://unrefugees.org.

[73] UNHCR 2023 https://unrefugees.org.

[74] See 2.3 for the international definition of a refugee and see 2.4 for an evaluation on the scope and application of the elements of the definition of a refugee.

refugees, as the international legal framework is applicable to other regions, such as Africa and Latin America, and domestic contexts such as SA.

This sets the stage for the discussion on the African and Latin American regional[75] and the South African[76] domestic refugee law frameworks in subsequent chapters.

2.2 The development of international migration law

The concept of migration is not new as humans have been known to move for a variety of reasons throughout the course of history. Rystad indicates that people initially moved in search of food to hunt and gather during early historical times.[77] In more recent times, patterns of migration have been known to change according to the local policies and laws states adopt and implement.[78] The history of migration is mainly divided into four periods, namely the 1800s to 1914, the period between WW I and WW II, the period after WW II to 1973, and 1973 to present.[79] During the first period, people mainly migrated for economic reasons. The entry, arrival, residence and work of migrants was not restricted, as states were in need of labourers. The period between WW I and WW II saw states approach migration more restrictively for reasons such as the paranoia of states involved in the war, state security and discriminatory views.[80] The period after WW II until 1973 was characterised by mass movements of people due to WW II, the Cold War and decolonisation.[81] The atrocities of WW II led to an emphasis on the recognition and protection of the human rights of migrants and states once again welcomed the entry and residency of migrants for labour purposes.[82] The period after 1973 again saw the implementation of policies that restricted migration in

[75] See Chapter 3.
[76] See Chapter 4.
[77] Rystad 1992 IMR 1169.
[78] Schindlmayr 2003 IM 111.
[79] Rystad 1992 IMR 1171-1172; see also Schindlmayr 2003 IM 112-117.
[80] Rystad 1992 IMR 1171; see also Schindlmayr 2003 IM 114.
[81] Rystad 1992 IMR 1171.
[82] Schindlmayr 2003 IM 116-117.

numerous ways, and as a result migrants were forced to seek alternative methods to enter states.[83]

People are still moving for various reasons, as discussed below.[87] Migration is a complex concept that touches on several matters and it is regulated by a combination of international legal frameworks that constitute what is referred to as international migration law (IML). IML is "largely rooted in human rights law" and "instruments relating to human rights and those that specify rights and standards of treatment for migrant workers, refugees and immigrants are significant in defining migration law".[84] The International Organization for Migration (IOM) was established in the 1951 to manage migration, to address the issues it presents, and to provide assistance to migrants.[85] It also later became a UN associated organisation.[86]

Over the years, there has been some development on the field of migration. In 1994, the UN adopted the Programme of Action and chapter X specifically deals with international migration and development.[87] The objectives include among others addressing the causes of migration and establishing international cooperation.[88] It also encourages the adoption of integrated migration policies that can manage migration and ensure protection of rights.[89] The 2030 Agenda for Sustainable Development (2030 Agenda) was adopted in 2015, identifying 17 goals that should be met in order to end poverty, establish equality and peace, and to protect human rights and the earth.[90] The 2030 Agenda also accepts that migrants contribute to sustainable development

[83] Schindlmayr 2003 IM 116. [87] See 2.2, para 7.

[84] Schindlmayr 2003 IM 117.

[85] IOM date unknown https://www.iom.int/iom-history#.

[86] UNGA Agreement concerning the relationship between the UN and the IOM A/70/976.

[87] UN Programme of Action of the International Conference on Population and Development.

[88] 10.10 of the UN Programme of Action of the International Conference on Population and Development.

[89] 10.3 to 10.8 of the UN Programme of Action of the International Conference on Population and Development.

[90] Preamble of the UNGA Resolution on Transforming our world: the 2030 Agenda for Sustainable Development A/Res/70/1.

and it is a reality that affects the development of the origin state. Cooperation is necessary to facilitate migration and to ensure protection of human rights.[91]

In 2016, the UN adopted the New York Declaration for Refugees and Migrants (NY Declaration), which recognised that the root causes of these movements should be addressed, that the human rights of migrants and refugees have to be protected, and that international cooperation is required.[92] Since the NY Declaration explicitly recognises that migrants and refugees face the same conditions, similar commitments are made to assist and to protect human rights.[93] Furthermore, the NY Declaration committed to the adoption of a global compact, which was done through UN General Assembly (UNGA) Resolution 73/195 in 2018. The Global Compact for Safe, Orderly and Regular Migration (GCM) encourages international cooperation and a comprehensive approach to addressing the issue of migration.[94] Nevertheless, it still reaffirms the principle of sovereignty, which allows states to domestically regulate migration.[95] Although some progress has been made with the implementation of the provisions of the GCM, it has been slow.[96] In addressing the gaps and challenges, the UN has committed to integrating migrants, to eradicate discrimination, to develop specific policies, to establish safe pathways for migration, and to implement measures that can prevent migrants from being victims of criminal activities.[101]

There is no globally accepted definition for migration or a migrant. The World Migration Report of 2022 indicates that the definitions are "informed by geographic, legal, political, methodological, temporal and other factors" such as "place of birth, citizenship, place of residence and duration of stay".[97] That being said, the IOM defines

[91] UNGA Resolution on Transforming our world: the 2030 Agenda for Sustainable Development A/Res/70/1 para 9.

[92] UNGA New York Declaration for Refugees and Migrants A/Res/71/1 paras 7, 11, 12 and 13.

[93] UNGA New York Declaration for Refugees and Migrants A/Res/71/1 paras 5, 6, 21 and II; see also UN date unknown https://www.un.org/en/global-issues/migration#.

[94] UNGA Resolution on Global Compact for Safe, Orderly and Regular Migration A/Res/73/195 paras 11 and 15.

[95] UN date unknown https://un.org/en/global-issues/migration#.

[96] UNGA Resolution on Progress Declaration of the International Migration Review Forum para 22. [101] UNGA Resolution on Progress Declaration of the International Migration Review Forum paras 5172.

[97] Vitorino World Migration Report 2022 22.

migration as the "movement of persons away from their place of usual residence".[98] A further distinction can be made between emigration, which is the movement from the country of nationality or residence and immigration, which is the movement into a country other than the country of nationality or residence.[99] A migrant is identified as:[105]

> An umbrella term, 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.

From the definition, it is clear that a migrant moves from their place of usual residence, that is, the "country in which a person lives", in other words, the "country in which he has a place to live where he normally spends the daily period of rest".[100] This is also referred to as the origin state. The nature or form of migration can be internal or international, regular or irregular, temporary or permanent, and voluntary or forced. Internal migration refers to people moving within a state, and international migration occurs where migrants leave their home countries and cross borders to seek better opportunities or safety.[101] The country to which a migrant moves is referred to as the destination. Migration is seen as regular when it takes place in accordance with the laws, while migration that takes place illegally is known as being irregular.[102] Temporary or permanent migration is mainly distinguished by the duration[103] and the intention of the stay.[104] When movement takes place for a specific reason and the migrant has the intention of returning to the original state, it is deemed to be temporary. The IOM indicates that this is when a person changes their residency for a period of three to 12 months, not including short travels for purposes of tourism or business, for example.[105] A person is classified as a permanent migrant when they

---

[98] IOM International Migration Law: Glossary on Migration 137.

[99] IOM International Migration Law: Glossary on Migration 64, 103. [105] IOM date unknown https://www.iom.int/who-migrant-0#.

[100] UN Recommendations on Statistics of International Migration 10.

[101] IOM International Migration Law: Glossary on Migration 108, 113.

[102] IOM International Migration Law: Glossary on Migration 108, 113, 116, 113, 137, 175.

[103] Clark Human Migration 17.

[104] UN Recommendations on statistics of international migration para 37.

[105] IOM International Migration Law: Glossary on Migration 198; see also UN Recommendations on statistics of international migration para 32.

move to another country for a minimum of 12 months with the intent to make that country their residence.[106]

The distinction between voluntary and forced migration is unclear and the classification will depend on the evaluation of the specific movement.[107] For instance, a person can be forced to migrate at first, but later on decide voluntarily where they want to settle.[108] The identification of the type of movement will therefore depend on when the determination is made. The distinction between the different types of migration is important as it assists with the classification of migrants. This in turn determines the standard and framework of protection that is applicable.[109] As is indicated below,[110] those migrants who are forced or compelled to leave and who qualify as refugees, for example, usually require more protection and support than other types of migrants.[111]

Certain factors have been identified that can be used to distinguish between voluntary and forced migration.[112] A voluntary migrant migrates to a destination of choice[113] and knowingly and willingly decides to leave to legally enter another state.[114] Examples include migration for labour purposes, joining family members and studying.[115] The criteria that indicate voluntariness include that the movement is not coerced, the opportunities and conditions in the home state are still conducive, there is an option to exit and the decision is based on full, actual and non-deceiving information.[116]

[106] IOM International Migration Law: Glossary on Migration 125.

[107] IOM International Migration Law: Glossary on Migration 77; see also Bakewell "Unsettling the boundaries between forced and voluntary migration" 3.

[108] Bakewell "Unsettling the boundaries between forced and voluntary migration" 3.

[109] Vitorino World Migration Report 2022 21; see also Ottonelli and Torresi 2013 IMR 785.

[110] See 2.3 and 2.4 in Chapter 2.

[111] Vitorino World Migration Report 2022 21.

[112] EMM date unknown https://emm.iom.int; see also Bakewell "Unsettling the boundaries between forced and voluntary migration"; see also Ottonelli and Torresi 2013 IMR 796-804; see also IOM International Migration Law: Glossary on Migration 77.

[113] Bakewell "Unsettling the boundaries between forced and voluntary migration" 1.

[114] EMM date unknown https://emm.iom.int.

[115] EMM date unknown https://emm.iom.int.

[116] Ottonelli and Torresi 2013 IMR 796-804.

Forced migration, on the other hand, is where a person is compelled to leave by "force, compulsion or coercion".[117]

According to Clark,[124] there are numerous factors that can influence migration. These include age, gender, education and ownership of property. In this regard, statistics indicate that a person aged between 20 and 35, with a higher level of education and who rents instead of owns property, is more likely to migrate. From the definition of a migrant explained earlier, it is also clear that there are several reasons for people to migrate, including political, social and economic factors and demography.[118] Movement due to political factors is mainly driven by government actions or inactions that result in conflict, war or violence, corruption, violation of human rights, unrest, rebellions, repression and unequal treatment. All these factors result in political instability, which drives people to move in search of safety and security.

Culture, religion, education, and health considerations are social factors that also drive migration. Throughout history groups of a similar culture or religion have tended to establish states where they can practice their beliefs and customs. In certain states, cultural or religious groups have become the victims of persecution based on their views and practices. Other groups move in search of better education or study opportunities, for better health services, or to escape outbreaks of diseases.

A poor economy, economic crises or poverty, or unemployment can also drive people to leave their residence in search of employment opportunities.[126] In this regard, economic factors can be the primary consideration for economic migrants, but a secondary consideration for refugees for example.[127] Demography can be a deciding factor in the movement of people who reside in areas that experience a growth in population due to high fertility and birth rates. These regions are usually densely

[117] IOM International Migration Law: Glossary on Migration 77. [124] Clark Human Migration 17-19.
[118] Telsac and Telsac 2022 https://researchgate.net; see also Castelli 2018 JTM 3-5. [126] Czaika and Reinprecht "Migration drivers: Why do people migrate?" 63 [127] Czaika and Reinprecht "Migration drivers: Why do people migrate?" 64.

populated, which affects the availability of resources and results in the easy outbreak of uncontrollable diseases.

Migration can also be classified according to push-pull factors.[119] Push factors are those that drive movement and motivate people to leave the origin state. On the other hand, pull factors are those that draw or attract people to a specific destination area.[129] For example, people can be pushed to move by conflict or political and economic instability. In these circumstances they are pulled to countries or destinations that can provide them with safety and better opportunities to improve their situation, circumstances and family life. However, this classification does not specify why only certain people move in these circumstances, and it does not consider that a decision to move can be influenced by other factors.[120]

Whatever the motivations, migration has a negative effect on both the origin and the destination state.[121] It affects the origin state as these movements result in towns and cities being left unoccupied and the youth and educated people being lost.[122] On the other hand, a mass influx of people overburdens the infrastructure of a destination state, which can result in unemployment[123] and a shortage of resources. It can also become a security challenge for these states since terrorists can cross borders to launch attacks from other territories, or criminal activities can increase.[124] Due to an increase in the availability of people who can fill jobs, earnings are decreased.[125] Often, migrants are preferred as employees since they are considered to be cheap labour. The price for housing usually also increases as there is a greater demand for accommodation. The integration of these migrants from different backgrounds into society also presents a challenge for these states. The perceived need to preserve a national identity and

[119] Czaika and Reinprecht "Migration drivers: Why do people migrate?" 51-53. [129] IOM International Migration Law: Glossary on Migration 164.
[120] Czaika and Reinprecht "Migration drivers: Why do people migrate?" 51.
[121] Clark Human Migration 19.
[122] Telsac and Telsac 2022 https://researchgate.net.
[123] Clark Human Migration 20.
[124] Tallmeister Is immigration a threat to security? 4-5.
[125] Telsac and Telsac 2022 https://researchgate.net.

competition for jobs and resources in some cases result in xenophobia.[126] Migration clearly does not only affect the origin or destination state, but it also affects the migrant in several ways. Migrants have to embark on long, difficult journeys to reach their destination, they have to adapt to a new environment, they have to compete for jobs and resources, and for these reasons they are vulnerable to human trafficking and xenophobic attacks.[127]

2.3 Climate change and disaster displacement

In addition to the causes identified and discussed above,[128] migration is also known to be induced by climate change or the environment as indicated in the introduction.[129] The IOM has defined climate migration as the "movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently within a state or across an international border".[130]

The changes in an environment can include slow-onset events such as rising sea levels, increasing temperatures and drought that affects food and water security, or imminent, sudden or rapid events such as natural disasters.[131] Climate change is caused by the emission of greenhouse gases that increase the Earth's temperature. This intensifies disasters such as cyclones and flooding, for example, and causes it to occur more frequently.[132] These events and conditions have an immense impact on people's livelihoods and can cause displacement as a result.[133] The IPCC warning in 1990 that

[126] Xenophobia is a negative attitude or hostility among nationals to migrants, foreigners, people of other cultures or strangers.

[127] Tsegay 2023 Genealogy 6-7.

[128] See 2.1 para 2.

[129] Prange 2022 https://cfr.org.

[130] IOM International Migration Law: Glossary on migration 31.

[131] Bryne 2018 UCILR 766-771.

[132] See 5.2 for a comprehensive outline of the climate change events that illustrate the intensity and frequency of these events with reference to practical examples. UNFCCC Fact sheet: Climate change science the status of climate change science today 1-2.

[133] UNHCR 2020 https://unhcr.org/news/stories/how-climate-change-multiplying-risks-displaceme nt.

the "greatest impact of climate change might be on human migration", has become a reality as the UNHCR stated in 2020 that "climate change is the defining crisis of our time and displacement is one of its most devastating consequences".[134] Given their location, certain areas such as Latin America, South Asia and sub-Saharan Africa have been identified as being more vulnerable to the effects of climate change than others.[135] Around 143 million internal climate migrants could be produced by these regions by 2050.[136] As is explored in Chapter 5,[137] the international community has committed to lower the emission of gases by adopting several instruments and by implementing numerous measures to address the issue of climate change. These include the implementation of measures to mitigate, prevent and adapt to the effects of climate change.[138]

Bryne indicates that until these universal goals have been reached, people will have to find ways to cope with the existing challenges brought on by climate change.[139] This includes the internal or international migration of people to escape these negative effects. There are several legal mechanisms in place to protect those who are forced to move internally as a result of the negative effects of climate change.[140] People who are forced to cross borders in these circumstances, on the other hand, do not enjoy the same protection.[141] Climate change as a driver of migration presents several difficulties in that it is not always the sole driver of movement, the events or disasters affect people differently, and relocation can affect a realm of human rights such as culture, religion and family life.[142] Until 2019, climate-induced migration was only seen

[134] UNHCR 2020 https://unhcr.org/news/stories/climate-change-defining-crisis-our-time-and-it-particularly-impacts-displaced#.

[135] Prange 2022 https://cfr.org.

[136] World Bank Group Groundswell Preparing for internal climate migration: Policy note #2 1; see also Prange 2022 https://cfr.org.

[137] See 5.2 for a discussion of the instruments and efforts that have been adopted by the international community in response to climate change.

[138] Bryne 2018 UCILR 763.

[139] Bryne 2018 UCILR 763-764.

[140] See 5.3 for a discussion of the UN Guiding Principles on Internal Displacement (1998).

[141] See 5.3 for a discussion on the gap in the law with regard to external displacement as a result of climate change. See also Mayer 2011 CJIELP 375; see also McAdam 2020 AJIL 712.

[142] Bryne 2018 UCILR 764-766.

as a driver of movement in as far as it overlaps with other factors, such as conflict.[143] Climate change has, however, been proved to be a sole driver of migration in the matter of Mr Teitiota and his family, who fled to NZ from the disappearing island of Kiribati.[144] It has been scientifically proven that this island is shrinking due to the rising sea levels as a result by climate change. As Mr Teitiota was forced to cross borders in search of protection, he specifically applied for refugee status on the basis that he and his family were forced to leave because the existing circumstances were violating their human rights.[145] By analysing the applicable international and domestic laws, NZ found that he did not qualify for refugee status, and he was returned to Kiribati.[146] In contrast, the UNHRC found in 2020 that climate change and disasters affect and threaten human rights such as the right to life, and therefore people who are affected by these circumstances cannot be returned to states where their right to life is threatened by climate change.[147] This confirmed the application of the nonrefoulement principle[148] to those displaced by climate change and also expressly recognises the existence of the concept of climate refugees.[149] Several authors, organisations and bodies prefer to use terms such as climate change-induced, forced or environmental

[143] Thompson 2019 https://unhcr.org; Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 10.

[144] See 5.3 and 5.4 for an identification and analysis of the case of Mr Teitiota as well as the consideration and judgment of both NZ and the UNHRC. Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 paras 4-11.

[145] Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 paras 4 and 5.

[146] Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 para 6.

[147] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 para 9.11.

[148] See 2.4 for a discussion on the scope and application of the non-refoulement principle.

[149] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 para 8.6; see also Su 2020 https://climatechangenews.com.

migrants[150] instead of climate refugee, as these terms do not create the higher obligation and standard of protection that would apply in the case of a refugee.[151]

Although the expansion in itself is welcomed, this recognition presents numerous challenges to the international community as this category of refugees is not recognised in law.[152] Various authors and bodies are of the opinion that legal reform is required to provide for an additional category called climate refugees by amending existing refugee law or by adopting an alternative instrument that can specifically address this issue.[153] Since climate change has been identified as a threat to international peace and security,[154] the international community as a whole should take responsibility for those displaced as a result.[155] Still, it will be a difficult task to have the international community reach consensus on this matter as it will put additional obligations on states and some states have already indicated their hostile attitude towards refugees. For this reason, the environmental law principle of CDR which means that states must be held responsible in correspondence with contribution to climate change, is also analysed.[156] A comprehensive analysis of the development of the refugee concept and the international, African and Latin American regional and domestic South African refugee law framework is needed to determine whether climate refugees are protected by existing refugee law or whether reform is needed.[157] **2.4 The development of the international refugee law framework**

[150] See 6.4 for the identification and explanation of the different terms used to describe those displaced by climate change and the arguments in support of these terms.

[151] Biermann and Boas 2010 GEP 66; see also Sciaccaluga International law and the protection of "climate refugees" 58.

[152] Prange 2022 https://cfr.org.

[153] See Chapter 6 for an extended discussion on the different arguments regarding the reformation of the refugee law framework to provide for the category of climate refugees and the criticism in this regard. See also Prange 2022 https://cfr.org.

[154] UN Women 2022 https://wrd.unwomen.org.

[155] Tanner date unknown https://un.org.

[156] See 5.2 for an explanation of the CBDR principle. See also Tanner date unknown https://un.org.

[157] See 2.3 and 2.4 for a discussion on the international refugee law framework. Also see Chapters 3 and 4 for an analysis of the African and Latin American and South African refugee law framework respectively.

The international recognition and protection of refugees and the development of the international refugee law framework started with the founding of the League of Nations in 1919.[158] States were confronted by an influx of people fleeing their countries of origin as a result of WW I, the Russian Revolution and the fall of the Ottoman empire.[159] The reservation of jobs and benefits for nationals and the requirement to possess a passport made it difficult for these people to cross borders.[160] Their arrival placed pressure on economies, and they were mistreated as a result. A need arose for a framework for their recognition and protection.[161] Fridjof Nansen was appointed as the first High Commissioner for Russian Refugees at the League of Nations in 1921. The office was tasked with formulating a definition of a

"refugee" and providing assistance to refugees who had to relocate.[162]

The "Nansen Passport" was introduced to identify Russians who had left their country, and this protection was later also extended to Armenian refugees. The definition for a Russian refugee was "any person of Russian origin who does not enjoy the protection of the Government of the Union of the Soviet Socialist Republics and who has not acquired any other nationality".[163] As protection was only provided to Russian and Armenian refugees under this system, the international community soon recognised that protection had to be extended to people from other nationalities.[164]

The first Convention of Refugees was adopted in 1933, and according to Barbara Metzger, it "became a landmark in the codification of international refugee law".[165] The Convention of Refugees addressed human rights, access to work and education and

[158] Feller 2001 WUJLP 130; see also Katz and Maluwa "Refugees and Stateless Persons" 505.
[159] Metzger "The League of Nations, Refugees and Individual Rights" 102.
[160] Metzger "The League of Nations, Refugees and Individual Rights" 102-103.
[161] Metzger "The League of Nations, Refugees and Individual Rights" 103.
[162] Metzger "The League of Nations, Refugees and Individual Rights" 103; see also Katz and Maluwa "Refugees and Stateless Persons" 505; see also Feller 2001 WUJLP 130.
[163] Metzger "The League of Nations, Refugees and Individual Rights" 104.
[164] Metzger "The League of Nations, Refugees and Individual Rights" 104.
[165] Metzger "The League of Nations, Refugees and Individual Rights" 106.

introduced the non-refoulement principle.[166] The equal treatment of refugees and foreigners was also recognised by this Convention of Refugees.[167] Although this was progress, the Covenant of the League of Nations[168] prohibited interference in the domestic affairs of a state, and as a result Germany could not be prevented from violating the human rights of Jewish people when Adolf Hitler came into power.[169]

The international community was eager to respond to Germany's violations as it resulted in thousands of people leaving Germany and crossing the borders of other states. However, Germany found numerous ways to frustrate this process and no organisation or office could ultimately provide protection to these refugees.[170] It was estimated that approximately 11 million people were displaced in the aftermath of WW II.[181] It once again became clear that provisions had to be made for the protection of refugees at an international level.[171] Although the United Nations Relief and Rehabilitation Administration (UNRRA) was established for the purposes of supervising camps, taking care of refugees and assisting them with resettlement, it was not equipped to assist these refugees with resettlement in other countries.[172] The International Committee on Refugees (IGCR) was founded thereafter to help German and Austrian refugees with relocation but their efforts were not enough to curtail the displacement of persons and to provide for adequate protection of these people. The humanitarian crises caused by the events in Germany and WW II forced key role

[166] The principle of non-refoulement prohibits a state from returning an asylum seeker to a state where their life or freedom is threatened on account of the grounds of race, religion, nationality, membership of a particular social group or political opinion. Metzger "The League of Nations, Refugees and Individual Rights" 106.

[167] Metzger "The League of Nations, Refugees and Individual Rights" 106.

[168] Article 15(8) of the Covenant of the League of Nations (1924); see also Dugard and Dugard "Human Rights" 455.

[169] Metzger "The League of Nations, Refugees and Individual Rights" 108; see also Dugard and Dugard "Human Rights" 455.

[170] Metzger "The League of Nations, Refugees and Individual Rights" 108; see also Dugard and Dugard "Human Rights" 455. [181] Carlin 1982 MJIL 5.

[171] Lewis 2005 IJRL 70.

[172] Carlin 1982 MJIL 5.

players to recognise the need for international law to focus on the protection of human rights.[173]

The Charter of the United Nations (UN Charter)[174] was adopted in 1945[175] and the Preamble states that faith in human rights must be reaffirmed. Article 1 of the UN Charter sets out the purpose of the organisation, which includes among other things to promote and encourage respect for human rights and for fundamental freedoms. This obligation is reiterated in Article 55 and Article 56, which stipulate that joint and separate action shall be taken to achieve the purpose stated in Article 55.[176] Although these provisions attempted to bring about cooperation in achieving the ideal goal of protecting human rights, enforceable duties were not imposed on states and no central body was established to force states to adhere to these provisions.[177]

In 1946, the Commission of Human Rights (CHR) was established to draft an internationally acceptable bill of human rights. This Commission drafted the UDHR,[178] which was proclaimed by the UNGA Resolution 217A(III) in 1948.[190] In December 1966, the UNGA further adopted the human rights treaties referred to as the ICESCR and the ICCPR.[179] All these instruments clearly uphold that all human beings are entitled to human rights and freedoms without any distinction being made.[180] It is clear that these rights and freedoms also extend to those who flee their home countries to seek refuge in a different state. Due to these people's vulnerability,[181] rights specifically include the right to be treated equally, not to be discriminated against, the right to life, as well as the right to the liberty and security of person, which includes not being

---

[173] Dugard and Dugard "Human Rights" 455.

[174] Charter of the United Nations (1945).

[175] UN date unknown https://un.org/en/about-us/un-charter; see also Dugard and Dugard "Human Rights" 456.

[176] Articles 55 and 56 of the Charter of the United Nations (1945).

[177] Bennett and Strug Introduction to International Law 191.

[178] UN date unknown https://un.org/en/about-us/udhr/history-of-the-declaration#. [190] OHCHR date unknown https://ohchr.org.

[179] OHCHR date unknown https://ohchr.org; see also Dugard and Dugard "Human Rights" 460.

[180] Article 1 and 2 of the Universal Declaration of Human Rights (1948); see also Harvey 2015 RSQ 48; Nirmal 2001 ISIL YBIHRL 96-97 and 102.

[181] Nirmal 2001 ISIL YBIHRL 102.

detained.[182] Refugees may also not be tortured or subjected to inhumane treatment. This includes the obligation on states not to return people to a country where they will be tortured or subjected to inhumane treatment.[183] Furthermore, refugees have a right to be recognised before the law, to have a nationality, to work, and to have an education.[184] Article 14(1) of the UDHR specifically recognises that everyone has the right to "seek and enjoy asylum from persecution in other countries".[185] International refugee law must be read with international human rights law.[186] According to Dugard and Dugard:[199]

> It is important to bear in mind that a refugee problem is, at heart, a human rights problem. The causes of forced displacement that give rise to the refugee problem are necessarily linked to human rights violations in the country of origin. Thus, the treatment of refugees and asylum-seekers within the state has to be seen not only in terms of the refugee treaties to which the state is a party but also in the broader context of other human rights treaties and customary international law.

To oversee the resettling and repatriation of refugees and to ensure that they are cared for, the UN created the International Refugee Organization (IRO).[187] The UNHCR replaced the IRO when it was dissolved in 1952.[188] In 1950, the UNHCR was established to provide international protection to refugees and to help governments facilitate the voluntary expulsion of refugees.[189] The organisation also had to give effect to Article 14(1) of the UDHR and the UN Declaration on Territorial Asylum.[190] The UNHCR was established with the responsibility of promoting the conclusion and

---

[182] Articles 2, 3, 7 and 9 of the Universal Declaration of Human Rights (1948); see also Harvey 2015 RSQ 48; see also Articles 2, 6 and 9 of the International Covenant on Civil and Political Rights (1966); see also Nirmal 2001 ISIL YBIHRL 100-106.

[183] Article 5 of the Universal Declaration of Human Rights (1948); see also Harvey 2015 RSQ 48; see also Article 7 of the International Covenant on Civil and Political Rights (1966); see also Nirmal 2001 ISIL YBIHRL 97-100.

[184] Articles 6, 15, 23 and 26 Universal Declaration of Human Rights (1948); see also Harvey 2015 RSQ 48; see also Articles 6, 13 and 16 of the International Covenant on Economic, Social and Political Rights (1966).

[185] Article 14(1) of the Universal Declaration of Human Rights (1948); see also Katz and Maluwa "Refugees and Stateless Persons" 506.

[186] Katz and Maluwa "Refugees and Stateless Persons" 504. [199]
Dugard and Dugard "Human Rights" 504.

[187] Carlin 1982 MJIL 5-6.

[188] Carlin 1982 MJIL 8; see also UNTC date unknown https://treaties.un.org.

[189] Chapter 1(1) of the Statute of the Office of the UNHCR (1950).

[190] Dugard and Dugard "Human Rights" 506.

ratification of conventions, administering their application and proposing amendments to conventions.[191] The creation of the UNHCR also resulted in the adoption of the 1951 Refugee Convention. This instrument is described as the cornerstone of international refugee law.[192] Prior to amendment in 1951, historical international refugee law only protected certain groups of refugees, but the 1951 Refugee Convention provided a broader definition of a refugee:[193]

> A person who as a result of events occurring before 1 January 1951 and 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.

The 1951 Refugee Convention contains important provisions for the status and treatment of refugees. These provisions may not be applied discriminately, and the 1951 Refugee Convention further stipulates that states are allowed to treat these persons at a higher standard without any prejudice.[194] With regard to the treatment of refugees, Article 7(1) determines that refugees shall be treated the same as aliens unless otherwise prescribed, and after residing in a country for three years, a refugee is exempted from legislative reciprocity.[195] In other words, after residing in a country for three years, refugees shall no longer be treated as foreigners but shall be granted the same rights as nationals.[196] In terms of Article 12(1), the laws of the country of domicile or residence will regulate the status of a refugee. The 1951 Refugee Convention prescribes different levels of treatment of refugees.[197] States must treat refugees the same as they would treat nationals with regard to freedom of religion,

---

[191] Paragraph 8(a) of the Statute of the Office of the UNHCR (1950).

[192] UNHCR A guide to international refugee protection and building state asylum systems 16; see also Introductory Note to the Convention Relating to the Status of Refugees (1951).

[193] Introductory note and Article 1A(2) and 1B(1) of Convention Relating to the Status of Refugees (1951).

[194] Introductory Note and Article 3 of the Convention Relating to the Status of Refugees (1951); see also Weis 1982 MJIL 29.

[195] Articles 7(1) and 7(2) of the Convention Relating to the Status of Refugees (1951).

[196] Avvocati 2023 https://lexology.com.

[197] Weis 1982 MJIL 29.

access to courts and legal assistance, rationing, elementary education, public relief, labour legislation and social security.[198] The same holds true for the right of association and joining of trade unions, as well as to the right to participate in activities that allow for the earning of wages.[199] Where a refugee acquires or leases property, wants to participate in a liberal profession[200] or becomes self-employed, requires housing or pursues a higher education,[201] the 1951 Refugee Convention provides that refugees shall be awarded the same treatment as aliens generally would in the same circumstances.[202]

In terms of Article 25, the local or international authority shall provide a refugee with administrative assistance in circumstances where a refugee requires it but cannot obtain it from their own country. There is an obligation on states to issue the necessary documents and certifications, which includes identification and travel documents.[203] Furthermore, the introductory note and Article 33 prohibits the imposition of penalties such as criminal prosecution or detention of refugees who enter and stay in a country illegally. Most importantly, it also endorses the principle of non-refoulement by expressly prohibiting an asylum seeker from being returned to a country where their life or freedom is in danger. In terms of Article 1(F), however, the provisions of the 1951 Refugee Convention will not apply to those who have committed crimes against peace or humanity, war crimes, serious non-political crimes, or who have violated the principles of the UN.[204]

---

[198] Articles 4, 16, 20, 22, 23 and 24 of the Convention Relating to the Status of Refugees (1951), see also Weis 1982 MJIL 30.

[199] Articles 15 and 17 of the Convention Relating to the Status of Refugees (1951), see also Weis 1982 MJIL 30.

[200] The Commentary on Article 19 of the 1951 Refugee Convention indicates that a liberal profession is followed by someone who has a qualification, who receives a salary and who is not an agent of the State. Examples of liberal professions include lawyers, dentists, engineers and architects.

[201] Articles 13, 19, 18, 21 and 22(2) of the Convention Relating to the Status of Refugees (1951), see also Weis 1982 MJIL 30.

[202] Weis 1982 MJIL 30; see also Article 7(1) of the Convention Relating to the Status of Refugees (1951).

[203] Articles 25(2), 27 and 28 of the Convention Relating to the Status of Refugees (1951).

[204] Article 1(F) of the Convention Relating to the Status of Refugees (1951); see also Strydom et al (eds) International Law 306.

Although the provisions of the 1951 Refugee Convention are important, it is clear from the definition that it was drafted in the context of WW II.[205] The application of the provisions was limited to persons who became refugees as a result of events in Europe or other parts before 1 January 1951.[206] Modern refugee situations started to arise in different parts of the world and in order for the 1951 Refugee Convention to remain the international instrument for the protection of refugees, it had to supplemented by the 1967 Protocol.[207] The 1967 Protocol recognised that the limitations related to geographical area and time in the initial definition of a refugee should be removed to provide for equal protection of all refugees who qualify as such according to the other requirements contained in the 1951 Refugee Convention definition.[208] These requirements are discussed in the next section.[209]

2.5 The elements that define a refugee

From the definition of a refugee quoted above,[210] it is clear that for a person to qualify for refugee status, they need to have: 1. A well-founded fear of persecution for reasons of 2. race, religion or nationality, or 3. membership of a particular social group, or 4. political opinion, and they must be 5. outside the country of nationality and 6. unable or unwilling to avail themselves of the protection of their home country. The scope and application of these elements is plain once it is clear exactly what each element entails. An analysis of the elements of the definition of a refugee can ultimately reveal whether climate refugees can in one way or another be covered under these elements.

2.5.1 Well-founded fear of persecution for reasons of...

[205] UNHCR A guide to international refugee protection and building state asylum systems 16.

[206] UNHCR A guide to international refugee protection and building state asylum systems 16.

[207] Weis The Refugee Convention, 1951 The Travaux Preparatoires analysed with commentary.

[208] Article 1 of the Convention Relating to the Status of Refugees (1951); see also Articles 1(2) and 1(3) Protocol Relating to the Status of Refugees (1967); Strydom et al (eds) International Law 301.

[209] See paras 2.3.1 to 2.3.4 for a discussion on the elements of the international definition of a refugee.

[210] Introductory note and Article 1A(2) and 1B(1) of Convention Relating to the Status of Refugees (1951). See 2.3 para 6 for the definition of a refugee in Chapter 2.

For a person to qualify as a refugee, the definition requires[211] that such person must have a "well-founded fear" of being persecuted based on race, religion, nationality, membership of a particular social group or political opinion. This clearly indicates that a specific motive is required for qualification as a refugee.[212] The problem with this statement is that the 1951 Refugee Convention does not clearly define these possible motives.[213] The UNHCR subsequently proposed certain interpretive guidelines that states can use to determine if a person qualifies as a refugee or not.[214] The test to determine if a "well-founded fear" exists, is as follows:[215]

> To the element of fear – a state of mind and a subjective condition – is added the qualification 'well-founded'. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term well-founded fear therefore contains a subjective and objective element, and in determining whether wellfounded fear exists, both elements must be taken into consideration.

The element consists of both a subjective and objective component.[216] The subjective component pertains to how a person reacts to certain events that have an impact on them personally. As indicated by the UNHCR Handbook and Guidelines,[217] this component should be determined by evaluating the state of mind of the person, in other words assessing the personality, credibility and psychological disposition of the person. It is also required that "everything that may serve to indicate that the

---

[211] Article 1A(2) Convention Relating to the Status of Refugees (1951).

[212] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 39.

[213] Dugard et al International Law 354.

[214] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 38; see also Strydom et al (eds) International Law 301.

[215] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 38; Strydom et al (eds) International Law 301.

[216] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 40–42; Dugard et al International Law 354-355; Strydom et al (eds) International Law 301-302.

[217] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 37-42; see also Strydom et al (eds) International Law 301.

predominant motive for a person's application is fear needs to be considered".[218] This includes consideration of the background of the person, their membership of a particular group, their interpretation of the situation, and their experience. In addition, this subjective fear must have an objective basis, which means that it must be established from the person's statements and the conditions in their home country that there is an unbearable situation in the country of origin that is causing the applicant's fear.[219]

The element of a well-founded fear does not require personal experience and it can be fulfilled where the person's fear of persecution is based on actions towards others. Each case must be considered on an individual basis, and the laws of the destination state and their implementation should be considered.[220] Furthermore, the person must show a good reason for the fear and the fear has to be reasonable. The fact that a person holds a valid passport issued by the state from which they are fleeing does not signify the absence of fear of persecution.[221]

The term persecution has not been defined, but a threat to life or freedom and the serious violation of human rights always amounts to persecution.[222] In the matter of Pitcherskaia v INS,[223] the applicant claimed that she had been persecuted as she was a member of a particular social group, namely Russian lesbians. The claim of persecution related to the therapy, shock treatment, medication and injections Russia applied to homosexuals to cure their disease and to change their sexual orientation.

---

[218] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 41.

[219] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 42.

[220] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 43.

[221] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 41, 45, 48 50.

[222] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) para 51; see also Article 33 Convention Relating to the Status of Refugees (1951).

[223] AK Pitcherskaia v INS 118 F 3d (9th Circuit 1997); see also Katz and Maluwa "Refugees and stateless persons" 510.

Her claim was denied by the by the Board of Immigration Appeals. They found that these treatments did not amount to persecution as the motive was to cure and not to punish.[224] The Court of Appeals did not agree with this finding and indicated that intent to punish is not a requirement for persecution. The verdict specifically indicated that the definition of persecution is objective and although "asylum cases involve actors who had a subjective intent to punish their victims, this subjective punishment or malignant intent is not required for harm to constitute persecution".[225] Persecution is defined as the "infliction of suffering or harm upon those who differ in a way that is regarded as offensive".[226] Thus, the subjective intent of the persecutor is irrelevant and the measure is "what a reasonable person would deem offensive".[227]

In 2012, the UNHCR indicated that "what amounts to persecution depends on the circumstances of each case, including the age, gender, opinions, feelings and psychological make-up of the applicant".[228] As with the element of a well-founded fear, there is a subjective component that should be established by considering the opinions and feelings of the person.[229] Each case must be evaluated on its own basis and merits and "individual integrity and human dignity must be weighed against the manner and degree to which the person can be injured".[230] Furthermore, the threat must exist in the whole country, because if it is only applicable to a specific area, the applicant can seek safety in another part of the country.[231] Also, serious discrimination or a limitation of rights or obscure punishment and the imposition of severe penalties for leaving the

[224] AK Pitcherskaia v INS 118 F 3d (9th Circuit 1997) Part I.

[225] AK Pitcherskaia v INS 118 F 3d (9th Circuit 1997) para 4.

[226] AK Pitcherskaia v INS 118 F 3d (9th Circuit 1997) para 6.

[227] AK Pitcherskaia v INS 118 F 3d (9th Circuit 1997) para 6.

[228] UNHCR Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity without the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees para 16.

[229] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 51-53.

[230] Goodwin-Gill and McAdam The refugee in international law 49; see also Harerimana v Chairperson of the Refugee Appeal Board 10972/2013 [2013] ZAWCHC 209 paras 36-42; see also Katz and Maluwa "Refugees and Stateless Persons" 509-510.

[231] Goodwin-Gill and McAdam The refugee in international law 74-75; see also Etugh v INS 921 F 2n 36 (3d Circuit 1990); see also Katz and Maluwa "Refugees and Stateless Persons" 510.

country can amount to persecution in certain circumstances.[232] The UNHCR mainly identifies the government as the agent of persecution, but it clearly states that if belligerent acts are committed by members of the population and it is tolerated by the government, this can also amount to persecution.[233] Similarly, the UNHCR that this persecution should not only include persecution by states but also by non-state actors.[234]

A matter before the Refugee Status Appeals Authority of NZ can serve as an example.[235] An appeal was lodged against the decision of the refugee status officer not to grant a South African woman and her son refugee status based on the fact that they had been victims of criminal attacks and activities in SA on a continuous basis.[236] The issues before the Appeals Authority included whether the events described by the applicants were believable, if they would be mistreated if they returned to their home country, and if this mistreatment amounts to persecution.[250] The woman and her son testified as to the events that occurred in SA and documentary proof was provided.[237]

The Appeals Authority first assessed the credibility of the woman and found that the evidence she provided was contradictory, inconsistent and implausible.[238] Secondly, the Appeals Authority analysed the information and statistics available on the criminal activity in SA.[239] It was established that in order to qualify for refugee status, being persecuted "comprises of serious harm and the failure of state protection".[240] Reference was also made to Chan v Minister of Immigration and Ethnic Affairs (1989) 169 CLR 379 (HCA) in which it was stated that a well-founded fear of persecution is if

[232] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 54-61.

[233] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 65.

[234] Wilkinson 1998 https://unhcr.org; see also Nirmal 2001 ISIL YBIHRL 114.

[235] New Zealand: Refugee Status Appeals Authority Refugee Appeal Nos 76508 & 76509 para 1.

[236] New Zealand: Refugee Status Appeals Authority Refugee Appeal Nos 76508 & 76509 paras 2-3. [250] New Zealand: Refugee Status Appeals Authority Refugee Appeal Nos 76508 & 76509 para 3.

[237] New Zealand: Refugee Status Appeals Authority Refugee Appeal Nos 76508 & 76509 paras 535.

[238] New Zealand: Refugee Status Appeals Authority Refugee Appeal Nos 76508 & 76509 paras 3969.

[239] New Zealand: Refugee Status Appeals Authority Refugee Appeal Nos 76508 & 76509 paras 7071.

[240] New Zealand: Refugee Status Appeals Authority Refugee Appeal Nos 76508 & 76509 para 72.

there is a "real, and not a remote or speculative, chance of persecution".[241] Therefore, although the woman and son had a subjective fear of becoming victims of crime if returned to South African, the objective assessment of the situation in the country revealed that their fear is not well founded.[242]

Although it is not a ground in the definition of a refugee, the UNHCR Guidelines specifically consider the application of these elements to what is referred to as "gender-related persecution".[243] The UNHCR Guidelines recognise that gender-related violence or acts that inflict serious pain and suffering amount to persecution. The UNHCR Guidelines specifically determines that the failure of states to terminate a forbidden gender practice, distinctive punishments based on gender or sexual orientation, implementation of restrictive or severe rules, discrimination, or failure to protect that results in harm, human trafficking and sexual exploitation, all constitute persecution.[244]

In addition to establishing a well-founded fear of persecution, the definition requires that the fear must be based on one of the grounds mentioned in the definition to qualify for refugee status. The "for reasons of" element requires a causal link or nexus between the fear and one of the grounds.[245] The following paragraphs discuss these grounds as stipulated in the definition of a refugee. The grounds of race, religion and nationality are discussed under one heading as they are relatively easy to identify.[246] The remaining two grounds, being membership of a particular social group and political

[241] Chan v Minister of Immigration and Ethnic Affairs (1989) 169 CLR 379 (HCA); see also New Zealand: Refugee Status Appeals Authority Refugee Appeal Nos 76508 & 76509 para 73.

[242] New Zealand: Refugee Status Appeals Authority Refugee Appeal Nos 76508 & 76509 paras 7476.

[243] UNHCR Guidelines on International Protection No 1: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002).

[244] UNHCR Guidelines on International Protection No 1: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002) paras 9-19.

[245] UNHCR Guidelines on International Protection No 1: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002) paras 20 and 21.

[246] See 2.4.2 in Chapter 2.

opinion, are discussed separately as they are less obvious and more difficult to identify.[247]

2.5.2 Race, religion and nationality

According the UNHCR Handbook,[248] the category of race includes all "ethnic groups referred to as races in common usage and it also includes minority groups with a common decent". Discrimination based on race violates human rights and therefore satisfies the element of persecution. Similarly, prohibiting someone from belonging to a religious community, worshipping, or discriminating against a person or harming or punishing a persons based on their specific religion, amounts to persecution.[249] Being a member of a specific racial group or belonging to a certain religious group is usually not sufficient in itself to qualify for refugee status. With regard to the element of nationality, it is clearly indicated that it includes citizenship as well as membership of an ethnic or linguistic group, and it can overlap with the grounds of race and political opinion.[250]

2.5.3 Membership of a particular social group

In terms of the UNHCR Handbook, a particular social group "normally comprises persons of similar background, habits or social status".[251] The UNHCR Guidelines indicate that a "particular social group is a group of persons who share a common characteristic other than the risk of being persecuted, or who are perceived as a group

---

[247] See 2.4.3 and 2.4.4 in Chapter 2.

[248] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) paras 68 and 70.

[249] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) paras 71, 73.

[250] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) paras 74, 76.

[251] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) para 77.

by society. The characteristic will often be innate, unchangeable or is otherwise fundamental to identity, conscience or exercise of human rights."[252] The group does not have to be of a certain size, interrelated, or a group where all the members are persecuted.[253] If such a group and its activities pose a challenge to the government and its policies, the origin of persecution can be membership.[254] Several court and refugee board cases have found that a social group can include people fearing persecution based on "gender, linguistic background and sexual orientation".[255] It has also been found that social groups can include adult women at risk of being subjected to female genital mutilation (FMS) in Sierra Leone,[256] having more than one child and returning to China where policies allow only one child per family,[257] and being a female child in the Democratic Republic of the Congo (DRC).[258]

In a matter before the South African Refugee Appeal Board,[259] the Appellant fled Nigeria as he feared persecution because he was homosexual. Firstly, the Board had to consider whether the Appellant was a member of a particular social group. The Board referred to the explanation of the United States of America (USA) Board of Immigration Appeals that membership of a particular social group is where a person belongs to a group of individuals that share common characteristics that cannot be changed or should not be changed as it defines them. Reference was also made to

---

[252] UNHCR Guidelines on International Protection No 1: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002) paras 29 and 30.

[253] UNHCR Guidelines on International Protection No 2: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002) 14, 15, 17 and 18.

[254] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) para 78.

[255] R v Immigration Appeal Tribunal, Ex Parte Shah (UNHCR intervening) [1999] 2 All ER 545 (HL); see also Katz and Maluwa "Refugees and Stateless Persons" 514.

[256] Secretary of State for the Home Department (Respondent) v K (FC) (Appellant) [2006] UKHL; ILDC 732 (UK 2006); see also Katz and Maluwa "Refugees and Stateless Persons" 514.

[257] Fang v Refugee Appeal Board 2007 2 SA 432 (T). This policy ended during the course of 2015 and does this case only serve as an example for what has been accepted as a social group.

[258] Jacob van Garderen NO v The Refugee Appeal Board (2008) 33 SAYIL 511; see also Katz and Maluwa "Refugees and Stateless Persons" 515.

[259] Refugee Appeal Board Decision (Nigeria) South Africa: Refugee Appeal Board Appeal against the decision of the Refugee Status Determination Officer of the Department of Home Affairs declining the grant of refugee status.

other case law that indicated that homosexuals are a particular social group for purposes of the definition of a refugee.[260] Secondly, the Board had to determine whether Nigerian law prohibited homosexual activity, and whether the applicant would face persecution if he was returned to Nigeria and found guilty. In answering these questions, the Board considered Nigerian law as well as news articles and publications on the existing circumstances in the country.[261] The Board found that the Appellant's fear was not well-founded as there was no evidence that homosexuals had been convicted because of their sexual orientation. There was no clear evidence that he would be persecuted if returned to Nigeria, and all that was required of him was not to practise homosexual activities in the open.[262]

Still, the interpretation of this category has been challenging. In the 1997 matter of R v Immigration Appeal Tribunal, Ex parte Shah[263] heard by the United Kingdom (UK) Court of Appeal, two women appealed the denial of their application for asylum on the basis that they will be persecuted (abused and punished) if returned to Pakistan as they were accused of committing acts against moral practice and the law of the country. The first court found that they did not qualify as refugees because they were not seen as members of a particular social group. The Court of Appeal also dismissed both claims on the basis that the characteristics of the phrase that refers to cohesion, unity, and recognition as a group by society was absent. The Lords of the Appeal case offered several opinions on this matter and some did not agree with the interpretation

[260] See Islam v Secretary of State for the Home Department and R v Immigration Appeal Tribunal ex parte Shah [1999] Imm AR 283.

[261] Refugee Appeal Board Decision (Nigeria) South Africa: Refugee Appeal Board Appeal against the decision of the Refugee Status Determination Officer of the Department of Home Affairs declining the grant of refugee status 18-30.

[262] Refugee Appeal Board Decision (Nigeria) South Africa: Refugee Appeal Board Appeal against the decision of the Refugee Status Determination Officer of the Department of Home Affairs declining the grant of refugee status 38-39.

[263] [1999] 2 WLR.

and application of the ground by the Court of Appeal.[264] Lord Hoffmann suggested that the concept of anti-discrimination be used as a guideline for interpretation:[265]

> In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental rights regard as inconsistent with the right of every human being to equal treatment and respect. The inclusion of particular social group recognised that there might be different criteria for discrimination, in pari materiae with discrimination on other grounds, which would be equally offensive to principles of human rights…In choosing to use the general term particular social group rather than an enumeration of specific groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming with the anti-discriminatory objectives of the Convention.

2.5.4 Political opinion

Although international refugee law does not define the concept of a political opinion, several guidelines have been proposed by the UNHCR and local court cases have assisted in the development of this notion.[266] The UNHCR stated that it is "any opinion on any matter in which the machinery of state, government, society or policy may be engaged".[267] This means that in order to qualify as a refugee, the person must not only have a political opinion that is different from the government, but it must also be proven that the person has a fear of being persecuted because of that political opinion.[268] The opinion could have been expressed or been of such a nature that it can be assumed that it will be expressed or the government could become aware of the

---

[264] Judgments – Islam (A.P.) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal Ex Parte Shah (A.P.) (Conjoined Appeals).

[265] Aleinikoff Membership in a particular social group: Analysis and proposed conclusions 35; see also Hoffmann Judgments – Islam (A.P.) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal Ex Parte Shah (A.P.) (Conjoined Appeals) 15.

[266] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue); see also Katz and Maluwa "Refugees and Stateless Persons" 511.

[267] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 32.

[268] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 80.

opinion.[269] The UNHCR indicates that the government should be aware of the political opinion before the country is fled and the repercussions that could be faced for such an opinion has to be analysed to determine whether there is a well-founded fear.[270] It should be pointed out that there is a difference between a political opinion and a political offence. With regard to a political offence, refugee protection will only be granted in certain circumstances.[271]

Application of these guidelines are clearly illustrated in the matter of Cf INS v EliasZacarias.[272] In this case the applicant's claim for asylum and prohibition on deportation was based on his fear of persecution for his political opinion. This application was denied as it was found that an attempted recruitment by a guerrilla movement in Guatemala did not constitute persecution. It was found that he could not prove support for the government or the guerrilla movement in opposition to the government, and a political motive for his refusal to undergo military service was absent. It was stated that:[273]

> The ordinary meaning of the phrase persecution on account of political opinion is persecution on account of the victim's political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion. Thus, the mere existence of a generalized political motive underlying the guerrillas' forced recruitment is inadequate to establish the proposition that Elias-Zacarias fear persecution on account of political opinion.

In the matter of Re Inzunza and Mei, it was held that:[274]

---

[269] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 82.

[270] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 83.

[271] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 84-86.

[272] Cf INS v Elias-Zacarias 502 US 478 (1992); see also Katz and Maluwa "Refugees and Stateless Persons" 512.

[273] Cf INS v Elias-Zacarias 502 US 478, 483 (1992).

[274] Re Inzunza and Orellana Mei (1970) 103 DLR (3 d) 105 (FCA); see also Katz and Maluwa "Refugees and Stateless persons" 512. [289] UNHCR 2004 https://refworld.org.

> It should not be whether the Board considers the applicant has engaged in political activities, but whether the ruling government of the country from which he claims to be a refugee considers his conduct to have been styled as political activity.

The element of political opinion was also addressed in a letter written by the UNHCR to the attorney general of the USA[289] delivering an opinion on the asylum application of the Guatemalan citizen Rodi Alvarado Pena. In this matter, Ms Alvarado sought protection from the USA government as her husband subjected her to severe violence and she could not get protection from the local police. Investigation into the circumstances in Guatemala revealed that women were the victims of discrimination and violence. It is also clear that with Ms Alvarado's constant attempts to leave her husband and to have him arrested and prosecuted, she has demonstrated a political opinion that is contrary to the policies of the government. The opinion also establishes that a court must not determine whether a person has participated in political activity, but rather whether the government of the country of origin perceives the activity as being political.

2.5.5 Outside the country of nationality

This requirement entails that a person can only qualify for refugee status if they are no longer in the state of nationality.[275] It must be determined whether the person holds the nationality of the particular state from which they are seeking protection. In the event that nationality cannot be determined, the country in which the person formerly resided must be taken into account.[276] If the person does not find themselves outside their country of nationality and does not fear persecution from this state, it is not necessary to obtain international protection. The person can seek protection from their own government.[277] The threat of persecution must exist for the claimant in their

[275] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 74, 87 and 93.

[276] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 89.

[277] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 88.

country as a whole. If there is an area in which the person would be safe, their claim for asylum may be unsuccessful.[278]

As indicated in the UNHCR Handbook,[279] there are circumstances where a person can become a refugee while already outside their country of nationality. The person could have left the country of origin without any fear of persecution, after which circumstances that justify the need for international protection arose. These persons are referred to as "bootstrap refugees" or refugees sur place.

2.5.6 Unable or unwilling to avail of the protection of home country

This element is met if circumstances beyond a person's control, such as conflict and the government's refusal or denial of protection, makes it impossible for the person to avail them of the protection of their state, thus amounting to persecution.[280] This must be determined by considering the circumstances of each case.[281] A person can be unwilling to avail themselves to the protection of their home state owing to a fear of persecution.[282] In the event that the protection is refused but the fear of protection is not present, the person will not qualify as a refugee in need of international protection.

2.5.7 Stateless persons outside their country of former habitual residence

In contrast with the discussion above, stateless persons refer to persons who do not have a nationality.[283] Although international human rights instruments acknowledge

[278] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 91.

[279] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 94; see also Dugard et al International Law 4th ed 516.

[280] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 98.

[281] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 99.

[282] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 100.

[283] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 97.

that everyone has the right to nationality,[284] this right is not always enforced, resulting in statelessness.[285] The Convention Relating to the Status of Stateless Persons (1954 Convention) determines that a person who is "not considered as a national by any State under the operation of its law" qualifies as a stateless person.[286] There are two forms of statelessness, namely de facto and de jure statelessness. The former relates to persons who can assert that they are a nationals of a state but who do not have physical evidence to support such allegation, while the latter relates to those persons who cannot allege that they are nationals of any state.[302] This category of people constitutes a vulnerable group as they constantly face the possibility of being arrested and detained as they are not in possession of legal documents or certificates that reflect their identity and nationality. They cannot apply for work, obtain medical assistance, or enrol to get an education.[287] Both groups within this category experience the same difficulties as stateless persons lack identification and documentation. They are vulnerable to arrest or detention as they are deemed to be present in the territory illegally.[288]

The definition contained in the 1954 Convention includes refugees, as all refugees are regarded as stateless.[289] In contrast to this, not all stateless persons automatically qualify as refugees.[290] In order to obtain refugee status, a stateless person must be outside their country of former habitual residence for reasons of race, religion, nationality, membership of a particular social group or political opinion.[291] The country of former habitual residence is defined by the 1951 Refugee Convention as the "country

[284] Article 15 of the Universal Declaration of Human Rights (1948); see also Articles 12(4) and 24(3) of the International Covenant on Civil and Political Rights (1966).

[285] Katz and Maluwa "Refugees and Stateless Persons" 535.

[286] Article 1(1) of the Convention Relating to the Status of Stateless Persons (1954). [302] Katz and Maluwa "Refugees and Stateless Persons" 535-536.

[287] Katz and Maluwa "Refugees and Stateless Persons" 536-537.

[288] Katz and Maluwa "Refugees and Stateless Persons" 535-537.

[289] UNHCR Legal and Protection Policy Research Series: UNHCR and De Facto Statelessness 10.

[290] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 102.

[291] See 2.4 for a discussion on the meaning, scope and application of the elements of the international definition of a refugee in Chapter 2. Introductory note and Article 1A(2) and 1B(1) of Convention Relating to the Status of Refugees (1951).

in which he had resided and where he had suffered or fears he would suffer persecution if he returned".[292] Furthermore, unlike asylum seekers who find themselves outside their country of nationality and unable to obtain protection from the state of which they are a national, stateless persons are unable to do so as they are not a national of any state.[293]

In an attempt to reduce and even prevent new cases of statelessness, the Convention on Reduction of Statelessness (1961) (1961 Convention) was adopted in 1961. The Introductory Note of the 1961 Convention obligates states to enhance the lives of stateless persons by protecting their human rights and by grating them citizenship. It also appointed the UNHCR to assist states with the creation, adoption and implementation of national laws to reduce statelessness and to deal with claims by this category of persons.[294] The issues related to statelessness and refugees are similar and both need protection under international law.[295]

2.6 The application of the definitional elements of a refugee to climate change and disaster displacement

The UNHCR has not issued comprehensive guidelines on the interpretation and application of the definition of a refugee and its elements to those who flee climate change events or its negative effects.[296] This is mainly because the 1951 Refugee Convention does not apply to these circumstances.[297] Weerasinghe explains that the supportive arguments include the following: these events cannot strictly be classified

[292] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 102 and 103.

[293] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) 99-100 and 101; see also Van Krieken 1979 NILR 24.

[294] Introductory Note to the Convention on the Reduction of Statelessness (1961).

[295] UNHCR Protecting the Rights of Stateless Persons: The 1954 Convention Relating to the Status of Stateless Persons 7.

[296] Weerasinghe Legal and protection policy research series: Refugee law in a time of climate change, disaster and conflict 83.

[297] See 6.2.5 for a discussion on the arguments against the application of the 1951 Refugee Convention in respect of climate refugees in Chapter 6.

as persecution as they do not meet the threshold as provided for by law; it is difficult to identify the discriminatory act and the persecutor; and states are not unwilling or unable to assist in these circumstances.[298]

Several authors and bodies have countered these arguments. The UNHCR for instance issued the Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters (Legal considerations) in 2020. They indicate that climate change violates human rights and its negative effects can amount to persecution. When these events affect a whole community, it can be supportive evidence of a fear of persecution.[299] The Legal considerations state in paragraph 9 that:[300]

> A decision as to whether a person has a well-founded fear of being persecuted requires a forward-looking assessment of all relevant facts and circumstances of each case. When assessing the risk of being persecuted in the context of climate change and disasters, it is important to understand that impacts may emerge suddenly or gradually; overlap temporally and geographically; vary in intensity, magnitude and frequency, and persist over time. At the same time, positive impacts of disaster risk reduction as well as national and international efforts to mitigate the adverse effects of climate change and disasters and operational responses in the country of origin, or improvements or innovations in the adaptive capacity of the country and its communities, need to be taken into account. Taken together, all of these circumstances will determine how the enjoyment of human rights are affected and whether a reasonable possibility of being persecuted in the country of origin exists.

Mayer argues that the failure of a government to take steps to reduce the vulnerability of its people to climate change can be seen as persecution.[301] Cooper argues that desertification, rising sea levels and the Chernobyl disaster are examples of events that amount to persecution for the purposes of the definition of a refugee.[302] It is held that

---

[298] McAdam 2009 MJIL 590-592; see also d'Orsi "Environmental refugee in Africa: Doctrinaire reflections, questions of practical protection and challenges remaining" 7.

[299] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters 7-8.

[300] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters 9.

[301] Mayer 2011 CJIELP 382-383; see also Cooper 1998 NYUELJ 502.

[302] Cooper 1998 NYUELJ 519-520; see also d'Orsi "Environmental Refugees in Africa: Doctrinaire reflections, questions of practical protection and challenges remaining" 18.

such nationals are persecuted by the government in that the government had failed to implement measures in prevention of such events or they had contributed to or worsened the damaging to the environment.[303] In all of these examples, it is argued that the actions of the government or their unwillingness to act caused harm to people, forcing them to leave.[304]

The argument is the same where a government discriminates against those affected by climate change events or where assistance is not provided,[305] is withheld, is obstructed or where aid is not accepted, is refused or is prevented.[306] It is also important to remember that these climate change events could create conditions that can instigate and even intensify discriminatory behaviour. In some circumstances these events combine with existing conflict, which justifies qualification as a refugee.[307] These events could also weaken the government, rendering them unable to provide the necessary protection and assistance.[324] Also, these conditions could affect resources and lead to food insecurity that affects livelihoods and violates the human rights of people, which amounts to persecution.[308] Similarly, the threats and limitations to socio-economic entitlements and rights have been argued as sufficient to constitute persecution.[309] As illustrated by McAdam, the persecutor in these circumstances could be the "international community and developed states" whose actions contribute to

[303] Cooper 1998 NYUELJ 502-521.

[304] Cooper 1998 NYUELJ 520.

[305] d'Orsi "Environmental Refugees in Africa: Doctrinaire reflections, questions of practical protection and challenges remaining" 21.

[306] Mayer 2011 CJIELP 383; see also d'Orsi "Environmental Refugees in Africa: Doctrinaire reflections, questions of practical protection and challenges remaining" 19; see also Sussman 2023 CJIL 62-63.

[307] Scott 2016 RSQ 27; see also Kaczmarska and Ono date unknown https://undrr.org; see also Sussman 2023 CJIL 63. [324] Sussman 2023 CJIL 63.

[308] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters 11.

[309] Hathaway and Foster The law of refugee status 235; see also Weerasinghe Legal and protection policy research series: Refugee law in a time of climate change, disaster and conflict 96; see also Sussman 2023 CJIL 62-63.

climate change, which in return negatively affects a person located in their home country.[310]

It has also been stated in the Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise (Sydney Declaration) that:[311]

> It may provide a context in which forms of harm that do engage existing international protection regimes may arise – for instance, where the disaster causes a breakdown of law and order or is used by a government as pretext for persecutory acts against certain parts of the population.

Although the persecution requirement is met in these circumstances, a person who flees as a result of climate change will have to prove that they fear persecution "for reasons of" grounds set out in the 1951 Refugee Convention before they will qualify for refugee status.[312] There has to be a link between the person, the perceived fear and the persecution risk. The UNHCR states in the Legal considerations[313] that the most vulnerable will be affected most by these climate change events. Furthermore, it can lead to pressure and exclusion on one of the grounds, and the circumstances created by these events could also result in violence or other illegal acts being committed against specific groups. Here Hathaway and Foster argue that a "predicament approach" should be followed when analysing the link condition.[314] This approach shifts the focus from the intent of the persecutor to the effect or the experience of and harm to the victim, and is supported by the NZ court as well as the UNHCR. As indicated by the UNHCR and Weerasinghe, the question should then rather be "do the reasons for the feared predicament within the overall context of the country relate to a convention ground?"[315] This approach is substantiated by the argument that

---

[310] McAdam 2009 MJIL 592; see also McAdam et al 2016 UNSWLRS para 83.

[311] Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise (2018).

[312] Cooper 1998 NYUELJ 521.

[313] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters 10.

[314] Hathaway and Foster The law of refugee status Chapter 5; see also Weerasinghe Legal and protection policy research series: Refugee law in a time of climate change, disaster and conflict 88.

[315] UNHCR Guidelines on International Protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A92) of the 1951 Convention and/or 1967 Protocol

although natural disasters are indiscriminate in nature, it affects people in different ways, and it affects those who are more vulnerable to these circumstances more than others.[316]

Claims for refugee status have to be considered individually by taking into consideration the context and the nature of the disaster or event.[317] This approach has been applied in different ways, including:[318] the "sufficient establishment of a link where one group is significantly over-represented amongst victims"; by the establishment of refugee status where the "predicament is the result of widespread discrimination against a group on a ground in the 1951 Refugee Convention"; and the establishment of a link where the "factors that led to or contributed to the person's vulnerability to the relevant harm feared can be related to a ground in the 1951 Refugee Convention".

Here Cooper[319] specifically argues that climate refugees can fall within the ambit of people who are discriminated against based on their membership to a specific social group. This category is broad enough to cover the groups that do not qualify in terms of the other elements. More specifically, climate refugees constitute a social group of people who do not have the "political power to protect their own environment".[320] People who are affected by desertification, global warming, and rising sea levels or human made disasters such as Chernobyl, are members of a social group. The failure or inability to act, worsening of damage to the environment, and corruption and the advancement of economic and financial interests, cause harm to people and result in them being part of a social group that cannot protect their environment. This argument

relating to the Status of Refugees and the Regional Refugee Definitions para 32; see also Weerasinghe Legal and protection policy research series Refugee law in a time of climate change, disaster and conflict 90.

316 Weerasinghe Legal and protection policy research series: Refugee law in a time of climate change, disaster and conflict 95.

317 Weerasinghe Legal and protection policy research series: Refugee law in a time of climate change, disaster and conflict 95-96.

318 Foster International refugee law and socio-economic rights 93-94, 281-283.

319 Cooper 1998 NYUELJ 521-526.

320 Cooper 1998 NYUELJ 526.

has merit, especially when considering the UNHCR's indication that this is an "open ground and that it should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms".[321]

Alternatively, Alexander and Simon argue that climate refugees can fall within the ambit of the definition of a refugee as they are "unable to return" to their place of residence. By extensively considering the objective and purpose of the 1951 Refugee Convention, they argue in favour of a broad interpretation of the definition of a refugee. They specifically argue that the grammatical structuring of the refugee definition eventually preferred by the drafters results in the absence of a requirement for those who are unable to return to prove fear and persecution. To support their argument, they consider the drafting history of the instrument to conclude that protection instead of persecution was its main objective.[322] The intention was to extend protection to "all persons who suffered from a fundamental or humanitarian loss of national protection".[323] Accordingly, they interpret the phrase as a "legal term of art that signals irreparable, fundamental, inability rather than mere difficulty or complication with the paperwork".[324] With specific reference to disappearing islands, it will become physically impossible to permanently return to these islands and to reside there.[325] Additionally, the people will not have a nationality, and although they are stateless, they will also qualify as refugees even though persecution and fear is absent.[326] Despite these persuasive arguments, Chapter 6 below presents several criticism that could potentially affect their validity.[327]

---

[321] UNHCR Guidelines on International Protection No 2: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002) 3.

[322] Alexander and Simon 2014 FJIL 545.

[323] Alexander and Simon 2014 FJIL 561.

[324] Alexander and Simon 2014 FJIL 533.

[325] Alexander and Simon 2014 FJIL 572.

[326] Alexander and Simon 2014 FJIL 533, 573.

[327] See 6.4 for an evaluation of the arguments presented against the expansion of existing law to cover the category of climate refugees.

2.7 The principle of non-refoulement

The principle of non-refoulement has been incorporated into numerous legal instruments and it is widely accepted as state practice. It is recognised as customary international law,[328] which means that states are bound by the principle even if they are not parties to the instruments that contain the provision.[329] Under international human rights law, this principle entails an absolute prohibition on removing a person to a country where they are at risk of torture or cruel, inhumane and degrading treatment or punishment, or other serious human rights violations such as enforced disappearance, risk of life in the absence of necessary medical care and violations of the rights of the child. States should guarantee that migrants who require protection in this context are not left in legal limbo and should ensure that they are granted a legal status. International human rights law determines that this principle applies to all persons under the jurisdiction or effective control of the state, whatever their status, and therefore it also applies to migrants.

As mentioned earlier, this principle is also contained in the 1951 Refugee Convention[330] and it is applicable to both asylum seekers and those already recognised as refugees.[331] The prohibition includes any manner of forcible measures to remove such person from the territory of a state,[332] and although it does not secure a right to be granted protection, the particular state must still allow entry and an opportunity to apply for asylum.[333] The 1951 Refugee Convention contains a provision for the exclusion of the applicability of this provision in certain circumstances. Article 33(2) clearly states that

---

[328] UNHCR The Principle of Non-Refoulement as a Norm of Customary International Law Response to Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/92, 2 BvR 1953/93, 2 BvR 1954/9; see also Katz and Maluwa "Refugees and Stateless Persons" 520.

[329] Allain 2001 IJRL 538; see also North Sea Continental Shelf, Judgment ICJ Reports 1969 par63.

[330] See 2.3 para 9 in Chapter 2. See also Article 33 of the Convention Relating to the Status of Refugees (1951).

[331] UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol para 6.

[332] UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol para 7.

[333] UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol para 8.

non-refoulement does not apply to those persons who present a danger to the security of country or who has been convicted of a serious crime and is a threat to the community of the country in which they find themselves.[334]

Despite this, states still have to adhere to human rights law and afford protection to all persons, irrespective of who they are.[335] Treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UDHR and the ICCPR clearly indicate that no person may be returned to a country where there is a threat of human rights violations, specifically a violation of the right to life, and they may not be tortured, inhumanely treated or detained.[336] This limits the rights of a state to act within its jurisdiction without other states interfering[337] as countries cannot refuse or limit the entrance of refugees at their borders.[338] Yet states are constantly introducing measures in an attempt to prevent the entrance and hosting of refugees. Some of these measures[339] include placing the responsibility solely on the state in which the asylum-seekers arrive, even though the state is unable to assist these people. Upon arrival, people are prevented from applying for refugee status and are kept in camps under conditions that violate their basic human rights.[340]

These measures are often implemented by states that actually have the capacity to host and assist refugees, and by doing so these states violate their obligations under international law.[341] This includes the return of persons to a state where they will be subjected to human rights violations.[342] In these circumstances, the transferring state can be said to have committed an internationally wrongful act for which indirect

---

[334] Article 33(2) of the Convention Relating to the Status of Refugees (1951).

[335] UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol para 17.

[336] Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); see also Articles 3 and 5 of the Universal Declaration of Human Rights (1948); see also Articles 6 and 7 of the International Covenant on Civil and Political Rights (1966).

[337] This right is better known as the right of sovereignty.

[338] Katz and Maluwa "Refugees and Stateless Persons" 520.

[339] Nirmal 2001 ISIL YBIHLRL 99.

[340] Nirmal 2001 ISIL YBIHRL 99.

[341] Nirmal 2001 ISIL YBIHLRL 99-100.

[342] Gillard 2008 IRRC 739.

international responsibility is incurred.[343] A state that commits an internationally wrongful act is under an obligation to stop the wrongful act, provide assurance that the act will not be repeated and pay compensation for any damages that may have been caused as a result of such act.[344] The purpose of reparation is to "wipe out all the consequences of the illegal act and re-establish a situation which would in all probability, have existed if the act had not been committed".[345]

Examples where states have been found guilty of violating the obligation of nonrefoulement is limited as courts and organisations rather attempt to prevent the expulsion from taking place. In the case of Chahal v the United Kingdom, the local court took cognisance of the fact that there was a real risk that the applicant would be subjected to torture had he been returned to his home country of India, and that deportation would result in a violation of Article 3 of the 1951 Refugee Convention.[346] In cases where a person has already been returned to a country where they are subjected to human rights violations, a state can either be compelled to exercise continued obligations towards to persons or to pay compensation.[347] In two distinctive cases, the UNHRC placed an obligation on Canada to make sure that a person who has already been returned to his home country is not subjected to the death penalty[348] and

[343] A state incurs direct international responsibility when international law obligations towards a different state is violated. On the other hand, a state incurs indirect international responsibility when a foreign person is injured, causing injury to another state; see also Article 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001); see also Dugard "State responsibility, diplomatic protection and the treatment of aliens" 389.

[344] Articles 30(a), 30(b) and 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001); see also Gillard 2008 IRRC 738; see also Dugard "State responsibility, diplomatic protection and the treatment of aliens" 389, 400.

[345] Chorzow Factory Case PCIJ Reports Series A no 17, 4 at 47; see also Dugard "State responsibility, diplomatic protection and the treatment of aliens" 400.

[346] Chahal v United Kingdom 70/1995/576/662 para 107; see also Gillard 2008 IRRC 738; see also Article 3 of the Convention Relating to the Status of Refugees (1951) which clearly prohibits a state from returning a person to a state where there is a possibility that they can be exposed to torture.

[347] Gillard 2008 IRRC 738.

[348] Charles Chitat Ng v Canada UNHRC CCPR/C/49/D/469/1991 (UNHRC) 1994 para 18; see also Gillard 2008 IRRC 739.

to compensate a person who has been deported to a country where there is a possibility of him being tortured.[349]

The matter of Mohamed v President of the Republic of South Africa[350] serves as another example. The question in this matter was whether SA could return a person to a state where he would face the death penalty. The state defended its actions by stating that they deported the applicant, they did not extradite him. The Constitutional Court (CC) found that where there is a risk that a person can be tortured or ill-treated, non-refoulement must be applied universally. They stated that:[351]

Makes no distinction between expulsion, return or extradition of a person to another state to face an unacceptable form of punishment. All are prohibited, and the right of a state to deport an illegal alien is subject to that prohibition. That is the standard that our Constitution demand from our governments in circumstances such as those that existed in the present case.

Similarly, the Committee on Torture obligated France to compensate a person who had been returned to Algeria where he was likely to be subjected to torture, and to report to them on the welfare of that person.[352] The matter of QA v Sweden also served before the UNHRC. Sweden wanted to return an asylum-seeker to Afghanistan where there was a substantial risk of being tortured or even killed due to his religion.[353] In 2020, the UNHRC found that Sweden failed to properly consider and assess the circumstances of the specific case and the risks the applicant could face when returned to Afghanistan.[354] It was also found that should Sweden deport the applicant, Articles

[349] Mansour Ahani v Canada CCPR/80/D/1051/2002 (UNHRC) 2004 para 12.

[350] Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening) 2001 3 SA 893 (CC); see also Kapindu 2020 CCR 114.

[351] Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening) 2001 3 SA 893 (CC); see also Kapindu 2020 CCR 114.

[352] Mafhoud Brada v France CAT/C/34/D/195/2002 (UN Committee against Torture) 2005 para 15; see also Gillard 2008 IRRC 738.

[353] Q.A. v Sweden CCPR/C/127/D/3070/2017 (UN Human Rights Committee) 2020 para 3.1.

[354] Q.A. v Sweden CCPR/C/127/D/3070/2017 (UN Human Rights Committee) 2020 para 9.8.

6 and 7 of the ICCPR[355] would be violated.[356] In light of the obligation to respect and implement the rights provided for by the ICCPR, the Committee found that Sweden must re-examine the applicant's case and implement measures that would give effect to the opinion of the Committee.[357]

As shown in Chapter 5,[358] the UNHRC implemented this refugee principle to extend recognition and protection to Mr Teitiota and his family as climate refugees. The UNHRC concluded that they may not be returned to the disappearing island of Kiribati as it has become uninhabitable and there would be the possibility of their human rights being violated if they are returned to the island.

2.8 Conclusion

Since the beginning of history, people have been migrating internally or internationally, regularly or irregularly, temporarily or permanently and voluntarily or forcedly. Regardless of the nature of the migration, factors such as age and gender, for example, influence migration. It has been known to take place for numerous reasons, including war, politics and economics for example. Over the last few years, migration has also been driven by environmental changes and natural disasters, which have been proven to be intensified by climate change. Until the commitments of the international community to reduce greenhouse gas emissions and to address the consequences of climate change bear fruit, people will have to adopt measures to cope with these circumstances. One of these coping measures includes migration.

When people move or are displaced internally due to adverse events, they are legally protected. However, the position is not the same when climate induced migrants are

[355] Article 6 of the International Covenant on Civil and Political Rights (1966) provides that everyone has the right to life and Article 7 of the International Covenant on Civil and Political Rights (1966) prohibits torture, cruel inhuman or degrading treatment or punishment.

[356] Q.A. v Sweden CCPR/C/127/D/3070/2017 (UN Human Rights Committee) 2020 para 10.

[357] Q.A. v Sweden CCPR/C/127/D/3070/2017 (UN Human Rights Committee) 2020 paras 11-12.

[358] See 5.4 and 5.5 for an explanation on the case of Mr Teitiota and the approaches followed by both NZ and the UNHRC in Chapter 5.

forced to move across borders in these circumstances. This is mainly because climate change was only recognised as a sole driver of migration in 2019. This is practically illustrated by the matter of Mr Teitiota and his family.[359] In contrast to the NZ courts who found that refugee status could not be awarded, the UNHRC relied on the non-refoulement principle[360] to prevent Mr Teitiota and his family from being returned to the island of Kiribati. The conditions on the island created by rising sea levels were found to violate their human rights and threaten their right to life. Based on this, the UNHRC explicitly recognised the concept of "climate refugees". This finding presents challenges to the international community as this category is not recognised in law. On the one hand, some argue that the existing refugee law framework is sufficient to cover this category of refugees. On the other hand, it is argued that reformation is required.[361] This chapter investigated the existing international refugee law framework to determine whether reform is required.

It is clear from the discussion above[362] that there are certain requirements that persons should comply with to qualify for refugee status in terms of the 1951 Refugee Convention and its 1967 Protocol. A person who has a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group or political opinion; who is outside their country of nationality; and who is unable or unwilling to avail themselves to the protection of their government, is a refugee.[363] Although each matter must be evaluated on a case-by-case basis, certain interpretative guidelines have been established which assist in determining the scope and application of these definitional elements. It has been established that a fear is well-founded when it is subjective and it is supported by objective and existing circumstances. Furthermore, a threat to life or freedom and violation of human rights amounts to persecution. With regard to the "for reasons of" one of the grounds, the elements of race, religion and

[359] See 5.3 and 5.4 for an analysis of the case of Mr Teitiota.

[360] See 2.6 for an explanation on the non-refoulement principle.

[361] See 6.2 and 6.3 for an evaluation of the different arguments against and in favour of legal reformation.

[362] See 2.5 for a discussion of the elements and requirements of the definition of a refugee.

[363] See 2.4 para 7 for the international definition of a refugee and see 2.5 for an explanation on the scope and application of the definitional elements of the refugee definition.

nationality are easily determined. In contrast, the grounds of membership of a particular social group and political opinion have been more challenging to ascertain. In the event that a person is a member to a group with a "common and unchangeable characteristic" and the group is recognised as such by the community, the person is seen to be a member of a particular social group. Also, the ground of political opinion is met where a person has an opinion that is different to the one held by the government and the person fears persecution based on that opinion.

The main objective of the analysis in this chapter was to establish whether the category of climate refugees could be addressed by the existing international refugee legal framework. The application of the criteria to climate refugees shows that the violation of human rights caused by climate change events or a government's lack of protection or assistance in these circumstances and its failure to act or to implement measures to prevent these events can amount to persecution. In order to link the fear with "for reasons of" one of the grounds contained in the definition, climate induced migrants can be seen as members of a particular social group. The lack of political power to prevent these climate conditions is identified as the common characteristic. In addition, those affected by rising sea levels for instance, will be unable to return to their disappearing states.

Even though these arguments are credible, Chapter 6 discusses several complications.[364] A conclusion on whether climate refugees are covered by existing law or if reform is necessary requires an investigation into the African and Latin

American refugee law framework. The analysis of the relevance and applicability of these frameworks to the category of climate refugees will contribute to a considered conclusion. This investigation follows in Chapter 3.[365]

[364] See 6.2.5 for the arguments presented as to why existing refugee law cannot be used to include the category of climate refugees.

[365] See Chapter 3 for a discussion of the African and Latin American regional refugee law frameworks.

CHAPTER 3

THE AFRICAN REGIONAL LEGAL FRAMEWORK FOR MIGRANTS AND REFUGEES: HISTORICAL DEVELOPMENT AND CONTEMPORARY CHALLENGES

3.1 Introduction

Similar to the international community discussed in Chapter 2,[366] the African continent continuously struggles with the constant movement of people.[367] The history of migration in Africa is embedded in the internal and international slave trade of Africans, colonialism, war, and even the voluntary movement of people in search of employment opportunities.[368] Migration in Africa is a complex issue[369] in that the nature of migration differs and it is influenced by several factors and occurs for numerous reasons. The characteristics of migration also vary from region to region. Migration in Africa mainly remains continental as African migrants prefer to remain on the continent and to move to other African states with an environment that is close to what they knew at home. The African Center for Strategic Studies (ACSS) have indicated that 80% of African migrants prefer to remain on the continent. Only 14 percent of intercontinental migrants are of African origin.[370] Migration presents several advantages and challenges to both migrants and African governments.[371] These are explicitly recognised in the African Common Position on Migration and Development. Numerous regional migration frameworks have been drafted to address the issues, such as the Migration Policy Framework (MPF), and the Convention for the Protection

[366] See Chapter 2 for an analysis of the international legal framework for migrants and refugees.
[367] AU Migration Policy Framework for Africa and Plan of Action (2018-2030) 16.
[368] De Haas and Frankema 2023 https://aehnetwork.org; see also AU Migration Policy Framework for Africa and Plan of Action (2018-2030) 20.
[369] Introduction to the African Common Position on Migration and Development (2006).
[370] ACSS 2023 https://africacenter.org.
[371] See 3.2 for a brief discussion on the advantages and challenges of migration in Africa.

and Assistance of Internally Displaced Persons in Africa (Kampala Convention).[372]

As is the case worldwide,[390] migration on the African continent is increasingly being driven by climate change and its negative consequences. During January 2023, the ACSS reported[391] that climate change is causing movements from rural to urban areas.

It indicated that "between 2020 and 2030, Africa's seven largest coastal cities – Lagos, Luanda, Dar es Salaam, Alexandira, Abidjan, Cape Town and Casablanca – are projected to grow by 40 percent". Also, approximately "2.5 million Africans have been temporarily displaced each year due to natural disasters". The African continent has been identified as being vulnerable[392] to environmental impacts and natural disasters, and such events have already affected the economy, food security and well-being of African people in certain areas.[393] As seen from the discussion below,[394] African countries such as Somalia and Burundi, for example, have been hit the hardest by climate change events even though they contribute the least to the gas emissions that cause climate change.[395]

The OAU was established in 1963[396] as a body that could draft instruments to deal with challenges such as conflict, independence struggles, economic and political problems, and poor governance.[397] Based on the impact of the 1951 Refugee Convention and its 1967 Protocol discussed in Chapter 2 above,[398] the OAU adopted the 1969 OAU Convention,[399] which incorporates the international provisions to deal with refugees while taking into account the circumstances on the continent. The 1969 OAU Convention also contains important provisions on the rights and treatment of refugees in Africa. Unlike the international position, Africa only incorporated the

Migrants, Refugees and Asylum Seekers (2023). See also 3.2 for an analysis of the different instruments that were adopted to address migration in Africa.

390 See 2.3 for a discussion on climate change and disaster displacement.

391 ACSS 2023 https://africacenter.org.

372 See also Treaty establishing the AEC (1991), Protocol to the Treaty establishing the AEC (2018), SADC Protocol on Facilitation of Movement of Persons (2005), Protocol on free movement of persons in the IGAD region (2021), Draft African Guiding Principles on the Human Rights of all

392 Addaney, Jegede and Matinda 2019 AHRY 244; see also Dos Santos Soares 2018 RCDA 1.

393 See 3.3 for a discussion on climate change and disaster displacement in Africa.

394 See 3.3 for a discussion on climate change and disaster displacement in Africa. See also 5.3 for a discussion on practical examples of the negative effects of climate change in African countries. 395 Nimubona 2023 https://thenewhumanitarian.org.

396 Some of the main purposes of the OAU was to encourage integration and to eradicate colonialism. Part of this mandate was to deal with conflict and to respond to people migrating as a result thereof.

397 Kanamugire 2020 Juridical Tribune 313.

398 See 2.4 and 2.5 for a comprehensive analysis of the 1951 Refugee Convention and its 1967 Protocol.

399 Sharpe 2013 AJICL 66-67.

protection of human rights[373] at a later stage. It was only in 1979 that a committee was appointed. It drafted the African Charter on Human and Peoples' Rights (African Charter) that was enforced in 1986.[374] The African Charter found inspiration in the UDHR, ICCPR and ICESR.[375] The African human rights system was later expanded with the adoption of additional instruments that specifically address the rights of children and women and the creation of a human rights court.[376]

This chapter focuses on Africa and the relevant regional instruments such as the 1969 OAU Convention, but the 1984 Cartagena Declaration is briefly discussed as well.[377] Both Africa and Latin America experience mass movements of people. Both regions were forced to adjust existing international law to cater for the context and challenges specific to these areas.[378] The definition that was eventually absorbed in the 1984 Cartagena Declaration was inspired by the 1969 OAU Convention. An examination of the 1984 Cartagena Declaration serves to illustrate how the extended definition has been used to include other categories of refugees.

---

373 See 3.4 for a brief discussion on the African human rights framework.

374 ACHPR date unknown https://achpr.au.int.

375 Bekker 2013 AHRLJ 3.

376 Bekker 2013 AHRLJ 4-7. See also African Charter on the Rights and the Welfare of the Child (1999), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

377 See 3.4.

378 Arboleda 1995 IJRL 87.

The discussion of the extended definition and its elements is important as it determines the requirements that have to be met for the provisions to apply.[379] The additional criteria[380] included in the comprehensive definitions of a refugee are explored with reference to the Guidelines and Legal considerations as published by the UNHCR and case law[381] to gain an understanding of the African and Latin American refugee law frameworks and specifically the term refugee. The objective of this discussion is to determine whether climate refugees can be accommodated under these frameworks and its extended definitions for refugees. Although these frameworks have been complimented as bringing reform, they present their own interpretative and application issues that are critically analysed in this chapter.[382] The African human rights framework and the existing free movement agreements are explored as a possible protective mechanism for climate refugees. As the African regional migration and refugee law frameworks apply to SA, this discussion sets the stage for a comprehensive analysis of the South African migration and refugee law framework in the next chapter.[383]

3.2 The development of African regional migration law

Over decades people have voluntarily and forcefully moved to and from Africa.[384] The history of migration in Africa can be divided into the pre-colonial, colonial and postcolonial period.[385] During the first two periods migration mostly occurred for social and economic reasons, as well as conflict. One of the earliest causes was the internal and international trade in African slaves. Once the slave trade was abolished, migration was driven by colonialism. During this time, people were forced to move in search of

[379] See 3.4 for the African definition of a refugee and see 3.5 for an analysis of the elements of the definition of a refugee.

[380] Article 1 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969); see also Part III(3) of the Cartagena Declaration on Refugees (1984).

[381] See 3.4; see also UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters.

[382] Wood 2019IJRL 292; see also Maluwa and Katz 2020 IJGLS 137-145.

[383] See Chapter 4 for a discussion on the South African legal framework for migrants and refugees.

[384] AU Migration Policy Framework for Africa and Plan of Action (2018-2030) 16.

[385] De Haas and Frankema 2023 https://aehnetwork.org; see also AU Migration Policy Framework for Africa and Plan of Action (2018-2030) 20; see also Adepoju 2008 ISSJ 387.

work and to escape the negative consequences of war. This did not exclude voluntary and seasonal movements to areas that presented economic growth and opportunities. Close to the end of the colonial period, both WWI and WWII caused the forced recruitment and movement of African soldiers to fight in the wars.

During the period after African states gained independence and in recent years, African regional migration and displacement has been driven by several push-pull factors.[386] These include amongst others conflict, poverty, economic problems, terrorism, and corrupt and weak governments.[387] It also includes the voluntary crossing of borders by people in search of better employment and education opportunities. Similar to global migration, African migration can be internal or international, regular or irregular, temporary or permanent, and voluntary or forced, and it is also affected by factors such as age and gender.[388] The causes vary throughout the African continent, but it has been found that it is mostly young people and women who tend to migrate.[389] African migration mainly occurs regionally as migrants move from one African state to another. The main reason for this is that neighbouring African countries share commonalties.

The African Common Position on Migration and Development was adopted after the Experts' Meeting was held in Algeria during April 2006. This document recognises that there are several advantages[390] to migration. This includes economic development as skilled migrants become available to occupy important jobs. Also, the Report on Leveraging Migration for Africa stipulates that "remittances[391][392] lead to increased investments in health, education and housing in Africa".[393] On the other hand, since African migration is complex, the African Union (AU) has acknowledged that it can also

[386] See 2.2 for an explanation on the term push-pull factors that drive migration. See also AU Migration Policy Framework for Africa and Plan of Action (2018-2030) 20.

[387] Introduction to the African Common Position on Migration and Development (2006).

[388] See 2.2 for an analysis of the different forms and factors of migration.

[389] AU Migration Policy Framework for Africa and Plan of Action (2018-2030) 20.

[390] AU Migration Policy Framework for Africa and Plan of Action (2018-2030) 23.

[391] This term means that migrants transfer some part of their wages to the family back home. See [392] .4 of the African Common Position on Migration and Development (2006).

[393] Ratha et al Leveraging migration for Africa: Remittances, skills and investments 47-49.

present immense challenges[394] to both migrants and governments. Irregular migration has resulted in human trafficking and the sexual assault and exploitation of migrants. States have also argued that migration presents a threat to their security, resulting in strict policies that do not accommodate migrants.[395] Governments' negative attitudes towards migrants and refugees have resulted in xenophobia[422] as citizens fear that foreigners will take their jobs. Furthermore, the movement of people to urban areas can place pressure on the resources and infrastructure of the state and result in cities becoming overpopulated. In addition, it places socio-economic strain on states as they have to assist and cooperate to help these people integrate into society and uphold human rights.[396] It also creates problems for the origin state as it can result in what is referred to as a "brain drain" if trained professional persons decide to leave their home countries to pursue careers in other states.[397]

In response to these challenges, several instruments have been adopted in the African region to address this issue.[398] The OAU suggested a MPF[399] to address the problems related to migration, to establish cooperation between states in dealing with migrants, and to assist migrants. The MPF was adopted in 2006, providing guidelines for African states as they deal with migration and its challenges. The effectiveness of the MPF was reviewed in 2016 and it was decided that it had to be updated and that a new Plan of Action had to be implemented.[400] The MPF addresses important topics relating to migration and it provides guidelines to states for implementing migration policies. The issues include migration governance, labour migration and education, dispersion engagement, border governance, irregular migration, forced displacement, internal

[394] AU Migration Policy Framework for Africa and Plan of Action (2018-2030) 22-23; see also the African Common Position on Migration and Development (2006).

[395] Preamble and 3.6 of the African Common Position on Migration and Development (2006). [422] See 2.2 for an explanation on the term xenophobia.

[396] 3.7 of the African Common Position on Migration and Development (2006).

[397] 3.2 of the African Common Position on Migration and Development (2006).

[398] d'Orsi and Naldi 2022 IRRC 1040-1045.

[399] AU Migration Policy Framework for Africa and Plan of Action (2018-2030) 16.

[400] AU Migration Policy Framework for Africa and Plan of Action (2018-2030) 17; see also Amadi and Vundamina 2023 LDD 43.

migration, and migration and trade.[401] It recognises that climate change causes and affects movement and that states should address it internally and regionally.[402]

In response to the problem with internally displaced persons (IDP) in Africa,[403] the Kampala Convention was adopted during October 2009 and entered into force during December 2012.[404] The Preamble[405] acknowledges that internal displacement can make the African continent unstable. The Preamble states that those who have been internally displaced must be assisted and their rights must be protected and granted without discrimination. It determines that although the principles of sovereignty and democracy are respected, the parties to the Kampala Convention have to take measures to address the causes of internal displacement. This is stipulated as an objective of the Kampala Convention as stipulated in Article 2(a). Other objectives of the Kampala Convention include that states must cooperate to prevent internal displacement, and in the event that it does happen, assistance has to be provided

(article 3).[406] The rights of internally displaced persons should also be respected.[407] This includes assistance with the execution of a choice to return, to be integrated or relocated.[408]

The Kampala Convention emphasises that party states should implement the necessary measures to prevent circumstances that can result in the arbitrary displacement of people.[409] The Kampala Convention recognises that arbitrary displacement is mainly

[401] Amadi and Vundamina 2023 LDD 43.
[402] Amadi and Vundamina 2023 LDD 44.
[403] d'Orsi and Naldi 2022 IRRC 1041-1042.
[404] AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2012).
[405] Preamble of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012).
[406] Article 2 of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012).
[407] Article 3 to 9 of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012).
[408] Article 6 of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012).
[409] Article 4(1) of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012).

caused by conflict or human rights violations, and adds that it includes evacuations caused by natural or human made disasters.[410] Article 5 even places a responsibility on party states to provide protection and assistance to those who have been displaced internally as a result of disasters, which would include disasters due to climate change.[411] In addition, party states have an obligation to provide for the basic needs of those who have been displaced [412] and people should be issued with documentation.[413] The adoption of the Kampala Convention indicates that the African continent has recognised the problem and are willing to do something about it.

The Treaty Establishing the African Economic Community (AEC) (Abuja Treaty)[414] was adopted by the OAU during 1991 to establish a regional integrated community and economy.[415] Amongst others, Article 4 determines that this objective shall be achieved by providing for free trade, free movement of people, resources, and residency. Accordingly, states are obligated to incorporate and implement the provisions of the

Abuja Treaty and to act in a cooperative manner to realise the goals.[416] Articles 6 to 17 provide for the establishment of agencies responsible for the implementation and observation of the Abuja Treaty, and they are each given their own functions and liabilities.[417] Provision is even made for the creation of a Court of Justice that shall hear matters relating to the Abuja Treaty and its content.[418] The decisions of this court shall be binding.[419] In order to ensure the free movement of people and to ensure residency

[410] Article 4(4) of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012).

[411] Article 5(4) of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012).

[412] Article 9(2)(b) of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012).

[413] Article 13 of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012).

[414] Treaty Establishing the AEC (1991) (also known as the Abuja Treaty).

[415] Article 4(1) of the Treaty Establishing the AEC (1991).

[416] Article 5 of the Treaty Establishing the AEC (1991).

[417] Articles 6 to 17 of the Treaty Establishing the AEC (1991).

[418] Article 18 of the Treaty Establishing the AEC (1991).

[419] Article 19 of the Treaty Establishing the AEC (1991).

and establishment, Article 43 provides for the creation of a protocol that can regulate these matters.[420]

The Protocol to the Treaty establishing the AEC (AEC Protocol) relates to the free movement of persons, right of residence and right of establishment. It was adopted by the AU during 2018. The Preamble indicates that the AEC Protocol envisages the goals of the integration and stability of the African continent and the objective is to give effect to the Abuja Treaty through free movement, residence and establishment.[421] The provisions of the AEC Protocol must be implemented without discrimination and it must be realised by allowing entry without a visa, residence and establishment.[422] Member states must allow citizens of other states with the required travel documents to enter its territory through an allocated area, and to move and leave the territory.[423] This includes the use of vehicles to enter if the prescribed requirements are met.[424] The AEC Protocol provides for the issuing of an African passport to the citizens of Member States and it even provides for the free movement of border communities, students, researchers, and workers.[425] Nationals who enter the territory of another member state must be issued with the necessary permits and they will have the right to reside and to establish themselves within the specific territory they have entered.[426]

The Abuja Treaty and the AEC Protocol provide for free movement as discussed above, and can provide assistance to people who need to flee their countries as a result of

[420] Article 43 of the Treaty Establishing the AEC (1991).

[421] Preamble and Article 2 of the Protocol to the Treaty Establishing the AEC relating to Free Movement of Persons, Right of Residence and Right of Establishment (2018).

[422] Articles 3 to 5 of the Protocol to the Treaty Establishing the AEC relating to Free Movement of Persons, Right of Residence and Right of Establishment (2018).

[423] Articles 7 to 9 of the Protocol to the Treaty Establishing the AEC relating to Free Movement of Persons, Right of Residence and Right of Establishment (2018).

[424] Article 11 of the Protocol to the Treaty Establishing the AEC relating to Free Movement of Persons, Right of Residence and Right of Establishment (2018).

[425] Articles 10 and 12-14 of the Protocol to the Treaty Establishing the AEC relating to Free Movement of Persons, Right of Residence and Right of Establishment (2018).

[426] Articles 15-17 of the Protocol to the Treaty Establishing the AEC relating to Free Movement of Persons, Right of Residence and Right of Establishment (2018).

displacement events or drivers.[427] There is also provision for people who do not have the required travelling documents in these circumstances by providing for an African passport or not requiring a visa. Unlike international, regional and South African national refugee law, there are no strict requirements to be met according to this AEC Protocol before a state will accept and protect those who are driven to cross borders. The AEC Protocol ensures that entry is lawful.[428] However, it has not yet been ratified by number of states required to enforce it.[429] States are reluctant to ratify for fear of a possible influx of people and failure to maintain their sovereignty.[430]

Several additional sub-regional agreements and instruments addressing migration have been adopted over the years. These are worth mentioning in this regard. This includes the protocols adopted by the Economic Community of West African States (ECOWAS)[431] region to facilitate the gradual implementation of the provisions contained in the Treaty on free movement, as well as the Common Approach, which provides guidelines on how to deal with migration.[432] The Southern African Development Community (SADC)[433] also adopted a protocol that deals with the free movement of people by providing for visa-free entry and border control.[434] Furthermore, there is also the Treaty establishing Community of Sahel-Saharan States (CEN-SAD), which was adopted with the aim of promoting free movement and ensuring the equal treatment of citizens of these states.[435]

---

[427] Wood 2015 FMR 24.

[428] Amadi and Vundamina 2023 LDD 33.

[429] Amadi and Vundamina 2023 LDD 40; see also Article 33 of the Protocol to the Treaty Establishing the AEC relating to free movement of persons, rights of residence and right of establishment (2018).

[430] Hirsch A strategic consideration of the African Union Free Movement of Persons Protocol and other initiatives towards the freer movement of people in Africa 3.

[431] The ECOWAS consists of several states situated in the Western part of Africa including Benin, Ghana and Nigeria for example.

[432] Amadi and Vundamina 2023 LDD 44-46.

[433] Situated in the Southern part of Africa it consists of states such as Angola, Botswana and SA for example.

[434] Article 14 of the SADC Protocol on Facilitation of Movement of Persons (2005); see also Amadi and Vundamina 2023 LDD 46.

[435] Treaty of the Community of Sahel-Saharan States (CEN-SAD) (1998) (as revised in 2013); see also d'Orsi and Naldi 2022 IRRC 1055.

The Protocol on the Free Movement of Persons in the Intergovernmental Authority on Development (IGAD Protocol)[436] was adopted in 2021.[437] The objective of this IGAD Protocol is to provide for the free movement of persons and the rights of residence and establishment.[438] Article 3 of the IGAD Protocol stipulates that member states shall award citizens the right to enter, to stay, to move freely and to exit the member state, and these migrants shall be awarded the same treatment and enjoy the same rights as nationals.[439] Article 5 indicates that states shall ensure free movement by allowing entry without a visa, permitting those who enter to stay within their territory for 90 days, and then to freely leave the state.[440] The movement of persons is, however, regulated by the provisions contained in Articles 6 and 7 of the IGAD Protocol, which indicate that persons can only enter through selected areas, they should have a valid travel document issued by their origin state, and they must not pose a threat to the security of the state.[441] The IGAD Protocol provides for the right of establishment by stipulating that states should allow those who enter to engage in business and economic activities; they are even allowed to be joined by their spouses and children.[442] Article 9 of the IGAD Protocol indicates that the citizens who enter the territory of another member state shall have the right to be employed and to enjoy the same employment benefits awarded to nationals.[443]

Article 10 of the IGAD Protocol stipulates that member states must provide these citizens with access to education and training, ensure that institutions have the same curriculum and standard of education, and that degrees and certificates are recognised by all the member states.[444] The citizens of member states who enter the territory of another state shall have the right to reside there subject to certain rules and

[436] The IGAD region is situated in the Eastern part of Africa and consists of Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan and Uganda who are also the member states.
[437] EU 2021 https://trust-fund-for-africa.europa.eu.
[438] Article 2 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[439] Article 3 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[440] Article 5 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[441] Articles 6 and 7 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[442] Article 8 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[443] Article 9 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[444] Article 10 of the Protocol on Free Movement of Persons in the IGAD region (2020).

regulations[445] and they shall also be protected.[446] Even though the IGAD Protocol determines that expulsion will be regulated by the laws of the state in which a person finds himself,[447] it must take place in accordance with the guidelines contained in Article 21.[448] It also provides that mass expulsion may not take place[449] and that no person may be expelled if the reasons stipulated in Article 20 are not present.[450]

All of these frameworks inspired the drafting of the African Guiding Principles on the Human Rights of all Migrants, Refugees and Asylum Seekers (Guiding Principles)[451] The draft recognises the important contribution that migrants make and the need for their rights to be protected. Principle 3 determines that migrants are entitled to rights and freedoms without discrimination. Included is the right to life, dignity, not to be tortured and not to forcefully disappear, and the right to protection and assistance.[452]

Part III of the Guiding Principles identifies additional protected vital rights, including the right to liberty and security, recognition, access to courts and other forums, and to protection and assistance when a crime victim. It also includes the right to freely practice religion, freedom of opinion and expression, private assembly and association, free movement, non-expulsion, the freedom to seek asylum, non-refoulement[453] and nationality.[454] Furthermore, migrants are entitled to have property, to work and to receive an education, and they have the right to health and an adequate standard of living.[455] Principle 36 requires cooperation among African states to prevent the

[445] Article 11 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[446] Article 12 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[447] Article 18 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[448] Article 21 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[449] Article 19 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[450] Article 20 of the Protocol on Free Movement of Persons in the IGAD region (2020).
[451] Foreword of the Draft African Guiding Principles on the Human Rights of All Migrants (2023).
[452] Principles 3 to 7 of the Draft African Guiding Principles on the Human Rights of All Migrants (2023).
[453] See 2.7 for an elaborated explanation on the term non-refoulement.
[454] Principles 13-17 and 20-22 of the Draft African Guiding Principles on the Human Rights of All Migrants (2023).
[455] Principles 25-28 of the Draft African Guiding Principles on the Human Rights of All Migrants (2023).

trafficking of migrants and for the creation of pathways that can assist with the safe and free movement of persons.

3.3 Climate change and disaster displacement on the African continent

As indicated before,[456] climate change and natural disasters have, in addition to the other grounds for migration mentioned above, forced many to leave their homes. When people are displaced internally as result of these events, they are protected.[457] However, where the negative effects of climate change result in international displacement of persons, the international community is faced with several legal challenges, problems and concerns. As illustrated in both Chapters 2 and 5,[458] climate change can affect people's human rights and result in circumstances that can be challenging for the state to deal with.

The African continent has specifically been described as being vulnerable to the effects of climate change.[459] Increasing temperatures, a rise in sea levels, an increase in the intensity and frequency of disasters, pest invasions, a decrease in precipitation and increased drought[487] are among the effects of global warming that have become evident. Africa strongly relies on agriculture for survival, and changes in temperature negatively affect this sector as crops and livestock are destroyed due to flooding, drought, or outbreak of pests.[460] These events also potentially affect food security, which in turn affects the stability of the continent as it has an immense negative impact on the health sector and the economy of a state.[461] The World Meteorological Organization (WMO) indicates in its report on the state of the climate in Africa that climate change results in the outbreak of diseases, and because of Africa's climate and

[456] See 2.3 for a discussion on climate change and disaster displacement.
[457] See 3.2 para 3 for a discussion on the Kampala Convention (2012).
[458] See 2.3, 5.3 and 5.4 for a discussion on the case of Mr Teitiota.
[459] Addaney, Jegede and Matinda 2019 AHRY 244; see also Dos Santos Soares 2018 RCDA 1. [487] UNFCCC 2020 https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa#.
[460] WMO State of the Climate in Africa 23-31.
[461] UNFCCC 2020 https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa#; see also WMO State of the Climate in Africa 18.

the difficulty the continent has in responding to adverse events, the perfect environment is created for these diseases to thrive.[462]

During 2019, Somalia, Kenya and Ethiopia received excessive rainfall that resulted in flooding and landslides and as reported by the WMO.[463] This allowed crops to grow, but immediately after these events it also created the perfect circumstances for pests to breed. By the end of 2019 and throughout 2020, these countries fell victim to crop destruction, food insecurity and hunger. By June 2022, conversely, the UN reported that rain failed for the fourth season in a row and that famine was once again a possibility.[464] Water shortages, extreme drought, destruction and loss of crops and livestock have resulted in hunger and deaths among millions of Somalis. Several people are starving and there is immense pressure on the health system as people, many of whom are children, are admitted to hospital with diseases and effects of malnutrition.[465] The Food and Agriculture Organisation (FAO) reported in 2023 that "Africa is facing a food crisis the likes of which it has never experienced before, with 282 million people undernourished, and a sharp increase expected next year."[466] In

2023, Burundi was also hit by extreme heat waves and floods that resulted in damage of infrastructure and the outbreak of diseases. The conditions are affecting water and food security.[467]

These circumstances can force people to cross borders in order to seek safety.[468] At the AU Humanitarian and Pledging Conference, it was stipulated that "millions of people may become migrants, internally displaced persons or be left at risk of statelessness in the context of climate change and disasters".[469] In June 2022 the conditions resulted

[462] WMO State of the Climate in Africa 31.
[463] Reliefweb 2019 https://reliefweb.int.
[464] UN 2022 https://news.un.org.
[465] UN 2022 https://news.un.org.
[466] FAO Africa Regional overview of food security and nutrition: Statistics and trends 1; see also Ndebele 2023 https://news24.com.
[467] Nimubona 2023 https://thenewhumanitarian.org.
[468] UNHCR Legal Considerations regarding claims for international protection made in the context of adverse effects of climate change and disasters para 2.
[469] AU 2020 Humanitarian and Pledging Conference 2.

in the displacement of more than 700 000 people.[470] In fact, it was indicated that by 2050, about 200 million people could need humanitarian assistance annually due to climate change and disasters.[471]

As discussed in Chapter 2,[472] the existence of climate refugees has already been acknowledged, although the term is not recognised in law. Scholars argue on the one hand that reform is required and on the other hand that the existing refugee law framework is sufficient to cover the category of climate refugees. In order to determine whether the African regional refugee law framework adequately addresses this category or whether reform is required, the development of the African refugee law framework and the concept of a refugee is discussed hereafter.

3.4 The development of the African regional refugee law framework

As indicated in the previous chapter,[473] refugees are not a modern phenomenon. The problem has existed for several decades already. In Africa specifically, the slave trade, colonialism, and the resulting struggles and wars to become independent contributed to the movement of people across borders.[474] After African states gained independence from European countries, issues like internal conflict and economic struggles further fuelled the refugee crises.[475]

The OAU was established in 1963,[476] and it adopted the OAU Charter. The OAU Charter recognises that freedom, equality, justice and dignity were important building blocks

[470] UN 2022 https://news.un.org.

[471] UNHCR 2021 https://unhcr.org/stories/climate-change-defining-crisis-our-time-; see also AU Humanitarian and Pledging Conference 2.

[472] See 2.3 for a discussion on climate change and climate induced displacement.

[473] See 2.4 for a discussion on the historical development of the international refugee law framework.

[474] Katz and Maluwa "Refugees and Stateless Persons" 506; see also Kanamugire 2020 Juridical Tribune 308-309.

[475] Kanamugire 2020 Juridical Tribune 311-312.

[476] Katz and Maluwa "Refugees and Stateless Persons" 506; see also Kanamugire 2020 Juridical Tribune 313.

needed to achieve the aspirations of the African peoples.[477] As is discussed below,[478] a provision similar to the one contained in the UN Charter to promote respect for human rights[479] was not included in the OAU Charter. Instead, it only recognised that the UN Charter and the UDHR will be used to promote cooperation. It stated the goal of establishing cooperation and harmony among African states and to assist states with decolonisation and in becoming independent.[480] Although the OAU did not have the standing of a legislature, it was able to participate in international affairs and enter into multilateral treaties.[481]

The OAU focused on the interests of states and promoted sovereignty. However, it soon became clear that the OAU was not effective as it did not have the capacity to deal with new challenges other that decolonisation that were emerging on the African continent.[482] As a result, the OAU was replaced by the AU in 2002, after which the focus shifted to strengthening cooperation and integration.[483] Article 3 of the Constitutive Act of the AU contains the objectives of the AU. It includes among other things the promotion of unity, integration, cooperation, stability, the protection of territory, the protection of human rights, and the promotion of participation in the economy and international relations.[484]

Shortly after the OAU was initially established, the attention turned to the refugee crisis in Africa.[485] The 1964 Resolution was adopted to acknowledge and address the African

[477] Preamble of the OAU Charter (1963).

[478] See 3.2 para 7 for a discussion on the African Charter on Human and Peoples' Rights.

[479] See 2.4 paras 6 and 7 for a discussion on the UN Charter and the UDHR.

[480] Katz and Maluwa "Refugees and Stateless Persons" 506; see also Preamble and Article 2 of the OAU Charter (1963); see also Kanamugire 2020 Juridical Tribune 313.

[481] Sharpe 2013 AJICL 56.

[482] Sharpe 2013 AJICL 54, 82.

[483] AU date unknown https://au.int/en/overview#.

[484] Article 3 of the Constitutive Act of the AU (2002); see also AU date unknown https://au.int/en/overview#; see also Sharpe 2013 AJICL 54.

[485] Sharpe 2013 AJICL 57.

refugee problem. In terms of this resolution, a commission consisting of several African states was established to evaluate the problem and make recommendations.[486]

The Investigation Commission (Commission) drafted and submitted a report during 1964[487] in which they acknowledged important refugee law principles. It included the principle that asylum seekers must be settled some distance away from the borders and that these asylum seekers are prohibited from attacking their state of nationality. It also contained the basic definition of a refugee and obligates states to assist refugees if they want to return to their own states. Importantly, it suggests that a convention on the status of refugees be drafted by the OAU. Resolution CM/Res 31 (III) was adopted. With this the OAU recognised the findings of the Commission and indicated that states have to cooperate in addressing the problem of refugees. The Commission was invited to draft a concept convention on refugees.[488] According to the Resolution, this draft had to be submitted at the fourth ordinary session.[489] The Commission started working on a draft convention, referred to as the Kampala Draft, and it largely incorporated provisions set out in the 1951 Refugee Convention.[490]

As indicated by Holborn and Sharpe, there were several concerns with the first draft convention as it omitted certain important provisions contained in the 1951 Refugee Convention. In some ways the draft competed with 1951 Refugee Convention.[491] More specifically, it was described as being "less liberal" than the 1951 Refugee Convention in that it did not provide for the right too employment and education. It also provided that the draft convention will enjoy preference over all other agreements regarding refugees. The UNHCR posted comments on the draft convention, and at the fourth ordinary session it was decided that a committee would be established to consider

---

[486] AU Resolution and Recommendations of the Second Ordinary Session of the Council of Ministers Held in Lagos Nigeria CM/Res 19 (II); see also Sharpe 2013 AJICL 57.

[487] Sharpe 2013 AJICL 59.

[488] AU Resolutions and Recommendations adopted by the Third Ordinary Session of the Council Ministers held in Cairo CM/Res 31 (III); see also Sharpe 2013 AJICL 59.

[489] AU Resolutions and Recommendations adopted by the Third Ordinary Session of the Council of Ministers held in Cairo CM/Res 31 (III).

[490] Sharpe 2013 AJICL 60.

[491] Sharpe 2013 AJICL 60.

these comments and to review the draft.[492] Accordingly, a final draft had to be submitted at the fifth ordinary session.[493] The UNHCR was requested to provide the appointed committee with a draft convention, but this could not be accepted as it "suffered serious shortcomings".[494]

A second concept was then drafted, referred to as the Leo draft, and this draft was closer to the 1951 Refugee Convention.[495] This draft, however, was still not acceptable to the OAU, as it contained "lower standards" and omitted several of the important provisions, such as the obligations of refugees and the principle of non-discrimination as contained in the 1951 Refugee Convention. The UNHCR then decided to draft a concept convention together with the OAU.[524] This resulted in a third draft, referred to as the Addis Ababa draft, that was more acceptable as it contained most provisions set out in the 1951 Refugee Convention, but also addressed the new circumstances in

Africa.[496] It provided that in the event of conflict between the 1951 Refugee Convention and the draft convention, the provisions of the draft convention will prevail.[497] However, the third draft was not accepted either. The Resolutions of the Seventh Ordinary Session of the Council of Ministers CM/Res 77 (VII) 1965[498] indicated that the OAU must address the situation unique to the African continent and that it must compliment the 1951 Refugee Convention. It was also determined that commentary should be submitted to the OAU Secretariat, which meant that they were given the task of presenting a new draft. As a result, a fourth draft was submitted, but it was not accepted as it did not focus on the refugee crisis on the African continent and the committee was once again appointed to construct a draft on refugees in

[492] AU Resolution of the Fourth Ordinary Session of Council of Ministers held at Nairobi CM/Res 4 (IV); see also Sharpe 2013 AJICL 60.

[493] AU Resolution of the Fourth Ordinary Session of Council of Ministers held at Nairobi CM/Res 4 (IV).

[494] Sharpe 2013 AJICL 61.

[495] Sharpe 2013 AJICL 61-62. [524] Sharpe 2013 AJICL 63.

[496] Sharpe 2013 AJICL 63-64.

[497] Sharpe 2013 AJICL 64.

[498] AU Resolutions of the Seventh Ordinary Session of the Council of Ministers CM/Res 77 (VII); see also Sharpe 2013 AJICL 64.

Africa.[499]

In 1967, a conference was held on the refugee problem in Africa and several recommendations were made that were used to construct a final draft convention for the African refugee situation.[500] The recommendations included that the 1951 Refugee Convention's definition of a refugee be used, but that it is expanded to provide for the circumstances on the African continent.[501] A draft definition was subsequently formulated that contained the 1951 Refugee Convention definition and recognised those who flee due to "external aggression and occupation, foreign domination or internal subversion" as refugees.[502] This draft was accepted and only minor changes were made, which included changing the word subversion to disorder.[503]

A period was allowed for comments to be made on the new draft convention, after which the final draft was submitted and finally accepted in 1969.[504] The 1969 OAU Convention was accepted and ratified, and has subsequently had an "international influence" on other regions. The 1984 Cartagena Declaration followed in the footsteps of the 1969 OAU Convention and also contains a broader definition of a refugee than the 1951 Refugee Convention.[534]

The nineteenth ordinary session of the AU recognised that refugees in Africa face unique problems. The session appointed a commission to consider these problems and to identify measures to provide assistance.[505] The resolution referred to the commission as the "Commission of Ten on Refugees". They meet on an annual basis and make regular comments, findings and suggestions to OAU regarding refugees in

[499] AU Resolutions adopted by the Council of Ministers at its Ninth Ordinary Session CM/Res 100 (IX); see also Sharpe 2013 AJICL 65.

[500] Sharpe 2013 AJICL 65.

[501] Sharpe 2013 AJICL 66.

[502] Sharpe 2013 AJICL 66-67.

[503] Sharpe 2013 AJICL 67; see also Article IX(2) of the OAU Convention governing the specific aspects of refugee problems in Africa (1969).

[504] Sharpe 2013 AJICL 68. [534]
Sharpe 2013 AJICL 68.

[505] AU Resolutions and Statement of the Nineteenth Ordinary Session of the Council of Ministers held at Rabat CM/Res 266 (XIX); see also Sharpe 2013 AJICL 69.

Africa.[506] The OAU held several conferences at which recommendations were made, and plans of action were discussed to address the protection of refugees in Africa. These recommendations were accepted and implementation methods were discussed and planned.[507] International organisations and offices facilitated the protection to refugees in Africa with conferences and fundraisers.[508] Also, in commemoration of the 1969 OAU Convention, the OAU and the UNHCR held a symposium in 1994 that resulted in the drafting of the Addis Ababa Document on Refugees and Forced Population Movements in Africa, addressing certain issues and making certain recommendations on how to deal with it.[509] The document also pays attention to refugee issues created by specific circumstances present on the African continent such as apartheid in SA, the genocide in Rwanda, and also women and children.[510]

Despite the developments in the fields of refugee law, it was only in 1979 that the focus shifted to the recognition and protection of the human rights of Africans.[511] In order to provide for measures to safeguard human rights, a committee was appointed to draft the African Charter.[512] This instrument was adopted in 1981 and came into effect during October 1986.[513] As it is based on the UDHR, ICCPR and the ICESR,[514] it explicitly recognises that "every individual is entitled to the enjoyment of rights and freedoms without distinction".[515] Article 12 provides for the right to freedom of movement, to leave and return, and to seek asylum. Part II of the African Charter also provides for the creation of a Commission that can implement measures for the promotion and protection of human rights. The remaining shortcomings in the African human rights law framework are addressed by complimentary instruments and

[506] AU Resolutions and Statement of the Twentieth Ordinary Session of the Council of Ministers held at Addis Ababa CM/Res 290 (XX); Sharpe 2013 AJICL 67.
[507] Sharpe 2013 AJICL 74-75.
[508] Sharpe 2013 AJICL 75-76.
[509] Sharpe 2013 AJICL 77.
[510] Sharpe 2013 AJICL 78.
[511] Bekker 2013 AHRLJ 2.
[512] ACHPR date unknown https://achpr.au.int.
[513] ACHPR date unknown https://achpr.au.int.
[514] Bekker 2013 AHRLJ 3.
[515] Article 2 of the African Charter on Human and Peoples' Rights (1986).

mechanisms.[516] These specifically cater for the rights of the welfare of the child,[517] the prevention of discrimination against women,[518] and the creation of an African Court[519] to assist the Commission. As argued by Bekker "whilst the adoption of the African Charter heralded the birth of the African human rights system, the first OAU treaty with what may be broadly terms a human rights dimension was the OAU

Convention".[520]

The 1969 OAU Convention was adopted by the Assembly of Heads of State of Government during 1969.[521] This document was drafted because the OAU was of the opinion that the existing international refugee law did not cater for the circumstances present on the African continent at that time.[522] It was adopted with the purpose of relieving refugees of their struggles, providing them with protection, and improving their circumstances.[523] It applies to all of those who find themselves within the territory of a state that is party to the 1969 OAU Convention.[524] The 1969 OAU Convention recognises that the 1951 Refugee Convention and its 1967 Protocol are the main instruments for the protection of refugees, which means that they will prevail in the event that there is a conflict between the instruments. It also identifies that the UN Charter and UDHR awards human rights to all human beings without distinction.[525]

---

[516] Bekker 2013 AHRLJ 4-7.

[517] See African Charter on the Rights and the Welfare of the Child (1999).

[518] See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

[519] See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

[520] Bekker 2013 AHRLJ 7.

[521] Preamble of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

[522] d'Orsi and Naldi 2022 IRRC 1036-1037.

[523] Preamble of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

[524] UNHCR Guidelines on international protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions para 47.

[525] Preamble of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

Article 1(3) provides that in the "case of a person who has several nationalities, the term country of which he is a national shall mean each of the countries of which he is a national".[526] Article 2(1) provides that member states must do everything to the best of their abilities to accept and host refugees, and Article 2(3) specifically recognises the non-refoulement principle. The 1969 OAU Convention stipulates that assistance must be granted to those states who are not able to assist people fleeing to their countries,[527] and Article 4 indicates that states may not discriminate when awarding protection to refugees. It even contains additional stipulations such as the settlement of refugees at a reasonable distance from the state from which they have fled.[528] Unlike the UNHCR, there is no African body to oversee the implementation of the 1969

OAU Convention. This causes problems as the 1969 OAU Convention solely depends on party states' willingness to comply with its obligations and to implement the necessary frameworks to ensure the recognition and protection of the rights of refugees.[529]

Although the 1969 OAU Convention provides for the extended protection of refugees, article 3 also prohibits a refugee from participating in activities that can negatively affect a host state or other OAU member states.[530] It also clearly indicates that refugee protection can be terminated in certain circumstances. These include but are not limited to seeking protection from the nationality state, obtaining a new nationality, returning to the country that was fled, or in the event that a serious crime has been committed.[531]

---

[526] Article 1(3) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

[527] Article 2(4) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

[528] Article 2(6) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969); see also Bennett and Strug Introduction to International Law 207.

[529] Katz and Maluwa "Refugees and Stateless Persons" 503-504.

[530] Article 3 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

[531] Articles 4(a) to 4(e) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

The 1969 OAU Convention contains a definition of a refugee in Article I(1) that is similar[532] to the 1951 Refugee Convention's definition:[533]

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

However, the OAU broadens this definition[534] by stipulating in article I(2) that:[535]

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

When comparing the definitions of a refugee contained in the UN's 1951 Refugee Convention and the OAU's 1969 OAU Convention, it is clear that the latter positively contributes to the development of refugee law by not requiring "deliberateness nor discrimination".[536] In terms of the 1951 Refugee Convention, an applicant must show that they fear persecution as they are being targeted deliberately due to race, nationality, religion, membership of particular social group or political opinion.[537] In contrast, by providing for other grounds such as external aggression, occupation and foreign domination, it removes the requirement of deliberateness and discrimination. It introduces "objective situations", which expands the conditions from which a person can flee their homes rather than requiring a "subjective fear".[538] The extended definition was formulated on consideration of the circumstances that existed in Africa[539]

---

[532] Strydom et al International Law 305.

[533] Article 1 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

[534] Katz and Maluwa "Refugees and Stateless Persons" 508.

[535] Article 1(2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

[536] Katz and Maluwa "Refugees and Stateless Persons" 508-509.

[537] Rankin New issues in refugee research - Working paper no 113 7.

[538] Rwelamira 1989 IJRL 559.

[539] UNHCR Guidelines on International Protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating

at the time of the drafting of the 1969 OAU Convention. It therefore recognises those who flee their countries as refugees as a result of decolonisation and civil war.[570] It also recognises those who flee as a result of "events seriously disturbing public order",[540] thus not limiting the scope of application.[541] More significantly, the 1969 OAU Convention is not simply a recommendation, it is binding on all party states.[542]

As mentioned earlier, the 1969 OAU Convention also influenced the 1984 Cartagena Declaration, which was adopted during November 1984 in response to the refugee crisis that took place in Latin America. Acknowledging the importance of the 1951 Refugee Convention and its 1967 Protocol, the 1984 Cartagena Declaration encourages states to take measures to implement its provisions, to cooperate with each other to eliminate the circumstances that result in people leaving their homes, and to provide for assistance to and protection of refugees.[543]

Similar to the 1969 OAU Convention, the 1984 Cartagena Declaration includes an expanded definition of a refugee. In addition to the provisions contained in the 1951 Refugee Convention and its 1967 Protocol, it defines a refugee as "a person who has fled his country because his live, safety or freedom has been threatened by generalized violence, foreign aggression, internal conflict, massive violation of human rights or other circumstances that have seriously disrupted public order".[544] Although these expanded definitions are groundbreaking within refugee law, they do create problems when it comes to legal application. These definitions have not been applied to many real life situations to create and establish a precedent, and there are concerns about their interpretation.[545] For example, there is no consensus as to whether the test

---

to the Status of Refugees and the Regional Refugee Definitions para 45. [570] Katz and Maluwa "Refugees and Stateless Persons" 508.

[540] Katz and Maluwa "Refugees and Stateless Persons" 515.

[541] Rwelamira 1989 IJRL 558-559.

[542] Rwelamira 1989 IJRL 560.

[543] Part I and II of the Cartagena Declaration on Refugees (1984).

[544] Part III(3) of the Cartagena Declaration on Refugees (1984).

[545] Wood 2019 IJRL 291, 299. [577]
Wood 2019 IJRL 296-297.

should be objectively or subjectively applied, about the meaning that should be ascribed to the concepts contained in the definition, or which situations are included or excluded from the definition.[577]

Tamara Wood suggests that the provisions contained in the 1969 Vienna Convention on the Law of Treaties (VCLT) can be used as a starting point to interpret the definition of a refugee contained in the 1969 OAU Convention.[546] Even though the VCLT only applies to treaties and to the states that are parties to it, the VCLT is considered to be customary international law, so it will apply irrespectively.[547] The provisions can, however, only be used in as far as they are applicable.[548] Article 31(1) of the VCLT is known as the general rule of interpretation, and it determines that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the lights of its object and purpose".[549] Wood suggests that there are four principles that should be taken into account when interpreting the definition of a refugee as contained in the 1969 OAU Convention.[550]

Firstly,[551] the general rule of interpretation must be used to interpret the 1969 OAU Convention's definition of a refugee and interpretations must not be influenced by other rulings, documents or information. In accordance with the general rule, the "literal (ordinary meaning) and teleological (object and purpose) approach" should be followed when interpreting a principle. This indicates that the elements of the definition should be interpreted in their entirety by taking into consideration the "context and object and purpose of the 1969 OAU Convention".

Secondly,[552] it should be interpreted in such a way that refugees are protected since the 1969 OAU Convention has a humanitarian purpose. This means that the emphasis

[546] Wood 2019 IJRL 298, 302.
[547] Wood 2019 IJRL 303.
[548] Wood 2019 IJRL 303.
[549] Article 31(1) of the Vienna Convention on the Law of Treaties (1969).
[550] Wood 2019 IJRL 304-305.
[551] Wood 2019 IJRL 305-308.
[552] Wood 2019 IJRL 308-311.

of the provisions contained in the 1969 OAU Convention is on the rights and protection of people. Some scholars have argued that the object and purpose of the 1969 OAU Convention is rather the "protection of state security and harmonious relations between states".[553] The 1969 OAU Convention contains provisions that support this argument as it prohibits attacks against the state and it "discourages subversive elements of the refugee populations". However, as indicated by Wood,[554] there are several provisions in the 1969 OAU Convention that indicate the contrary. For example, there are numerous provisions that focus on protecting refugees and their rights. Furthermore, Article II(2) clearly stipulates "the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly at by any Member State".[555]

Consequently, any interpretation of the definition has to support the humanitarian purpose of the 1969 OAU Convention. The definition must therefore not be interpreted in such a way that people are excluded, and to ensure this, "a broad approach is what is needed rather than a narrow linguistic approach".[556] The elements that are taken into account when interpreting the definition should apply to the circumstances and provision should also be made for modern day circumstances. Wood mentions this as the third principle to consider when interpreting the extended definition of a refugee.

As mentioned before,[557] the 1969 OAU Convention was drafted against the background of the end of colonialism, and in order for these provisions to apply to the changing present circumstances, Wood suggests an extensive approach.[558] This method of interpretation does not change the provisions but rather allows for it to be relevant to the current situation.[559] Lastly, when interpreting the expanded definition, the

[553] Van Garderen and Ebenstein "Regional Developments: Africa" 186; see also Wood 2019 IJRL 309.
[554] Wood 2019 IJRL 309-311.
[555] Article II(2) of the OAU Convention on the Protection of Refugees in Africa (1969); see also Wood 2019 IJRL 310.
[556] Wood 2019 IJRL 311.
[557] See 3.4 for a discussion on the historical development of the African regional refugee law framework.
[558] Wood 2019 IJRL 311.
[559] Wood 2019 IJRL 311.

elements should be compared to similar provisions contained in international law.[560] The 1969 OAU Convention does not define the elements contained in the definition and therefore the explanation of these concepts elsewhere in international law is incorporated in studies on refugees. By following this approach, a consistent practice can be established.[561] However, the same concepts can have different meanings depending on the context in which they are used.[562] To assist with the interpretation of these definitions and their specific elements, the UNHCR published the Guidelines and Legal Considerations, which are discussed in the following section. **3.5 The definitional elements of a refugee under African regional law**

As discussed above,[563] the African regional refugee law and the traditional definition both recognise those who flee due to 1. external aggression, occupation, foreign domination, or due to 2. events seriously disturbing public order, and who are 3. in either part or the whole of his country of origin or nationality, and 4. is compelled to leave his place of habitual residence to seek refuge in another place outside his country of origin of nationality as refugees. These elements are analysed below to determine their scope and how they should be applied. As with the international position, the rationale for this discussion is to establish if climate refugees are protected by the existing African refugee law framework.

3.5.1 Disruption of public order

In the Legal Considerations,[564] the UNHCR provides guidelines for the interpretation and application of the definition of a refugee contained in the 1969 OAU Convention and the 1984 Cartagena Declaration. As the element of "disruption to public order" has

[560] Wood 2019IJRL 314-319; see also Article 31(3)(c) of the VCLT that determines that there shall be taken into account, together with the context any relevant rules of international law applicable in the relations between the parties.

[561] Wood 2019 IJRL 319.

[562] Wood 2019 IJRL 308, 311, 318.

[563] See 3.4 for a comprehensive discussion on the African regional definition of a refugee.

[564] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 14.

not been restricted, the UNHCR suggests that a broad approach be followed when interpreting this phrase to provide for modern circumstances.

The UNHCR considers the concept of public order to "encompass the prevailing level of the administrative, social, political and moral order as assessed according to the effective functioning of the state in relation to its population and based on respect for the rule of law and human dignity to such an extent that the life, security and freedom of people are protected".[565] The public order is thus disturbed when the proper functioning of a state is affected.[566] To determine whether such a disruption is serious for the purposes of this test, each event should be evaluated on its own merits and the "nature and extent" and the effect that the disruption has on the "security and stability" of a state should be taken into consideration.[567]

To determine if a person qualifies as a refugee in a particular situation, it has to be established whether the "serious disturbance to public order exists as a matter of fact based on the assessment of available evidence".[568] The disruption can be a once off or series of events that can occur in a part of or in the entire State against which the State cannot provide safety.[569] Situations that have been considered to seriously disrupt public order includes but are not limited to acts of violence, violations of human

[565] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 16; see also UNHCR Guidelines on International Protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions paras 56 and 78.

[566] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 16.

[567] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 16; see also UNHCR Guidelines on International Protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions paras 56 and 59.

[568] UNHCR Legal considerations regarding claims fir international protection made in the context of the adverse effects of climate change and disasters para 16, see also UNHCR Guidelines on International Protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions para 59.

[569] UNHCR Guidelines on International Protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions para 57.

rights and situations where the territory has become uncontrollable by the government. [570] The Guidelines indicate that circumstances that amount to disturbances in a particular state includes the declaration of a state of emergency by the government, terrorism, armed conflict, the committing of international crimes,

[570] UNHCR Guidelines on International Protection No 12 Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions para 58.

mass killings of people, a lack of basic needs and services and territory take over and occupation by terrorists or insurgent groups.[571]

3.5.2 Compelled to leave and seek protection abroad

It is clear from the definition that the prevailing circumstances must be such that it compels a person to leave their home country or place of habitual residence to seek refuge abroad. The UNHCR indicates that when a "situation is sufficiently serious that it is objectively reasonable for a person to leave her or his place of habitual residence and seek refuge in another country, she or he needs to be protected".[572]

The test for what is objectively reasonable was applied in the matter of Radjabu v Chairperson of the Standing Committee for Refugee Affairs in SA in 2014. In this matter, the applicant's initial application was dismissed as the determination officer and the Standing Committee were of the opinion that he had a rivalry with his uncle and therefore could not be awarded asylum.[573] He decided to have the matter reviewed by the court as he indicated that he fled the eastern part of the DRC because acts of violence were taking place in that area, specifically against those who are of mixed origin.[574] In support of his argument, he also submitted reporting documents of the UN indicating that these events were taking place and that there was concern about the situation. In order to determine whether the applicant was a refugee, the court considered the local definition of a refugee.[575]

---

[571] UNHCR Guidelines on International Protection No 1: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions para 59.

[572] UNHCR Guidelines on International Protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions para 50.

[573] Radjabu v Chairperson of the Standing Committee for Refugee Affairs in South Africa 8830/2010 [2014] ZAWCHC 134 para 11.

[574] Radjabu v Chairperson of the Standing Committee for Refugee Affairs in South Africa 8830/2010 [2014] ZAWCHC 134 paras 1 and 15.

[575] Radjabu v Chairperson of the Standing Committee for Refugee Affairs in South Africa 8830/2010 [2014] ZAWCHC 134 paras 6 and 15.

Paragraph 6 of the judgment clearly indicated that this definition is based on the provisions contained in the 1969 OAU Convention. The test to determine whether a person qualifies as a refugee is objective in that it should be established if any of the objectively ascertainable circumstances provided for in the definition exists in the state from which the person has fled. In addition, the test also contains a subjective element in that it should be determined whether the circumstances had such an effect on the person that they were compelled to leave the state in which they were living. In order to evaluate if the causative effect has forced the person to flee, the personal circumstances of the applicant should be considered. The facts regarding the circumstances and how it has affected the person should be considered, and then a value judgment has to be made on the facts of whether the situation has compelled the person to flee. The court reiterated that in determining if a person is a refugee, a

"humanitarian approach" should be followed as this is one of the objects of the 1969 OAU Convention.

In the Radjabu case, considerations included shortcomings with the administrative process: there was no interpreter present when the applicant conveyed his version of events to the officer and his attorney, and there was no proper investigation into the facts of the case. The court decided that the ruling of the determination officer and the Committee had to be set aside.[576] As the review pertained to the reasonableness of the administrative process, the court had to further determine whether the matter had to be referred back to the original decision makers or if it had the power to reverse the original ruling and to grant the applicant asylum.[577] After considering case law, the court ordered that the initial ruling be set aside and that the applicant's application be heard by an independent determination officer who could consider the circumstances

[576] Radjabu v Chairperson of the Standing Committee for Refugee Affairs in South Africa 8830/2010 [2014] ZAWCHC 134 para 32.

[577] Radjabu v Chairperson of the Standing Committee for Refugee Affairs in South Africa 8830/2010 [2014] ZAWCHC 134 para 33.

in the eastern part of the DRC. A proper interpreter had to be provided to help the applicant at the hearing.[578]

The UNHCR indicates that a person must be at a risk of serious harm to be compelled to leave and to seek protection abroad. In determining whether such risk of serious harm exists, the following factors should be taken into account:[579]

> How the disaster unfolds and develops, the geographical proximity of the disaster to the person's place of habitual residence, how it affects their life, physical integrity, liberty and enjoyment of other human rights; and how the State responds.

With this borne in mind, even if a specific incident disturbs the public order, a person will only be at risk for harm if the State is unable to assist and to remedy the situation. In the matter of Harerimana v The Chairperson of the Refugee Appeal Board, the applicant applied to the court to have his rejected application for asylum and appeal set aside and for him to be recognised as a refugee.[580] The court considered that the applicant, among many others, had left Burundi where rebels controlled the territory and launched violent attacks.[581] It was argued that the application was not considered properly, that the decision makers acted unlawfully and that a gross mistake was made with the ruling as he did not flee persecution, but was rather forced to leave his country of residence as a result of events seriously disrupting public order.[582] The court considered the definition of a refugee and once again indicated that this definition was based on the one provided for by the 1969 OAU Convention.[583] It was also once again

[578] Radjabu v Chairperson of the Standing Committee for Refugee Affairs in South Africa 8830/2010 [2014] ZAWCHC 134 para 41.

[579] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 17.

[580] Harerimana v The Chairperson of the Refugee Appeal Board 10972/2013 [2013] ZAWCHC 209 at paras 1, 4 and 6.

[581] Harerimana v The Chairperson of the Refugee Appeal Board 10972/2013 [2013] ZAWCHC 209 at paras 35-39.

[582] Harerimana v The Chairperson of the Refugee Appeal Board 10972/2013 [2013] ZAWCHC 209 at paras 6, 7 and 8.

[583] Harerimana v The Chairperson of the Refugee Appeal Board 10972/2013 [2013] ZAWCHC 209 at para 10.

recognised that the test to determine whether a person qualifies as a refugee is objective.[584] In addition, the court also used the guidelines provided by

Hathaway and repeated same in its judgment:[585]

> As long as a person is compelled to seek refuge because of an anticipated serious disruption of public order, he or she should not be placed in a position of having to demonstrate a linkage between her personal status (or that of some collectivity of which she is a member) and impending harm. Because the African standard emphasizes assessment of the gravity of disruption of public order rather than motive for flight, individuals are largely able to decide for themselves when harm is sufficiently proximate to warrant flight.

The court ruled that the original decision be set aside, and that the applicant qualify as a refugee.[586] It was also emphasised that the decision makers should remember that there are other grounds based on which people are allowed to leave their countries of residence.[587]

Although the 1969 OAU Convention is largely viewed as a positive contribution to refugee law, there are several inherent issues that affect its successful application. When comparing the provisions contained in the 1969 OAU Convention to those in the 1951 Refugee Convention, it is clear that both provide that a person who acts contradictory to the goal of the OAU is excluded from refugee protection.[588] Rwelamira indicates that this can create a problem as the purpose of the OAU is not narrowly described. There is a lack of state practice regarding acts that contravene the purpose of the OAU.[589] Furthermore, as indicated above, the 1969 OAU Convention contains a provision that a person will cease to qualify as a refugee if they do not respect the laws of the state in which they find themselves and if they commit a subversive act against

---

[584] Harerimana v The Chairperson of the Refugee Appeal Board 10972/2013 [2013] ZAWCHC 209 at para 11.

[585] Harerimana v The Chairperson of the Refugee Appeal Board 10972/2013 [2013] ZAWCHC 209 at para 12.

[586] Harerimana v The Chairperson of the Refugee Appeal Board 10972/2013 [2013] ZAWCHC 209 at para 43.

[587] Harerimana v The Chairperson of the Refugee Appeal Board 10972/2013 [2013] ZAWCHC 209 at par41.

[588] Rwelamira 1989 IJRL 172.

[589] Rwelamira 1989 IJRL 173.

the state from which they had fled.[590] Rwelamira once again reiterated that this provision can cause problems as it is unclear what a subversive act is and the

Convention does not prohibit such acts against all African states.[591]

Oyelade[592] argues that since the 1969 OAU Convention considered the circumstances in Africa at the time of drafting, it does not strongly focus on the human rights of refugees. It rather focuses on strengthening the response between African states and to provide states with the authority to manage and limit the actions of refugees.[593] The basic rights of refugees, such as shelter and housing, food, sanitation, reunification with family, assistance with settling or returning to country of residence, not to be subjected to cruel or inhumane treatment, and not to be discriminated against, are not clearly stipulated in the 1969 OAU Convention. Also, it does not address refugee women or internally displaced persons, and it places restriction on the movements and expressions of refugees, which can contradict other provisions international refugee law. Despite this, as indicated in Chapter 2,[594] the international and regional human rights law framework remains intact as migration law and refugee law are linked to human rights law.

Furthermore, at first the 1969 OAU Convention did not have a central monitoring mechanism, and although a body has been established in the meantime to deal with refugees, it is not sufficient as it lacks the necessary tools. Oyelade suggests that in order for this mechanism to be effective, a reporting system has to be put in place to monitor the existing situation.[595] The refugee situation in Kenya highlights problems with the timeframes within which asylum applications are processed. The Convention

[590] Article III of the OAU Convention on the Protection of Refugees in Africa (1969).
[591] Rwelamira 1989 IJRL 173.
[592] Oyelade 2006 ISIL YBIHRL 223-229.
[593] Oyelade 2006 ISIL YBIHRL 224.
[594] See 2.4 for a discussion on human rights law and the applicable instruments.
[595] Oyelade 2006 ISIL YBIHRL 226.

does not clearly stipulate the time limit within which an asylum application has to be processed.[596]

Although the expanded definition of a refugee is important for the development of refugee law, it has created further problems. When courts have to apply the provisions of the 1969 OAU Convention, and more specifically the extended definition of a refugee, they have to rely on the rules of interpretation as provided for by the VCLT.[597] There can, however, be problems with the interpretation as the rules are "so all embracing that the interpreter is left able to hang his hat nearly anywhere he will". It is difficult to establish the purpose, objective and the intentions of the writers and, as established before, there is a lack of precedence regarding its application.[598] Furthermore, the broad scope of the extended categories in the definition results in vagueness. Some academics argue for instance that the application of the 1969 OAU Convention is limited to Africa. Rankin, however, argues that the term "every person" includes all individuals that seek asylum, irrespective of where they originate from. This argument is supported by the objective of the 1969 OAU Convention, the amendments to the definition, affirmation by the African Commission on Human Rights, and case law.

As stipulated by the UNHCR, the extended definition may result in "vagueness and uncertainty".[599] For instance, the extended definition can be interpreted to include those who flee "non-discriminatory deprivations of their human rights resulting from the complete socio-economic breakdown or failure of the state".[600] However, there are states that do not agree with this argument and argue that these people are economic migrants and are not protected by the 1969 OAU Convention.[601] For example, SA had a flood of refugees crossing its borders in 2008 as a result of Zimbabwe's economy

[596] Oyelade 2006 ISIL YBIHRL 228-229.
[597] Rankin New Issues in Refugee Research – Working Paper No 113 11.
[598] Rankin New Issues in Refugee Research – Working Paper No 113 11-12.
[599] Rankin New issues in Refugee Research – Working Paper No 113 1.
[600] Katz and Maluwa "Refugees and Stateless Persons" 515-516.
[601] Katz and Maluwa "Refugees and Stateless Persons" 516.

collapsing and the political friction in the country.[602] Many people fled as they were facing uncertainty due to evictions, a loss of jobs, food scarcity and deprivation of basic services, resulting in no access to clean water and sanitation.[635] In response to this situation, SA treated these people as illegal foreigners and immigrants by subjecting them to the respective application procedures, deporting them and limiting their human rights, including poor access to job opportunities, housing, healthcare and social grants.[603] South African officials defended the response by indicating that these Zimbabweans are not entitled to protection as they did not flee their country due to conflict and therefore are not real refugees but simply economic migrants.[604]

In the case of Chihomba v Chairperson: Refugee Appeal Board,[605] the applicant fled Zimbabwe as he supported the main opposition and knew of people who were supposedly abducted and killed because of their support. He applied for asylum in SA, but the application was denied because it could not be proven that the applicant had a fear of persecution. In his own words, the applicant came to SA to find work, so the court found that the applicant was an economic migrant and not a refugee in need of international protection. The applicant appealed this decision and one of the major arguments used to support his appeal was that the initial decision was refoulement.[606] However, the Appeal Board dismissed the application as it found that the political conditions in Zimbabwe had improved,[607] and that the principle of non-refoulement did not cover economic migrants who enter SA to benefit financially.[608] SA's reaction to this situation and their treatment of Zimbabweans fleeing their country as a result of the circumstances that existed at the time, was criticised by organisations such as

[602] HRW Neighbors in need: Zimbabweans Seeking Refuge in South Africa. [635]
HRW Neighbors in need: Zimbabweans seeking Refuge in South Africa.

[603] HRW Neighbors in need: Zimbabweans Seeking Refuge in South Africa.

[604] Katz and Maluwa "Refugees and Stateless Persons" 516; see also HRW Neighbors in need: Zimbabweans Seeking Refuge in South Africa.

[605] Chihomba v Chairperson: Refugee Appeal Board (16418/2012) [2015] ZAGPPHC 444 (16 June 2015) paras 5, 8, 10 and 19.

[606] Chihomba v Chairperson: Refugee Appeal Board (16418/2012) [2015] ZAGPPHC 444 (16 June 2015) para 31.

[607] Chihomba v Chairperson: Refugee Appeal Board (16418/2012) [2015] ZAGPPHC 444 (16 June 2015) para 32.

[608] Chihomba v Chairperson: Refugee Appeal Board (16418/2012) [2015] ZAGPPHC 444 (16 June 2015) para 31.4.

Human Rights Watch (HRW).[609] They argued that the mass evictions that took place in Zimbabwe during that time violated human rights and the people that were evicted had a fear of persecution as they were opposed to the ruling government. They stated that SA was failing to meet its obligations under international and regional law and that the international community had to help SA to accept and house these refugees.

3.6 The application of the African and Latin American regional definitional elements of a refugee to climate change and disaster displacement

Considering the regional extended definition of a refugee, those displaced as a result of the negative effects of climate change or disasters can be included and protected under the broader definition of a refugee in both the African and Latin American refugee law.[610] More specifically, those fleeing natural disasters or negative effects of climate change can be included and protected under the phrase "events seriously disrupting public order".[611] In this context, a disruption of public order is considered to be:[612]

> Serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts. The effect of the disaster can be immediate or localized, but is often widespread and could last for a long period of time. The effect may test or exceed the capacity of a community or society to cope, using its own resources, and therefore may require assistance from external sources, which could include neighbouring jurisdictions, or those at the national or international levels.

Weerasinghe illustrates how this ground was used to protect Somalis who fled during 2010 and 2011 as a result of food shortages and famine caused by extreme drought conditions.[613] During 2011, famine resulted in the death of approximately 260 000

---

[609] HRW Neighbors in need: Zimbabweans Seeking Refuge in South Africa.

[610] Addaney, Jegede and Matinda 2019 AHRY 250.

[611] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters paras 13-16.

[612] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 15.

[613] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 36.

people, and climate change was declared the reason for the lack of rain in this area.[614] The decrease in precipitation resulted in a lack of food and water, loss of work and destruction of the agricultural sector.[615] Furthermore, as Al-Shabaab insurgents were present in the area, Somali people became victims of conflict and violence.[616][617] All of these factors culminated in the extreme violation of human rights and a humanitarian

[614] Reliefweb 2022 https://reliefweb.int/report/somalia/.

[615] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 36.

[616] Maxwell, Kim and Majid Planning from the future: Case study: The Somalia Famine of 2011-12

[617] .

crises. Subsequently, thousands of Somalis were forced to desert their homes, to cross international borders and to seek protection from neighbouring Ethiopia and Kenya.[618]

In response to this crisis, the UNHCR published the Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Somalia (Eligibility Guidelines).[619] This document indicated that Somalis who fled due to the circumstances in the state may meet the requirements of the definition of a refugee provided for by international refugee law. The Eligibility Guidelines emphasised that the expanded definition in the 1969 OAU Convention should be used when Somalis do not meet the requirements of the international refugee law definition of a refugee.[620] The UNHCR considered the circumstances present in Somalia at that time as "events seriously disrupting public order" and stipulated that people who resided in the affected areas were at "risk of serious harm".[621] However, as Weerasinghe[622] rightfully indicates, the document only referred to the disaster and environmental elements in one paragraph. The guidelines were not updated to reflect the situation caused by drought and food shortage.

During 2017 the UNHCR also recognised that those who are compelled to leave their countries as a result of climate change or disasters combined with other factors should qualify as refugees in terms of international and regional refugee law.[623] Kenya as a

---

[618] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 37.

[619] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 38.

[620] UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Somalia 39.

[621] UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia 41.

[622] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 39.

[623] UNHCR Legal Considerations on Refugee Protection for People Fleeing Conflict and Famine Affected Countries 2.

Weerasinghe In harm' conflict or violence and disaster or climate change

receiving state for many people who fled from Somalia, mostly accepted these people under the expanded definition of a refugee provided in the 1969 OAU Convention.[624][625]

Since dry conditions and food shortages was the leading driver of an influx of refugees, it was decided that "Somalis arriving in conditions of worsening food insecurity soon to be classified as famine, should continue to be considered as refugees".[626] However, the guidelines specified that the qualification and recognition was "not based on the elements of the definition but rather on humanity".[627] Similarly, Ethiopia allowed Somalis access to its territory and mainly recognised them as refugees in terms of the expanded regional definition, specifically the criteria of "events seriously disrupting public order".[628] The factors considered to be indicative of this situation was the lack of "access to humanitarian assistance and basic services such as water and healthcare" due to a limitation on movement.[629] The Ethiopian government also emphasised in

2015 that, in accordance with the 1951 Refugee Convention and the 1969 OAU Convention, they will accept and protect those who are forced to leave their countries "due to natural disasters, mainly climate related calamities such as drought".[630]

Similarly, Weerasinghe argues that the 1984 Cartagena Declaration can be used to include and protect those who flee their countries as a result of natural disasters or events related to climate change. It is worth mentioning the example of Haiti, which was struck by an earthquake in 2010 that resulted in the deaths of more than 200 000

[624] s way: International protection in the context of nexus dynamics between

[625] .

[626] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 44.

[627] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 44.

[628] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 53.

[629] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 55.

[630] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 55.

Weerasinghe In harm' conflict or violence and disaster or climate change

people.[631] The earthquake had a negative effect on the stability of the state as the infrastructure and important buildings were damaged and numerous public officials were killed.[632] What intensified the effects of this disaster was the fact that the state was already struggling due to poor governance, poverty, discrimination and violence.[633634] As a result of these circumstances and an outbreak of disease, approximately 1.5 million people were displaced.[635] In response to this crisis, the UNHCR and the Office of the United Nations High Commissioner for Human Rights (OHCHR) wrote a letter[636] in which they suggested that protection be granted to the people fleeing Haiti in response to this disaster. The letter, however, also indicated that this protection should only be granted until it was possible and safe for these people to return to Haiti. This letter was later updated and states were requested not to return these people to Haiti as the situation in the state is not stable and the protection of these already vulnerable people cannot be ensured.

It is valuable to consider the different responses of two states that faced an influx of people during this time. The first of these states is Brazil. In response to over 70 000 people who fled to its territory after the earthquake struck, Brazil either granted them "permanent residence for humanitarian reasons" for five years or entrance as a "permanent visa with the option of obtaining permanent residence for humanitarian reasons".[637] Nevertheless, as observed by Weerasinghe, Brazil granted none of these Haitians refugee status as they did not meet the criteria for a refugee as established

[631] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 60-61.

[632] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 62.

[633] s way: International protection in the context of nexus dynamics between

[634] .

[635] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 62; see also NRC/IDMC 2016 https://ref world.org.

[636] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 63; see also UNHCR 2010 https:/unhcr.org.

[637] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 64-65.

Weerasinghe In harm' conflict or violence and disaster or climate change

by refugee law.[638] More specifically, the relevant consideration offices[639][640] found that these Haitians did not have a well-founded fear of persecution as required by the definition of a refugee. In one court case that was filed, the applicant argued that the expanded criteria of a refugee should be considered in these matters as these Haitians were victims of human rights violations.

The local court rejected this claim by considering 1. whether the state is able to act; 2. if there is peace; and 3. if the international community is also of the opinion that there are violations of human rights in the area. The court found that the right to life,

[638] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 65-69.

[639] s way: International protection in the context of nexus dynamics between

[640] .

Weerasinghe In harm' conflict or violence and disaster or climate change

safety or freedom should also be threatened. The definition of a refugee in international refugee law only includes those who flee due to a natural disaster if it can be shown that the person also has a well-founded fear of persecution based on one of the grounds stipulated in the definition.[641] Brazil's interpretation and application of refugee law indicated that some states only consider regional refugee law if they find that international refugee law applies.[642] Mexico, on the other hand, considered both the international and regional refugee definitions in determining if a person who had fled from Haiti due to the earthquake qualified for refugee status.[643]

Nevertheless, as indicated before, both the 1969 OAU Convention and the 1984 Cartagena Declaration require that a person should be compelled to leave and to seek protection abroad in order to be awarded refugee status. Therefore, as indicated by the UNHCR, those who flee as a result of climate change or a disaster will only be able to qualify as a refugee if the particular event has affected their circumstances and as a result forced them to leave their country and to seek assistance beyond their country's borders.[644]

In addition to the 1969 OAU Convention and the 1984 Cartagena Declaration, however, academic authors have explored the African regional human rights system and values[645] with regard to the protection of climate refugees.[646] The African Charter applies to all people without distinction,[647] including those who have been displaced.[677] Among other things, it specifically recognises certain rights and values that are important to those who have been displaced due to climate-related events or disasters,

[641] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 72.

[642] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 73.

[643] Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 79.

[644] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 17.

[645] See 3.2 for an analysis of the African regional human rights framework.

[646] Addaney, Jegede and Matinda 2019 AHRY 252; see also d'Orsi and Naldi 2022 IRRC 1043.

[647] Article 2 of the African Charter on Human and Peoples' Rights (1986). [677] d'Orsi and Naldi 2022 IRRC 1044.

such as respect for life and integrity, the right to leave their country, development, and a general satisfactory environment that is favourable to their development.[648]

Essentially, the African Charter stipulates that states have to pay attention to the "right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights".[649] This is important for climate refugees as human rights violations amount to persecution. The rights that can be affected in such circumstances include the right to life, health, water and food.[650] State parties have an obligation to protect these rights[651] and violations of these rights due to disasters or climate change events could thus be seen as non-compliance with these obligations.[652] Nevertheless, as indicated by Addaney, Jagede and Matinda,[653] this approach to protecting climate refugees will only be successful if African states unite and cooperate in this regard. It amounts to a "value-driven human rights-based approach to protecting African climate refugees".[654]

Although free movement agreements have been developed to integrate states and to develop the regional economy, Wood describes the IGAD Protocol as a "breakthrough agreement and significant achievement to assist people fleeing natural hazards, disasters and climate change in eastern Africa". [655] The Platform on Disaster Displacement (PDD) even held a workshop and embarked on a study under her guidance titled "The Role of Free Movement of Persons Agreements in Addressing Disaster Displacement: A Study of Africa."[656] The workshop considered the advantages

[648] Articles 4, 12, 22 and 24 of the African Charter on Human and Peoples' Rights (1986).

[649] Preamble to the African Charter on Human and Peoples' Rights (1986); see also Addaney Jegede and Matinda 2019 AHRY 254.

[650] d'Orsi and Naldi 2022 IRRC 1043-1044.

[651] Article 25 of the African Charter on Human and Peoples' Rights (1986).

[652] d'Orsi and Naldi 2022 IRRC 1043-1044.

[653] Addaney, Jegede and Matinda 2019 AHRY 253, 258.

[654] Addaney, Jegede and Matinda 2019 AHRY 253.

[655] Wood 2020 https://disasterdisplacement.org.

[656] PDD Stakeholder workshop report: The role of free movement of persons' agreements in addressing disaster displacement in Africa with focus on ECOWAS, IGAD and SADC regions 10.

and the possibility of using these free movement agreements to provide for the protection of those who flee as a result of disasters or climate change. As indicated by Wood,[657] the IGAD region includes African countries such as Somalia, Ethiopia and South Sudan, all of which have been affected severely by environmental disasters. She argues that the provisions of the protocol allow for persons who are affected by disasters or climate change in this region to freely move and to be ensured that they will not be returned to the affected area.

In support of this argument, Article 16(1) of the IGAD Protocol for instance, provides that party states shall allow movement "in anticipation of, during, or in the aftermath of disaster to enter into their territory". Furthermore, it provides in Article 16(2) that citizens affected by disaster may stay when "return is not possible or reasonable". To use free movement agreements as a response to climate induced displacement is also advantageous as these agreements do not have requirements that are as strict as refugee law.[658] People who have the right to freely move do not need to qualify for protection and assistance and do not need documentation and passports upon arrival.[659] The argument is supported by Ama Francis, who stipulates that these agreements:[660]

> Have the potential to address the gap because they are responsive to the complex and regional nature of climate-induced migration, these agreement allow for movement before, during or after a sudden or slow onset event, thereby increasing mobility options regardless of whether movement was forced or voluntary, is temporary or permanent, or directly caused by a climate-related event.

Although Wood suggests that free movement agreements such as the IGAD Protocol can be used to provide for disaster or climate induced displacement, it does present several issues and shortcomings.[661] For instance, it does not provide for the granting and protection of human rights as provided for by refugee law, and party states to

[657] Wood 2020 https://disasterdisplacement.org.
[658] Wood 2020 https://disasterdisplacement.org.
[659] Wood 2020 https://disasterdisplacement.org.
[660] Francis 2019 SCCCL 20.
[661] Wood 2020 https://disasterdisplacement.org; see also Wood 2022 FMR 64. [692] Wood 2022 FMR 64.

such agreement may discretionally regulate entry and stay, which can be challenging for those who have been displaced due to disasters.[692] As movement is expected to increase due to climate-related events, Amadi and Vundamina indicated that, "it can act as a stop-gap by offering some support to persons affected by climate change".[662]

3.7 Conclusion

As is illustrated above, people have been moving to and from Africa for several years. African migration[663] is complex as it is embedded in a history of slave trade, colonialism and war, and the nature, factors and causes of movement vary from region to region. African migrants also prefer to remain on the continent by moving between African states. As illustrated by the African Common Position on Migration and Development, migration has several economic and development advantages. However, it also presents numerous political and socio-economic challenges to both migrants and African governments.[664] To address these issues, several African regional migration frameworks such as the MPF and the Kampala Convention have been adopted.[665]

Similar to the international position as discussed in the previous chapter,[666] contemporary migration in Africa is driven by climate change and its negative effects.[667] Africa is vulnerable to these changes and climate change has already negatively affected the continent and its people.[668] Some African countries are affected the most by climate change and related events despite contributing the least to gas emissions.[669]

---

[662] Amadi and Vundamina 2023 LDD 33, 40.

[663] See 3.2 for a discussion on migration in Africa.

[664] See 3.2 for an elaboration on the advantages and challenges of migration in Africa.

[665] See 3.2 for an analysis of the different instruments that were adopted to address migration in Africa. See also Treaty establishing the AEC (1991), Protocol to the Treaty establishing the AEC (2018), SADC Protocol on Facilitation of Movement of Persons (2005), Protocol on free movement of persons in the IGAD region (2021), Draft African Guiding Principles on the Human Rights of all Migrants, Refugees and Asylum Seekers (2023).

[666] See 2.3 for a discussion on climate change and disaster displacement.

[667] See 3.3 for an explanation on climate change and disaster displacement within the African continent.

[668] See Addaney, Jegede and Matinda 2019 AHRY 244; see also Soares 2018 RCDA 1; see also WMO State of the Climate in Africa; see also UN 2022 https://news.un.org.

[669] Nimubona 2023 https://thenewhumanitarian.org; see also 3.3 for a discussion on climate change and disaster displacement within the African continent. See also 5.3 for practical examples on how climate change has affected African countries.

Where people are displaced internally as a result of these circumstances, they are protected by law.[670] However, when people are forced to cross borders in these situations, their protection is not guaranteed.[671] Although the concept of a climate refugee has been acknowledged internationally, it is not explicitly recognised in law.[672] As with the international law, some argue that the African regional refugee law framework will have to be reformed to cater for climate refugees while others argue that the existing framework is sufficient to cover this category of refugees.[673] In order to determine whether such reform is required or not, the existing African regional refugee law framework was examined in this chapter.[674]

After several drafts, the 1969 OAU Convention was eventually adopted, providing for the recognition and protection of refugees in Africa. It included the international definition of a refugee but extended it to be context specific.[675] Although the main discussion related to the African regional refugee law framework, the 1984 Cartagena Declaration was also briefly discussed in this chapter.[676] As was indicated before, the 1969 OAU Convention inspired the 1984 Cartagena Declaration in that the extended African regional definition of a refugee was absorbed in the Latin American framework. Both regions also dealt with an influx of refugees and were forced to adopt frameworks and terms that would cater for the exceptional circumstances in those areas. The main reason for including the Latin American region was to indicate, as is the position with

[670] See 2.2 for an analysis of the Kampala Convention (2012).

[671] See 2.3 and 5.3 which indicates that there is a gap in law with regard to climate induced external displacement. See also Mayer 2011 CJIELP 379.

[672] See 2.3 and 5.3 confirming the acknowledgement of the term climate refugees. See also UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/2016 para 8.6; see also Su 2020 https://climatechangenews.com.

[673] See Chapter 6 for an extended discussion on the different arguments regarding the reformation of the refugee law framework to provide for the category of climate refugees as well as the critique which has presented in this regard.

[674] See 3.4 for an analysis of the African regional refugee law framework and 3.5 for a discussion on the African definition of a refugee.

[675] Article 1(2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969); see also Arboleda 1995 IJRL 87.

[676] See 3.4 and 3.5. [708]
See 3.6.

the African region, how the extended definition of a refugee has been implemented to include, accommodate and protect climate refugees in this area.[708]

By analysing the extended definition of a refugee as provided for by the 1969 OAU Convention and the 1984 Cartagena Declaration, it is clear that a person can also qualify for refugee status when they flee their country due to the serious disturbance of public order.[677] This term has not been defined, but certain guidelines have been established that can assist with its interpretation and application.[678] The criteria are met in the event that the proper functioning of a state has been affected. The relevant authorities will evaluate the seriousness of the disturbance on the merits of each case by considering its nature and extent as well the effect it has had on the security and stability of a state. In addition, the person must have been compelled to leave their home country or place of habitual residence to seek refuge abroad, which means that their state should be unable to assist them and to remedy the imminent or anticipated risk of harm.

The main objective of the aforementioned analysis was to determine whether climate refugees could be protected by the existing African and Latin American refugee law framework. More specifically, whether the extended definition can be interpreted in such a way that this category of refugees is included. Here specific reference was made to the argument that the category of climate refugees can be included under the auspice of the element of "events seriously disrupting public order".[679] This has been applied practically to existing situations in both Africa and Latin America where people

[677] See 3.5 for an analysis of the definitional elements of a refugee under African and Latin American refugee law. See also Article 1(2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) and Part III(3) of the Cartagena Declaration on Refugees (1984).

[678] See 3.5.1 and 3.5.2 for a discussion and explanation of the definitional elements. See also UNHCR Guidelines on International Protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions; see also UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters.

[679] See 3.6 for the application of the regional definitional elements to climate refugees. [712] See 3.5.2.

have been forced to flee these events because they were at risk of serious harm as their human rights were affected, putting them in need of humanitarian assistance.

Although it has been illustrated that the regional frameworks are progressive in nature, the chapter[712] found that they have inherent flaws that present certain challenges. By referring to the opinions of academic authors, it has been established that these issues include amongst others a lack of certain essential provisions, uncertainty and difficulty with interpretation, as well as the narrow context of specific application.[680] Also, as seen in Chapter 6, there have been several complications during application to climate refugees. The African human rights framework and free movement agreements were subsequently investigated as a possible solution to the problem.[714]

Both the international and African regional refugee law frameworks are applicable to SA. Therefore, the South African domestic legal framework applicable to refugees should be examined before concluding whether climate refugees can be covered by the frameworks discussed in Chapters 2 and 3. The next chapter offers a comprehensive understanding of the provisions contained in the local refugee law and the approaches followed by SA in dealing with refugees who find themselves within the state's territory.

[680] See 3.5.2; see also Rwelamira 1989 IJRL; see also Oyelade 2006 ISIL YBIHRL; see also Rankin New Issues in Refugee Research – Working Paper No 113. [714] See 3.6.

CHAPTER 4

THE SOUTH AFRICAN LEGAL FRAMEWORK FOR MIGRANTS AND REFUGEES: HISTORICAL DEVELOPMENT AND CONTEMPORARY CHALLENGES

4.1 Introduction

SA has always been a popular destination for migration in Africa, and in 2023 the ACSS reported that there are approximately 2.9 million immigrants in the country.[681] This means that at least five percent of the estimated population of 60 million are migrants, making SA the country hosting the most immigrants in Southern Africa.[682] The history of migration in SA spanned the eras of colonialism, apartheid and the post-apartheid era. During all these time periods, the main reason for migration to SA was economical, since the country was developing at a fast rate. As with the international and African regional positions analysed before,[683] migration to SA is complex as there are several causes and different factors that influence movement.[684] There are several advantages and disadvantages to migration, and it also presents challenges for the government. SA's attitude towards migrants is reflected in the laws that were adopted at different stages to deal with migration. At first, the country welcomed migrants to work at the mines and to contribute to the country's growth, but the government later implemented strict laws that complicated entry into the territory. SA adopted legislation such as the Aliens Control Act and the Immigration Act, both amended on numerous occassions to address the issue of migration.

[681] ACSS 2023 https://africacenter.org.

[682] ACSS 2023 https://africacenter.org.

[683] See 2.2 and 3.2 for a discussion on the characteristics of international and African regional migration.

[684] SACN Migration, mobility and urban vulnerabilities 14.

The patterns of migration constantly change, and as SA is vulnerable to climate change,[685] the country can experience migration driven by its negative consequences.

SA has is one of the countries that contributes the most to gas emissions due to its coal production and it has therefore committed to measures to reduce these emissions.[686] In 2023, parliament tabled the Climate Change Bill, which recognises the importance of taking action to address the issue of climate change.[687]

Despite these efforts, events related to climate change has already affected the country in numerous ways.[688] Certain areas are experiencing an increase in rainfall that has resulted in flooding, while other areas are dealing with extreme temperatures that cause dry conditions and water scarcity. These conditions affect crop growth and food security and it creates the perfect circumstances for disease outbreaks. In this regard, Mastrorille reports on a study that has found that South Africans move internally to escape these conditions.[689] In fact, the IDMC has indicated that between 2008 and 2022, more than 200 000 people were displaced within SA as a result of these occurences.[690] As with the international and African regional position discussed in the previous sections, [691] people who are displaced internally in SA due to these circumstances are protected by law. On the other hand, although people who cross borders in these circumstances are protected by human rights law, they do not enjoy protection as climate refugees in terms of international or African regional refugee law. This chapter explores whether South African refugee law provides for the inclusion and protection of climate refugees. In order to do so, the chapter analyses the South

[685] Institute at UC Berkeley 2023 https://belonging.berkeley.edu; see also World Bank Group Climate risk country profile: SA 5.

[686] Institute at UC Berkeley 2023 https://belonging.berkeley.edu. See also 4.3.

[687] See 4.3 for a summary on the provisions contained in the Climate Change Bill (2023).

[688] See 4.3 for an investigation on climate change and South African disaster displacement. See also Institute at UC Berkeley 2023 https://belonging.berkeley.edu; see also World Bank Group Climate risk country profile: SA 5.

[689] Mastrorillo date unknown https://climatemigration.org.uk; see also Williams and Huber 2022 https://spia.princeton.edu.

[690] IDMC date unknown https://internal-displacement.org.

[691] See 2.3 and 3.3 for an analysis of climate change and international and African regional disaster displacement. See also 5.5.

African refugee law framework with specific reference to its historical context and development.

After SA became a democary, it experienced an influx of refugees from neighbouring states. At that stage SA had ratified the 1951 Refugee Convention and its 1967 Protocol, as well as the 1969 OAU Convention, but it did not have national legislation that directly addressed the issue of refugees.[692] Instead, refugees resorted under the restrictive Aliens Control Act, in terms of which all foreigners were seen as aliens. Refugees were subsequently exposed to human rights violations.[693] After the acceptance of the Constitution, which explicitly recognises the place that international law has in domestic law and the role it plays in acceptance and interpretation, SA adopted the South African Refugees Act and its Regulations shortly thereafter.[694]

The South African Refugees Act incorporated many international and regional refugee provisions, principles, responsibilities and rights that directly address the entrance, acceptance, recognition and protection of refugees.[695] The Act even incorporated a definition of a refugee as contained in the 1951 Refugee Convention and its 1967 Protocol, as well as the 1969 OAU Convention. It is clear that SA is struggling to comply with its international and regional obligations towards refugees,[696] yet it still proposed and accepted several controversial amendments to the South African Refugees Act and its Regulations.[697] These amendments complicate the application procedure and limit the human rights of refugees who should be recognised and safeguarded by the country.[698] Some of these amendments have even been challenged before South African courts. A comparison of the South African Refugees Act and its Regulations

[692] Katz and Maluwa "Refugees and Stateless Persons" 507.

[693] See 4.1; see also Katz and Maluwa "Refugees and Stateless Persons" 507; see also Article 1 of the Aliens Control Act 96 of 1991.

[694] Hicks 1999 IJGLS 405, 407 and 413; see also ss 39(1)(b), 231, 232 and 233 of the Constitution of the Republic of South Africa, 1996.

[695] See 4.3.

[696] See Kiliko v Minister of Home Affairs 2006 4 SA 114 (C) as an example.

[697] Katz and Maluwa "Refugees and Stateless Persons" 527; see also Ziegler 2020 CCR 67; see also R24 of the Regulations to the South African Refugees Amendment Act (2020).

[698] See 4.4 and 4.5 in Chapter 4; see also Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC).

before and after amendments may offer an understanding of the South African refugee law framework. It can also reveal whether the existing South African refugee law is sufficient to address the category of climate refugees or whether reform is required. Together with the previous two chapters, this discussion lays the foundation for the explanation of climate change, the recognition of climate refugees, and the lack of protection of this category of refugees to follow in the subsequent chapter.[699]

4.2 The development of South African migration law

The history of migration in SA was steered by the events that occurred during three main periods, namely colonisation, apartheid, and the post-apartheid era.[700] The colonisation of SA by the Netherlands and Britain resulted in Europeans migrating and settling in Cape Town. At first, Europeans came to this area to assist with its development, but as their interest in movement declined, slaves were imported from other parts of Africa for these purposes. Later, the discovery of gold and diamonds contributed to the economic growth of SA and attracted labour migrants from all over the world. Shortly after SA gained independence from Britain, skilled labour migrants were still imported to SA but restrictions were implemented to regulate migration. These restrictions included that migrants had to enter without their families and that they were not allowed to settle in the country permanently.

During apartheid, internal migration in SA was driven by the government's forceful resettlement of black people, and internationally, conflict in other African countries forced people to move to SA in search of refuge.[701] In response, SA implemented strict laws to limit and regulate these movements. After apartheid was abolished and SA was reintegrated into the international community, it experienced an influx of migrants. Its attitude changed during this era and the country started to welcome migrants, asylum

[699] See Chapter 5.

[700] Schauwinhold 2015 https://bdp.de. See also Khan "The evolution of refugee law in South Africa" 1-5.

[701] Schauwinhold 2015 https://bdp.de.

seekers and refugees.[702] SA has experienced economic growth to such an extent that it has one of the largest economies in Africa.

Although people move to SA for several cultural, political and social reasons,[703] the main reason is economical.[704] It has been mentioned before that there are several factors that can influence migration,[705] but it is largely the category of younger people and women[706] who migrate to SA in search of improved circumstances. As explained in both Chapters 2 and 3, the nature of migration can differ,[707] but migration to SA seems to be mainly temporarily[708] and irregular[709] in nature.[710] Migration is temporary in that most migrants apply for temporary residence permits and work visas to fill jobs in SA. Irregular migration [711] presents immense political, economical and social challenges to the South African government. This type of migration typically involves criminal activity, human trafficking or smuggling, and as there is no control over this type of movement the actual number of irregular migrants present in the country is unknown. In many instances, migrants who do not have documentation are preferred for employment over locals as they are considered cheap labour. As a result, South Africans have developed a xenophobic[712] attitude towards migrants.[713]

This being said, migration is also advantageous to SA in that immigrants contribute to the economy. The Organisation for Economic Co-Operation and Development (OECD) points out that immigrants "raises the income per capita", they create job opportunities

[702] Moyo 2021 https://migrationpolicy.org.
[703] DSSA 2018 https://statssa.gov.za.
[704] Dinbabo and Nyasulu 2015 AHMR 31.
[705] See 2.2 for a list of the factors that can influence migration. Also see 3.2, which indicates that it is mainly women that migrate in Africa as a whole.
[706] White Paper on International Migration (2017) 1.
[707] See 2.2 for an explanation on the different types of migration. Also refer to in 3.2.
[708] Ginsburg et al 2021 BMC Public Health 3; see also White Paper on International Migration (2017) 25.
[709] Tati 2008 https://journals.openedition.org; see also White Paper on International Migration (2017) 29.
[710] See 2.2 for an evaluation of the nature of migration.
[711] Tati 2008 https://journals.openedition.org.
[712] See 2.2 for an explanation on the term xenophobia.
[713] Jacobsen 2007 FFWA 208-209; see also Tati 2008 https://journals.openedition.org. See 4.5 for an analysis of xenophobic attacks in South Africa.

through entrepreneurship, and by paying taxes they have a "positive impact on the government's fiscal balance".[714] On the other hand, migration also negatively affects SA as many South African citizens leave the country in search of better opportunities.[715] Most of these include professionals such as doctors, attorneys and teachers, which results in a demand for skilled workers due to a brain-drain.[716] In order to address the issue of migration, SA adopted the Aliens Control Act in 1991. In terms of the Act, all persons entering SA were seen as aliens. People had to appear before an immigration officer before entrance into the country and entry had to take place at a designated point.[717] Failure to comply with the aforementioned provisions was an offence that could result in conviction.[718] In terms of section 11 of the Act, a person presenting themselves to the immigration officer had to produce a valid passport containing a valid visa, unless exempted. A person could not enter SA for residence purposes without the required permit being issued in terms of section 23 of the Act. An alien residing in the country who was not in possession of such a permit could be arrested and detained for a period of one year and they may even be removed from the country.[719]

When SA became a democracy, it soon became clear that there was a conflict between the restrictive provisions of the Aliens Control Act on the one hand and the extensive provisions of the newly adopted Constitution on the other hand.[720] The Constitution grants everyone human rights and protects these human rights in response to the discriminatory and suppressive policies previously implemented in the country.[721] It also recognises the importance of the international law by providing as follows:[722]

39. Interpretation of Bill of Rights

[714] OECD and ILO How immigrants contribute to SA's economy 31-33.
[715] Moyo 2021 https://migrationpolicy.org.
[716] Bhorat, Meyer and Mlatsheni Skilled labour migration from developing countries 23-25.
[717] Sections 1, 5 and 6 of the Aliens Control Act 96 of 1991.
[718] Sections 5 and 6 of the Aliens Control Act 96 of 1991.
[719] Section 27 of the Aliens Control Act 96 of 1991.
[720] Hicks 1999 IJGLS 407, 413.
[721] Hicks 1999 IJGLS 405.
[722] Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

1. When interpreting the Bill of Rights, a court, tribunal or forum

    a. must promote the value that underlie an open and democratic society based on human dignity, equality and freedom;

    b. must consider international law; and

    c. may consider foreign law.

The method of interpretation is also clearly prescribed in section 233 of the Constitution, which states:

233. Application of international law

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Section 231 indicates the procedure to be followed for international agreements to be accepted and enacted in domestic law:

231. International agreements

1. The negotiating and signing of all international agreements is the responsibility of the national executive.
2. An international agreement binds the Republic only after it has been approved by resolution on both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
5. The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.

Section 232 considers customary international law as law in SA as long as it is consistent with the Constitution.

In terms of the Aliens Control Act, a person who is classified as a prohibited person can be arrested, detained and deported from the country.[723] A prohibited person was defined as a person who did not enter the country through a designated port of entry, who did not follow the process as prescribed by the Act, who is undesirable, or who has been ordered to depart the country.[724] According to section 39 of the Aliens Control Act, prostitutes and sick, ill or disabled persons were also considered prohibited persons. Pariah rightly indicates that this could amount to discrimination that would be against the Constitution.[725] Furthermore, the justification for arrest, detention and deportation on the broad grounds of reasonable suspicion and the implementation of difficult administrative processes resulted in the deprivation and violation of several rights secured by the Constitution.[726]

An increase in xenophobic attacks coupled with pressure from the international community forced the South African government to reconsider the position of immigrants in the country.[727] In an attempt to align the Aliens Control Act with the Constitution, amendments were made to the Act in 1995. These amendments included a review of detention periods that could be longer than 30 days, for example.[728] In addition, the Green Paper on International Migration (1997 Green Paper) was published by the Department of Home Affairs (DHA) in May 1997. The 1997 Green Paper[729] recognised that people were crossing the South African border and that there should be provision for immigrants to access labour, that refugees should be protected and that measures should be taken to deal with economic migrants. Although it is aimed at controlling immigration, it recognises that human rights have to be protected.

[723] Hicks 1999 IJGLS 408.
[724] Section 39(2) of the Aliens Control Act 96 of 1991; see also Hicks 1999 IJGLS 407.
[725] Hicks 1999 IJGLS 409.
[726] Hicks 1999 IJGLS 410-412.
[727] Handmaker and Parsley 2001 CJR 42 and 44-46; see also Hicks 1999 IJGLS 399-402.
[728] Handmaker and Parsley 2001 CJR 42.
[729] Summary and Chapter 1 of GN 849 in GG 18033 of May 1997 Green Paper on International Migration (1997).

The White Paper on International Migration (1998 White Paper) was presented to parliament in October 1998.[730][731] To give effect to the provisions of the international and regional conventions, SA eventually implemented the South African Refugees Act 130 of 1998 and the Regulations in 2000.[732] Although it was described as a progressive bill, as will be seen from the discussion below,[733] it caused several practical complications.[767] As predicted, the Aliens Control Act was eventually repealed and replaced by the Immigration Act 13 of 2002 and its Regulations.[734] SA adopted this legislation to control the increase in migration it experienced in the post-apartheid era. The Immigration Act and its Regulations mirrored the restrictive provisions contained in the previous legal framework and only minor changes were made to ensure that it is constitutional.

In an effort to keep up with the pace of migration to SA and the resulting challenges, the Immigration Act and its Regulations were revised in 2004, 2007, 2011 and 2014. In 2016, a Green Paper on International Migration (2016 Green Paper)[735] was published that recognised the importance of the reformation of the migration legal framework in SA. It proposed a policy that among other things is constitutional, contributes to the economic growth of the country, and focuses on Africa and national security. The document held that the policy should address the management of migrants, their integration in society, legal gaps in respect of refugees and asylum seekers, and it should also consider migration in the rest of Africa.[736] The 2016 Green

Paper also proposes an easier procedure for applying for a visa in SA. In 2017, the

---

[730] Handmaker and Parsley 2001 CJR 42; see also Moyo and Botha "Refugee policy as infrastructure"
[731] .

[732] Katz and Maluwa "Refugees and Stateless Persons" 519; see also Handmaker and Parsley 2001CJR 42.

[733] See 4.4.1 for an examination of the South Africa Refugees Act and its Regulations. [767] Moyo and Botha "Refugee policy as infrastructure" 80.

[734] Katz and Maluwa "Refugees and Stateless Persons" 507; see also Handmaker and Parsley 2001 CJR 46.

[735] OECD and ILO How immigrants contribute to SA's economy 60.

[736] OECD and ILO How immigrants contribute to SA's economy 61. [771] MSF 2021 https://msf.org.za.

White Paper on International Migration (2017 White Paper) was published for comments, and it contained and proposed the same reforms of the policy as the 2016 Green Paper. The suggested amended act was published in 2018 for commentary by the public but it has not yet been implemented by the government.

Despite the call for reform, migrants still experience ill treatment in SA in that they are being denied access to healthcare and they are subjected to detention for long periods of time in poor conditions, whereafter they are deported to their countries of origin.[771]

4.3 Climate change and disaster displacement in South Africa

As mentioned in the previous section,[737] SA has for several reasons always been a popular migration destination in Africa.[738] However, since SA is itself vulnerable to climate change,[739] migration to, from and within SA can soon be driven more strongly by climate change and its negative effects. SA is one of the top 15 countries that contributes to greenhouse gas emissions as it uses coal to produce electricity.[740] This being said, SA has committed to implementing measures to decrease these gas emissions. During the course of October 2023, the African Climate Foundation (ACF)[741] reported that SA presented the Climate Change Bill, which has been described as the "first piece of legislation in the country specifically aimed at mitigating and addressing the effects of climate change".

The Minister of Forestry, Fisheries and the Environment even stated that "today, we ensure our country has a legal instrument to build resilience against the impacts of climate change and to reduce emissions in a manner aligned with our national circumstances and development pathways".[777] The drafting of this legislation indicates

[737] See 4.2 for the historical development of migration law in SA.
[738] See 4.3 for a discussion on migration in South Africa.
[739] Institute at UC Berkeley 2023 https://belonging.berkeley.edu; see also World Bank Group Climate risk country profile: SA 5.
[740] Institute at UC Berkeley 2023 https://belonging.berkeley.edu.
[741] ACF 2023 https://africanclimatefoundation.com. [777]
ACF 2023 https://africanclimatefoundation.org.

that the SA government recognises that action against the effects of climate change is necessary. The Bill gives the state the required measures to be able to do so.[742]

The preamble of the Bill recognises that everyone has the right to a healthy environment, that the environment has to be protected, that climate change is a threat that should be addressed, that SA is vulnerable to the effects of climate change, and that SA has an international obligation to address this issue and to reduce gas emissions. Section 2 stipulates that the objectives include the implementation of responses to climate change, managing climate change through adaptation and mitigation, the realisation of international obligations and protecting the environment by contributing to a decrease in gas emissions. Section 10 provides for the establihment of a Commission that can report and advise on the responses, mitigation and adaptation. Chapter 4 deals with adaptation and provides that the Minister should set objectives, scenarios, strategies and plans for the management of adaptation.[743]

Also, a report on the achievement of adaptation objectives should be drafted by the Minister.[744]

Despite these efforts, SA has already been negatively affected by these events. Natural disasters have been occuring, temperatures have been rising, and percepitation has been decreasing in certain areas, resulting in drought.[745] In 2022, extreme flooding in KwaZulu-Natal caused by heavy rainfall resulted in the the death of more than 400 people and the displacement of many more.[746] Harvey and E&E News reported that the heavy rainfall that caused flooding was "worsened by the influence of climate change and the likelihood of an event this severe happening at all has more than doubled because of global warming".[747] In September 2023, several people died and many were forced to evacuate their homes as a result of weather events and flooding

[742] ACF 2023 https://africanclimatefoundation.com.
[743] Sections 16, 17, 18 and 19 of the Climate Change Bill (2023).
[744] Section 20 of the Climate Change Bill (2023).
[745] USAID South Africa Climate change country profile.
[746] Wits University 2023 https://wits.ac.za.
[747] Harvey and E&E News 2022 https://scientificamerican.com.

in Cape Town.[748] Furthermore, in October 2023, there was more flooding in KwaZuluNatal (KZN) that once again resulted in the death of several people. It also caused damage to infrastructure.[749]

November 2023 was branded as the "hottest month of the year in SA", as some of the highest temperatures were recorded in certain areas due to a heatwave that hit the country. The heatwave continued for approximately 10 days and was described as being extraordinary and a "likely result of global warming".[750] The World Bank Group predicted temperatures to rise 2.0°C by 2050 and 4.2°C by 2090.[751] These warm conditions have also resulted in extreme drought in areas, leading to a scarcity of

[748] ReliefWeb 2023 https://reliefweb.int/disaster/fl-2023-000200-zaf.
[749] ReliefWeb 2023 https://reliefweb.int/disaster/fl-2023-000200-zaf.
[750] Evans 2024 https://dailymaverick.co.za.
[751] World Bank Group Climate risk country profile: SA 9.

water that has affected the growth of crops and the sustainability of livestock, in turn affecting food security.[752] All of these circumstances have also created the ideal environment for diseases to break out.[753]

In response to these events and conditions, South Africans have been moving internally to escape these negative effects.[754] A study conducted by Princeton University[755] on environmental migration in SA have found that people preferred to move to areas that have a more stable climate. They prefer to move to cooler or dryer areas to escape either heat or flooding. These internal migrants are protected by law, as mentioned above.[756] There is South African domestic legislation[757] and court judgments that protect and safeguard the rights of those displaced within the country.[758] In addition, as SA is a party thereto, the international UN Guiding Principles

on Internal Displacement[759] will also apply in these circumstances.[760]

In contrast to this, people who cross South African borders as a result of these circumstances do not enjoy the same level of protection. As discussed in both Chapters 2 and 3,[761][762] the concept of climate refugees has not been formally recognised by international or African regional refugee law. The next section examines the South African legal framework for migration specifically as it pertains to refugees.

---

[752] SACN date unknown https://sacities.net.

[753] USAID South Africa Climate change country profile.

[754] Mastrorillo date unknown https://climatemigration.org.uk.

[755] Williams and Huber 2022 https://spia.princeton.edu.

[756] See 2.3 and 3.3 for a discussion on climate change and international and African disaster displacement.

[757] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and s 26(3) of the Constitution of the Republic of South Africa, 1996.

[758] Lwabukuna 2012 SAPL 221-229.

[759] See 5.3 for a discussion on the UN Guiding Principles on Internal Displacement (1998).

[760] Lwabukuna 2012 SAPL 213-216.

[761] See 2.3 and 3.3 for a discussion on climate change and international and African disaster displacement.

[762] , 505.
Katz and Maluwa "Refugees and Stateless Persons"

4.4 The development of the South African refugee law framework

Over the decades, refugees have been known to flee war, famine and other harsh circumstances on the African continent.[798] Until today, SA is one of the states hosting the most refugees in Southern Africa. [763] These movements have increased substantially after apartheid. One example is movement from Mozambique. Soon after the start of the new dispensation SA was faced with a problematic situation.[764] SA had to implement measures and laws to address these circumstances.[765] Consequently, SA entered into an agreement with the UNHCR to establish their influence in the country.[766] Similarly it entered into an agreement with Mozambique to which the UNHCR was a party in order to regulate the return of Mozambique nationals to their home country. Soon thereafter, SA ratified the 1951 Refugee Convention and its 1967 Protocol and the 1969 OAU Convention.[767]

During this time, however, the country did not implement any domestic legislation that could address the issue of refugees. Until the South African Refugees Act was implemented in 1998, refugees were managed in terms of the Aliens Control Act.[768] In addition to the restrictive provisions discussed above,[769] the Act determined that a person who entered the country seeking asylum or refuge had to report to an immigration officer and then present them with all the necessary information and documents.[770] Upon applying, the applicant would be issued with a valid temporary

---

[763] Migrants Refugees Migration Profile: South Africa 1; see also UNHCR date unknown https://unhcr.org/countries/south-africa.

[764] Katz and Maluwa "Refugees and Stateless Persons" 506-507.

[765] Katz and Maluwa "Refugees and Stateless Persons" 502.

[766] Agreement between the Government of the Republic of South Africa and the UNHCR governing the legal status, privileges and immunities of the UNHCR office and its personnel in South Africa (1991).

[767] Katz and Maluwa "Refugees and Stateless Persons" 507. SA became a party to the 1969 OAU Convention during the course of 1995 and to the 1951 Refugee Convention and its 1967 Protocol during the course of 1996.

[768] Katz and Maluwa "Refugees and Stateless Persons" 507. See 4.2 for a discussion on the Aliens Control Act and its limited provisions.

[769] See 4.2 for an identification of the restrictive provisions that was contained in the Aliens Control Act.

[770] Katz and Maluwa "Refugees and Stateless Persons" 517-518.
Katz and Maluwa "Refugees and Stateless Persons"

permit containing the terms and conditions that had to be met. The immigration officer would then present the facts to the Refugee Affairs Standing Committee, who would make a decision.[771]

The decision would then be conveyed to the immigration officer who would inform the applicant on whether their application had been granted or refused and in the event of the last mentioned, that the applicant would have the right to appeal against the outcome.[772] Asylum seekers could work and study pending the outcome of their application. They could also remain in the country pending the outcome of review or appeal of a decision made by the committee.[773]

Although the laws dealing with asylum seekers and refugees is a different regime, it still falls within the ambit of the rules on immigration.[774] Many of the provisions[775] are applicable to asylum seekers or refugees on the one hand and to immigrants on the other hand. An asylum seeker remains an immigrant if not granted the necessary status and protection by the receiving state. An immigrant applying for asylum and waiting for confirmation of refugee status may not be subjected to refoulement. The application for residency or a permit is regulated by the provisions of immigration law. In addition, should the application for asylum be rejected, refugee protection is no longer available and the person is administered in terms of the policies of immigration.[776]

Nevertheless, as soon as the immigration law applies, there are limitations on situations in which applications can be made for residency, and these together with visa applications have to made outside of SA.[777] As will be seen from the discussion below,

---

[771] 518.
[772] Katz and Maluwa "Refugees and Stateless Persons" 518.
[773] Katz and Maluwa "Refugees and Stateless Persons" 518-519.
[774] Katz and Maluwa "Refugees and Stateless Persons" 531; see also Moyo and Botha "Refugee policy as infrastructure" 78.
[775] Katz and Maluwa "Refugees and Stateless Persons" 531.
[776] Katz and Maluwa "Refugees and Stateless Persons" 531.
[777] Katz and Maluwa "Refugees and Stateless Persons" 531-532.
Katz and Maluwa "Refugees and Stateless Persons"

once an application for asylum has been rejected or refugee status has been revoked, a person is recognised as an illegal foreigner and may be dealt with in terms of the Immigration Act.[778] This makes asylum seekers vulnerable to arrest and deportation and exposes them to possible persecution even when they might have valid claims.[779] This results in the violation of the principle of non-refoulement.[780]

4.4.1 The South African Refugees Act and its Regulations

As indicated above, SA adopted the South African Refugees Act and the Regulations published in terms of the South African Refugees Act during April 2000. The Act provides for a definition of a refugee that is similar to the definitions contained in the 1951 Refugee Convention, the 1967 Protocol and the 1969 OAU Convention.[781][782] In the matter of Tantoush v Refugee Appeal Board,[818] it was found that the standard of proof is the reasonable possibility of persecution and not a real risk of persecution on a balance of probabilities.[783] The Preamble of the Act clearly indicates that it was adopted with the purpose:[784]

> To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees, to provide for the reception into South Africa of asylum seekers, to regulate applications for and recognition of refugee status, to provide for the rights and obligations flowing from such status, and to provide for matters connected therewith.

Section 2 of the Act recognises the non-refoulement principle by expressly prohibiting refusal of entry and forced return or expulsion when there is a possibility that the applicant may be persecuted or when there is a threat to life, safety or freedom.[785]

---

[778] 532.

[779] Katz and Maluwa "Refugees and Stateless Persons" 533.

[780] Katz and Maluwa "Refugees and Stateless Persons" 507 and 533.

[781] Katz and Maluwa "Refugees and Stateless Persons" 519; see also s 3 of the South African Refugees Act 130 of 1998.

[782] SA 232 (T).

[783] Tantoush v Refugee Appeal Board 2008 1 SA 232 (T) paras 97 and 106.

[784] Preamble of the South African Refugees Act 130 of 1998.

[785] Section 2 of the South African Refugees Act 130 of 1998; see also Katz and Maluwa "Refugees and Stateless Persons" 520-521.

Katz and Maluwa "Refugees and Stateless Persons"

Furthermore, the Act provides for entry of asylum seekers without documents. If a person claims to enter with the purpose of seeking asylum, a transit visa can be issued for this purpose.[786] Also, if there is a possibility that the person might be persecuted based on certain grounds or there is a threat to their safety and freedom based on

[786] 521.
Katz and Maluwa "Refugees and Stateless Persons"

certain grounds, they may not be returned even if they entered the country on an irregular basis.[787]

This principle was applied in the case of Abdi v Minister of Home Affairs.[788] that the case concerned two Somalis, one who was recognised as a refugee and another who was as an asylum seeker in SA. They left SA for Namibia without informing the authorities and as a result they were arrested, detained and deported as they were seen as illegal immigrants. They were deported via SA and upon arrival, they were detained at a detention facility at the airport. The Appellants, through a representative, brought an application to have their deportation interdicted and in response, the officials argued that the Appellants were deportees from Namibia and therefore SA did not have jurisdiction over the matter. They substantiated this argument by relying on the Chicago Convention on International Civil Aviation, which clearly stipulates that deportees at these detention facilities are the responsibility of the carriers (in this case Kenya Airways), whether they are refugees or not.[789] The appeal court considered the position of international, regional and municipal law on this argument and found that this was contrary to the Constitution and the international principle of sovereignty.[790][791]

Foreigners who find themselves in the country, at sea, on an international flight, or at the airport but who have not entered or received permission to enter, are human beings entitled to the recognition, granting and protection of human rights, and as such SA has jurisdiction over them.[792] The court diregarded the Chicago Convention

on International Civil Aviation as it clearly states that asylum seekers may not be returned to a state where there is a threat to their life or freedom based on certain grounds.[828] In this case, it was clear that the Appellants would face persecution based

[787] Katz and Maluwa "Refugees and Stateless Persons" 521.

[788] (734/10) [2011] ZASCA 2 (15 February 2011) paras 5-8 and 15.

[789] Abdi v Minister of Home Affairs (734/10) [2011] ZASCA 2 (15 February 2011) paras 7, 10 and 25.

[790] Abdi v Minister of Home Affairs (734/10) [2011] ZASCA 2 (15 February 2011) paras 20-22 and [791] .

[792] Abdi v Minister of Home Affairs (734/10) [2011] ZASCA 2 (15 February 2011) paras 20-22. [828] Abdi v Minister of Home Affairs (734/10) [2011] ZASCA 2 (15 February 2011) para 25.

on their political opinion if returned to Somalia and thus deportation would result in the violation of their rights and the Constitutional values.[793]

Persons excluded from refugee status include those who have committed serious crimes or punishable acts and those who have transgressed the values of the UN or the OAU. A person loses their refugee status in certain circumstances as set out in section 5 of the Act.[794] In terms of the provisions of the Act, the Minister is obligated to administer the Act. It provides for certain duties and obligations that the DirectorGeneral (DG) must fulfill with the Standing Committee.[795] The former may establish as many Refugee Reception Offices (RRO) as necessary and each Office must have a Refugee Reception Officer (RRO) and a Refugee Status Determination Officer (RSDO).[796] Furthermore, the DG has to regulate among other factors the methods and time frames within which matters are referred and dispensed with, the forms and documents that have to be completed and issued, as well as the conditions that have to be adhered to until the application has been finalised.[797] The Standing Committee must be composed in a certain manner as indicated in the Act and it has several powers and duties as indicated in section 11. Most importantly, it has to monitor and review the decisions made by the RSDO and it has to decide on the conditional studying and working of asylum seekers.[798]

Section 12 indicates that a Refugee Appeal Board must be created to which refugee cases and decisions may be appealed. Chapter 3 explains the procedure for an asylum application and indicates that an asylum seeker has to apply in person, have their fingerprints taken, and when over the age of 16, present two photos of themselves[799] to a RRO at an RRO.[800] The Regulations published in terms of the South African

[793] Abdi v Minister of Home Affairs (734/10) [2011] ZASCA 2 (15 February 2011) paras 26 and 27.
[794] Sections 4 and 5 of the South African Refugees Act 130 of 1998.
[795] Section 6(2) and Chapter 2 of the South African Refugees Act 130 of 1998.
[796] Sections 8(1) and (2) of the South African Refugees Act 130 of 1998.
[797] Section 38 of the South African Refugees Act 130 of 1998.
[798] Sections 11, 11(b), 11(e), 11(g) and 11(h) of the South African Refugees Act 130 of 1998.
[799] Sections 21(1) and (3) of the South African Refugees Act 130 of 1998; see also Regulation 6 of the Regulations to the South African Refugees Act (2000).
[800] Section 21(1) of the South African Refugees Act 130 of 1998.

Refugees Act provides for a permit that is valid for 14 days to attend the RRO for a person who has entered but has not submitted an application, but intends to do so.[801]

This provision was the matter of concern in the case of Arse v Minister of Home Affairs in which an Ethiopian citizen fled to SA due to a fear of persecution based on his political opinion.[802] Upon arrival he was issued with a transit permit in terms of the Immigration Act, which allowed him 14 days to attend to a RRO to apply for asylum. Due to alleged long queues at the respective office, the Appellant did not apply and was consequently arrested and detained by the police. During detention, the Appellant was assisted in applying for asylum and upon rejection of the application, he appealed the decision. The Refugee Appeal Board did not provide him with an expeditious decision and he applied to the court a quo to interdict his deportation, to have him released from detention as it was unlawful, and to have his asylum permit reissued.[803] Upon dismissal of the application, the Appellant appealed to the Supreme Court of Appeal (SCA).[804] In opposition, the Respondents argued that upon expiry of the transit permit, the Appellant became an illegal foreigner that could be dealt with in terms of the provisions of the Immigration Act, which meant that he could be detained and deported.[805]

Despite the arguments presented before court, the court found that the detention of the Appellant was unlawful as it exceeded the time frames provided for in both the South African Refugees Act and the Immigration Act and there were no reasonable justifications for the extension of this period.[806] It limited and infringed his right to freedom and not to be detained without a trial.[807] The court also considered[844] the provisions of the Refugees Act regarding the issuing of the asylum permit and found

[801] Regulation 2 of the Regulations to the South African Refugees Act (2000).
[802] Arse v Minister of Home Affairs 2012 4 SA 544 (SCA) para 2.
[803] Arse v Minister of Home Affairs 2012 4 SA 544 (SCA) para 3.
[804] Arse v Minister of Home Affairs 2012 4 SA 544 (SCA) para 3.
[805] Arse v Minister of Home Affairs 2012 4 SA 544 (SCA) para 7.
[806] Arse v Minister of Home Affairs 2012 4 SA 544 (SCA) paras 7 and 20.
[807] Arse v Minister of Home Affairs 2012 4 SA 544 (SCA) paras 9 and 10. [844] Arse v Minister of Home Affairs 2012 4 SA 544 (SCA) para 22.

that once the permit had been issued, the Appellant could no longer be seen as an illegal foreigner. His detention and deportation was therefore a violation of the non-refoulement principle and as a result the court ordered the reissuing of the permit.

Both the South African Refugees Act and its Regulations provide for several duties and responsibilities on the part of the RRO. Section 21(2) of the Act stipulates that the RRO has to evaluate the application to ensure that the information is correct.[808] The RRO must provide interpreting services to the applicant[809] and provide the applicant with a date to appear for an interview. They also have inform the applicant that they need to return for the interview, issue the permit, inform the applicant of the conditions contained in the permit, confirm that the permit can be withdrawn in certain circumstances, and remind the applicant to renew the permit when necessary.[810] The application has to be submitted to the RSDO.[848] The Regulations provides for 180 days for consideration of the application from date of lodgment.[811] In the event that a decision has not been reached within this time frame, the applicant may apply to the Standing Committee for permission to work or study.[812] When considering the application, further information may be requested and consultation with the UNHCR may take place.[813] It must be ensured that the applicant's rights are considered and that the procedure, rights, duties and proof is understood.[814] An application can be granted, rejected as unfounded, rejected as manifestly unfounded, abusive or fraudulent, or can be referred.[815] If it is rejected as being unfounded, the decision may be appealed to the Refugee Appeal Board.[816] If it is rejected as manifestly unfounded, abusive or fraudulent, the RSDO must give reasons in writing for the refusal and refer

[808] Section 21(2) of the South African Refugees Act 130 of 1998.

[809] Regulation 5(1) of the Regulations to the South African Refugees Act (2000) determines that the applicant will be provided with competent interpretation at all stages of the asylum process.

[810] Regulation 4(1) of the Regulations to the South African Refugees Act 130 of 1998 (2000). [848] Section 21(2) of the South African Refugees Act 130 of 1998.

[811] Regulation 3(1) of the Regulations to the South African Refugees Act 130 of 1998 (2000).

[812] Regulation 3(3) of the Regulations to the South African Refugees Act (2000).

[813] Section 24(1) of the South African Refugees Act 130 of 1998.

[814] Section 24(1) of the South African Refugees Act 130 of 1998.

[815] Katz and Maluwa "Refugees and Stateless Persons" 523-524.

[816] Section 24(3) of the South African Refugees Act 130 of 1998; see also Katz and Maluwa "Refugees and Stateless Persons" 524.

the reasons with recordings to the Standing Committee, which can confirm or set aside the decision.[817]

While waiting for the outcome of the application, the RRO must provide the applicant with a permit that allows them to reside in SA[818] and in the event that a decision is appealed, the permit has to be renewed pending the review.[819]

The matter of Saidi v Minister of Home Affairs concerned asylum seekers whose asylum permits lapsed before they had received the outcome of their applications.[820] They applied to have the permits renewed but these applications were denied.[821] The court extensively considered the different provisions of the South African Refugees Act dealing with the asylum permits and commented that the failure to renew such permits pending the outcome or review would expose asylum seekers to the possibiity of being returned to a state where they might face persecution.[822] This is directly contrary to the principle and obligation of non-refoulement and can result in the potential violation of human rights.[823]

In terms of Regulation 7, the permit has to meet certain requirements. Accordingly, the permit must look like Annexure 3 attached to the Regulations, indicate a date on which it expires, indicate the date and time when the applicant must return, contain the department stamp and stipulate that the permit can be withdrawn if the requirements are not met.[824] The permit can be made subject to certain terms and conditions that may not be contrary to the Constitution or international law.[863] The permit may be amended or extended, lapse, or as indicated before, be withdrawn if

---

[817] Sections 24(3) and (4) of the South African Refugees Act 130 of 1998; see also Katz and Maluwa "Refugees and Stateless Persons" 524.

[818] Section 22(1) of the South African Refugees Act 130 of 1998.

[819] Katz and Maluwa "Refugees and Stateless Persons" 525.

[820] Saidi v Minister of Home Affairs 2018 4 SA 333 (CC) para 2.

[821] Saidi v Minister of Home Affairs 2018 4 SA 333 (CC) para 3.

[822] Saidi v Minister of Home Affairs 2018 4 SA 333 (CC) paras 30 and 34.

[823] Saidi v Minister of Home Affairs 2018 4 SA 333 (CC) para 40.

[824] Regulation 7 of the Regulations to the South African Refugees Act (2000). [863] Section 22(1) of the South African Refugees Act 130 of 1998.

certain circumstances are present.[825] The lapse[826] and withdrawal of a permit may result in detention if the Minister deems fit.[827] With regard to a permit that has lapsed, however, the Regulations indicate that detention can be avoided if the applicant can prove that there were compelling reasons to leave the country without informing the Minister.[828][829]

SA, however, has been having difficulties with compliance to these provisions in the Act. The matter of Kiliko v Minister of Home Affairs[868] shows a lack of sufficient implementation of measures to deal with the influx of refugees to the country. The failure to deal with applications and to issue permits timeously resulted in numerous difficulties and detriments to applicants. The court found in this matter that the practice of the Cape Town Office to only process 20 permits per day was unconstitutional.

If an application is rejected, the reasons for rejection has to be presented to the applicant in writing,[830] and such decision must be reviewed by the Standing Committee. The applicant may appeal any decision in person within 30 days of confirmation of rejection of the application[831] to the Appeal Board established in terms of the Act.[832] The Act determines that the Appeal Board can confirm, set aside or substitute any decision.[833] In the matter of Pembele v Appeal Board for Refugee Affairs,[834] the SCA found that the Minister of Home Affairs and the DG of Ministry of Home Affairs has to

[825] Section 22(6) of the South African Refugees Act 130 of 1998; see also Regulation 8(1)(a) and 8(2) of the Regulations to the South African Refugees Act (2000).

[826] Regulation 9(1) of the Regulations to the South African Refugees Act (2000).

[827] Section 23 of the South African Refugees Act 130 of 1998; see also Regulation 8(1)(b) of the Regulations to the South African Refugees Act (2000).

[828] Regulation 9(1) of the Regulations to the South African Refugees Act (2000).

[829] SA 114 (C) paras 8 to 11.

[830] Regulation 12(3) of the Regulations to the South African Refugees Act (2000).

[831] Regulation 14(1)(a) of the Regulations to the South African Refugees Act (2000).

[832] Sections 25(1) and 26(1) of the South Africa Refugees Act 130 of 1998.

[833] Section 26(2) of the South African Refugees Act 130 of 1998.

[834] Pembele v Appeal Board for Refugee Affairs Case number 15931/96 (SCA Cape of Good Hope Provincial Division).

provide applicants with reasons for the decisions of the Standing Committee. The court even went further by declaring that:

> All pending appeals against decisions of the Standing Committee involving asylum seekers who have not been furnished with reasons in writing shall be suspended until such reasons are furnished whereupon they shall be entitled to supplement and/or amplify their appeal to the First Respondent within a reasonable time to be determined by the Second and/or Third Respondents.

Section 27 recognises the rights of refugees, which include recognition, legal protection, permits, identity[835] and travel documents,[836] employment, basic health services and basic education.[837] The right to work and study have been challenged in numerous court cases in SA.

The case of Minister of Home Affairs v Watchenuka[838] related to an issued permit that prohibited the applicant and her son who fled to SA from Zimbabwe from working or studying in SA pending the outcome of their asylum application. In terms of an annexure to the prescribed form that was issued at that stage, all asylum seekers were prohibited from working or studying pending the consideration of their application. The applicant applied to court for this prevention to be declared unconstitutional. The State argued that employment was prohibited by international refugee instruments, that the right could be abused by some, and that it affects the availability of job opportunities for South Africans.

The court of first instance found that the Minister could not prescribe conditions relating to work or study without considering the decision of the Standing Committee. The Standing Committee had the express authority to prescribe conditions in terms of the provisions of the Act. Similarly, the Appeal Court found that this provision implies

---

[835] Section 30 of the South African Refugees Act 130 of 1998; see also Regulation 15 of the Regulations to the South African Refugees Act (2000).

[836] Section 31 of the South African Refugees Act 130 of 1998; see also Regulation 15 of the Regulations to the South African Refugees Act (2000).

[837] Section 27 of the South African Refugees Act 130 of 1998.

[838] [2004] 1 All SA (SCA) (28 November 2003) paras 10, 11 to 13, 185, 17, 22, 23, 25, 26, 28, 29, 32, 33 and 34.

that the decision for conditions relating to work or study vests with the Standing Committee and not with the Minister. Nevertheless, it found that the prohibition was in line with the conditions of the Standing Committee as they indicated that work or study was generally prohibited but that if an asylum application was not finalised within 180 days, application could be made to the Standing Committee for upliftment of the terms. The court indicated that it could only direct the Standing Committee to alter its decision if it was unlawful. In consideration, the court stated that the direction of the Standing Committee was contrary to the Bill of Rights, more specifically negatively affecting the right to human dignity. This right, however, does not entail that a person can freely enter and stay in the country to work and study. This indicates that the right is not absolute and it may be limited in certain circumstances. However, if the need for employment arises as a necessity for sustainability, the court indicated that other considerations have to be taken into account. Therefore, a general prohibition is unlawful and a "material invasion of human dignity". Therefore, the circumstances of an applicant have to be taken into account and each matter has to be decided on a case-by-case basis.[839]

The matter of Somali Association of South Africa v Limpopo Department[840] related to the question of whether asylum seekers and refugees' right to employment included self-employment by having trading shops. In this matter, the police raided and closed several business in the Limpopo area that were being operated by foreigners and/or asylum seekers or refugees. Owners and employees were arrested and in support of these arrests, it was argued that the necessary permits were not in place and that asylum seekers and refugees were not allowed to operate businesses in SA. The applicant applied to court for an order that this category of people are allowed to selfemployment and thus to have their own businesses. In support of the application, it was contended that in the event that there are no job opportunities available, asylum seekers and refugees cannot find ways to earn an income, resulting in discrimination.

[839] Minister of Home Affairs v Watchenuka [2004] 1 All SA 21 (SCA) (28 November 2003) paras 33 to 34.

[840] (48/2014) [2014] ZASCA 143 (26 September 2014) paras 1, 3, 4, 5, 9, 22, 24, 43 and 44.

The Respondents supported their actions by arguing that asylum seekers and refugees did not have the same rights as South Africans.

The court of first instance followed a narrow approach and found that the right to employment did not include self-employment. By properly considering the provisions of international instruments, the South African Refugees Act and its Regulations, as well as the Watchenuka and Union cases, the Appeal Court, however, came to a different conclusion. It found that there was "no blanket prohibition against asylum seekers and refugees seeking employment".[841] There is no provision indicating that employment is limited to wage-earning employment. They found that when a refugee cannot obtain a work and they are destitute and humiliated as a result, they can resort to means of self-sustainability as a result of a right to human dignity.

The Act provides that even in the event that a refugee must be removed from SA, the rights of the refugee have to be respected.[842] The protection provided to refugees in terms of the Act includes not to be detained for long periods. In the event that such detention is more than 30 days, it has to be reviewed by the judge of the High Court in that area.[843] As seen before, release is justified if detention exceeding 30 days has not been reviewed.[844] The dependents of refugees who have been granted asylum may remain in SA even if they cease to be a dependent or if the refugee passes away.[845] Although the Act contains numerous provisions for the granting of protection and the recognition of the rights of refugees, it also clearly stipulates that refugees have a responsibility to obey South African laws.[846] Section 38 of the Act allows for the Minister to make regulations to regulate the procedures and to realise the objectives

[841] Somali Association of South African v Limpopo Department of Economic Development, Environment and Tourism (48/2014) [2014] ZASCHA 143 (26 September 2014) para 43.

[842] Section 28 of the South African Refugees Act 130 of 1998.

[843] Section 29 of the South African Refugees Act 130 of 1998.

[844] Arse v Minister of Home Affairs 2010 7 BCLR 640 (SCA); see also Katz and Maluwa "Refugees and Stateless Persons" 525.

[845] Section 33 of the South African Refugees Act 130 of 1998; see also Regulation 16 of the Regulations to the South African Refugees Act (2000).

[846] Section 34 of the South African Refugees Act 130 of 1998.

of the Act. These Regulations to the South African Refugees Act contains expanded provisions on the sections contained in the Act. It was published in April 2000.

Regulation 3 [847] sets out the procedures, timelines and conditions for asylum applications. It stipulates that an application for asylum has to be processed within 180 days of being filed, in failure of which application can be made for permission to work and study. The applicant must appear in person to make the application, to be interviewed and to hear the outcome unless they can give justified reasons for the inability to appear. Regulation 4 indicates that the RRO must provide the applicant with interpreting services, issue and renew the permit, and notify the applicant of the terms of the permit, the date to appear and the possibility of withdrawal in certain circumstances.[848]

With regard to interpreting, Regulation 5[849] stipulates that competent interpretating must be provided where necessary and practicable. In the event that the provision of interpretating is not practicable, the applicant must provide for it themselves after being provided with adequate notice to this effect. The interpreter has to comply with certain requirements as set out in Regulation 5(3), and this entails that they cannot be a representative of the country from which the applicant has fled, the applicant's attorney or their witness, and they must be able to translate from the spoken language to a language understood by the RRO. The applicant is required to disclose and surrender all information, travel documents and other permits when the application for asylum is made.[889] As determined before, Regulation 7 contains specific requirements for the asylum permits that have to be issued.

The permit must be issued in a prescribed format and contain specific information, such as the time for which it is valid, the date and time on which the applicant has to appear for renewal, information regarding possible withdrawal if conditions are not met

[847] R3(1) to R3(4) of the Regulations to the South African Refugees Act(2000).
[848] R4 of the Regulations to the South African Refugees Act (2000).
[849] R5(1) to R5(3) of the Regulations to the South African Refugees Act (2000). [889] R6(1) of the Regulations to the South African Refugees Act (2000).

and the department's stamp.[850] Regulation 8 determines that the permit can be withdrawn in certain circumstances, such as if the asylum seeker does not appear on the date determined in the permit, conditions are not met, the application is dismissed or rejected, or the applicant cannot qualify or ceases to qualify as a refugee. It is further determined that upon withdrawal, the asylum seeker can be detained.

Regulation 10[851] expansively regulates section 24 of the Act by determining that the RRO must hold a hearing to obtain and evaluate the information provided by an applicant. Even though the RSDO may verify identities and information by asking questions and obtaining further evidence, they should still ensure that the applicant understands the process, rights and obligations. Similarly, the applicant must answer questions and provide supporting evidence but they may be represented, have a witness, and submit affidavits. The applicant has to prove that they qualify for refugee status and the circumstances in the country from which the applicant has fled may also be considered in this regard.[852] Applications have to be decided on a case-bycase basis, and should an application be rejected, reasons have to be given to the applicant in writing.[853] A denied application is referred to the Standing Committee, which has to determine whether the decision has to be reversed and sent back to the RSDO or if it should be confirmed.[854] The appeal procedure provided for by section 26 of the Act is further regulated by Regulation 14, which determines that an appeal has to be lodged within 30 days of rejection and it must be lodged in person.[855]

Regulation 15 contains the rights of successful asylum seeking applicants. It stipulates that they are entitled to status recognition, identity and travel documents, legal protection, residence in the country, to apply for an immigration permit after residing in the country for five years, employment, health services, and primary education. The identity document referred to in Regulation 15(b) shall be valid for two years. After the

[850] R7(1) to R7(3) of the Regulations to the South African Refugees Act(2000).
[851] R10(1) to R10(4) of the Regulations to the South African Refugees Act (2000).
[852] R11 of the Regulations to the South African Refugees Act (2000).
[853] R12(1) and R12(3) of the Regulations to the South African Refugees Act (2000).
[854] R13 of the Regulations to the South African Refugees Act (2000).
[855] R14 of the Regulations to the South African Refugees Act (2000).

two years, application for renewal has to be made to the Standing Committee. Upon application, the Regulations determine that the Standing Committee can conclude that the applicant will remain a refugee who is entitled to apply for an immigration permit, or they can notify the applicant that their status has been withdrawn, or they can renew the identity document for a further two years.[856] Dependents who can prove their relationship to the main asylum seeking applicant and who appear in person before the RSDO will also be issued with a permit.[857] Even in the event that the dependent relationship is terminated, the person will be allowed to remain the country and to apply for asylum.[858]

Regulation 17 deals with the withdrawal of refugee status and determines that before the status can be withdrawn, the refugee must be informed of the intention to do so, the reasons and they have to be informed that they have 30 days to submit a response in writing.[859] Upon withdrawal for failure to respond or for supported reasons, the person will be recognised as a prohibited person in the country.[860]

4.4.2 The South African Refugees Amendment Act and its Regulations

Despite these provisions, it became clear that SA was struggling to fulfill its duties and obligations in terms of the Act. Certain worrisome amendments to the Act were proposed during the course of 2008, 2011, 2015 and 2017.[861] Notwithstanding the criticism, the amendments were formally adopted during the course of 2020.[862]

---

[856] R15(4) of the Regulations to the South African Refugees Act (2000).
[857] R16(1) to 16(5) of the Regulations to the South African Refugees Act (2000).
[858] R15(6) of the Regulations to the South African Refugees Act (2000).
[859] R17(1) of the Regulations to the South African Refugees Act (2000).
[860] R17(3) of the Regulations to the South African Refugees Act (2000).
[861] Katz and Maluwa "Refugees and Stateless Persons" 527; see also Khan "The evolution of refugee law in South Africa" 5.
[862] Ziegler 2020 CCR 67.

Similarly to the South African Refugees Act, the Minister also established and published Regulations to the South African Refugees Amendment Act (Amendment Act) that came into operation in January 2020.[863] This repealed the Regulations to the South African Refugees Act.[864] Significant changes and additions were made to the old Regulations. These complicated the application procedure, narrowed the scope and mandates initially provided for, and substantially limited the rights of refugees. As a result, it can be argued that these amendments have had the effect that SA is no longer complying with its international responsibilities and that the Act is infringing the rights contained in the Constitution.[865] The major amendments are discussed in detail below, while minor amendments are referred to in short for easy reference.

The definition clause of the Amendment Act revokes the Status Determination Committee and replaces it with a RSDO.[866] The clauses dealing with exclusion from and cessation of refugee status is expanded in the Amendment Act. The Act now provides that entry through a non-designated point is a reason to be excluded from refugee status.[867] Consequently, the Amendment Act now contains grounds that are not contained in the 1969 OAU Convention or the 1951 Refugee Convention,[868] possibly resulting interpretative issues and limitations on inclusion and protection.[869] Regulation 4(2) stipulates that "no refugee or asylum seeker may participate in any political activity or campaign in furtherance of any political party or political interest in the Republic".[870] In addition to the authority to establish RO, the DG may also now disestablish these offices.[871] Section 8(2) also repudiates certain requirements that the RRO has to meet by simply requiring that the Office must have an officer of the Department.

[863] R25 of the Regulations to the South African Refugees Amendment Act (2020); see also Khan "The evolution of refugee law in South Africa" 5.

[864] R24 of the Regulations to the South African Refugees Amendment Act (2020).

[865] Ziegler 2020 CCR 67.

[866] Section 1(e) of the South African Refugees Amendment Act, 11 of 2017.

[867] Sections 4 and 5 of the South African Refugees Amendment Act 11 of 2017; see also ss 4 and 5 of the South African Refugees Act 130 of 1998.

[868] Ziegler 2020 CCR 88-91.

[869] Ziegler 2020 CCR 88-91.

[870] Regulation 4(2) of the Regulations to the South African Refugees Amendment Act (2020).

[871] Section 8(1) of the South African Refugees Amendment Act 11 of 2017; see also s 8 of the South African Refugees Act 130 of 1998.

Furthermore, the requirement that officers must receive training has also been removed.[872]

Sections 8B to 8F deal with the Refugee Appeals Authority and although the changes to these sections are minor, it now provides for the possible membership of non-South African citizens and those who have not been imprisoned for longer than seven years.[873] Sections 9A to 9H have been inserted in the Amendment Act and regulate the Standing Committee for Refugee Affairs.[914] The prescribed standards for appointment qualification[874] in the origianl Act have been removed from the Amendment Act.[875] Although the functions of the Standing Committee are relatively similar to those set out in the original Act, the duration of the office term is now limited, there is provision for removal in certain circumstances, for member payment and for the performance of administration duties.[876]

The provisions prescribing the procedure for application for asylum is significantly adjusted in the Amendment Act. In terms of section 21 of the Act, a person must report to a RRO within five days from entering the country. A person must also now submit their biometrics before applying for asylum and not when making the application. Furthermore, the Act determines that the details of spouses and dependents have to be declared in the application, and an asylum seeker who is not in possession of transit visa may be questioned to determine if they have valid reasons for not possessing such a visa.

By considering factors such as nationality, gender, religion, political opinion and social group, the DG can also require certain asylum seekers to report to specifically allocated

---

[872] Section 8 of the South African Refugees Amendment Act 11 of 2017; see also s 8(3) of the South African Refugees Amendment Act 130 of 2008.

[873] Sections 8E(1)(a) and (b) of the South African Refugees Amendment Act 11 of 2017. [914] Sections 9A to 9H of the South African Refugees Amendment Act 11 of 2017.

[874] Section 10(2) of the South African Refugees Act 130 of 1998 determines that the Minister must have due regard to the experience, qualifications, expertise and ability to perform the functions of office. S 10(4) also determines that at least one of the members have to be legally qualified.

[875] Section 9B of the South African Refugees Amendment Act 11 of 2017.

[876] Sections 9C to 9H of the South African Refugees Amendment Act 11 of 2017.

offices if required.[877] Furthermore, should asylum or refuge be granted, it is provided that dependents be granted the same protection as the principal applicant. In the event that the particular person is no longer dependent, they are allowed to apply for asylum in terms of the Act.[878] Regulation 8 also deals with the application for asylum and determines that a valid asylum transit visa or valid visa issued in terms of the Immigration Act, proof of a valid identity document or declaration of identity, and biometrics have to be submitted together with the application. If the visa referred to above cannot be presented, "good cause for illegal entry" into the country has to be shown before an application for asylum can be made.[879]

Section 22 deals with the asylum seeker permit, now referred to as the asylum seeker visa.[880] This section substitutes the provisions in the principal Act and determines that an asylum seeker is entitled to be issued with a visa while their application is considered. This permits the asylum seeker to reside in the country subject to certain terms and conditions.[881] The particular section also provides that the DG, instead of the Minister, may withdraw the visa in certain cases.[882] In such an event the applicant can be arrested and detained until the application has been finalised.[883] Also, should it be determined that an asylum seeker cannot sustain themselves or their dependents, the provision determines that shelter and basic necessities may, instead of must, be provided.[884]

An asylum seeker must renew their visa within one month of expiration, by failure of which their application shall be deemed to be abandoned unless justifiable reasons for

[877] Sections 21(1C) and 21(1D) of the South African Refugees Amendment Act 11 of 2017.

[878] Section 21(B) of the South African Refugees Amendment Act 11 of 2017.

[879] R8(3) of the Regulations to the South African Refugees Amendment Act (2020).

[880] Section 22 of the South African Refugees Act 130 of 1998. s 22 of the South African Refugees Amendment Act 11 of 2017.

[881] Section 22(1) of the South African Refugees Amendment Act 11 of 2017.

[882] Section 22(5) of the South African Refugees Amendment Act 11 of 2017; see also s 22(6) of the South African Refugees Act 130 of 1998.

[883] Section 23 of the South African Refugees Amendment Act 11 of 2017; see also Ziegler 2020 CCR 94-95.

[884] Sections 22(6) and (7) of the South African Refugees Amendment Act 11 of 2017.

failure can be presented.[885] The consequence of an abandoned application is also clearly stipulated in the Act. In such event re-application is not allowed and the asylum seeker must be considered an illegal foreigner.[886] The right to work and receive an education is not automatic and has to be endorsed on the visa. In the event that these activities are allowed, a letter of the employer or education centre has to be provided to the department within 14 days from the date of commencement.[887] It has been argued that this provision is unconstitutional as it restricts the right to dignity.[888]

Regulation 12[889] sets out the requirements for the asylum seeker visa that is issued in terms of section 22 of the Act. In addition to the old Regulation 7, the visa must contain the conditions for residence, employment and education in the country and the rights and responsibilities of the holder. It must notify the holder that they have to appear in person on the date indicated and the results of failing to comply with any terms contained in the visa. Furthermore, the Regulations problematically determines that the applicant must first be assessed to see if the applicant has the "ability to sustain himself and his dependents before a right to seek employment" may be granted.[890] The applicant must always be able to present the original visa and should also report to the RRO where they initially applied for the visa to have the visa extended.

The RSDO must decide on the application and can make the same decisions as the Status Determination Committee could have in terms of the principal Act.[891] Regulation 14 only requires the RSDO conducting the hearing to inform the applicant of the process that has to be followed.[892] There is no similar provision obliging the Officer to ensure that the procedure, rights and responsibilities are understood.[934] It furthermore

---

[885] Section 22(12) of the South African Refugees Amendment Act 11 of 2017.

[886] Section 22(13) of the South African Refugees Amendment Act 11 of 2017.

[887] Sections 22(8) and (9) of the South African Refugees Amendment Act 11 of 2017.

[888] Katz and Maluwa "Refugees and Stateless Persons" 530; see also Minister of Home Affairs v Watchenuka [2004] 1 All SA 21 (SCA) (28 November 2003) para 27.

[889] R12(2) to R12(8) of the Regulations to the South African Refugees Amendment Act (2020).

[890] R12(5) of the Regulations to the South African Refugees Amendment Act (2020).

[891] Section 24 of the South African Refugees Act 130 of 1998; see also s 24 of the South African Refugees Amendment Act 11 of 2017.

[892] R14(3) of the Regulations to the South African Refugees Amendment Act (2020). [934] R10(1) of the Regulations to the South African Refugees Act (2000).

provides that the Officer must test the application, record the proceedings and decide the outcome. The Officer is also provided with an extended mandate to get legal advice, and to consider other information and other decisions made.[893]

The rights of the applicant to have representation and to present witnesses, affidavits and other proof does not appear in the new Regulations.[894] It is also determined that the applicant must attend the Office where they originally applied to receive the outcome of their application in writing.[895] Similar to the principal Act, in the event that the application is rejected as manifestly unfounded, abusive or fraudulent, the application must still be reviewed by the Standing Committee, and upon further rejection, an appeal can be lodged with the Refugee Appeals Authority.[896] The provisions that govern appeals have been restricted since an appeal must now be lodged within 10 working days of the application being rejected.[897] Should the applicant not appear at the appeal, a decision can be made on the evidence already presented.[898] If the appeal cannot be lodged for any reason,[899] the applicant must request the failure to be condoned with proof of circumstances. If the appeal is not lodged or it is dismissed, the applicant will be regarded as an illegal foreigner.[900]

Chapter 5 of the principal Act that dealt with the rights and obligations of refugees was amended to stipulate that an application for permanent residence can only be made after residing in the country for 10 years from asylum being granted, instead of five

[893] R14(6) of the Regulations to the South African Refugees Amendment Act (2020).

[894] R10(4) of the Regulations to the South African Refugees Act (2000); see also R14 of the Regulations to the South African Refugees Amendment Act (2020).

[895] R14(8) of the Regulations to the South African Refugees Amendment Act (2020).

[896] Sections 24A and 24B of the South African Refugees Amendment Act 11 of 2017.

[897] R16(1)(a) of the Regulations to the South African Refugees Amendment Act (2020). R14(1) of the Regulations to the South African Refugees Act (2000) determined that an appeal must be lodged within 30 days from receipt of notice of rejection.

[898] R16(3) and (5) of the Regulations to the South African Refugees Amendment Act (2020).

[899] R16(3) of the Regulations to the South African Refugees Amendment Act (2020) indicates these reasons as (a) being institutionalized, (b) being admitted to witness protection, (c) being quarantined, (d) being arrested and not granted bail and (e) any other such reason.

[900] R16(4) of the Regulations to the South African Refugees Amendment Act (2020).

years.[901] With regard to recognition as a refugee, the amended Regulations do not provide for the right to protection, remaining in the country, employment, education and basic health services.[902] It also does not grant the Standing Committee the mandate to declare a person a refugee indefinitely, meaning that they would not need to apply for the renewal of the identity document within the prescribed period.[903] Currently, refugees or asylum seekers can be removed from the country in certain situations and there is no obligation on the Minister to consider the rights of these persons when ordering their removal.[904]

Section 36 determines that refugee status can be withdrawn by the Standing Committee in certain circumstances, in which case the refugee must be informed of the decision and be granted an opportunity to address the Standing Committee regarding the decision to withdraw. The amended provision also does not stipulate that status may only be withdrawn after considering all the facts and with due regard for the rights of the person. Upon refugee status being withdrawn, the refugee is now regarded as an illegal foreigner. The new Regulations also does not require the Standing Committee to explain that it intends to withdraw the refugee status of a person but simply that it provides notice of such intention to withdraw.[905] It also does not place the burden of proof on the Standing Committee to prove that the withdrawal is validated with reasons. Instead it provides the Standing Committee with the mandate to confirm or withdraw refugee status upon receiving the refugee's response to the notice.[906] In the event of withdrawal due to failure to respond to the notice, refugee status lapses and the person is classified as an illegal foreigner.[907] In addition,

[901] Section 27(c) of the South African Refugees Amendment Act 11 of 2017; see also s 27(c) of the South African Refugees Act 130 of 1998.

[902] R17 and R18 of the Regulations to the South African Refugees Amendment Act (2020); see also R15 of the Regulations to the South African Refugees Act (2000).

[903] R17 and R18 of the Regulations to the South African Refugees Amendment Act (2020); see also R15 of the Regulations to the South African Refugees Act (2000).

[904] Section 28(2) of the South African Refugees Act 130 of 1998; see also s 28(2) of the South African Refugees Amendment Act 11 of 2017.

[905] R23(1)(a) of the Regulations to the South African Refugees Amendment Act (2020); see also R17(1)(a) of the Regulations to the South African Refugees Act (2000).

[906] R23(2) of the Regulations to the South African Refugees Amendment Act (2020).

[907] R23(6) of the Regulations to the South African Refugees Amendment Act (2020).

Regulation 20 determines that if the refugee status of a person is withdrawn, they have to surrender any documents issued to them.[908]

There are several other provisions that have been removed from the new Regulations. For instance, there is no provision for a period within which an application for asylum has to adjudicated,[909] the RRO is no longer provided with the duties it should fulfill in respect of assisting an applicant,[910] and no provisions are made for the granting of interpretating when required.[911] On the other hand, the new Regulations contain several other provisions that were not included in the original Regulations. For instance, it specifies that where a spouse or a party to a permanent homosexual or heterosexual relationship is included in an application for asylum, the marriage or relationship must be authenticated, and in the event that the marriage is terminated, the necessary supporting documents have to be submitted to the authority.[912]

Furthermore, the mandate of the Standing Committee is extended by indicating that it can determine its own procedures and rules, the conditions under which a person may study or work, and the industries in which studies or employment are not permitted.[913] Regulation 19 provides for the procedure to be followed to obtain a travel document. It indicates what the issued document has to contain and it provides that a fee may be charged for the issuing of the document.[914] Section 20A is inserted to provide for certain measures to be implemented and regulated to prevent fraudulent action and crime at the offices established in terms of the Act.[915]

[908] R20 of the Regulations to the South African Refugees Amendment Act (2020).
[909] R3(1) of the Regulations to the South African Refugees Act (2000).
[910] R4 of the Regulations to the South African Refugees Act (2000).
[911] R5 of the Regulations to the South African Refugees Act (2000).
[912] R2 and R3 of the Regulations to the South African Refugees Amendment Act (2020).
[913] R5 of the Regulations to the South African Refugees Amendment Act (2020).
[914] R19 of the Regulations to the South African Refugees Amendment Act (2020).
[915] Section 20A of the South African Refugees Amendment Act 11 of 2017.

4.5 Insufficiencies in the South African refugee law

The provisions of the Amendment Act and its Regulations have been criticised and have been challenged before the local courts on numerous occasions. These amendments result in a restrictive approach to refugees that is in direct contrast with the progressive international and even African regional standards. This is despite the fact that SA is one of the countries hosting the most refugees in Southern Africa.[916] As mentioned before, the rights of refugees are curtailed in the Amendment Act, as they may not participate in political activities[917] and they have limited access to employment, education and marital rights.[918] It can be argued that these restrictions amount to the revocation of constitutional rights and result in the already vulnerable becoming more susceptible.

The Minister of Home Affairs has defended the implementation of these restrictive measures under the umbrella of state protection and security. This could lead to the conclusion that asylum seekers are a threat to national security. In addition, the functionality of the Reception Office (RO) and the complicated application procedure have also been scrutinised. It was reported as early as 2012 that asylum seekers have been denied access to the country at entry points[919] and in circumstances where they did enter, they have not been able to launch the necessary applications.[920] Furthermore, in cases where there were delays between entry and the launching of the application, permits have been refused.[921] Also permits have been refused when applications for asylum had been denied.[922]

As indicated before, it is expected of asylum seekers to return to the RO where they originally applied to renew their permits,[923] and failure to apply for renewal results in

[916] UNHCR date unknown https://unhcr.org/countries/south-africa.
[917] Ziegler 2020 CCR 89-90; see also Kavuro 2022 Obiter 74-76.
[918] Ziegler 2020 CCR 82-84.
[919] Katz and Maluwa "Refugees and Stateless Persons" 533.
[920] Ziegler 2020 CCR 76-77.
[921] Ziegler 2020 CCR 79.
[922] Ziegler 2020 CCR 80.
[923] Ziegler 2020 CCR 77.

them being declared as an illegal foreigner who may be detained.[924] Despite the ROs struggling to process valid applications due to a shortage of staff and putting limitations and caps on the number of applications accepted by the offices per day,[925] the Minister made the decision to close several of the ROs.[926] Asylum seekers who entered the country through Cape Town, for instance, were forced to apply at the remaining ROs in other parts of the country.[927] Asylum seekers and refugees are excluded from participating in activities that can affect their choices since they are prohibited from political participation. They have also been denied the right to employment, education and registration of marriage based on the provisions contained in the Amendment Act.[928]

Asylum seekers have also been barred from applying for residence permits, and in the event that they wanted to apply, the application should be done outside of SA.[929] All of these issues were practically illustrated during the refugee crisis in SA between 2019 and 2020 when asylum seeking applicants and refugees were evicted from the UNHCR offices in Cape Town where they protested.[930] They requested assistance to be resettled outside SA as there was a lack of protection from the state. There were delays in documentation finalisation and xenophobic attacks[931] were being launched against this category of persons in the country.[932] During these attacks, several people were

[924] Ziegler 2020 CCR 80.

[925] Ziegler 2020 CCR 76-77.

[926] Ziegler 2020 CCR 77-78; see also Katz and Maluwa "Refugees and Stateless Persons" 534.

[927] Scalabrini Centre, Cape Town v Minister of Home Affairs [2017] 4 All SA 686 (SCA) para 12.

[928] Ziegler 2020 CCR 81, 101-102; see also Kavuro 2022 Obiter 74-76; see also Minister of Home Affairs v Watchenuka 2004 4 SA 326 (SCA); see also Governing Body of the Juma Musjid Primary School v Essay 2011 8 BCLR 761 (CC) (11 April 2011); see also Mzalisi v Ochuqwu [2019] ZASCA 138 (SCA).

[929] Ziegler 2020 CCR 86-87.

[930] Kiewit 2020 https://mg.co.za; see also BBC 2020 https://bbc.com; see also Shoba 2019 https://dailymaverick.co.za; see also Shoba and Tobias 2019 https://dailymaverick.co.za; see also Kavuro 2022 Obiter 69.

[931] Khan "The evolution of refugee law in South Africa" 13.

[932] Kiewit 2020 https://mg.co.za; see also BBC 2020 https://bbc.com; see also Shoba 2019 https://dailymaverick.co.za; see also Shoba and Tobias 2019 https://dailymaverick.co.za.

killed, businesses were plundered and destroyed and several families were forced to flee to other parts of the country.[933]

SA's restrictive policies and the comments of representatives of the country contributed to the crisis.[934] The fact that the Minister of Home Affairs stated that migrants have no reason to flee their countries and they are overburdening the SA system enflamed the negative feelings that South African citizens harboured towards these people.[935] As a result of the eviction, the asylum seekers had no place to stay and were forced to take refuge in a church building in Cape Town pending the requested reallocation.[936] During their stay in the church building, their basic human rights were violated as they did not have access to basic services.[937] Several of the asylum seekers and refugees who had to stay in these conditions did not have the required permits as they had been waiting for years to have their applications heard and finalised by SA.[938]

The domestic courts have addressed these issues by relying on the principle of nonrefoulement and human rights to declare the practices and provisions of refugee law in SA as unconstitutional.[981] In fact, as indicated before, the non-refoulement principle has been negatively affected by administrative processes, actions and decisions taken by SA.[939] The courts have ruled that the compulsory return of applicants to the specific RO where they initially applied is unreasonable as it can be an expensive and timeconsuming exercise in the event that relocation has already taken place.[983] As indicated before, this can also have a negative effect on the

[933] HRW 2019 https://hrw.org.

[934] Shoba and Tobias 2019 https://dailymaverick.co.za; see also Kavuro 2022 Obiter 55.

[935] Shoba and Tobias 2019 https://dailymaverick.co.za; see also Dawson, Gandar and Ekambaram 2019 https://dailymaverick.co.za; see also Kavuro 2022 Obiter 69-70.

[936] Kiewit 2020 https://mg.co.za; see also BBC 2020 https://bbc.com; see also Shoba 2019 https://dailymaverick.co.za; see also Shoba and Tobias 2019 https://dailymaverick.co.za.

[937] Shoba and Tobias 2019 https://dailymaverick.co.za.

[938] Shoba and Tobias 2019 https://dailymaverick.co.za. [981]
Ziegler 2020 CCR 72.

[939] Ziegler 2020 CCR 76. [983]
Ziegler 2020 CCR 77.

employment and the children of the applicant. This issue results in the violation of the refugees' rights to free movement and choice of place of residence.[940]

Local courts have also addressed the refusal to issue permits in the event of delays and to renew and reissue permits, as this leaves vulnerable people without protection.[941] Even though the courts have ordered the reopening of some of these offices,[942] they have acknowledged that "the obligations of the government to refugees are neither unrestrained nor undefined. The material resources of governments are limited".[943] Nonetheless, the court ordered the reopening of an RO in Cape Town as its closure was seen to be an "irrational and unlawful" move.[944] The South African courts have even found that the review process was "overburdened"[945] and that there were "glaring defects in the decision and decision-making process",[946] and that the decisions were "systematically dysfunctional".[947]

With regard to the limitation of the rights to employment, education and even registration of marriage, the domestic courts have found that the rights contained in the Bill of Rights applies to everyone within the territory of SA, and that limitation specifically violates the right to human dignity.[948] With regard to residence permits,

---

[940] Ziegler 2020 CCR 78-79; see also Minister of Home Affairs v Scalabrini Centre [2013] ZASCA 134; 2013 6 SA 421 (SCA) para 33; see also Article 26 of the Convention Relating to the Status of Refugees (1951).

[941] Ziegler 2020 CCR 79-81; see also Ruta v Minister of Home Affairs 2019 2 SA 329 (CC) para 51; see also Saidi v Minister of Home Affairs 2018 4 SA 333 (CC) para 30.

[942] Ziegler 2020 CCR 78; see also Minister of Home Affairs v Somali Association of South Africa Eastern Cape [2015] ZASCA 35, 2015 3 SA 545 (SCA).

[943] Ziegler 2020 CCR 78; see also Scalabrini Centre, Cape Town v Minister of Home Affairs [2017] 4 All SA 686 (SCA).

[944] Katz and Maluwa "Refugees and Stateless Persons" 534; see also Scalabrini Centre, Cape Town v Minister of Home Affairs [2017] 4 All SA 686 (SCA) paras 64 and 71.

[945] Katz and Maluwa "Refugees and Stateless Persons" 534; see also Tshiyombo v Members of the Refugee Appeal Board 2016 4 SA 469 (WCC) para 20.

[946] Katz and Maluwa "Refugees and Stateless Persons" 534; see also Katshinga v Chairperson of Standing Committee for Refugee Affairs (19726/2010) [2011] ZAWCHC (2 November 2011) 480.

[947] Katz v Maluwa "Refugees and Stateless Persons" 534; see also Tshiyombo v Members of Refugee Appeal Board 2016 4 SA 469 (WCC) para 14.

[948] Ziegler 2020 CCR 81-85; see also Minister of Home Affairs v Watchenuka [2004] 1 All SA 21 (SCA) (28 November 2003); see also Governing Body of the Juma Masjid Primary School v Essay 2011 8 BCLR 761 (CC); see also Mzalisi v Ochogwu [2019] ZASCA 138 (SCA).

courts have found that asylum seekers cannot be expected to apply outside of SA as they would have to surrender their asylum permits.[949] The prohibition on participation in political activities has not yet been challenged in court. Nevertheless, as the rights to freedom of expression, assembly, association and political choices are protected by the South African Constitution[950] and this exclusion would affect the dignity and liberty of asylum seekers and refugees, it can be argued that this provision is discriminatory of nature.[951][952]

As recently as February 2023, the Cape Town High Court found that certain provisions of the Act are unconstitutional and the matter has been referred to the CC for final declaration. In the matter of Scalabrini Centre of Cape Town v Minister of Home Affairs,[996] the applicants instituted an application to have sections 22(12) and (13) declared unconstitutional. The applicant is an institution that acts to protect migrants, asylum seekers and refugees. The applicant argued before court that asylum seekers who do not have documents are illegal foreigners and can thus be deported or detained. This can result in the return of people to situations where they might be subjected to persecution. These people should therefore be provided with an opportunity to apply for a visa and in the event that there is a delay in doing so, they should not be prohibited. They emphasised that when the main asylum seeking applicant is treated as an illegal foreigner, the dependents included in their application is dealt with in a similar manner. Consequently, there is a risk that children can be subjected to deportation. The applicant argued that these provisions are against the non-refoulement principle contained in international law and the Constitution, making it unconstitutional.

Although they acknowledged that the provisions are unconstitutional, the Respondents argued that these provisions are "reasonable and justifiable" and were implemented to

[949] Ziegler 2020 CCR 86; see also Ahmed v Minister of Home Affairs 2019 1 SA 1 (CC) para 59.
[950] Ziegler 2020 CCR 102; see also ss 16, 17, 18 and 19 of the Constitution of the Republic of South Africa, 1996.
[951] Ziegler 2020 CCR 102; see also Kavuro 2022 Obiter 74-76.
[952] SA 249 (WCC) paras 1, 4, 5, 7.5, 9, 10, 25, 28, 29, 30, 31, 32, 34, 35, 37, 37 and 58.

have asylum seekers renew their visas timeously to prevent backlogs in the system. In support of this argument, the Respondents contended that the issuing of an asylum permit is temporary and may be subjected to certain terms and conditions. Furthermore, the frequent renewal of the permit allows for a distinction to be made between those who are actually seeking asylum and those who are simply abusing the process to settle in the country. Also, this procedure is a deterrent measure and less administrative than charging a penalty as provided for in the old Act, as it forces the applicants to have their applications finalised, consequently clearing the backlog. According to the Respondents, the declaration of abandonment is also automatically reviewable by the Standing Committee. If the applicant can give justifiable reasons for not appearing, the endorsement can be refused. In response to the main argument of the Respondents, the applicants argued that the DHA was responsible for the existing backlogs as they did not have sufficient centres and resources to process the applications. The asylum seeking applicant has to renew their permit at the original application centre and the centres issue temporary permits with regular return dates. The applicants also reiterated that in certain circumstances, the asylum seeking applicants fail to renew their permit due to circumstances over which they do not have any control. Sometimes they do not have the funds to attend to the RO, they are not able to take leave at work, or they are not able to find someone to take care of their children.

The court used what is referred to as the "two-stage test", which entails a determination on "whether these provisions infringes on any right in the Bill of Rights and if there is such an infringement, whether it is reasonable and justifiable in terms of section 36 of the Constitution".[953] The last mentioned section determines as follows:[998]

> Limitation of rights
>
> 36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an

[953] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC) para 10. [998] Section 36 of the Constitution of the Republic of South Africa, 1996.

open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) The nature of the right

(b) The importance of the purpose of the limitation

(c) The nature and extent of the limitation

(d) The relation between the limitation and its purpose (e) Less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

In analysing the nature of the right in question in this matter, the court[954] specifically referred to Article 33 of the 1951 Refugee Convention and its 1967 Protocol, which clearly indicates that no person may be returned to a country where they may face persecution based on certain grounds. This principle of non-refoulement applies to both refugees and asylum seekers, as well as to the country of origin as well as any other country where the applicant may face persecution.

The court described it as the "cornerstone of international refugee protection" and as "critical and essential for refugees, migrants and asylum seekers, and is thus wellestablished under international law".[955] In this regard, the court proceeded to analyse South African refugee law, which also contains the principle of non-refoulement as well as the other provisions that deal with abandonment, decisions and offences. In terms of the provisions of the South African refugee law as discussed before, an asylum seeking applicant will only be issued with a visa that should be renewed on a regular basis. Only once the applicant is recognised as a refugee will they be issued with a long-term valid permit.

According to the judgment of the court, the average turnaround time for refugee recognition in SA is approximately five years, which means that there will be several renewals. As long as an asylum seeker is in possession of a valid permit, they are

[954] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC) paras 13, 15, 17, 23, 24, 26 and 57.

[955] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC) paras 13 to 15.

allowed to stay in the country, work, study and access other services in the country.[956] Once that permit is withdrawn, the person is classified as an illegal foreigner who is no longer permitted to perform the aforementioned activities and who has to be deported.[957] As a result, the dependents, and more relevantly the children of the applicant, are affected as well.[958] In response to the fact that children in these circumstances are left without legal documents and are therefore left vulnerable to action by the state, the applicant argued that this is not in the best interest and wellbeing of the child, which is a principle protected by both international and municipal law.[959] Abandonment results in a violation of the requirements that children who seek refuge should be provided with "appropriate protection and humanitarian assistance in the enjoyment of applicable rights", that the circumstances of the individual child has to be considered, that the child must be heard, and that a child is an "individual with his own inherent dignity and rights".[960]

By considering the aforementioned arguments and the legal provisions, the court found that these provisions challenged before court result in an "extremely adverse limitation on the right of non-refoulement" and that there is "no defensible and logical connection between the limitation and its purpose".[961] The fact that an abandoned application is automatically reviewed by the Standing Committee is not sufficient for the court, as this review only relates to the reason for not renewing the permit rather than the reasons as to why the person had fled their country.[962] In fact, the court declared these provisions to be "clearly arbitrary" as it allows for deportation based on circumstances beyond the applicant's control rather than the actual facts of the case.[1008] According to the court, these provisions result in applications being prejudged without considering

[956] Saidi v Minister of Home Affairs 2018 4 SA 333 (CC) para 13.

[957] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC) paras 17 to 26.

[958] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC) paras 17, 26, 40 and 41.

[959] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC) paras 42 and 46.

[960] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC) paras 42, 44, 46 to 48, 51 and 52.

[961] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC) paras 58, 60 and 66.

[962] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC) para 59. [1008] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC) para 62.

the facts of the case, thus resulting in discrimination and unlawfulness.[963][964] The automatic limitation of the rights of children included in these applications are not justifiable for the court either.[965] Importantly, the court stated the following in paragraph 67:[966]

> [67] The right to non-refoulement is of great importance in the overall constitutional scheme, as it recognizes human beings right to dignity. In S v Makwanyane the Constitutional Court stated that the right to dignity and the right to life are intertwined, and are the most important of all human rights. The right to dignity is afforded to everyone. In Lawyers for Human Rights v Minister of Home Affairs the Constitutional Court held that as such, it should be understood to apply to everyone, both citizens as well as foreigners who may be in the country but have not been granted permission to enter or remain. In Minister of Home Affairs and Others v Watchenuka and Another the prinicipal was affirmed in the Supreme Court of Appeal.

In conclusion, the court found that the limitation of the right of non-refoulement was not justified and therefore sections 22(12), 22(13), Regulation 9 and Form 3 were declared to be unconstitutional and void.

When analysing the aforementioned issues, it is difficult not to agree with Ruvi Ziegler,[967] who has argued that the South African courts have not been complying with their obligations as stipulated in section 39[968] and section 233[969] of the Constitution. If they used international refugee law as the "primary interpretative source", the courts would have found that the South African legislation contradicts and violates the provisions of international refugee law. For instance, in South African law a person is

---

[963] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC) paras 63 and [964].

[965] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 para 65.

[966] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 para 67.

[967] Ziegler 2020 CCR 73-74.

[968] As indicated before, s 39 of the Constitution of the Republic of South Africa, 1996 stipulates that when the courts, tribunals or forums interpret the Bill of Rights, international law must be considered.

[969] As indicated before, s 233 of the Constitution of the Republic of South Africa, 1996 indicates that legislation must be interpreted in a way that is consistent with international law.

considered to be refugee if they comply with the requirements of the definition, while international refugee law does not require the act of formal recognition.

Asylum seekers are "presumptive refugees"[970] and may not be sent back to the country from which they came,[971] and no penalties may be imposed once a country has been entered and there is a delay in the application for asylum.[972] International law also protects everyone's freedom of association and expression[973] and does not prohibit asylum seekers and refugees from participating in political activities.[974] The 1951 Refugee Convention unambiguously and without limitations grants to refugees the right to work, to be self-employed, to study and in fact, the provisions state that these rights "shall" be granted.[975] This eliminates any choice of governments to limit or disregard these rights, clearly creating an international obligation that states should meet.[976] Internationally, asylum seekers are protected against detainment and in the event that detention is justified, the implementation and consideration of certain measures are required.[977] Many provisions contained in South African law are in contradiction to and inconsistent with international refugee law provisions as they result in discrimination, the restriction of the rights and protection of asylum seekers, and it constantly exposes them to possible deportation to a country where they might face persecution. This despite the fact that they might have a valid claim.[978]

As indicated by Ziegler,[979] the implementation of the amendments by the South African government is unlawful and it violates human rights and SA's international obligations.

---

[970] Ziegler 2020 CCR 79, 86, 99.

[971] Ziegler 2020 CCR 86.

[972] Ziegler 2020 CCR 79; see also Article 31(1) of the Convention Relating to the Status of Refugees (1951).

[973] Articles 19, 21 and 22 of the ICCPR (1966); see also Ziegler 2020 CCR 100.

[974] Ziegler 2020 CCR 100-101.

[975] Ziegler 2020 CCR 82-84; see also Articles 17, 18 and 22 of the Convention Relating to the Status of Refugees (1951).

[976] Ziegler 2020 CCR 84; see also Articles 17, 18 and 22 of the Convention Relating to the Status of Refugees (1951).

[977] Ziegler 2020 CCR 97.

[978] Ziegler 2020 CCR 74, 100.

[979] Ziegler 2020 CCR 103-104.

As indicated before, the amendments are also inconsistent and incompatible with the provisions of international refugee law. The proper consideration and application of international refugee law by the South African courts could have resulted in judgments with long-lasting effects and could have resulted in the declaration of the amendments as unconstitutional.[980]

The aforementioned matter was heard by the CC, and in December 2023 the order of the Western Cape High Court was confirmed. It was found that the process does not consider the principle of non-refoulement and possible persecution is ignored.[981] Refugees are recognised as a "vulnerable group that calls for compassion" and therefore the aforementioned provisions are in contrast with non-refoulement.[982] Furthermore, the provisions violate the right to dignity and the right to life as asylum seekers in terms of these provisions cannot work or have access to basic services, and can be arrested, detained and deported in these circumstances.[983] In conclusion, the court found that the subsections are "irrational and arbitary".[984]

Although this judgment is welcome, the position of refugees was further complicated by the proposal of the Minister of Home Affairs, Aaron Motsoaledi,[985] in November

2023 in the White Paper on Citizenship, Immigration and Refugee Protection (2023 White Paper).[986] He stated that "SA should withdraw from the UN refugee protection regime – and re-enter with exceptions on refugee rights. That's because courts have established jurisprudence unfavourable to state interest and because of a lack of resources." He indicated that SA has made a "serious mistake" to become a state party

[980] Ziegler 2020 CCR 74, 103.

[981] Scalabrini Centre of Cape Town v Minister of Home Affairs (CCT 51/23) [2023] ZACC 45 (12 December 2023) para 27(d).

[982] Scalabrini Centre of Cape Town v Minister of Home Affairs (CCT 51/23) [2023] ZACC 45 (12 December 2023) para 28.

[983] Scalabrini Centre of Cape Town v Minister of Home Affairs (CCT 51/23) [2023] ZACC 45 (12 December 2023) paras 36-40.

[984] Scalabrini Centre of Cape Town v Minister of Home Affairs (CCT 51/23) [2023] ZACC 45 (12 December 2023) para 40.

[985] Merten 2023 https://dailymaverick.co.za.

[986] GN 4061 in GG 49690 of 10 November 2023 White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa No 4061 (2023).

to these regimes without reservations and that this is important since SA lacks the resources to realise certain refugee rights.

The 2023 White Paper suggests a "new policy framework with exceptions" and that SA must implement new legislation that deals with citizenship, immigration and refugees in one act.[987][988] The Minister argued that the main reason for this suggestion is that legislation should cater for the new challlenges SA is facing.[1033] The new act should include the "best international practices in dealing with refugee protection".[989][990] The Minister recognised that there are shortcomings in the decision-making process, that the procedures are time-consuming, and that the system is being abused, and made certain suggestions.[1035] These include that final decisions on asylum application only be made by competent authorities, the first safe country principle[991] be applied, and that those who enter the country unlawfully should show good cause for illegally being present in the territory.[992]

The 2023 White Paper has been published for comments by the public and once these comments have been considered, the next step will be to draft the proposed legislation.[993] The reform suggestions will bring complications[994] since SA will be able to pick which rights and commitments they are willing to comply with. This route is easier than granting the necessary resources to improve the situation and the

[987] 51.1 and 51.2 of GN 4061 in GG 49690 of 10 November 2023 White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa No 4061 (2023).

[988] of GN 4061 in GG 49690 of 10 November 2023 White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa No 4061 (2023).

[989] 51.3 of GN 4061 in GG 49690 of 10 November 2023 White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa No 4061 (2023).

[990] and 125 of GN 4061 in GG 49690 of 10 November 2023 White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa No 4061 (2023).

[991] This means that in the event that a different country is transited while travelling to SA, an asylum application has to be made in that safe country instead of SA.

[992] 122.6 to 122.8 of GN 4061 in GG 49690 of 10 November 2023 White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa No 4061 (2023).

[993] Merten 2023 https://dailymaverick.co.za.

[994] Masiko-Mpaka and Seibert 2023 https://hrw.org.

treatment of refugees in the country. The first safe country principle can also create problems as there is no guarantee the the first country is safe for asylum seekers and refugees.

The aforementioned actions by the domestic government indicate that the South African government prefers to follow a narrow and restrictive approach to refugees. Therefore, even though the existing legislation contains similar provisions as the international and African regional refugee law frameworks, SA is not accepting the broader interpretation that is required to recognise and accommodate the category of climate refugees.

4.6 Conclusion

Throughout history, SA has been a popular migration destination in Africa. Migration to SA developed throughout the country's complex history. Its nature is dynamic as it occurs for several reasons and is driven by different factors.[995] As has been illustrated above,[996] there are several advantages and disadvantages to migration and it also presents numerous challenges to the local government. In response to these challenges, the South African government adopted the Aliens Control Act, which was repealed and replaced by the Immigration Act.[997] The Immigration Act has since been amended on several occasions to keep up with the modern day circumstances in SA.

SA has itself been described as being vulnerable to climate change,[998] but it can soon also experience migration that is driven by events associated with climate change. Although SA has acknowledged that action and response is required by adopting the

[995] See 4.2 for a discussion on the development of South African migration law.

[996] See 4.2 for an analysis of the advantages, disadvantages and challenges presented by migration.

[997] See 4.2 and 4.3 for an explanation on the Aliens Control Act 96 of 1991 and the Immigration Act 13 of 2002 as well as its amendments.

[998] Institute at UC Berkeley 2023 https://belonging.berkeley.edu; see also World Bank Group Climate risk country profile: SA 5.

Climate Change Bill, events related to climate change have already affected SA in several ways.[999] On the one hand, it has resulted in excessive rainfall and floods, and on the other hand extreme temperatures have caused drought and water scarcity. All of these circumstances also affect food security and causes diseases to break out.

People who are displaced internally as a result of these conditions are protected by law, while those who cross borders enjoy limited to no protection as the category of climate refugees has not yet been formally recognised by international or African regional refugee law. This chapter set out to determine whether South African refugee law is sufficient to protect this category of refugees. In order to do so, the chapter analysed and examined the historical development and content of the domestic refugee law framework.

After apartheid ended, SA experienced an influx of refugees who fled the negative consequences of armed conflicts in neighbouring countries.[1000] SA became a party to 1951 Refugee Convention and its 1967 Protocol as well as the 1969 OAU Convention, but it only had the restrictive Aliens Control Act in place to deal with refugees. It later adopted the South African Refugees Act and its Regulations, in terms of which it incoporated the important provisions contained in the international and African regional refugee law instruments. It also adopted the international and African regional definitions of a refugee.[1001]

In 2018, certain amendments to the South African Refugees Act were adopted. These complicate the asylum application procedure and limit the rights of refugees.[1002] This is despite the fact that SA has a duty to accept entering refugees and to respect,

[999] See 4.3 for a discussion on climate change and disaster displacement in SA.

[1000] See 4.4 for the historical context and development of South African refugee law. See also Katz and Maluwa "Refugees and Stateless Persons" 502-507; see also Migrants Refugees Migration Profile South Africa 1; see also UNHCR date unknown https://unhcr.org/countries/south-africa.

[1001] See 4.1.1 for an examination of the South African Refugees Act and its Regulations before amendment.

[1002] See 4.1.2 for an examination of the South African Refugees Act and its Regulations after amendment.

protect, guarantee and realise their human rights.[1003] This duty is embedded in international and regional refugee law frameworks, to which South Africa is a member state.[1004] The amended provisions are in direct contrast with the existing international and regional refugee law, even though the Constitution clearly indicates that international law plays a prominent role in SA[1005] as was indicated in the discussion above.[1006] Some of these amendments have even been challenged before South African courts and they have been found to be unconstitutional.[1007]

Still, the Minister of Home Affairs suggested in 2023 that SA withdraw from the international refugee law framework and re-enter it with reservations, as SA does not have the capacity or resources to comply with its international obligations in terms of these laws.[1008] This action would be easier than implementing measures to protect refugees. The actions of the local government and the lack of willingness to operate and to assist indicate that a narrow and restrictive approach is preferred to address the issue.[1009] The government's attitude towards asylum seekers and refugees have also resulted in the ill treatment of refugees. It has even provoked xenophobic outlooks and actions among locals.[1055] The main objective of this discussion was to determine whether the South African refugee law in its current form is sufficient to cover the category of climate refugees.

It is clear that SA's constricted approach and attitude towards refugees is in direct contrast with the expansive approach that the international and African regional

---

[1003] See 4.5.

[1004] See 4.1 to 4.5; see also Katz and Maluwa "Refugees and Stateless Persons" 507. As indicated before South Africa ratified the respective Conventions and Protocol during 1995 and 1996.

[1005] Sections 39(1)(b), 231, 232 and 233 of the Constitution of the Republic of South Africa, 1996.

[1006] See 4.2.

[1007] See 4.5 for a discussion on the insufficiency of South African refugee law. Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC).

[1008] Merten 2023 https://dailymaverick.co.za; see also Gen Not 4061 in GG 49690 of 10 November 2023 White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa No 4061 (2023).

[1009] See 4.5. [1055]
See 4.5.

communities prefer.[1010] Consequently, it is highly unlikely that the South African government and the legislation in its current form will recognise, accommodate and assist climate refugees.

In the next chapter, the concept of climate change is explained, with specific reference to its negative effects and the events it causes that result in the displacement of persons.[1057] The chapter also elaborates on the recognition of climate refugees as well as the lack of legal protection for these people.[1011] This lays the foundation for the argument in favour of legal reform in Chapter 6.[1059]

[1010] See 2.6 and 3.6 for a discussion on the arguments in favour of application of international and African regional refugee law to climate refugees. [1057] See 5.2.
[1011] See 5.3 and 5.4. [1059]
See Chapter 6.

CHAPTER 5

CLIMATE CHANGE AND THE RECOGNITION OF CLIMATE REFUGEES

5.1 Introduction

In 2021, climate change,[1012] which refers to the change in the earth's global temperature due to greenhouse gas emissions,[1013] and its negative effects was identified as one of the largest challenges the international community is facing in modern times.[1014] In 2022, the UN expert Ian Fry stated that "human-induced climate change is the largest, most pervasive threat to the natural environment and societies the world has ever experienced, and the poorest countries are paying the heaviest price".[1015] In this regard, Fry has stated that the "overall effect of inadequate actions to reduce greenhouse gas emissions is creating a human rights catastrophe, and the costs of these climate change related disasters are enormous".[1016] In fact, the World Health Organization (WHO) has indicated in 2023 that "research shows that 3.6 billion people already live in areas highly susceptible to climate change. Between 2030 and 2050, climate change is expected to cause approximately 250 000 additional deaths per year, from under nutrition, malaria, diarrhoea and heat stress alone".[1017]

The international community has been addressing the issue of climate change by adopting several instruments and entering into agreements. In so doing, role players have pledged to implement measures to mitigate, prevent and adapt to climate change. This chapter examines the concept of climate change, and the UNFCCC, Kyoto Protocol, Paris Agreement and the Cancun Agreements.[1018] This analysis will allow for a better

[1012] See 5.2 for an explanation of the concept of climate change in Chapter 5.

[1013] UN date unknown https://www.un.org/en/climatechange/what-is-climate-change.

[1014] UN 2021 https://press.un.org/en/2021/sc/14445.doc.htm; see also UN 2021 https://press.un.org/en/2021/sc14445.doc.htm.

[1015] OHCHR 2022 https://ohchr.org.

[1016] OHCHR 2022 https://ohchr.org.

[1017] WHO 2023 https://who.int.

[1018] See 5.2.1; see also UNFCCC (1992); see also Kyoto Protocol to the UNFCCC (1997); see also Cancun Agreements (2010); see also Cancun Adaptation Framework Doha Amendment (2012); see also Paris Agreement (2015).

understanding of the concept of climate change and the measures that have already been implemented by the international community to address this issue. The focus of the study, however, is not climate change per se, which would necessitate and in-depth analysis of the concept and all the applicable environmental law influences. Instead, this study focuses on the effects of climate change on migration, and more specifically the external displacement of people as a result.

Although the aforementioned instruments are reforming in nature, their application and the realisation of their goals have been challenging.[1019] Despite these ideals, greenhouse gas emissions have in fact increased, further increasing temperatures with dire consequences for the planet.[1020] The year 2023 has been identified as being the warmest year on record.[1021] Climate change has been already been proven to contribute to the increase in the frequency and intensity of heat waves, drought, wildfires, floods and natural disasters.[1022] It has also been proven to affect the habitability of territories and to negatively affect the realisation of human rights.[1023] Although it does not discriminate, more vulnerable states are more susceptible to the consequences than developed states, whose actions contribute the most to climate change.[1024] The chapter illustrates the intensity of these effects by identifying and explaining them with specific reference to practical examples and existing circumstances.[1025]

[1019] See 5.2.2 for an analysis of extreme weather events and natural disasters exacerbated by climate change.

[1020] See 5.2.2 for an analysis of extreme weather events and natural disasters exacerbated by climate change; see also IPCC Working Group II contribution to the Sixth Assessment Report; see also UN 2021 https://news.un.org/en/story/2021/08/1097362.

[1021] WMO 2024 https://wmo.int.

[1022] EEA 2023 https://eea.europa.eu.

[1023] See 5.2.

[1024] UNFCCC Outcome of the first global stocktake – Draft decision -/CMA.5 – Proposal by the President para 15.

[1025] See 5.2.2 for an analysis of extreme weather events and natural disasters exacerbated by climate change.

The discussion also illustrates that these events can result in the displacement of persons.[1026] In September 2023, the UN indicated that these events have already

"caused an average of more than 20 million people to leave their homes and move to other areas in their countries each year".[1027] Migration and displacement due to climate change has been described as being "one of the defining challenges been seen to manifest across different regions in different ways".[1028] As indicated before,[1029] people who are displaced internally as a result of these conditions are recognised and protected in terms of the existing mechanisms that are already in place.[1030] No corresponding provisions are made for the recognition of persons who are forced to cross borders in these circumstances and they are therefore left vulnerable to human rights violations.[1031]

As discussed before[1032] and elaborated on in this chapter,[1033] the main reason for the vulnerability of internationally displaced persons in these circumstances is that international community until recently only recognised climate change as a driver of movement if it was combined with other factors, such as conflict.[1034] It was only in 2020 that the UNHRC expressly recognised the existence of what it referred to as climate refugees in the matter of Mr Teitiota discussed in previous chapters.[1035] The facts of the Teitiota matter, the arguments presented and the approach followed by both NZ and the UNHRC are of significance to this study and are therefore comprehensively evaluated and analysed in this chapter. The main objective of this discussion is to determine whether people in fact cross borders to escape the negative

[1026] See 5.3.
[1027] UNHCR 2023 https://unhcr.org; see also Mohamed 2023 https://aljazeera.com.
[1028] Mohamed 2023 https://aljazeera.com.
[1029] See 2.3, 3.3, 4.3 and 5.3 for a discussion of climate change and disasters displacement.
[1030] See 2.3 and 5.3 for a discussion on the UN Guiding Principles on Internal Displacement (1998); see also 3.2 for an analysis of the Kampala Convention (2012).
[1031] See 5.3.
[1032] See 2.2.
[1033] See 5.3.
[1034] Ghaly 2021 ANU URJ 94-96.
[1035] See 2.2; see 5.3 and 5.4; see also UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/2016.

effects of climate change on the environment, and if they do, whether are they are recognised, protected and covered by existing legal frameworks. This will set the stage for the examination of the existing legal framework and the proposal of a new treaty to protect the category of climate refugees in the next chapter.

5.2 Climate change

As indicated in Chapter 2,[1036] the international community has been facing arduous challenges due to the increasingly negative impact of climate change on the environment. In fact, the IEP predicted in September 2020 that approximately 1.2 billion people could be climate refugees by 2050.[1037] Climate change occurs when excess greenhouse gases are released into the atmosphere,[1038] leading to changes global climate patterns.[1039] Gases are also released into the atmosphere by wildfires or by deforestation for example, exacerbating the problem.[1040]

5.2.1 The development of instruments to address climate change

In 1992, the UNFCCC was created with the following objective:[1041]

> Stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt

[1036] See 2.3 for a discussion on climate change and disaster displacement.

[1037] IEP Over one billion people at threat of being displaced by 2050 due to environmental change, conflict and civil unrest 1.

[1038] Vinuales 2011 LJIL 223; see also Dugard and Tladi "International Environmental Law" 603.

[1039] Article 1(5) of the UNFCCC (1992) defines greenhouse gases as the gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation. The list of greenhouse gases can be found in Annexure A of the Kyoto Protocol to the UNFCCC (1997) and includes oil, natural gas, waste disposal and burning of fields for example. Article 1(2) of the UNFCCC (1992); see also UNFCCC 2011 "Fact sheet: Climate change science the status of climate change science today" 1-2.

[1040] NOAA The impact of wildfires on climate and air quality; see also EC date unknown https://climate.ec.europa.eu/climate-changte/causes-climate-change_en#; see also Dugard and Tladi "International Environmental Law" 603.

[1041] Article 2 of the UNFCCC (1992).

naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

In terms of Article 3 of the UNFCCC, the environment must be protected, states should limit, prevent and mitigate the effects of climate change, and assistance must be provided to developing states and those states that are most severely affected by climate change. The Kyoto Protocol was adopted in 1997[1042] with the purpose of obligating states to limit and ultimately reduce the emission of greenhouse gases within a specified timeframe.[1043] The Kyoto Protocol that came into force in February 2005[1044] is based on the principle of CDR and specific national and regional development priorities.[1045]

The Kyoto Protocol places a stronger obligation on developed states as it acknowledges that they contribute more to the emission of greenhouse gases. The aim is to reduce the emission of these gases by five percent during the commitment period.[1046] The Kyoto Protocol also contains provisions that force states to verify, monitor, record and report the emission of gases.[1047] However, the summits struggled to produce an agreement containing terms and conditions and responsibilities to which states would be willing to commit.[1048]

Nonetheless, states contracted the Cancun Agreements at the 2010 climate change summit. In terms of this agreement, states agree to take the necessary steps to deal reduce gas emissions that cause climate change.[1049] The purpose of the Cancun

[1042] UNFCCC date unknown https://unfccc.int/kyoto_protocol#.

[1043] Article 3(1) of the Kyoto Protocol to the UNFCCC (1997); see also Dugard and Tladi "International Environmental Law" 604; see also UNFCCC date unknown https://unfccc.int/lyoto_protocol#.

[1044] UNFCCC date unknown https://unfccc.int/kyoto_protocol#; see also Dugard and Tladi "International Environmental Law" 604.

[1045] Article 10 of the Kyoto Protocol to the UNFCCC (1997); UNFCCC date unknown https://unfccc.int/kyoto_protocol#; Dugard and Tladi "International Environmental Law" 604.

[1046] Article 3(1) of the Kyoto Protocol to the UNFCCC (1997); see also Dugard and Tladi "International Environmental Law" 604.

[1047] Article 3 of the Kyoto Protocol to the UNFCCC (1997); see also UNFCCC date unknown https://unfccc.int/kyoto_protocol#.

[1048] Dugard and Tladi "International Environmental Law" 604.

[1049] UNFCCC 2011 https://unfccc.int; see also Liu 2011 ELR 43.

Agreements is to encourage the reduction of gas emissions by adopting the appropriate measures, providing for funding and other supporting methods, and efforts to assist developing countries and the most vulnerable to mitigate the effects of climate change and to adapt.[1050] One of the objectives of the Cancun Agreements is also to ensure that forests are protected through the "reduction of emissions from deforestation and forest degradation in developing countries (REDD+)" and they provide for the regular submission of reports on mitigation and reduction in an effort to monitor.[1051] The Green Climate Fund (GCF) was established under the auspices of the UNFCCC and COP to control the funds contributed and to use it as needed.[1052]

Importantly, the Cancun Adaptation Framework was created to regulate the cooperative methods to assist states with the implementation of adaptation measures. [1053] The Adaptation Committee established in terms of the Cancun Adaptation Framework provides assistance with implementation of adaptation measures and monitoring.[1054] Adaptation refers to the implementation of measures to help communities adapt to the affected environment and conditions. In certain circumstances, it can require the relocation of people to safer areas while considering the protection and safeguarding of human rights.[1055] Furthermore, as discussed later in this study, it also requires the implementation of measures to reduce the impact of climate change events.[1056] International bodies continue to implement programmes to help states adopt these measures in their local policies.[1057]

In 2012 the Doha Amendment was adopted, in terms of which signatory states again committed to reduce greenhouse gases for a further period between 2013 and

[1050] UNFCCC 2011 https://unfccc.int.; see also Liu 2011 ELR 44.
[1051] Liu 2011 ELR 44-47.
[1052] Liu 2011 ELR 45.
[1053] Liu 2011 ELR 47; see also UNFCCC 2011 https://unfccc.int.
[1054] UNFCCC 2011 https://unfccc.int.
[1055] UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR 66.
[1056] Mayer 2011 CJIELP 370-372.
[1057] UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR 66-67.

2020.[1058] In addition, the list of greenhouse gases contained in Annexure A was extended.[1059] With the adoption of an international treaty on climate change in 2015, it became unclear whether the Doha Amendment would ever come into force.[1060]

The UNHRC recognised in 2008[1061] that climate change is threatening communities and that it affects the exercising of human rights. It expressed concern about the vulnerability of island states and other developing states to the effects of climate change and requested the OHCHR to research the relationship between climate change and human rights. As discussed below, the Maldives made a comprehensive submission to the UNHRC regarding the impact that climate change has had on the islands and the rights of Maldivians.[1062] In the meantime, this topic was the main focus of the Resolutions and other documents, and also at several conferences and discussions.[1063] In 2015, the UNHRC held a full-day discussion on the topic and the findings were recorded in the Summary Report H/HRC/29/19.[1064] It held two sessions that focused on the implementation of measures to address climate change as it affects human rights and on the effect that climate change has on the ability of states to realise human rights.[1065] The heads of states such as Kiribati, Tuvalu and Bangladesh were part of the discussions. As discussed below, these states are struggling due to climate change events.[1066] Not only did participants emphasise that more focus should be placed on human rights by incorporating this aspect in agreements and instruments,

[1058] Doha Amendment to the Kyoto Protocol to the UNFCCC (2012); see also Dugard and Tladi "International Environmental Law" 604.

[1059] Annex A of the Doha Amendment to the Kyoto Protocol to the UNFCCC (2012); see also UNFCCC date unknown https://unfccc.int/kyoto_protocol#.

[1060] Dugard and Tladi "International Environmental Law" 604-605.

[1061] UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR.

[1062] UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR.

[1063] OHCHR Understanding human rights and climate change 10-12.

[1064] OHCHR Understanding human rights and climate change 5; see also OHCHR Summary report of the OHCHR on the outcome of the full day discussion on specific themes relating to human rights and climate change H/HRC/29/19 paras 3 and 4.

[1065] OHCHR Summary report of the OHCHR on the outcome of the full day discussion on specific themes relating to human rights and climate change H/HRC/29/19.

[1066] OHCHR Summary report of the OHCHR on the outcome of the full day discussion on specific themes relating to human rights and climate change H/HRC/29/19 para 34.

they indicated that action is necessary.[1067] Although there have been national efforts, it was indicated that action should be taken particularly in respect of securing the right to food and nutrition and that states have to prevent and where necessary mitigate the negative effects of climate change on the most vulnerable.[1068]

In certain circumstances, the most vulnerable are also those who have made the most limited contribution to climate change. This means that climate change and its challenges is an issue that should be addressed internationally.[1069] The Paris meeting in 2015 was the best opportunity for this approach to be absorbed into a global agreement.[1070] The UNHRC suggested that the instrument should obligate developed countries to address issues of climate change, provide for funding and adaptation, monitor the effects on human rights, create a specialised court and compel the use of alternative sources to lower emissions.[1071] The OHCHR published a report in the same year[1072] in which they found that climate change does have a negative effect on the realisation of human rights.[1073] This made clear that human rights should be incorporated in the development and creation of prevention, mitigation and adaptation measures. This inclusion will ensure that the measures implemented in this regard are more "effective and inclusive". Setting state obligations for such an approach will ensure the recognition and protection of the human rights of those affected by climate change.[1074] The rights that are most affected in these circumstances are the right to life, self-determination, development, housing, education, food, water and sanitation.[1075] Although the effects of climate change do not distinguish between

[1067] OHCHR Summary report of the OHCHR on the outcome of the full day discussion on specific themes relating to human rights and climate change H/HRC/29/19 paras 9 and 10.

[1068] OHCHR Summary report of the OHCHR on the outcome of the full day discussion on specific themes relating to human rights and climate change H/HRC/29/19 paras 8-11 and 50.

[1069] OHCHR Summary report of the OHCHR on the outcome of the full day discussion on specific themes relating to human rights and climate change H/HRC/29/19 paras 8, 21, 31, 51, 67 and 78.

[1070] OHCHR Summary report of the OHCHR on the outcome of the full day discussion on specific themes relating to human rights and climate change H/HRC/29/19 para 37.

[1071] OHCHR Summary report of the OHCHR on the outcome of the full day discussion on specific themes relating to human rights and climate change H/HRC/29/19 para 41.

[1072] UNCCL 2015 https://uncclearn.org.

[1073] OHCHR Understanding human rights and climate change 2.

[1074] OHCHR Understanding human rights and climate change 7, 10.

[1075] OHCHR Understanding human rights and climate change 13-24.

groups and people, they do affect the rights of those who are already in vulnerable situations more than others.[1076]

However, the focus of these efforts was not on the displacement caused by climate change. This issue was addressed for the first time at the COP 16. Here participants indicated that states should contribute according to their level of contribution to climate change to help developing states adapt to and address the issue of climate displacement.[1077] The topic that was further discussed at COP 18 and COP 19[1078] and it was eventually incorporated into the Paris Agreement, which was adopted at COP 21.[1079] The Paris Agreement was created with the objective to "strengthen the global response to the threat of climate change by holding the increase in the global average temperature below two degrees Celsius above pre-industrial levels".[1080] It contains provisions that obligate states to provide a report on national efforts and plans to address climate change every five years.[1081] Article 7 provides that states should implement measures for adaptation to the negative effects of climate change. This article also recognises that support is necessary to achieve these goals, especially for states that are vulnerable to the effects of climate change. It also requests states to respect migrants[1082] and it further emphasises the issue of displacement due to climate change by providing for the creation of a task force to investigate this issue.[1083] Their report was published in 2018 and it recognised that climate change events present a problem that requires a human rights protective response.[1084] The suggested response largely focuses on adaptation, prevention, facilitation of migration and relocation.[1085]

[1076] OHCHR Understanding human rights and climate change 22-24.
[1077] Jolly and Ahmad 2014-2015 ISIL YBIHRL 231-232.
[1078] Jolly and Ahmad 2014-2015 ISIL YBIHRL 232-233.
[1079] UNFCCC date unknown https://unfccc.int/process-and-meetings/the-paris-agreement.
[1080] Article 2(1)(a) of the Paris Agreement (2015).
[1081] Article 4(9) of the Paris Agreement (2015).
[1082] Preamble to the Paris Agreement (2015).
[1083] Sciaccaluga International law and protection of "climate refugees" 146.
[1084] TFD Report of the TFD – September 2018 20 and 22.
[1085] TFD Report of the TFD – September 2018 79; see also Sciaccaluga International law and protection of "climate refugees" 148.

The Doha Amendment was ratified by two more states during October 2020[1086] and entered into force at the end of December 2020.[1087]

Despite these efforts, the Intergovernmental Panel on Climate Change (IPCC)[1088] released a report during July 2021 that indicated that human activity has resulted in a further 1.5°C increase in the earth's temperature.[1089] In fact, this report described it "as nothing less than a code red for humanity. The alarm bells are deafening, and the evidence is irrefutable".[1138] The report indicated that the detected changes to the earth's atmosphere, temperatures, sea levels and weather patterns were likely driven by human activity.[10901091] The report specified that concentrations of greenhouse gas in the atmosphere were extremely high, that there had been a rapid increase in global temperatures and that the earth has warmed by 1.1°C.[1092] Despite these warnings, the Agence France Presse (AFP) reported in 2023 that gas emissions were at their highest level and that "human-induced warming has been increasing at an unprecedented rate of over 0.2 degrees Celsius per decade".[1093] An IPCC report indicated in 2021 that what is known as the "Arctic sea ice area" had been reduced and that sea levels were raising at a fast rate.[1094]

The IPCC released a report in April 2022 that encouraged climate reaction that includes various local, national and regional policies and plans as well as the creation of

---

[1086] UNFCCC 2020 https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment.

[1087] Article 2 of the Doha Amendment to the Kyoto Protocol to the UNFCCC (2012); see also UNFCCC 2020 https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment.

[1088] According to the IPCC factsheet, the IPCC is a body of the UN that conducts scientific research on climate change. The body reports on the effects and risks and proposes methods and measures to adapt and to mitigate the negative effects of climate change.

[1089] UN 2021 https://news.un.org/en/story/2021/08/1097362. [1138] UN 2021 https://news.un.org/en/story/2021/1097362.

[1090] IPCC Working Group I contribution to the Sixth Assessment Report of the IPCC Climate Change [1091] : The physical science basis A.1 p 7; see also UN 2021 https://news.un.org/en/story/2021/08/1097362.

[1092] IPCC Working Group I contribution to the Sixth Assessment Report of the IPCC Climate Change 2021: The physical science basis A.1.1 at 7, A.1.3 – A.1.4 at 7-8, A.2.1 at 10A and A2.2 at 10; see also UN 2021 https://news.un.org/en/story/2021/1097362.

[1093] AFP 2023 https://citizen.co.za.

[1094] IPCC Working Group I contribution to the Sixth Assessment Report of the IPCC Climate Change 2021: The physical science basis A.1.7 at 8, A.2.3 at 10 and A.2.4 at 10.

institutions.[1095] The provisions in these policies and plans contain both mitigation and adaptation methods, and as indicated in the report, these can assist in addressing gaps in the law addressing climate change.[1096] The report also indicated that the integration of adaptation and mitigation will "advance progress towards sustainable development and that ambitious mitigation efforts will reduce the need for adaptation in the long term" and this supports what was referred to as an integrated approach.[1097] The various international cooperation efforts were also considered and the important role of non-state actors, climate clubs and other transnational and subnational organisations in fighting climate change was emphasised.[1098] Nevertheless, the report indicated that the goals of the Paris Agreement are not being realised and that the aforementioned role players could play an important role in reaching its goals and implementing its provisions.[1099]

The report further pointed to the importance of assisting developing states in addressing climate change, the linkage between climate mitigation and sustainable development, and the enhancement of human rights. However, despite all these efforts, energy emissions were at their highest in history.[1100] Scientists have observed the melting of arctic ice and glaciers, rising sea levels, increases in rainfall and warmer temperatures resulting in drought and creating the ideal environment for wildfires, all due to changes in the atmosphere.[1101] These conditions have also contributed to warmer ocean temperatures,[1102] which have a negative effect on marine life.[1103] In fact, it was warned that should action not be taken and these emissions not be lowered, the world would become "uninhabitable".[1104] As indicated by UN Chief Antonio Guterres, if the world does not respond to this warning and act accordingly, the

[1095] IPCC Working Group II contribution to the Sixth Assessment Report chapter 13.
[1096] IPCC Working Group II contribution to the Sixth Assessment Report para 13.2.
[1097] IPCC Working Group II contribution to the Sixth Assessment Report para 13.8.
[1098] IPCC Working Group II contribution to the Sixth Assessment Report chapter 15.
[1099] IPCC Working Group II contribution to the Sixth Assessment Report para TS 2 at 265 and chapters 15 and 16.
[1100] UN 2022 https://news.un.org.
[1101] IPCC Working Group II contribution to the Sixth Assessment Report paras 1.2.2, 6.5.4 and 15.6.4.
[1102] NASA 2023 https://earthobservatory.nasa.gov/images/151743/the-ocean-has-a-fever#.
[1103] UN date unknown https://un.org/climatechange/science/climate-issues/ocean-impacts.
[1104] UN 2022 https://news.un.org.

situation will result in "unprecedented heat waves, terrifying storms, widespread water shortages and the extinction of millions of species of plants and animals".[1105] The report indicated that events driven by climate change are already resulting in human suffering and it has forced people to abandon their homes.[1106]

5.2.2 Extreme weather events and natural disasters exacerbated by climate change

Despite this warning, an increase in temperatures and the rapid rise of sea levels have resulted in the world facing extreme conditions and more frequent disasters.[1107] In fact, the UN indicated in March 2021 that natural disasters have been occurring three times more frequently than 50 years ago.[1108] As indicated above, climate change results in a rise in temperatures, which results in the warming of oceans and the melting of ice and glaciers, which in turn results in rising sea levels.[1109] This mechanism has resulted in what the WMO calls extreme weather events such as cyclones and heavy rainfall that leads to flooding and landslides,[1110] heat waves and wildfires.[1111] These catastrophes negatively affect agriculture and infrastructure, which in return has devastating consequences for the economy of a state.[1112] The report predicted that due to climate change, these events are likely to occur more often and with greater intensity, and the humanitarian crises caused by these events reflect the reality of the

[1105] UN 2022 https://news.un.org.

[1106] Thompson 2022 https://unhcr.org; see also IPCC Working Group II contribution to the Sixth Assessment Report para 14.5.1.2.

[1107] WMO 2021 https://wmo.int/news/media-centre/state-of-climate-2021-extreme-events-and-ma jor-impacts; see also WMO 2021 https://wmo.int/media/news/weather-related-disastersincrease-over-past-50-years-causing-more-damage-fewer-deaths#.

[1108] UN 2021 https://news.org/en/story/2021/03/1087702#.

[1109] WMO State of Global Climate Provisional Report; see also WMO 2021 https://wmo.int/news/media-centre/state-of-climate-2021-extreme-events-and-major-impacts.

[1110] WMO 2021 https://wmo.int/news/media-centre/state-of-climate-2021-extreme-events-andmajor-impacts.

[1111] WMO State of Global Climate Provisional Report; see also WMO 2021 https://wmo.int/news/media-centre/state-of-climate-2021-extreme-events-and-major-impacts.

[1112] UN 2021 https://news.org/en/story/2021/03/1087702#.

challenges that result from climate change.[11131114] To exacerbate these conditions, an El Niño[1115] weather climate pattern developed during the course of 2023.[1116]

The last decade has been declared the warmest in history,[1117] 2020 was declared one of three warmest years,[1118] and the UN confirmed that the year 2022 was one of the eight hottest years ever documented.[1119] Some of the highest temperatures in years were recorded in 2022, and it was even reported that the month of March 2023 was one of warmest on earth.[1120] India had the hottest February month on record in

2023, [1121] while Beijing logged one of the highest temperatures since proper recordkeeping started.[1122] The intense increase in temperatures have resulted in an upsurge in extreme heat waves in South America, parts of South Asia and parts of Europe during the course of 2022 and 2023.[1123] These heat waves prompted what was referred to as a "false autumn in the UK",[1124] resulting in the death of 500 people[1125] and the necessity to save fish from dry rivers in Spain.[1126] It was even predicted that these temperatures could be beyond what humans can survive[1127] and that this will

[1113] IPCC Working Group I contribution to the Sixth Assessment Report of the IPCC Climate Change [1114] : The physical science basis A.3 p 12-13; see also UN 2021 https://news.un.org/en/story/ 2021/08/10977362.

[1115] For an explanation of El Niño, refer to NOAA 2023 https://oceanservice.noaa.gov.

[1116] WMO 2023 https://wmo.int/news/media-centre/el-nino-expected-last-least-until-april-2024.

[1117] UNRIC 2020 https://unric.org.

[1118] WMO 2021 https://wmo.int/news/media-centre/2020-was-one-of-three-warmest-years-re cord#.

[1119] WMO 2023 https://wmo.int/news/media-centre/past-eight-years-confirmed-be-eight-warmestrecord#; see also UN 2023 https://news.un.org/en/story/2023/01/1132387.

[1120] NOAA 2023 https://noaa.gov.

[1121] News24 2023 https://www.news24.com/fin24/climate_future/news/india-to-get-heatwavesthis-year-after-hottest-february-on-record-20230302.

[1122] Lau 2023 https://edition.cnn.com.

[1123] Suli et al 2023 WCE 1-2; see also EU 2023 https://climate.copernicus.eu; see also Aljazeera 2023 https://www.aljazeera.com/news/2023/7/19/heatwaves-set-more-records-across-europe-asiaand-usa.

[1124] News24 2022 https://www.news24.com/fin24/climate_future/news/heatwave-triggers-falseautumn-in-uk-20220824.

[1125] Aljazeera 2022 https://www.aljazeera.com/news/2022/7/20/europe-counts-cost-of-heatwaveas-spain-pm-says-more-than-500-die; see also Aljazeera 2023 https://www.aljazeera.com/news/ 2023/7/19/heatwaves-set-more-records-across-europe-asia-and-usa.

[1126] News24 2023 https://www.news24.com/fin24/climate_future/news/fish-rescued-from-driedoout-river-as-drought-torrid-heat-hit-spain-20230426.

[1127] World Bank Group Climate investment opportunities in India's cooling sector 14.

affect the most vulnerable in India.[1128] As indicated by the WMO, the high temperatures experienced in Europe during July 2023 is a matter of concern as it "is having a major impact on human health, ecosystems, economies, agriculture, energy and water supplies".[1129] Several health warnings and alerts had to be issued and outside activities had to be limited in certain countries during the month of July 2023.[1130]

In September 2023, the UN indicated that the European summer was the warmest summer recorded and that "climate breakdown has begun. Scientists have long warned what our fossil fuel addiction will unleash. Our climate is imploding faster than we can cope with extreme weather events hitting every corner of the planet".[1131] The intensified heat waves resulted in uncontrollable wild fires that have caused severe damage and an increase in carbon emissions.[1179] Uncontainable fires were the worst in the Amazon during the month of August. Spain lost about 1000 hectares of land and there was "nothing left to burn" in the Arctic.[1132] Canada has constantly been a topic of discussion as the country struggled to contain wildfires. Almost 10 million hectares were destroyed by these fires.[1133] In fact, the wildfires blazing in Canada caused stark smoky conditions as far as NY City in the USA. The smoke greatly affected the air quality in this area.[1134] The heat waves also resulted in wild fires spreading in Russia, South Western France and Greece.[1135] In fact, it was reported that the fires in France emitted the most carbon[1136] and that the year of 2022 was one of the worst for wild

[1128] Siddiqui and Fareed 2023 https://aljazeera.com.

[1129] CCES date unknown https://www.c2es.org/content/drought-and-climate-change/.

[1130] Salgado 2023 https://reuters.com; see also CCES date unknown https://www.c2es.org/content/heat-waves-and-climate-change/.

[1131] UN 2023 https://press.un.org/en/2023/sgsm21926.doc.htm. [1179] UNEP 2022 https://unep.org.

[1132] Maclean 2023 https://reuters.com; see also Muniz 2023 https://phys.org; see also News24 2022 https://www.news24.com/fin24/climate_future/news/nothing-left-to-burn-wildfires-blazethrough-the-arctic-20220908.

[1133] Aljazeera 2023 https://www.aljazeera.com/news/2023/8/23/mapping-the-scale-of-canaadasrecord-wildfires; see also Matza 2023 https://bbc.com.

[1134] Hochul 2023 https://governor.ny.gov.

[1135] Anon 2023 https://reuters.com; see also Pokharel, Mawad and Paddison 2023 https://edition.cnn.com.

[1136] Phys Org 2022 https://phys.org; see also Dickie 2022 https://reuters.com.

fires in South West Europe.[1137] The rise in temperatures and a decrease in rainfall also resulted in extreme drought in certain parts of the world.[1138] Southern Africa struggled with extreme drought during the course of 2019.[1139] These drought conditions were also recorded in Western Europe, the USA, Portugal and Tunisia.[1140] Somalia indicated in October 2022 that the country is experiencing its worst famine[1141] and in February 2023 it was predicted that the drought conditions could result in the death of 135 people per day.[1142] In the same month, it was reported that the drought on the Horn of Africa was worse than the 2011 famine and that it is causing hunger

[1137] JRC 2023 https://joint-research-centre.ec.europa.eu.

[1138] CCES date unknown https://www.c2es.org/content/frought-and-climate-change/; see also EC date unknown https://climate.ec.europa.eu/climate-change/consequences-climate-change_en.

[1139] WMO State of Climate in Africa 5, 15-16; see also UNFCCC 2020 https://unfccc.int/news/climatechange-is-an-increasing-threat-to-africa#.

[1140] JRC 2023 https://joint-research-centre.ec.europa.eu; see also NOAA 2023 https://ncei.noaa.gov; see also Amaro et al 2023 https://europarl.europa.eu; see also Abidellaoui 2023 https://reuters.com; see also Aljazeera 2023 https://www.aljazeera.com/gallery/2023/12/13/photos-livingdead-tunisian-villages-suffer-drought-climate-change.

[1141] Aljazeera 2022 https://www.aljazeera.com/news/2022/10/18/somalia-faces-worst-famine-inhalf-a-century-un-warns; see also Ki-Moon date unknown https://un.org.

[1142] UNICEF 2023 https://unicef.org/press-releases/new-study-finds-43000-excess-deaths-mayhave-occurred-2022-drought-somalia; see also News24 2023 https://www.news24.com/fin24/climate_future/news/somalia-drought-could-lead-to-135-deaths-a-day-un-study-20230320.

among more than 22 million people.[1143] By June 2023, Denmark experienced two weeks without rain for the first time since 2006.[1144]

On the other hand, cyclones, typhoons and hurricanes, as well as flooding and mudslides caused by an increase in rainfall have resulted in displacement and even death. During March 2019, Mozambique and Zimbabwe were negatively affected by cyclone Idai, which destroyed properties, forced thousands of people to leave their homes, and resulted in the deaths of approximately 600 people.[1145] More than 140 000 people were displaced as a result of this disaster. A few weeks later, in April 2020, another cyclone made landfall in Mozambique and once again destroyed several homes, resulting in the deaths of approximately 45 people.[1146] As a result of this event, more than 18 000 people were displaced.[1147] In November 2020, hurricane Eta hit Nicaragua and triggered extreme events that resulted in the deaths and displacement of many people.[1148] Shortly after, hurricane Iota also made landfall and caused these events to spread to other parts of Central America.[1149] The flash floods and landslides caused by these hurricanes resulted in the destruction of homes, buildings, infrastructure, agricultural land and products, and has even negatively affected basic sanitation and water.[1150] In total, the lives of roughly 7.4 million people have been affected by these two hurricanes in Central America.[1151]

[1143] UN 2022 https://un.org; see also Anon 2022 https://theguardian.com; see also NASA 2022 https://earthobservatory.nasa.gov; see also Aljazeera 2023 https://www.aljazeera.com/gallery/2022/4/19/20-million-risk-starvation-as-horn-of-africa-drought-worsens-un.

[1144] News24 2023 https://www.news24.com/fin24/climate_future/news/denmark-goes-two-weekswithout-rain-for-first-time-since-2006-20230607.

[1145] UNOCHA 2019 https://unocha.org; see also WMO State of Climate in Africa 14-15; see also NASA 2023 https://eol.jsc.nasa.gov/ ESRS/Disasters/ShowIDCTracking.pl.

[1146] UNOCHA 2019 https://reliefweb.int; see also Refugees International Devastation and Displacement: Unprecedented cyclones in Mozambique and Zimbabwe a sign of what's to come? 9; see also WMO State of Climate in Africa 14-15; see also NASA 2023 https://eol.jsc.nasa.gov/ ESRS/Disasters/ShowIDCTracking.pl.

[1147] UNOCHA 2019 https://unocha.org.

[1148] IFRC 2021 https://reliefweb.int.

[1149] NASA 2023 https://eol.jsc.nasa.gov/ESRS/Disasters/ShowIDCTracking.pl.

[1150] IFRC 2021 https://reliefweb.int.

[1151] IFRC 2021 https://reliefweb.int.

Between July and August 2021, countries in Europe and Asia experienced heavy and abnormal rainfall, causing flooding, and in China, it was reported that flash floods resulted in the death of approximately 302 people and caused severe pecuniary loss.[1152] In Germany and parts of Belgium, precipitation resulted in rivers overflowing. This caused extreme flooding that contributed to the deaths of approximately 220 people.[1153] Heavy rainfall also caused flash floods that swept through the streets of the northern provinces of Turkey, leading to many deaths and the evacuation of more than 1 000 people as homes and infrastructure were destroyed.[1154] In July and August 2022, there were floods in Iran, Sudan and Nigeria that resulted in many deaths.[1155] In September 2022, there was an increase in precipitation in Pakistan during the monsoon season that resulted in floods.[1156] In response, the UN Chief stated that he "has never seen climate carnage like the Pakistan floods".[1157] It was also indicated that "climate change likely made Pakistani's extreme rainfall more intense".[1158] Farmlands were destroyed in West Africa due to such floods,[1159] and a typhoon also hit Japan, the Philippines and South Korea during the same month.[1160] Between December 2022 and April 2023, floods in South Africa as a result of heavy rainfall was branded as one of the "most expensive climate events"[1161] and it caused the displacement of several people.

[1152] WMO State of Global Climate Provisional Report; see also Yeung 2021 https://edition.cnn.com.

[1153] WMO State of Global Climate Provisional Report.

[1154] Aljazeera 2021 https://aljazeera.com; see also Reliefweb 2022 https://reliefweb.int/disaster/fl2022-000277-sdn.

[1155] Davies 2022 https://floodlist.com; see also Reliefweb 2022 https://reliefweb.int/disaster/ff-2022000274-irn; see also Reliefweb 2022 https://reliefweb.int/disaster/fl-2022-000271-nga; see also Reliefweb 2022 https://reliefweb.int/disaster/fl/2022-000277-sdn.

[1156] UNOCHA 2022 https://reliefweb.com; see also UNICEF 2023 https://www.unicef.org/emergencies/devastating-floods-pakistan-2022; see also WWA 2022 https://worldweatherattribution.org.

[1157] Guterres 2022 https://news.un.org; see also Aljazeera 2022 https://www.aljazeera.com/news/2022/9/10/never-seen-climate-carnage-like-in-pakistan-un-chief.

[1158] WMO 2022 https://wmo.int.

[1159] Abubakar 2022 https://phys.org.

[1160] Reliefweb 2022 https://reliefweb.int/map/republic-korea/northeast-asiaand-philippines-typhoonhinnamnor-dg-echo-daily-map-05092022.

[1161] De Wet 2022 https://news24.com.

The beginning of 2023 saw destruction after hurricanes and cyclones in countries such as Malawi, Mauritius,[1162] India and Pakistan.[1163] Hurricane Freddy hit Malawi and surrounding countries, setting the record for being one of the longest lasting storms.[1164] The two cyclones that hit Vanuatu in quick succession resulted in destruction and displacement.[1165] These set the stage for the submission of a request to the International Court of Justice (ICJ) to focus on the responsibility of states and the protection of human rights with regard to climate change as will be discussed below.[1166] After all of the tropical cyclones, including one that hit Australia,[1167] it was reported in May of 2023 that the cyclones have intensified and they are more destructive due to climate change.[1168] In July 2023 China was hit by a tropical storm referred to as typhoon Talim, the winds and rainfall of which caused major destruction of property and infrastructure.[1169] Furthermore, between April and July 2023, an increase in rainfall resulted in flooding and landslides in India,[1170] Colombia,[1171] Sudan,[1172] and South Korea[1173] resulting in death and displacement.[1174] In September

[1162] WMO 2023 https://public.wmo.int/media/news/tropical-cyclone-freddy-may-set-new-record; see also Reliefweb 2023 https://reliefweb.int/disaster/tc-2023-000023-mdg.

[1163] NASA 2023 https://earthobservatory.nasa.gov/images/151463/cyclone-biparjoy-churns-towardindia-and-pakistan; see also Saifi, Suri and Mogul 2023 https://edition.cnn.com.

[1164] WMO 2023 https://public.wmo.int/media/news/tropical-cyclone-freddy-may-set-new-record; see also Reliefweb 2023 https://reliefweb.int/disaster/tc-2023-000023-mdg.

[1165] Aljazeera 2023 https://www.aljazeera.com/news/2023/3/4/state-of-emergency-declared-invanuatu-as-second-cyclone-hits; see also Needham 2023 https://reuters.com.

[1166] Needham 2023 https://reuters.com; see also Lewsey 2023 https://cam.ac.uk.

[1167] Aljazeera 2023 https://www.aljazeera.com/news/2023/4/14/australia-buffeted-by-record-windsas-cyclone-hits-northwest.

[1168] News24 2023 https://www.news24.com/fin24/climate_future/news/climate-change-makescyclones-more-intense-desctructive-scientists-20230515; see also Clarke and Otto Reporting

extreme weather and climate change: A guide for journalists 6.

[1169] McGarvey and Guinto 2023 https://bbc.com; see also News24 2023 https://www.news24.com/news24/world/news/typhoon-talim-leaves-behind-crushed-vehicles-beached-whale-in-southernchina-20230718.

[1170] Khadka 2023 https://bbc.com.

[1171] Aljazeera 2023 https://aljazeera.com/news/2023/7/18/heavy-rains-cause-landslides-incolombia-killing-at-least-eight.

[1172] Zoni 2023 https://unhcr.org.

[1173] Nasser, Lau and Kwon 2023 https://ccn.com.

[1174] Khadka 2023 https://bbc.com; see also Aljazeera 2023 https://aljazeera.com/news/2023/7/18/heavy-rains-cause-landslides-in-colombia-killing-at-least-eight; see also Nasser, Lau and Kwon 2023 https://cnn.com; see also UNHCR 2023 https://unhcr.org.

2023 a cyclone hit Greece, Turkey and Bulgaria, causing flooding in these areas.[1175] Later in the month the same storm hit Libya with increased rain, causing dams to burst. These floods resulted in the flooding of a city, leading to many deaths and several people still unaccounted for.[1224]

[1175] Anon 2023 https://theguardian.com; see also Aljazeera 2023 https://www.aljazeera.com/gallery/2023/9/6/photos-heavy-rainstorms-trigger-flooding-in-greece-turkey-bulgaria. [1224] Hulton 2023 https://theguardian.com.

All of these reports indicate that over the last three years, there has been an increase in extreme weather events and conditions. In some instances, it is clear that these events have even been intensified.[1176] These conditions create the perfect environment for insect plagues that destroy crops to break out,[1177] for diseases to break out and spread, and for the pollution of water resources. This in turn negatively affects food and water security, which is essential for human survival. In fact, climate change could increase hunger in Africa and in countries such as Portugal and Spain, restrictions to be placed on water use. In June 2023, the UN Weather Agency reported that the disasters due climate change up to date have already cost approximately 4.3

trillion dollars.[1178]

5.3 Lack of legal protection for climate refugees

In 2020, the IDMC reported that approximately 24.9 million people were displaced as a result of natural disasters during the course of 2019.[1179] At the end of 2022, the IDMC indicated that there was an increase in displacements as a result of disasters, leaving the total at 32.6 million. This figure was the highest in a decade.[1180] These displacements mostly occur internally as people leave their homes and move to another area within their state of origin. In fact, in 2021, the World Bank Group predicted in the Groundswell Report that by 2050, approximately 216 million people in six regions are likely to be displaced inside their countries due to climate change.[1181] People who are internally displaced as a result of climate change can still rely on the UN Guiding Principles on Internal Displacement, human rights law, and domestic law for protection.[1231]

[1176] Clarke and Otto Reporting extreme weather and climate change: A guide for journalists 6.
[1177] CDC 2022 https://cdc.gov; see also Preiser et al 2023 https://preventionweb.net.
[1178] UN 2023 https://news.un.org/en/story/2023/05/1136897.
[1179] IDMC 2020 https://internal-displacement.org.
[1180] Migration Data Portal 2023 https://migrationdataportal.org; see also IOM 2023 https://iom.int.
[1181] The World Bank The Groundswell Report xi. [1231]
See 2.3 and 3.5.

The UN Guiding Principles on Internal Displacement were developed and adopted with the sole purpose of providing for the protection of those who are forced to migrate internally.[1182] These principles are to be used as a guideline in line with the provisions of international law to ensure that this category of people are sufficiently covered.[1183] It recognises those who flee conflict, violence, human rights violations and even disasters nationally as internally displaced persons, and it guarantees the nondiscriminatory protection of rights.[1184] States have a duty to apply the principles and to provide the necessary protection and humanitarian assistance to those displaced within its borders.[1185] Arbitrary displacement and attacks against people who are displaced internally is prohibited, and where possible, alternative measures should be explored.[1186] In the event that displacement has to take place, states have to ensure that human rights are not violated and they have to provide for proper living conditions and basic needs such as food, water, sanitation, housing and healthcare.[1187] The principles specifically acknowledge that the right to life, dignity, liberty, integrity, security and movement is important and it may not be violated through attacks, inhumane treatment and captivity.[1188] The family life of internally displaced persons have to be respected and provision is made for investigation into those missing, reunification and the cohabitation of families.[1189] Furthermore, internally displaced persons are entitled to medical care, documentation, owning property, employment, freedom of association and primary education.[1190] Those who are internally displaced must be assisted in freely returning, or when this is not possible, in relocating without their rights being violated. They should also receive help to reintegrate.[1191] They must be treated equally and be assisted in recovering their possessions, and in the event

[1182] Foreword to the UN Guiding Principles on Internal Displacement (1998).
[1183] Introductory note to the UN Guiding Principles on Internal Displacement (1998).
[1184] Introduction: Scope and Purpose, Principle 1 and Principles 4 of the UN Guiding Principles on Internal Displacement (1998).
[1185] Principles 3 and 5 and 24 to 27 of the UN Guiding Principles on Internal Displacement (1998).
[1186] Principles 6, 7(1) and 10 of the UN Guiding Principles on Internal Displacement (1998).
[1187] Principles 7(2), 8 and 18 of the UN Guiding Principles on Internal Displacement (1998).
[1188] Principles 10 to 14 of the UN Guiding Principles on Internal Displacement (1998).
[1189] Principles 16 and 17 of the UN Guiding Principles on Internal Displacement (1998).
[1190] Principles 19 to 23 of the UN Guiding Principles on Internal Displacement (1998).
[1191] Principles 15(d) and 28 of the UN Guiding Principles on Internal Displacement (1998). [1242] Principles 29 of the UN Guiding Principles on Internal Displacement (1998).

that this is not possible, they must be compensated.[1242] Even though comprehensive provision is made for the recognition and protection of internally displaced persons, principle 15 still recognises the right of this category of people to cross borders to seek assistance.

When conditions result in people fleeing their homes by crossing an international border, it is known as external displacement. There is no similar framework as discussed above for such cases, and it is clear therefore that there is a protection gap in the international refugee law.[1192] Climate change events that have been identified as possible drivers of external displacement includes "desertification, deforestation, degradation and disappearance of land, extreme weather conditions and rising of sea levels".[1193] External displacement in these situations are mainly recognised if they are caused by an overlap between climate change and other factors, such as conflict and violence.[1194] An example is the situation in Somalia, where people are constantly forced to desert their homes due to the consequences of extreme droughts, coupled with violent attacks launched by the terrorist group Al-Shabab.[1195] Similarly, the drought and conflict in Afghanistan also illustrates the overlapping of these factors, resulting in displacement.[1196]

However, displacement as a result of climate change alone is a reality.[1197] As indicated by the UNHCR in 2019, "forced displacement across borders can stem from interaction between climate change and disasters with conflict and violence or it can arise from natural or man-made disasters alone. Either situation can trigger international protection needs."[1198] For example, due to its location, the geography of the land and its overpopulation, Bangladesh is more susceptible to the negative effects of climate

[1192] d'Orsi and Naldi 2022 IRRC 1030; see also d'Orsi 2023 https://theconversation.com.
[1193] Ghaly 2021 ANU URJ 94-96.
[1194] Thompson 2019 https://unhcr.org; see also Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 4, 10.
[1195] Thompson 2019 https://unhcr.org.
[1196] IDMC GRID 2019: Global Report on Internal Displacement 5, 36.
[1197] EJF 2018 https://ejfoundation.org.
[1198] Thompson 2019 https://unhcr.org.

change.[1199] A predicted increase in natural disasters coupled with other existing factors can possibly result in a wave of migrants to neighbouring India.[1251] Although several organisations have been continuously raising the issue of the increase in people migrating as a result of climate change and the lack of protection provided for these people since the 1990s, the international community has overlooked this topic.[12001201] The Report of the IPCC that was released in 1990 projected that the "greatest single impact of climate change could be on human migration".[1202]

The above warning came to fruition during the events in the Carteret Islands in Papua New Guinea[12031204] during 2005.[1205] Due to its location, the inhabitants became victims of natural disasters and extreme weather events that affected their livelihoods and resulted in food scarcity.[1206] Furthermore, the island is disappearing because of sea levels rising, and during 2005, the inhabitants of this island had to be urgently relocated to the larger island of Bougainville.[1207] As a result of these events, they were recognised as the "first climate refugees" and as indicated in an article released during that year:[1208]

> The people of the Carteret Islands, in Papua New Guinea, are the first entire people to officially be evacuated because of climate change. Their islands are being swallowed by the sea and their crops of banana, taro and breadfruit destroyed by storm surges and king tides.

[1199] EJF On the frontlines: Climate change in Bangladesh 3. [1251]
Panda 2010 https://papers.ssrn.com.

[1200] Laczko and Aghazarm (eds) Migration, environment and climate change: Assessing the evidence
[1201] .

[1202] IOM Migration and Climate Change No 31 9.

[1203] Connell "Nothing there atoll? Farewell to the Carteret Islands: Living Climate Change in Oceania"
[1204] .

[1205] IOM Migration and Climate Change No 31 26.

[1206] Connell "Nothing there atoll? Farewell to the Carteret Islands: Living Climate Change in Oceania" 74; Connell 2006 APV 4-5.

[1207] Behrman and Kent "Overcoming the legal impasse? Setting the Scene" 3.

[1208] Behrman and Kent "Overcoming the legal impasse? Setting the Scene" 3; see also Connell "Nothing there atoll? Farewell to the Carteret Islands: Living Climate Change in Oceania" 73; see also Connell 2006 APV 4.

Similarly, the conditions exacerbated by warm temperatures and drought in the Sahel region[1209] have resulted in food insecurity and the outbreak of conflicts that have forced people to move.[1210] Given these circumstances, this region was "declared the world's fastest-growing displacement and protection crisis" in 2020.[1211]

Furthermore, in response to the UNHRC Resolution 7/23, the Maldives submitted a document to the OHCHR that explained in full what impact climate change has had on the territory and its inhabitants. Substantiating their argument with scientific opinions and existing facts, the Maldives indicated that there is a direct link between the destruction of the environment and the violation of human rights.[1212] They illustrated that climate change events and conditions it creates[1213] affect humans in several ways and thus endangers a range of secured human rights.[1214] It has an immense impact on the livelihood, survival, health and property of the people, as well as the economy and the infrastructure of the country.[1215] This directly affects and violates the right to life, dignity, property, food, housing, health, work and water. In this regard, the country substantiated its argument by referring the opinion of an ICJ judge who stated that:[1216]

> The protection of the environment is a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all human rights spoken of in the UD and other human rights instruments.

[1209] African countries such as Burkino Faso, Cameroon, Chad, Gambia, Guinea, Mauritania, Mali, Niger, Nigeria and Senegal fall within the Sahel region.

[1210] d'Orsi and Naldi 2022 IRRC 1032.

[1211] d'Orsi and Naldi 2022 IRRC 1047.

[1212] UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR 13.

[1213] The submission by the Maldives focuses on rising sea levels, rising temperatures, disasters and changing rain fall patterns. See UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR 21-38.

[1214] UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR 18.

[1215] UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR 2018 38-59.

[1216] Weeramantry Separate opinion of Vice-President Weeramantry in response to the GabčíkovoNagymaros Project 88; see also UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR 13.

Although the opinion was given in response to a matter before the ICJ regarding a dispute about the completion of a dam project,[1217] it is relevant to the issue of climate change as it destroys and harms the environment. The islands have been experiencing an increase in extreme weather events and due to their location, they are vulnerable to these events and to eventual disappearance due to rising sea levels.[1218] The group of islands will cease to exist, directly affecting the inhabitants' right to selfdetermination and nationality.[1219]

Similarly, Tuvalu and Kiribati are islands situated in the Pacific Ocean. Due to their location, they are predicted to become uninhabitable due to the rapid rise in sea levels resulting from climate change.[1220] In Tuvalu, rising sea levels have already caused floods, has resulted in food and water scarcity and has affected the economic activities.[1221] As early as 2002, the country indicated that it wanted to approach the ICJ for legal action against the USA and Australia for causing climate change. In 2013 it requested NZ and Australia to assist by allowing their nationals to enter as refugees. The request was not granted.[1222] Although NZ has implemented a labour migration programme and the Pacific Access Category Agreement (PAC Agreement), these instruments only allow for the entry of a small number of Tuvalu citizens. It is not sufficient for the acceptance and resettlement of those affected by climate change.[1223] A person previously living in Kiribati applied to NZ[1224] for refugee status in 2015 based on the fact that the island has become uninhabitable due to the effects of climate change.[1225] The facts of the case[1226] entailed that Mr Teitiota, his wife and three

[1217] Weeramantry Separate opinion of Vice-President Weeramantry in response to the GabčíkovoNagymaros Project 86; see also ICJ 1997 https://icj-cij.org.

[1218] UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR 15-19.

[1219] UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR 21.

[1220] Balesh 2015 EELJ 80-84.

[1221] Balesh 2015 EELJ 85-86.

[1222] Balesh 2015 EELJ 86-87.

[1223] Balesh 2015 EELJ 86; see also Williams 2008 Law and Policy 515-516.

[1224] See 2.3.

[1225] Su 2020 https://climatechangenews.com; UNHRC Views adopted by the committee under article 5(4) of the Optional Protocol concerning communication number 2728/2016 CCPR/C/127/D/ 2728/2016 7 January 2020.

[1226] Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 paras 4-6.

children were living in NZ after their permits had expired. When NZ wanted to return them to their country of nationality, Mr Teitiota applied for refugee status based on the argument that the islands were disappearing due to sea levels rising and that this will force the citizens to the migrate.

He submitted that his right to life is threatened by the conditions in Kiribati as the "intrusion of salt water affects the growing of crops" and clean water was not available, causing health issues. His application was refused by the Refugee and Protection Officer, the Tribunal, the High Court and the Court of Appeal because the applicant did not qualify as a refugee or protected person in terms of refugee law. Furthermore, the authorities deemed the six questions of law that the applicant used in support of his appeal to not be of importance.[1227] The applicant then applied to the Supreme Court of NZ to appeal the Court of Appeal's decision and counsel for the applicant indicated that the issue before the court is:[1228]

> Whether NZ's refugee law extends protection to a person who faces environmental displacement and the operation of a number of International Conventions, most importantly relating to the care of his three children under the age of six born in NZ.

The points raised in favour of the appeal in paragraph 11[1229] included whether: 1. the public international law recognises an environmental refugee; 2. NZ refugee law provides for a broader definition of a refugee; 3. the Convention on the Rights of the Child should be used to assess harm for purposes of the 1951 Refugee Convention; and 4. the right not to be deprived of means of subsistence is included in the right to life. The Supreme Court found that these questions are not of importance and the applicant will not face "serious harm when returned to his country and it is not persuaded that there is any risk of a substantial miscarriage of justice".[1230] This

[1227] Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 para 6.

[1228] Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 paras 7 and 11.

[1229] Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 paras 11(a) to 11(d).

[1230] Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 para 12.

decision could hardly be criticised as the NZ courts based their decision on the fact that the applicant in this matter did not qualify as a refugee as he did not flee his country due to a fear of persecution at the hands of his government as specified in the definition.[1231] This illustrated the fact that the international law did not at this stage recognise climate refutes and therefore did not provide any protection to those externally displaced due to the effects of climate change.[1232]

In contrast to this position, the UNHCR assessed the application of the definition of a refugee contained in the 1951 Refugee Convention[1233] in the context of climate change and disasters.[1234] They argued that by following a broader approach, a valid claim for refugee status can be made if a person flees his/her country due to climate change and disasters, and in support of their argument, the UNHCR accurately indicated during October 2020:[1235]

> Climate change and disasters affect the enjoyment of human rights because of human exposure and vulnerability to their impacts as well as state capacity, ability and willingness to provide protection. Climate change and disasters may limit access to and control over land, natural resources, livelihoods, individual rights, freedoms and lives, which may threaten, amongst others, the enjoyment of the right to life; physical integrity; an adequate standard of living; health, water and sanitation; and self-determination and development.

In fact, during October 2021, the UNHRC recognised a clean, healthy and sustainable environment as a human right for the first time[1236]. Resolution 48/13 clearly indicates that climate change and destruction of the environment negatively affect human

---

[1231] Baker-Jones and Baker-Jones 2015 QUT LR 114-116.
[1232] Baker-Jones and Baker-Jones 2015 QUT LR 115-116.
[1233] See 2.5 for an analysis of the international definition of a refugee.
[1234] See 2.6 for the application of the definitional elements of a refugee to climate change and disaster displacement. UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters.
[1235] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters paras 5-7.
[1236] UN 2021 https://news.un.org/en/story/2021/10/1102582.

rights.[1237] The adoption of Resolution 48/13[1238] meant that the UNHRC recognised that a preserved environment is important for the maintenance of important human rights, including the right to well-being, health, water, sanitation and food. It was also emphasised that although these negative effects are experienced universally, their impacts are felt more severely by already vulnerable groups.

Climate change, amongst others, has also been recognised as a threat to the right to life. States have a responsibility to attend to environmental challenges and to ensure that those who are more negatively affected than others are afforded additional protection.[1239] These potential violations could be seen as persecution in terms of the 1951 Refugee Convention definition of a refugee.[1240] With regard to the well-founded fear element of the definition of a refugee, the UNHCR states that a "forward-looking assessment of all the relevant facts and circumstances of the case" should be made.[1241] People who are already vulnerable due to their ethnicity, race, religion, gender or social group could have a well-founded fear as their access to food, resources and assistance by the government could be limited or even applied discriminately.[1242] Climate change and disasters result in a lack of resources and food scarcity, which could intensify violence and conflict and create a well-founded fear amongst the affected community members.[1243]

[1237] UNHRC Resolution adopted by the Human Rights Council A/HRC/Res/48/13; see also UN 2021 https://news.un.org/story/2021/10/1102582.

[1238] UNHRC Resolution adopted by the Human Rights Council A/HRC/Res/48/13; see also UN 2021 https://news.un.org/story/2021/10/1102582.

[1239] UNHRC Resolution adopted by the Human Rights Council A/HRC/Res/48/13.

[1240] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 7.

[1241] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 9.

[1242] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 10.

[1243] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 11.

Although limited, however, progress has been made in this regard. At the 21st COP[1244] during October 2015, the Warsaw International Mechanism (WIM) for Loss and Damage associated with Climate Change Impacts was established with the purpose of creating a UNFCCC task force to deal with climate change displacement. It established methods, mechanisms and procedures to deal with loss and damage caused by events related to climate change.[1245] The Action 6 Plan submitted by the WIM Executive Committee entailed the collection of data on how climate change is affecting not only internal but also cross-border migration and displacement.[1296] Although disasters mostly result in internal displacement, more information is required on those who cross borders as a result of these events.[1246] The Paris Agreement, which was mentioned before, was adopted at the COP 21,[1247] and in the preamble it mentions that states have an obligation when addressing climate change to protect the rights of migrants.[1248] An Advisory Group on Climate Change and Human Mobility was also created, and this group consists of several offices and organisations[1249] that have the task of advising and supporting the UNFCCC parties on matters related to climate change displacement, migration and relocation, as well as human mobility. This term incorporates displacement, migration and relocation.[1250] The Group collects data and information and ensures that the provisions of the UNFCCC addresses modern

[1244] The COP is a conference that takes place every year where each signatory state to the UNFCCC is represented. At these conferences, the implementation of the UNFCCC is reviewed and decisions are made regarding the adoption of other measures to ensure that progress is made in this regard.

[1245] Attapattu "A new category of refugees?" 34; see also UNFCCC date unknown https://unfccc.int; see also UNFCCC Report of the Conference of the Parties on its twenty-first session para 49. [1296] UNHCR 2015 https://unhcr.org.

[1246] UNHCR 2015 https://unhcr.org.

[1247] Behrman and Kent "Overcoming the Legal Impasse: Setting the Scene" 5.

[1248] Preamble of the Paris Agreement (2015); see also Behrman and Kent "Overcoming the Legal Impasse: Setting the Scene" 5.

[1249] The Advisory Group on Climate Change and Human Mobility consists of the UNHCR, IOM, United Nations University Institute for Environment and Human Security (UNU-EHS), United Nations Development Programme (UNDP), Norwegian Refugee Council (NRC) and its Internal Displacement Monitoring Centre (NRC IDMC), Refugees International (RI), Center for International Relations Studies de Science Po (Sciences Po-CERI) and the Arab Network for Environment and Development (RAED); see also UNFCCC Human Mobility in the context of climate change UNFCCC-Paris COP-21: Recommendations for the Advisory Group on Climate Change and Human Mobility 2.

[1250] UNFCCC Human Mobility in the context of climate change UNFCCC-Paris COP-21: Recommendations for the Advisory Group on Climate Change and Human Mobility 2.

situations.[1251]

Although displacement was once again tabled and incorporated in the decision taken at the COP 22, displacement due to climate change was not attended to.[1252] In 2018, the Global Compact on Refugees was adopted and incorporated in a UNGA Resolution.[1253] It recognises:[1254]

> While not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements. In the first instance, addressing root causes is the responsibility of countries at the origin of refugee movements. However, averting and resolving large refugee situations are also matters of serious concern to the international community as a whole, requiring early efforts to address their drivers and triggers, as well as improved cooperation among political, humanitarian, development and peace actors.

This document has its limitations as climate change was once again recognised only as an element that interacts with other factors that cause refugee movements.[1255] However, the Comprehensive Refugee Response Framework (CRRF) forms part of the Global Compact on Refugees. It envisions a response to refugees and recognises that disasters and degradation can result in displacement.[1256] This view was once again reiterated in 2021 by the World Bank Group, who recognised climate change as a driver for people whose lives are affected by climate change to migrate.[1257] However, it is not

[1251] UNFCCC Human Mobility in the context of climate change UNFCCC-Paris COP-21: Recommendations for the Advisory Group on Climate Change and Human Mobility 2.

[1252] Attapattu "A new category of refugees?" 35; see also UNFCCC Report of the Conference of the Parties on its twenty-second session, held in Marrakech from 7 to 18 November 2016 para 9.

[1253] UNGA Resolution adopted by the General Assembly A/Res/73/151 para 4; see also d'Orsi "Environmental refugees in Africa: Doctrinaire reflections, questions of practical protection and challenges remaining" 8.

[1254] UN Global Compact on Refugees 4.

[1255] McDonnell 2018 http://npr.org.

[1256] UNHCR date unknown https://www.unhcr.org/comprehensive-refugee-response-framework; see also d'Orsi "Environmental refugees in Africa: Doctrinaire reflections, questions of practical protection and challenges remaining" 8.

[1257] The World Bank The Groundswell Report.

binding on the international community and numerous countries have already indicated that they will not implement the document.[1258]

Nevertheless, the Global Compact on Refugees can still be recognised and regarded as "soft law", which is defined by John Dugard as "imprecise standards, generated by declaration adopted by diplomatic conferences or resolutions of international organisations, that are intended to serve as guidelines to states in their conduct, but which lack the status of law".[1259] Therefore, it might result in the creation of a customary international law rule and serve as a basis for the creation of a new treaty.

At the 26th COP, participants agreed on several methods to implement the provisions of the Paris Agreement. These included an increase in funding, support for adaptation, mitigation, and a commitment to decrease the emission of gases.[1260] The COP resulted in the creation of the Glasgow Climate Pact, which once again recognised climate change as a global concern and emphasised that international action is necessary to limit its effects.[1261] Although these efforts are welcomed, role players such as Andrew Harper, the Special Advisor on Climate Action to the UNHCR, once again expressed concern that implementation methods that are important to "protect vulnerable communities around the world and to avoid devastating consequences for millions of refugees, displaced and stateless persons" were not adopted.[1262] COP 27 was held in Egypt during 2022, and according to the UN Climate Change Conference (UNCCC) there were five key outcomes that contribute positively in addressing the issue of climate change.[1263] The conference decided that a fund will be created to assist vulnerable states that experience financial damages as a result of climate change events. This decision was even branded as an "important step towards justice" and as

[1258] Arnold-Fernandez 2023 https://frontiersin.org.

[1259] Dugard et al International Law 41.

[1260] Glasgow Climate Pact 2021 decision -/CMA.3 advanced unedited version paras 3-5 and 9-37.

[1261] Glasgow Climate Pact 2021 decision -/CMA.3 advanced unedited version; see also Guterres date unknown https://un.org.

[1262] UNHCR 2021 https://unhcr.org/news/briefing/2021/11/618e36334/unhcr-world-must-turn-cop 26-words-action-forcibly-displaced-stateless-people.html.

[1263] UNFCCC 2022 https://unfccc.int.

an "outcome which moves us forward".[1264] The funds will be generated from investments made by states and other institutions to assist developing states with adapting to and dealing with modern-day challenges.[1265] Furthermore, states have recommitted to limiting gas emissions and to achieving this ideal. The conference also formulated what is referred to as a mitigation work programme.[1266]

With its new emphasis on holding non-state actors accountable for their actions, the COP 27 shifted the focus to implementation instead of just agreeing and planning. As indicated at the conference, the "heart of implementation is: Everybody, everywhere in the world, every single day, doing everything they possibly can to address the climate crisis".[1267] During June 2023 the Summit for a New Global Financial Pact was hosted by France and attended by several states, institutions and representatives.[1268] The idea behind the Summit was to establish an international funding structure to address climate change, among other things.

[1264] UNFCCC 2022 https://unfccc.int.
[1265] UNFCCC 2022 https://unfccc.int.
[1266] UNFCCC 2022 https://unfccc.int.
[1267] UNFCCC 2022 https://unfccc.int.
[1268] UNESCO 2023 https://unesco.org; see also France Diplomacy 2023 https://diplomatie.gouv.fr.

The COP 28 took place in Dubai during November and December of 2023.[1269] This was an important event to review the ideals and goals in response to climate change.[1270] The progress in addressing climate change was reviewed in terms of the global stocktake provisioned by the Paris Agreement. Progress was found to be slow.[1271] One alarmingly note was that global warming has already affected several regions and that the most vulnerable was those who made the least contribution to climate change the least. In this regard the conference recognised that universal action is required by moving away from the use of coal, using alternatives such as wind and solar for energy, and even by using vehicles with a no or low gas emissions. There was an emphasis on the importance of the implementation of mitigation and adaptation efforts among local governments, the strengthening of responses and measures to protect and restore the environment, and international cooperation to combat climate change. The financial implications were also addressed. The conference highlighted that developing countries should receive continued assistance with the implementation of their mitigation and adaptation efforts. As a way forward, the provisions of the Paris Agreement on states' regular reporting on their national contributions were reiterated.

5.4 Recognition of climate refugees by the UN

In 2016, Mr Teitiota, whose case was mentioned before,[1272] submitted a claim to the UNHRC in which he alleged that NZ violated his Article 6 ICCPR right to life by returning him to Kiribati and not adequately considering the possible harm he would face if returned.[1273] With regard to the admissibility of the complaint, NZ argued that even with the careful consideration of the facts presented by the applicant to the local tribunal and courts, the applicant could not be recognised as a refugee or a protected

[1269] UNFCCC Outcome of the first global stocktake – Draft decision -/CMA.5 – Proposal by the President paras 3-4, 15-16, 18-65, 71, 154-155 and 164-166.

[1270] UNFCCC 2023 https://unfccc.int.

[1271] UNFCCC 2023 https://unfccc.int.

[1272] See 2.3 and 5.3 for a discussion on the matter of Mr Teitiota and his family.

[1273] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand 3 and 9.2. CCPR/C/127/D/2728/2016 paras

person in terms of refugee law.[1274] Furthermore, the applicant failed to make out an apparent case that his right to life was violated as he could not prove that he faced an actual or imminent harm to his right to life and the climate conditions do not constitute a real risk of deprivation of life by the government.[1275]

It was also argued that the applicant did not submit new and alternative evidence to the Committee to indicate and prove that the local tribunal and courts erred in their judgments.[1276] Mr Teitiota countered the argument by stating that due to the lack of clean water, he and his family have been encountering health problems. The Fifth Assessment Report of the IPCC was submitted as new evidence. This report indicated that people in Kiribati would face serious survival issues if the increase in global temperatures and sea level continued.[1277] NZ also submitted to the Committee that the complaint had no merits due to the fact that his right to life was not threatened by the government.[1278] The applicant, on the other hand, argued that for climate refugees, the risk of serious harm arises from environmental factors indirectly caused by humans, rather than from violent acts.[12791280]

The Committee published its decision on the claim in January 2020. They found that for purposes of admissibility, there was sufficient evidence that indicated that the

[1274] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 paras 4.2 and 4.3.

[1275] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 paras 4.5 and 4.6.

[1276] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 para 4.7.

[1277] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 para 5.

[1278] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 paras 6.1 and 6.2.

[1279] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 paras

[1280] .1-7.3.

applicant's right to life will be affected if returned to Kiribati as climate change has affected the habitability of Kiribati.[1281] When considering the merits of the case,[1282] the Committee referred to the obligation of states not to return a person to his country if there is a personal, real risk that the person would suffer irreparable harm. The Committee indicated that a receiving state must consider all the facts, circumstances and conditions presented by a person alleging that there is a potential risk to his right to life. The Committee referred to the General Comment that indicated that dignity and non-exposure to events that can lead to early death is included in the right to life.

Importantly, they stated that:[1283]

> The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of Article 6 of the Covenant even if such threats and situations do not result in the loss of life. Furthermore, the Committee recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.

The Committee found [12841285] that NZ properly evaluated the applicant's case by considering all the facts, circumstances and conditions in Kiribati. Similarly to NZ, the Committee found that the applicant failed to prove that the growth of crops was impossible and that fresh water was indeed available. Thus, there was not a real risk that he would face food scarcity and health risks that could pose a threat to his right to life or dignity. The Committee recognised and acknowledged the reality of climate

---

[1281] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 para 8.6.

[1282] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 para 9.3.

[1283] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 para 9.4.

[1284] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 paras

[1285] .6 to 9.9.

change but indicated that due to the predicted timeframe within which Kiribati would become uninhabitable, there was sufficient opportunity for the local government and

the international community to assist with the adaptation, protection and relocation of its people.[1286] Yet, the Committee importantly noted that:[1287]

> Both sudden-onset events (such as intense storms and flooding) and slow-onset processes (such as sea level rise, salinization, and land degradation) can propel crossborder movement of individuals seeking protection from climate change-related harm. The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under Articles 6 or 7 of the Covenant, thereby triggering the nonrefoulement obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.

Although the Committee did not find in favour of the applicant, it extensively considered international human rights law and the existing international refugee law framework and found that a person cannot be returned to the originated country if his life is threatened by the negative effects of climate change.[1288] Therefore, they recognised for the first time that "climate refugees" do exist.[1289] This recognition is a milestone and breakthrough for refugee law as it shows that the existing law is outdated. It emphasised that the constant development and adaptation of legal frameworks is necessary to ensure that it caters for modern circumstances.

Given the refugee law framework,[1290] the practical implementation of the recognition is challenging as it was illustrated before that people crossing borders due to the effects of climate change were not recognised by international law and were provided with

---

[1286] UNRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/2016 paras 9.10 and 9.12.

[1287] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 para 9.11.

[1288] Su 2020 https://climatechangenews.com; UNHRC Views adopted by the committee under article 5(4) of the Optional Protocol concerning communication number 2728/2016 CCPR/C/127/D/ 2728/2016 7 January 2020.

[1289] Su 2020 https://climatechangenews.com.

[1290] See 2.4 for a discussion on the international refugee law framework and 2.5 for an analysis of the elements of the definition of a refugee.

limited and in some cases no protection.[1291] This is mainly due to the fact that the definition for a refugee provided for in the 1951 Refugee Convention and its 1967 Protocol does not include those that flee their countries as a result of the negative effects of climate change. Thus, the recognition of those previously referred to as "climate migrants" or "environmentally displaced persons" as refugees, establishes a controversial issue.[1292] The universally accepted definition of a refugee does not recognise this category and it is widely accepted that a refugee is a person who flees from his government. However, the recent events in Syria for example reveal that people can be forced to flee their country as a result of the acts perpetrated by nonstate actors as well.[1293] Still the UNHRC stated that if people seek protection abroad because their lives are threatened by climate change, they must be treated as if they were fleeing due to a fear of persecution.[1294] Accordingly, the Commissioner also acknowledged and emphasised the importance of observing the non-refoulement[1295] "principal".[1296]

Recent events have placed the aforementioned issue centre stage and indicate that climate change has become a reality in the modern day world. Countries cannot ignore the fact that people are affected by the immediate or long-term effects of climate change and that these events drive movement. Recently, Australia has been experiencing an influx of people leaving the slowly disappearing Pacific islands in search of employment and residency.[1297] Australia has been encouraging this process by instating the Pacific Engagement Visa. This visa grants residence in Australia for

[1291] Brown Migration and climate change 13, 14.

[1292] See 6.4 for an analysis and explanation of the different terms that exist to refer to climate refugees.

[1293] Behrman and Kent "Overcoming the Legal Impasse? Setting the Scene" 12.

[1294] Su 2020 https://climatechangenews.com.

[1295] Article 33(1) of the Convention Relating to the Status of Refugees (1951) recognises the nonrefoulement "principle" by stating that "no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[1296] Su 2020 https://climatechangenews.com; UNHRC Views adopted by the committee under article 5(4) of the Optional Protocol concerning communication number 2728/2016 CCPR/C/127/D/ 2728/2016 7 January 2020.

[1297] Doan et al Migration and labor mobility from Pacific Island countries; see also Stober 2023 https://globalnews.ca.

people originating from the Pacific islands, and it allows for applicants to live, work and study in the state.[1298] The programme also provides for re-allocation support as well as assistance in finding work or even funding their studies.[1299] However, as indicated before, not all states are open to the idea of providing for a broader approach to the aforementioned issues. With this being said, the fate of Vanuatu attracted international attention to the subject of such state responsibility after being struck by two destructive cyclones in quick succession. The ICJ was requested to issue an advisory opinion on the obligations of states and climate change in terms of Resolution A/RES/77/276 adopted by the UNGA in March 2023.[1300] The Resolution[1301] acknowledges that climate change is a reality and that states have a responsibility to protect human rights and to reduce carbon emissions. Despite this obligation, carbon emissions are still increasing, resulting in destructive weather events and creating conditions that drive displacement.

Consequently, action is required to enable states to respond to and manage the negative effects of climate change. This being said, the UNGA specifically requested that the ICJ provide guidance on the responsibility of states to protect the environment and the consequences if states cause harm to the environment.[1302] Although the participation of several states and institutions in the proceedings to establish such legal opinion have been approved, as of July 2023 the legal opinion has not yet been published.[1303] On the same basis, residents of a Caribbean island instituted legal proceedings against the Dutch government for not protecting them against the negative effects of climate change.[1304] The litigants emphasised that the local government has a responsibility to limit their carbon emissions and to protect the

[1298] Australian Government 2023 https://dfat.gov.au.
[1299] Australian Government 2023 https://dfat.gov.au.
[1300] UNGA Request for an advisory opinion of the ICJ on the obligations of States in respect of climate change A/Res/77/276; see also Tigre and Bañuelos 2023 https://blogs.law.columbia.edu.
[1301] UNGA Request for an advisory opinion of the ICJ on the obligations of States in respect of climate change A/Res/77/276.
[1302] UNGA Request for an advisory opinion of the ICJ on the obligations of States in respect of climate change A/Res/77/276.
[1303] ICJ 2023 https://icj-cij.org.
[1304] Greenpeace International 2023 https://greenpeace.org; see also Kaminski 2023 https://aljazeera.com; see also Oppenheimer et al Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities in IPCC Special Report on the Ocean and Cryosphere in a Changing Climate.

islands against rising sea levels and its consequences.[1305] By failing to do so, they argued, the human rights of the islanders have been violated.[1306]

5.5 Conclusion

Climate change[1307] is a universal modern-day issue that presents a continuous challenge to the international community. This chapter[1308] has indicated that climate change has a negative impact on the environment in that it continues to affect global temperatures, resulting in heat waves, droughts, wildfires, floods and natural disasters. In response to this, the international community has adopted several instruments[1309] to address this issue. This shows that climate change is considered a serious matter of concern that requires global attention and response. Member states have pledged their commitment to lowering greenhouse gas emissions and adopting measures that can assist with the adaptation and mitigation of climate change.[1310] Despite these measures, the earth's temperature has been increasing and as a result the intensity and frequency of natural disasters has increased.[1311] As illustrated by the discussion in this chapter,[1312] the conditions exacerbated by climate change affect the livelihood of people and violate human rights.[1313] This affects developing and vulnerable states

[1305] Greenpeace International 2023 https://greenpeace.org; see also Kaminski 2023 https://aljazeera.com.

[1306] Greenpeace International 2023 https://greenpeace.org; see also Kaminski 2023 https://aljazeera.com.

[1307] See 5.2 for an explanation of the term climate change.

[1308] See 5.2.2 for a discussion on extreme weather events and natural disasters exacerbated by climate change.

[1309] See 5.2.1 for a discussion on the different instruments that have been adopted by the international community in order to address the issue of climate change.

[1310] See UNFCCC (1992), Kyoto Protocol to the UNFCCC (1997), Cancun Agreements (2010), Doha Amendment to the Kyoto Protocol to the UNFCCC (2012) and the Paris Agreement (2015).

[1311] UN 2022 https://news.un.org; see also WMO 2021 https://wmo.int/news/media-centre/state-ofclimate-2021-extreme-events-and-major-impacts.

[1312] See 5.2.2 for a discussion on extreme weather events and natural disasters exacerbated by climate change and the effect it has on populations.

[1313] See 5.2.

more than developed states that likely contribute to climate change more through its gas emissions.[1314]

As discussed previously, more frequent disasters and slow environmental degradation has forced people to abandon their homes.[1315] People who are displaced internally due to these circumstances are protected by law.[1316] However, those who are forced to seek protection abroad do not enjoy the same protection in law.[1317] This was practically illustrated by the facts and findings in the matter of Mr Teitiota and his family, who crossed borders to seek protection against rising sea levels on the island of Kiribati.[1318] Mr Teitiota's application for assistance was rejected as NZ found that he did not qualify as a refugee in terms of the criteria established by existing refugee law.[1319] Climate change was until recently only seen as a driver of movement in as far as it overlaps with other factors, such as conflict for example. However, the UN and COP continued to emphasise climate change to such an extent that it was later found to be a sole driver of migration. The UNHRC found that Mr Teitiota's right to life will be affected if he is returned to the disappearing island of Kiribati, explicitly recognising the existence of climate refugees for the first time in history.[1320]

As indicated in the beginning of this chapter, the main objective of this discussion was to determine whether people cross borders to escape the negative effects of climate change and in the event that they do, whether they are protected by law. The matter of Mr Teitiota and other situations such as people arriving in Australia for example,[1370]

[1314] Liu 2011 ELR 44.

[1315] See 2.3, 3.3, 5.3 and 5.4 for a discussion on climate induced displacement; see also IDMC 2023 https://internal-displacement.org; see also IDMC 2023 https://reliefweb.int.

[1316] See 3.2 for a discussion on the Kampala Convention (2012) and see 5.3 for an examination of the UN Guiding Principles on Internal Displacement (1998).

[1317] Ghaly 2021 ANU URJ 94-96.

[1318] See 5.3 and 5.4 for an examination of the matter of Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 paras 7 and 11.

[1319] Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 para 12. See 2.5 for an analysis of the international definition of a refugee and see 2.6 for an application of the elements of the definition of a refugee to climate refugees.

[1320] Su 2020 https://climatechangenews.com. [1370]
See 5.4.

illustrate that climate induced displacement is a reality. In this regard, the UNHRC's recognition of the existence of climate refugees can be complimented as being profound and significant, but it does present the international community with practical challenges. This is mainly because this category of refugees has not been incorporated in the existing international definition of a refugee.[1321] Also, there is no universal legal framework that explicitly caters for the recognition and protection of climate refugees.

The next chapter subsequently investigates the suggestions that have been made by academic authors, bodies and other organisations on refugee law reform to protect climate refugees. The chapter examines, compares and contrasts the different arguments on reform to draw a conclusion on whether existing legal frameworks are sufficient to protect climate refugees or whether a new treaty or protocol should be adopted.[1372]

[1321] See 2.5 for the international definition of a refugee and see 2.6 for the application of the definition of a refugee to those displaced as a result of climate change. [1372] See Chapter 6.

CHAPTER 6

THE LEGAL PROTECTION OF CLIMATE REFUGEES BY MEANS OF EXISTING FRAMEWORKS VERSUS A UNIQUE FRAMEWORK

6.1 Introduction

As indicated in the previous chapter,[1322] the UNHRC recognises those who are displaced externally as a result of the effects of climate change as climate refugees.[1323] This decision was hailed as "significant" as it establishes an international obligation to protect those displaced as a result of climate change.[1324] Still, this finding has presented the international community with several practical and implementation challenges. The main reason for this is that there is no legal framework that provides for the recognition and protection of this category of refugees,[1325] thus clearly leaving a gap in the existing refugee law framework.[1326]

As indicated before,[1327] climate change, the negative impact it has on the environment, human rights violations and displacement as a result is a contemporary issue that continues to receive the attention of the international community. This clearly justifies the recognition, protection and assistance of climate refugees. Several scholars and other bodies have proposed ways to address the issue.

[1322] See 5.4 for the discussion on the recognition of climate refugees by the UNHRC.

[1323] Su 2020 https://climatechangenews.com; UNHRC Views adopted by the committee under article 5(4) of the Optional Protocol concerning communication number 2728/2016 CCPR/C/127/D/ 2728/2016 7 January 2020.

[1324] Aleksandrova, Schraven and Serraglio A real game changer? The implications of the UN's ruling on climate refugees 1.

[1325] See 5.3 for a discussion the lack of protection of climate refugees; see also Mayer 2011 CJIELP 379-380.

[1326] PDD "State-led, regional, consultative process" 131.

[1327] See 2.3, 3.3, 4.3 and 5.2 for a discussion on climate change and displacement as a contemporary challenge.

Some argue that existing laws and legal concepts suffice to protect the category of climate refugees.[1328] These existing legal frameworks include the extension of the

1951 Refugee Convention and its 1967 Protocol, regional documents such as the 1969 OAU Convention, the 1984 Cartagena Declaration and the Kampala Convention, human rights law with specific reference to the principles of non-refoulement and precaution, state responsibility, environmental law, and other local and regional initiatives such as the Dhaka Principles.[1329] This chapter examines these legal instruments.

As indicated in this chapter,[1330] however, each of these legal frameworks have their own problems and challenges when applied to the category of climate refugees.[1331] For this reason, some have suggested that a new treaty be created and adopted, existing instruments be expanded, or that regional and non-binding soft law measures such as UN Resolutions be implemented.[1332] The second part of this chapter examines the creation and adoption of an original treaty that specifically defines the concept of climate refugees and which obligates member states to accept, respect and protect this category of persons and to adopt measures to comply with their international obligations in this regard.[1333] The draft conventions that have already been established in this regard are analysed to explore this argument. The arguments in favour of the expansion of existing conventions by adopting additional protocols to the UNFCCC[1334] and the 1951 Refugee Convention are also reviewed in this chapter.[1335] Since it may be difficult for the international community to reach an agreement on the adoption of

[1328] See 2.6, 3.6 and 6.2 for a discussion on the application of existing legal frameworks and concepts to the category of climate refugees.

[1329] See 6.2.

[1330] See 6.2.7 for an analysis of the problems with existing legal frameworks and their application to climate refugees.

[1331] See 6.2.7.

[1332] See 6.3. The arguments of some of the following authors and bodies are presented in this chapter: Wood, Mayer, McAdam, Poon, Sciaccaluga, Behrman and Kent, Ataputtu, Perez, Prier, Addaney, Jegede and Matinda, Docherty and Giannini, Biermann and Boas, Hodgkinson, Burton, Andersons and Young, UNHCR and OHCHR.

[1333] See 6.3.

[1334] See 5.2.1 for an examination of the UNFCCC (1992) and the Kyoto Protocol to the UNFCCC (1997).

[1335] See 6.3.2.

a new treaty, the trend leaning towards regional agreements and soft law measures to address the issue are also investigated.[1336]

The main objective of this integrated synopsis of various suggestions by different authors, bodies and organisations is to ultimately determine whether the existing legal frameworks are sufficient to protect climate refugees or whether the creation and adoption of a unique convention that specifically caters for their needs and protection is required.

This chapter[1337] illustrates that one of the reasons why the international community is failing to reach consensus on the issue of climate induced displacement is that different terms are in use to refer to this category of people.[1338] All of these concepts are identified and defined in this chapter to determine which elements are important when considering the establishment of a complete and thorough definition for a climate refugee. The term climate refugee is still preferred by some as it emphasises the seriousness of the issue and signifies the need for a response to be developed and the need for a higher standard of protection to be applied in these circumstances.[1390] The scope of this chapter is limited to the identification of the important elements that should be contained in the definition of a climate refugee and the identification of important provisions that should be absorbed in a proposed new treaty. This will lay the foundation for the way forward and the suggestions that will be made in the subsequent chapter.

6.2 Protecting climate refugees under existing law

As indicated before,[1339] climate change has become one of the main drivers of internal and even external displacement in the modern world since there has been an increase

[1336] See 6.3.3.
[1337] See 6.4.
[1338] See 6.4. [1390]
See 6.4.
[1339] See 2.3, 3.3, 3.4 and 5.3 for a discussion on climate change and disaster displacement.

in sudden and slow-onset climate change events. These have proven to have lasting negative effects on populations.[1340] The UNHCR noted in 2017 that:[1341]

> The consequences of climate change are enormous. Scarce natural resources such as drinking water are likely to become even more limited. Many crops and some livestock are unlikely to survive in certain locations if conditions become too hot and dry, or too cold and wet. Food security, already a concern, will become even more challenging.

Although there are international and regional legal frameworks that provide for the protection of displaced persons,[1342] those who cross borders to escape the negative effects of climate change do not fall within the ambit of these laws.[1343] This leaves them exposed and vulnerable to several human rights violations.[1344] Due to an increase in climate change events and practical illustrations of the negative effects it has on populations, this topic has been receiving more attention over the last couple of years.[1345] There is clearly a gap in the refugee law framework as it is not sufficient to provide for the inclusion and protection of climate refugees. The existing refugee law is therefore outdated, and it has to be extended, amended or supplemented to provide for these modern-day challenges.[1346]

Some academics have argued that climate refugees are adequately protected by existing law, while others have argued that the existing refugee law can be interpreted in such a way that it would include the category of climate refugees.[1347] Others have

---

[1340] McAdam 2020 AJIL 711; see also UNHCR 2020 https://unhcr.org/news/stories/climate-changedefining-crisis-our-time-and-it-particularly-impacts-displaced#; OHCHR 2022 https://ohchr.org.

[1341] Zia (ed) 2017 https://www.ncbi.nlm.nih/gov/pmc/articles/PMC5519075; see also see also Attapattu "A new category of refugees?" 38.

[1342] See 3.5 for analysis of the Kampala Convention (2012) and see 5.3 for a discussion on the UN Guiding Principles on Internal Displacement (1998).

[1343] Mayer 2011 CJIELP 379-380; see also McAdam 2020 AJIL 712. Previous chapters have shown that those who are displaced internally as a result of the negative effects of climate change are protected by existing frameworks such as the UN Guiding Principles on Internal Displacement (1998) and the Kampala Convention (2012).

[1344] See 6.2.7 for a discussion on the problems with existing law; see also Sciaccaluga International law and the protection of "climate refugees" 79, 117.

[1345] Sciaccaluga International law and the protection of "climate refugees" 7.

[1346] PDD "State-led, regional, consultative process" 131.

[1347] See 2.6, 3.6 and 6.2.1 to 6.2.6 for the application of existing laws to those displaced by climate change.

argued that the existing 1951 Refugee Convention should be adjusted or supplemented to include the category of climate refugees.[1348] Last mentioned argument includes that the UNFCCC must be amended. On the other hand,[1349] some have argued that extension or amendment is not possible and that a new convention and framework has to be drafted.[1350] Each of these reform suggestions, however, have attracted its own extensive criticism that is discussed and analysed in depth below.[1351]

6.2.1 Refugee law extended

As mentioned above,[1352] some have argued that existing refugee law can be sufficient to provide for the inclusion of the category of climate refugees.[1353] This can either be done by modifying the existing 1951 Refugee Convention to explicitly include climate refugees or by simply providing for the content of this Convention to be interpreted more broadly.[1354] The former is unlikely to happen as the 1951 Refugee Convention has existed for decades and has not been amended to accommodate other categories of refugees.[1355] The latter suggestion, however, means that a person who flees as a result of climate change will have to prove that they have a well-founded fear of being persecuted in their country of origin.[1356] These events cannot strictly be classified as persecution as they do not meet the threshold prescribed by law.[1357] Jane McAdam points out there is the absence of a persecutor. However, in these cases the persecutor could be regarded as a different state whose actions contributed to the climate change that in turn negatively affected a person in their home country.[1358] This results in the

---

[1348] See 6.2.1.

[1349] See 6.3.2.

[1350] See 6.3; see also PDD "State-led, regional, consultative process" 132.

[1351] See 6.2.7 for an examination of the problems with applying existing laws to the category of climate refugees.

[1352] See 2.6 for the application of the definitional elements of a refugee to climate change and disasters displacement.

[1353] Ghaly 2021 ANU URJ 100; see also Perez "Beyond the shortcomings of international law" 218; see also Cooper 1998 NYUELJ 487-489.

[1354] Perez "Beyond the shortcomings of international law" 218; see also Gonzalez 2020 WLIJ 381.

[1355] Cooper 1998 NYUELJ 499.

[1356] McAdam 2020 AJIL 712.

[1357] McAdam 2009 MJIL 590-592.

[1358] McAdam 2009 MJIL 592; see also McAdam et al 2016 UNSWLRS para 83.

exact opposite of the definition of a refugee.[1359] On the other hand, Mayer argues that in the event that a government does not take steps to reduce the climate vulnerability of its people, this can be seen as persecution.[1360] On this point, Cooper argues that desertification and rising sea levels for example amount to persecution for purposes of the definition of a refugee.[1413] Accordingly, nationals are persecuted by the government in that governments have contributed to the environment being damaged, consequently forcing citizens to leave.[1361] The argument is the same where the government discriminates against those affected by these climate change events and where aid is refused.[1362] With this in mind, even if it is valid to argue that climate change events or disasters do not amount to persecution:[1363]

> It may provide a context in which forms of harm that do engage existing international protection regimes may arise – for instance, where the disaster causes a breakdown of law and order or is used by a government as pretext for persecutory acts against certain parts of the population.

This being said, it is important to remember that these climate change events could create conditions that can lead to and even aggravate discriminatory behaviour. In some circumstances these events combine with existing conflict, which justifies qualification as a refugee.[1364] Nevertheless, to qualify as a refugee, it must also be established that there is a fear of persecution based on the grounds set out in the 1951 Refugee Convention.[1365] Here Cooper argues that climate refugees can fall within the ambit of being discriminated against based on their membership to a specific social group, the social group being people who do not have the means or the capacity to protect their own environment.[1366] Although this argument may have some weight, it

---

[1359] McAdam 2009 MJIL 592.

[1360] Mayer 2011 CJIELP 382-383; see also Cooper 1998 NYUELJ 502. [1413] Cooper 1998 NYUELJ 519-520.

[1361] Cooper 1998 NYUELJ 519-520.

[1362] Mayer 2011 CJIELP 382-383.

[1363] McAdam 2020 AJIL 712; see also Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise (2018).

[1364] McAdam 2020 AJIL 712; see also Scott 2016 RSQ 27; see also Kaczmarska and Ono date unknown https://undrr.org; see also Sussman 2023 CJIL 63.

[1365] Cooper 1998 NYUELJ 521.

[1366] Cooper 1998 NYUELJ 521-526.

is difficult not to agree with McAdam, who points out that these climate change events are not discriminatory and do not target specific categories of people.[1367]

6.2.2 Regional documents

Some scholars argue that climate refugees can fall within the ambit of the extended definitions of a refugee contained in both the 1969 OAU Convention and the 1984 Cartagena Declaration.[1368] The UNHCR stated in 2011 that these regional frameworks can be a solution to include those who cross borders due to the negative effects of climate change.[1369] These frameworks recognise and include those who flee as a result of circumstances that seriously disrupt public order.[1370] It can be argued that natural disasters can seriously disrupt public order as it can prevent the government from functioning properly.[1371] As illustrated in Chapter 3, African and Latin American states have used this extended definition to accept asylum seekers fleeing climate change events linked to conflict.[1372] Tamara Wood suggests several methods that can be used to interpret the phrase "seriously disrupting public order" as found in the 1969 OAU Convention.[1373]

Methods include an analysis of the merits of each case by taking into account the effects of the event rather than its cause, consideration of the non-refoulement principle, looking for a total breakdown of law and order, and gauging the effect on

---

[1367] McAdam 2009 MJIL 592; see also McAdam et al 2016 UNSWLRS para 83.

[1368] See 3.6 for the application of the African and Latin American regional definitional elements of a refugee to climate change and disaster displacement; see also Attapattu "A new category of refugees?" 43; see also Sussmann 2023 CJIL 64; see also Cooper 1998 NYUELJ 496; see also McAdam et al 2016 UNSWLRS para 86.

[1369] UNHCR Summary of deliberations: Climate change and displacement: Identifying gaps and responses: Expert roundtable, Bellagio Conference Centre 22-26; see also McAdam et al 2016 UNSWLRS para 91.

[1370] Article 1 of the OAU Convention governing the specific aspects of refugee problems in Africa (1969); see also Cartagena Declaration on Refugees (1984).

[1371] Sussman 2023 CJIL 65.

[1372] Addaney, Jegede and Matinda 2019 AHRY 251; see also Wood Protection and disasters in the Horn of Africa: Norms and practice for addressing cross-border displacement in disaster contexts 7.

[1373] Wood Protection and disasters in the Horn of Africa: Norms and practice for addressing crossborder displacement in disaster contexts 26.

the enjoyment of human rights.[1374] Although it would be challenging to automatically include climate refugees in the 1969 OAU Convention as indicated below, Wood indicates that it "would provide a sound framework for both planning and assessing state responses to disaster-related cross-border movement".[1375] The Kampala

Convention[1376] that was adopted in the African region has also been suggested as a guideline to address external environmental displacement[1377] and it has been described as "good news, a sign of hope for the victims of environmental displacement and a commendable legislative example for the other regions and the international community as a whole".[1378] In respect of the 1984 Cartagena Declaration, Cantor has illustrated that several American states have of temporarily assisting those who do not qualify as refugees but who may require such level of protection.[1379]

6.2.3 Human rights law

Climate change and the events it triggers threaten the survival of each and every person. One suggestion is that the human rights law framework be used to respond to the challenges.[1380] As stated by the OHCHR, "human rights obligations, standards and principle have the potential to inform and strengthen international, regional and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes".[1381] In terms of human rights law, states have to protect the rights of people in their territory and these people, which includes climate

---

[1374] Wood Protection and disasters in the Horn of Africa: Norms and practice for addressing crossborder displacement in disaster contexts 26-27.

[1375] Wood Protection and disasters in the Horn of Africa: Norms and practice for addressing cross border displacement in disaster contexts 31.

[1376] AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012).

[1377] Schloss "Cross-border displacement due to environmental disaster" 249.

[1378] Dos Santos Soares 2018 RCDA 42.

[1379] Cantor Law, policy and practice concerning the humanitarian protection of aliens on a temporary basis in the context of disaster 19-22.

[1380] OHCHR FAQ on human rights and climate change 1; see also Mayer 2011 CJIELP 386; see also McAdam and Limon Policy Report: Human rights, climate change and cross-border displacement: The role of the international human rights community in contributing to effective and just solutions.

[1381] OHCHR FAQ on human rights and climate change 1.

refugees, are entitled to enjoy these rights.[1382] This includes the obligation of states to prevent and even to mitigate human rights violations that can be caused by climate change.[1383] Events have shown that climate change can result in the violation of basic human rights, which in turn triggers a need for protection by the international community.[1384] Human rights law is relevant as the violation of human rights can urge people to search security abroad and in the event that a person finds himself in another state, it ensures that protection is granted.[1385] The OHCHR indicates that these events and the resulting circumstances can infringe the right to a clean and healthy environment, food, health, housing, and water and sanitation, all of which influence people's livelihoods.[1386]

More specifically, these events threaten and violate the right to life, as they cause casualties.[1387] Therefore, closely related to the protection of human rights is the observance of the principle of non-refoulement[1388] that is embedded in international, regional and domestic refugee and human rights law frameworks and that has even been recognised as customary international law.[1389] It binds all states even if they are not a party to the 1951 Refugee Convention.[1390] As indicated in Chapter 5,[1391] the UNHRC used this principle to prohibit the return of Mr Teitiota to the disappearing

[1382] Perez "Beyond the shortcomings of international law" 217; see also Sciaccaluga International law and the protection of "climate refugees" 106; see also Mayer 2011 CJIELP 386.

[1383] OHCHR FAQ on human rights and climate change 43-44.

[1384] Sciaccaluga International law and the protection of "climate refugees" 106.

[1385] McAdam Climate change, forced migration and international law 186; see also Perez "Beyond the shortcomings of international law" 217.

[1386] OHCHR Report of the UNHCR on 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 A/HRC/38/21; see also Sciaccaluga International law and the protection of "climate refugees" 108, 126.

[1387] Sciaccaluga International law and the protection of "climate refugees" 119-123.

[1388] The principle of non-refoulement is contained in Article 33(1) of the 1951 Refugee Convention and entails that a state may not return a person to his home country if there is a possibility that he may be tortured or subjected to human rights violations.

[1389] Katz and Maluwa "Refugees and Stateless Persons" 520; see also Costello and Foster 2015 NYIL 273; see also Saidi v Minister of Home Affairs 2018 4 SA 333 (CC) para 32; see also McAdam 2020 AJIL 713; see also Addaney, Jegede and Matinda 2019 AHRY 249.

[1390] Poon "Drawing upon international refugee law" 159.

[1391] See 5.4 and 5.5 for a discussion on the matter of Mr Teitiota, including the arguments and decisions.

island of Kiribati based on the fact that his return will expose him to the violation of his human rights, more specifically the right to life.[1392] Similarly, this principle was used by a French court to prohibit the return of a resident who had breathing problems to Bangladesh where there is air pollution on the basis that it could affect his right to life.[1393] Other regional practices have indicated that an event will have to satisfy a range of criteria before a state will provide protection under the auspice of human rights law.[1394] The actions of a local government should present an imminent threat, the nature of the harm must be serious, and there must be a real chance that the harm will occur.[1395]

Jenny Poon[1396] argues that the aforementioned principle should be combined with the precautionary principle in international environmental law to protect people in the event of climate induced displacements. The objective of this principle is to prevent scientific uncertainty being used as an excuse to implement measures that can prevent the degradation of the environment where there is a threat of serious or irreparable damage. In terms of this provision, states have an obligation to prevent environmental harm, and in the event that this harm has occurred, states have to provide assistance to those who have been affected by this harm. This being said, the non-refoulement principle prevents harm to refugees, while the precautionary principle prevents harm to the environment.[1397] However, as the court in NZ argued in hearing the matter of Teitiota, environmental degradation, natural catastrophes and exposure of humans are linked.[1398]

[1392] Keshen and Lazickas 2022 https://jia.sipa.columbia.edu.

[1393] Keshen, Lazickas and Solórzano 2021 https://multilateralism.sipa.columbia.edu.

[1394] Anastasiou "Public international law's applicability to migration as adaptation" 179-183.

[1395] Anastasiou "Public international law's applicability to migration as adaptation" 179-183.

[1396] Poon "Drawing upon international refugee law" 158; see also Sciaccaluga International law and the protection of "climate refugees" 137-138, 158, 162.

[1397] Poon "Drawing upon international refugee law" 162.

[1398] Ioane Teitiota v Chief Executive of the Ministry of Business Immigration and Employment SC 7/2015 [2015] NZSC 107 para 27.

In addition, it is worth mentioning the right to a nationality is embedded in Article 15 of the UDHR.[1399] In this regard, McAdam and Mayer consider the consequences of states that cease to exist as a result of slow-onset climate change events such as sea levels rising and whether this renders nationals stateless.[1400] According to Article 1 of the Montevideo Convention, this criteria includes a defined territory, a permanent population, an effective government, and capacity enter into foreign relations with other states.[1401] The long-term negative effects of climate change can mean that island states such as Tuvalu and Kiribati will at some point no longer comply with the criteria for statehood and the populations of these states will be forced to move as these territories become uninhabitable. This arguably renders them stateless.[1402] In this event, alternative protection mechanisms and frameworks are triggered that can also be helpful in protecting those affected by climate change.[1403] These conditions, however, can be anticipated and prevented by for example already allowing the nationals of disappearing states to relocate to a different state or to obtain dual citizenship.[1404]

6.2.4 State Responsibility

Closely linked to the aforementioned argument is the inclusion and protection of climate refugees by assigning state responsibility.[1405] As refugees and the protection of the environment against climate change are of international concern, states have an international responsibility to prevent the degradation of the environment and to protect climate refugees.[1406] States have an international obligation to do no harm and

---

[1399] Article 15 of the UDHR (1948); see also Mayer 2011 CJIELP 385.

[1400] McAdam 2010 UNSWLRS 11; see also Mayer 2011 CJIELP 383-385. According to Article 1 of the Convention Relating to the Status of Stateless Persons (1954) a stateless person is one that is not considered as a national by any State under the operation of its law.

[1401] Article 1 of the Montevideo Convention (1933); see also McAdam 2010 UNSWLRS 5-10.

[1402] McAdam 2010 UNSWLRS 13-14 and 21-23.

[1403] McAdam 2010 UNSWLRS 13-14.

[1404] McAdam 2010 UNSWLRS 15-19.

[1405] Poon "Drawing upon international refugee law" 164-165; see also Sciaccaluga International law and the protection of "climate refugees" 129.

[1406] Attapattu "A new category of refugees?" 42; see also Poon "Drawing upon international refugee law" 164-165; see also Sciaccaluga International law and the protection of "climate refugees" 84, 108.

to adopt measures that can ensure that its contribution to harm is limited.[1407] A UN Special Rapporteur emphasised this by saying that "the international community must realise its responsibility to protect people displaced across borders by climate change impacts".[1408] This argument is supported by Benoit Mayer in his academic work titled The international legal challenges of climate-induced migration: Proposals for an international legal framework. Firstly, he reiterates that the UNFCCC obligates states to assist states vulnerable to climate change to adapt to its effects.[1409] Secondly, he argues that morality places an obligation on states to intervene and to assist persons whose human rights are negatively affected or violated.[1463] EU states such as

Germany, for instance, have embraced this obligation by expansively recognising those who flee as a result of humanitarian crises such as that in Syria as refugees.[1410] Furthermore, the ICJ has indicated on numerous occasions that states are liable if they cause harm to other states.[1411] Therefore, states that perform acts that contribute to climate change should be held accountable for their actions, and they have an obligation to protect persons affected by the negative effects of such contributory climate change. As stipulated in Chapter 5, the matter of the obligations of states in the context of climate change have been referred to the ICJ for an advisory opinion.[1412]

6.2.5 Environmental law

Many have argued that international environmental law can be used to include and protect climate refugees.[1413] More specifically, the UNFCCC[1414] can be amended or

---

[1407] Sciaccaluga International law and the protection of "climate refugees" 87-88.

[1408] Fry 2023 https://ohchr.org.

[1409] Article 4(4) of the UNFCCC (1994); see also Mayer 2011 CJIELP 375. [1463] Mayer 2011 CJIELP 375-376.

[1410] Attapattu "A new category of refugees?" 42.

[1411] Poon "Drawing upon international refugee law" 166; see also Trail Smelter Arbitration (USA v Canada) (1938-1941) 3 RIAA 1095, 1965; see also Corfu Channel (UK v Albania) [1949] ICJ Rep 4, 18-22.

[1412] At the date of writing, the ICJ has not yet released the Advisory Opinion on the obligations of states in respect of climate change; see also UNGA Request for an advisory opinion of the ICJ on the obligations of States in respect of climate change A/Res/77/276.

[1413] Behrman and Kent "Overcoming the legal impasse? Setting the scene" 9; see also Sciaccaluga International law and the protection of "climate refugees" 145-156.

[1414] See 5.2.1 for a discussion on the UNFCCC (1992).

reinterpreted. It has already resulted in the creation of a task force, which indicates that members are dedicated to enforcing the obligations. Sufficient financial means for implementation has been provided, and the way in which it was drafted allows for obligations to be created.[1415] The Global Compact on Refugees[1416] and the GCM were also adopted. In combination Sciaccaluga describes them as the "embryo of what might become the near future a legal system dedicated to the protection of forced climate migrants".[1417]

6.2.6 Other local and regional initiatives and frameworks

There are several academic authors who argue that the identified gap in international refugee law can be addressed by complimenting existing law with local and regional initiatives and frameworks. The argument is supported by the following reasoning:[1418]

> State-led, (sub)-regional, consultative processes might stand a better chance to recognize and build consensus around the most appropriate and relevant measures for the respective (sub)-region, and enhance national policy and normative development. It is a fact that regional and sub-regional organizations and processes are often more coherent in terms of the interest of Member States and are more likely to reach a consensus on issues, as they usually share similar concerns.

There are several local and regional initiatives and frameworks that are worthy of mention. All of these recognise that displacement due to climate change is a reality and they mostly follow a humanitarian approach to this controversial issue.[1419] In 2012, the Dhaka Principles were drafted with the purpose of providing for the protection of the rights of migrants who work.[1420] Amongst others, the Dhaka Principles provide for

---

[1415] Behrman and Kent "Overcoming the legal impasse? Setting the scene" 9.

[1416] See 5.3.

[1417] Sciaccaluga International law and the protection of "climate refugees" 146.

[1418] PDD "State-led, regional, consultative process" 126, 145; see also Attapattu "A new category of refugees?" 43; see also Perez "Beyond the shortcomings of international law" 222.

[1419] PDD "State-led, regional, consultative process" 126; see also Gonzalez 2020 WILJ 382.

[1420] Dhaka Principles for migration with dignity (2012); see also Perez "Beyond the shortcomings of international law" 222.

equal treatment, free access to personal documents, and safe and decent working and living conditions for migrant workers.[1421]

According to Perez, these rights could be extended to climate induced migrants in the workplace.[1422] The Nansen Initiative[1423] allows for the acknowledgement of the existence of climate refugees and the necessity to provide protection for this category of people.[1424] The consultative group effort of states involved in this initiative over several years resulted in the Protection Agenda.[1425] Last-mentioned recognises the legal gaps with respect to climate change cross-border displacement and proposes global efforts to provide a solution for this problem.[1426] It proposes short-term measures such as granting visas to those originating from disaster hit areas or assisting with the relocation of animals from dry or flooded regions. In addition to responding to these issues, the Protection Agenda also proposes that these events be prevented and mitigated.[1427] As a result of these frameworks, the PDD was established to assist states in implementing the aforementioned recommendations.[1428]

The Peninsula Principles on Climate Displacement (Peninsula Principles),[1429] on the other hand, provides protection to those displaced as a result of both disasters and slow-onset events even if they are not interlinked with other factors.[1430] It also establishes state responsibilities to prevent such displacement and to support adaptation.[1431] The Brazil Declaration and Plan of Action (Brazil Declaration)[1432] that

---

[1421] Dhaka Principles for migration with dignity (2012).

[1422] Perez "Beyond the shortcomings of international law" 222.

[1423] Nansen-Initiative: Disaster-induced cross-border displacement (2012).

[1424] Attapattu "A new category of refugees?" 43.

[1425] PDD "State-led, regional, consultative process" 128; Nansen Initiative Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (2015); see also McAdam et al 2016 UNSWLRS para 98.

[1426] PDD "State-led, regional, consultative process" 129.

[1427] PDD "State-led, regional, consultative process" 131.

[1428] PDD "State-led, regional, consultative process" 128; see also Gonzalez 2020 WILJ 383.

[1429] The Peninsula Principles on climate displacement within states (2013).

[1430] Attapattu "A new category of refugees?" 45.

[1431] Perez "Beyond the shortcomings of international law" 222.

[1432] Brazil Declaration: A framework for cooperation and regional solidarity to strengthen the international protection of refugees, displaced and stateless persons in Latin America and the Caribbean, Brasilia (2014).

was adopted in 2014, recognises that climate change displacement is a problem that requires further investigation and attention.[1433] In Chapter 7, the plan requests the UNHCR to study the subject and to provide guidance on methods that can be implemented locally and regionally to respond to this issue.[1434]

6.2.7 Problems with existing law

The suggestions mentioned above to address the gaps in the law with respect to the protection of climate refugees are arguably progressive in nature. Nevertheless, some argue that the aforementioned frameworks are not sufficient to provide for the recognition, inclusion and protection of climate refugees, and that they are merely complimentary.[1435] This being said, each of these frameworks present their own challenges as is indicated in the below discussion.

In the first place, there are numerous obstacles that would have to be overcome before climate refugees will automatically be included in the existing refugee law framework. It is clear that the existing definition of a refugee does not explicitly include the category of climate refugees as the 1951 Refugee Convention and its definition was created with the circumstances of war in mind.[1436] It therefore predominantly protects those who flee for political reasons.[1437] Article 31(1) of the VCLT clearly indicates that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

[1433] McAdam et al 2016 UNSWLRS para 90; see also PDD "State-led, regional, consultative processes" 142; see also Garlick, Franck and Bower "Enhancing legal protection" 122.

[1434] Chapter 7 of the Brazil Declaration: A framework for cooperation and regional solidarity to strengthen the international protection of refugees, displaced and stateless persons in Latin America and the Caribbean, Brasilia (2014).

[1435] Sciaccaluga International law and the protection of "climate refugees" 159-160; see also McAdam and Limon Policy Report: Human rights, climate change and cross-border displacement: The role of the international human rights community in contributing to effective and just solutions.

[1436] Article 1 of the Convention Relating to the Status of Refugees (1951); see also Mayer 2011 CJIELP 380-383; see also Sciaccaluga International law and the protection of "climate refugees" 157; see also Biermann and Boas 2010 GEP 72; see also Ghaly 2021 ANU URJ 91; see also Prieur "Towards an international legal status of environmentally displaced persons" 235.

[1437] Sciaccaluga International law and the protection of "climate refugees" 157.

purpose".[1438] Climate change is not listed in the definition as a ground to justify migration and it would be difficult to argue that climate change and related events amount to persecution.[1439] The suggested reading-in exercise can also result in states using favourable interpretive and discretionary skills.

The extension of this definition increases the obligation on states and holds them to a higher standard, and as a result, states are reluctant to accept a wider interpretation of the definition of a refugee. It is also highly unlikely that states will be willing to accommodate an extensive group of refugees that is not as clear cut as the category of political refugees.[1440] One of the reasons include the encumbering effects[1441] and the hostile attitude of nationals towards refugees.[1442] Countless academic writers have indicated that one of the main challenges with this category of refugees is the fact that they do not only flee and seek protection as a result of current of imminent climate change threats.[1443] People are also forced to leave their countries as a result of what is referred to as "slow-onset events," which in the long term makes their country of residence uninhabitable.[1444] In these circumstances, the risk remains that a person will not be recognised as a refugee and be offered the necessary protection as return to his country will not result in refoulement.[1445] Additionally, as indicated before, displacement due to these events is mostly internal, and the 1951 Refugee Convention will have to be amended to provide for these circumstances as well.[1446] This is clearly in contrast with the exclusive objective of the refugee law framework to protect those who cross borders and seek assistance in a different country.[1447]

[1438] Article 31(1) of the VCLT (1969).

[1439] Prieur "Towards an international legal status of environmentally displaced persons" 236.

[1440] Biermann and Boas 2010 GEP 74.

[1441] Eckersley 2015 EJPT 15.

[1442] Cooper 1998 NYUELJ 500-501.

[1443] Sciaccaluga International law and the protection of "climate refugees" 161-162.

[1444] Sciaccaluga International law and the protection of "climate refugees" 162.

[1445] Sciaccaluga International law and the protection of "climate refugees" 163.

[1446] Sussman 2023 CJIL 63.

[1447] Chapter 1 of A guide to international refugee protection and building state asylum systems; see also the definition of a refugee in the Convention Relating to the Status of Refugees (1951), which clearly requires that the person find themselves outside of their country of nationality to qualify as a refugee, among other requirements.

As indicated by the High Commissioner in 1992:[1448]

> Using the term environmental refugee to refer to all people forced to leave their homes because of environmental changes loses their distinctive need of refugees for protection. It blurs the respective responsibilities of national governments towards their citizens and of the international community towards those who are without protection. It also impedes a meaningful consideration of solutions and action on behalf of the different groups. Therefore, the UNHCR believes the term environmental refugee is a misnomer.

Robert McCleman indicated in 2008 that:[1449]

> Although the concept of environmental refugees has now been around for several decades, there has been little appetite among governments or policy makers, especially in developed nations to pursue the idea of adding the environmental refugee as a possible new category of protected persons. A well-established international definition of a refugee already exists and a person fleeing an environmental crisis (whether human-caused or of purely natural origin) does not begin to meet that accepted definition.

Sylvia Ghaly also provides several other reasons for why the states will oppose the inclusion of the climate refugees.[1450] Firstly, there is the perception that the inclusion will weaken the rights of other categories of refugees[1451] and it is likely that states will only accommodate one of the categories of refugees and not both.[1452] Secondly, it is difficult to attribute the reason for displacement to climate change and related events alone.[1453] Thirdly, states feel that this is a matter that has to be dealt with by the local state.[1454] Some of the climate change events are predictable over time and can be sufficiently addressed by the local government.[1455]

[1448] Attapattu "A new category of refugees?" 38.

[1449] Attapattu "A new category of refugees?" 44.

[1450] Ghaly 2021 ANU URJ 91; see also Scissa Recognition and protection of environmental migrants in international law 2.

[1451] Ghaly 2021 ANU URJ 91; Scissa Recognition and protection of environmental migrants in international law 2; see also Addaney, Jegede and Matinda 2019 AHRY 251.

[1452] Biermann and Boas 2010 GEP 74.

[1453] Ghaly 2021 ANU URJ 91; see also Prange 2022 https://cfr.org.

[1454] Ghaly 2021 ANU URJ 91.

[1455] Biermann and Boas 2010 GEP 74.

Therefore, as Prieur argues, the existing refugee law should not be extended to automatically include this new category of refugees. One argument is that the amendment and extension of the existing 1951 Refugee Convention may affect its strength.[1456] Furthermore, the existing 1951 Refugee Convention and its 1967 Protocol does not contain provisions that are applicable to these circumstances and does not specifically provide for the protection of climate refugees.[1457] In fact, the UNHCR has indicated that the creators of the 1951 Refugee Convention "purposefully declined to extend refugee status to victims of such events".[1458]

Secondly, the regional 1969 OAU Convention and the 1984 Cartagena Declaration was also created with the circumstances in these regions at the time in mind.[1459] It was never the intention of the drafters to include climate refugees in the scope of the definition.[1460] What is more, these documents apply regionally and do not create or establish international responsibilities. The 1969 OAU Convention does not provide for implementation to be monitored, and the 1984 Cartagena Declaration is classified as soft law.[1461] The 1969 OAU Convention provides for provisional protection as refugees in the past often intended to eventually return and resettle in their home countries once circumstances improved.[1462] Climate refugees, on the other hand, require longterm protection as countries can be irreversibly affected by climate change.[1463]

As evident from practical examples, protection is extended to those who flee climate change events that are interlinked with other factors, such as conflict.[1464] Although it can be argued that cross-border displacement as a result of climate change can fall

[1456] Prieur "Towards an international legal status of environmentally displaced persons" 236.

[1457] PDD "State-led, regional, consultative processes" 132; see also Poon "Drawing upon international refugee law" 163; see also UNHCR Joint submission: Forced displacement in the context of climate change 9.

[1458] Poon "Drawing upon international refugee law" 163; see also UNHCR Joint submission: Forced displacement in the context of climate change 9; see also Mayer 2011 CJIELP 381-382.

[1459] Biermann and Boas 2010 GEP 73.

[1460] Cooper 1998 NYUELJ 497; see also Biermann and Boas 2010 GEP 73.

[1461] Addaney, Jegede and Matinda 2019 AHRY 250; see also Cooper 1998 NYUELJ 499.

[1462] Cooper 1998 NYUELJ 498.

[1463] Cooper 1998 NYUELJ 498.

[1464] McAdam et al 2016 UNSWLRS para 87.

within the ambit of seriously disrupting public order, the other criteria of the definition also have to be met. The requirement that a person has to leave his place of habitual residence can result in further exclusion of the category of climate refugees.[1465] The regional implementation of the extended definition to include those displaced as a result of climate change has been ambiguous and inconsistent, and therefore no agreed state practice is currently in place.[1466] Although the Kampala Convention[1467] is a landmark document for those displaced as a result of environmental issues, it only applies to those displaced internally.[1468]

Thirdly, human rights law does not provide for the crossing of borders and the allocation of a specific status to people who flee environmental issues, which in turn provides for a higher form of protection.[1469] Mayer[1524] also points out that states only have an obligation to protect the human rights of those under their effective control, and states do not have effective control over climate change effects. Mayer therefore classifies human rights law in these circumstances as being vague and open to interpretation. Cooper highlights that the existing human rights framework does not specifically cater for environmental issues.[1470] It is clear that it cannot work alone and should be interpreted and used in combination with other rules and systems to provide sufficient protection.[1471] With regard to the principle of non-refoulement, Addaney, Jegede and Matinda also warn that the disagreement between states on the scope of the concept leads to discrepancies its application.[1472]

Although a classification as stateless could provide an alternative method of protection for those displaced as a result of climate change, this concept in itself presents several

---

[1465] Wood Protection and disasters in the Horn of Africa: Norms and practice for addressing crossborder displacement in disaster contexts 28-29.

[1466] Anastasiou "Public international law's applicability to migration as adaptation" 178-179.

[1467] AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012).

[1468] Abebe The Kampala Convention and environmentally displacement in Africa 7.

[1469] Behrman and Kent "Overcoming the legal impasse? Setting the scene" 5-8. [1524] Mayer 2011 CJIELP 386-388.

[1470] Cooper 1998 NYUELJ 495; see also Gonzalez 2020 WLIJ 373.

[1471] Perez "Beyond the shortcoming of international law" 217.

[1472] Addaney, Jegede and Matinda 2019 AHRY 249.

challenges that renders this argument ineffective.[1473] The Convention regulating statelessness has not been ratified by many states, which limits the options for territory, which is a requirement for application.[1474] It also does not provide for a prohibition on expulsion when a person entered territory.[1475] In addition, only recognising those who are denied nationality as stateless, severely complicates the extension of applicability to other situations.[1476] The relocation of populations as a means to prevent statelessness places an obligation on the hosting state to observe, protect and guarantee the rights of these people. This exercise may require people to abandon their native identities.[1477]

Fourthly, the frameworks that provide for state obligations and responsibility lacks measures to enforce and to hold responsible those who do not comply with their international obligations.[1478] Fifthly, the use or amendment of the UNFCCC is not a viable option to address the issue of climate refugees either as it was not created with the purpose of including this category of persons. It only addresses the obligations that states have towards each other.[1479] Moreover, the ancillary documents that were adopted is non-binding and classified as soft law.[1480]

Lastly, the aforementioned local and regional initiatives are described as being complimentary[1481] to existing law. This illustrates that states are aware of displacement caused by climate change and it therefore has to be collectively addressed. However, although these structures can be used as a guideline, it still does not provide a

[1473] See 2.5.7 for a discussion on stateless persons outside their country of former habitual residence; see also McAdam et al 2016 UNSWLRS para 92.

[1474] Mayer 2011 CJIELP 384-385; see also McAdam et al 2016 UNSWLRS para 92.

[1475] McAdam 2010 UNSWLRS 12-15; see also Mayer 2011 CJIELP 384-385.

[1476] McAdam 2010 UNSWLRS 12-15; see also Garlick, Franck and Bower "Enhancing legal protection" 123; see also McAdam et al 2016 UNSWLRS para 92.

[1477] McAdam 2010 UNSWLRS 16-19.

[1478] Sciaccaluga International law and the protection of "climate refugees" 92; see also Eckersley 2015 EJPT 15.

[1479] Docherty and Giannini 2009 HELR 358; see also Behrman and Kent "Overcoming the legal impasse? Setting the scene" 6.

[1480] Sciaccaluga International law and the protection of "climate refugees" 146, 151.

[1481] Pere "Beyond the shortcomings of international law" 222.

comprehensive solution to fill the gap in international refugee law.[1482] The Dhaka Principles, for instance, only apply to the category of migrant workers, while the Peninsula Principles are non-binding and only apply to those who are displaced internally.[1483] One of the main limitations on the Nansen Initiative, for instance, is that it only extends recognition and protection to those who have fled as a result of a disasters and not due to long-term environmental degradation.[1484] According to Gonzalez, further shortcomings include that these instruments fail to attribute responsibility to states that contribute to climate change and implementation is voluntary.[1485]

6.3 Establishing a unique legal framework for climate refugees

Given the above, it can be argued that the creation and establishment of a unique agreement or treaty specifically dealing with the issue of climate refugees is justified. Several proposals have been made that range from the adoption of an original convention and the addition of a protocol to the UNFCCC, to the formation and adoption of regional agreements or soft law frameworks.[1486]

[1482] Attapattu "A new category of refugees?" 48.

[1483] Attapattu "A new category of refugees?" 45.

[1484] Attapattu "A new category of refugees?" 43; see also Gonzalez 2020 WILJ 384.

[1485] Gonzalez 2020 WILJ 384.

[1486] Mayer 2011 CJIELP 369-370; see also Prieur "Towards an international legal status of environmentally displaced persons" 236; see also Perez "Beyond the shortcoming of international law" 221; see also Biermann and Boas 2010 GEP; see also Docherty and Giannini 2009 HELR;

6.3.1 Creating a new instrument

Although authors Docherty and Giannini support the creation of an original treaty to address the issue of international climate induced displacement, they emphasise that such a framework should complement existing policies.[1542] Their definition of a climate refugee encompasses the following elements: 1. involuntary movement; 2. externally; 3. for permanent or temporary relocation; 4. due to sudden or slow-onset climate change events; 5. to which human most likely contributed.[1543] Unlike the proposed conventions discussed below, it is clear from this definition that the framework these authors suggest would not cover internal displacement.[1544] They recognise that climate change threatens the survival of refugees, that it can sometimes make it impossible for refugees to return to their home state, and that people require protection against both unexpected and continuing climate change events.[1545] Inserting the requirement of a link between human action and climate change, places a responsibility of taking action for those displaced as a result of these events.[1546] The authors suggest that a treaty be established that provides for protection, assistance and responsibility, as well as a monitoring and implementation mechanism.[1547]

In order for the provisions of the proposed instrument to apply, however, a person would have to meet the requirements of the definition. As with the 1951 Refugee Convention, the determination is made on a case-by-case basis, but the authors support group considerations as climate change does not only affect one person.[1548]

This approach is supported by the authors of the proposed Draft Convention for Persons Displaced by Climate Change that is discussed below.[1549] This method would be more cost and time effective, would result in equality and prevention, and will

see also Williams 2008 Law and Policy; see also Schloss "Cross-border displacement due to environmental disaster"; see also Hodgkinson et al 2010 MULR; see also Huang et al "Research on legal regulation" 1707; see also Jolly and Ahmad 2014-2015 ISIL YBIHRL 244.

1542 Docherty and Giannini 2009 HELR 360.

1543 Docherty and Giannini 2009 HELR 361 and 372.

Hodgkinson et al

1544 Docherty and Giannini 2009 HELR 360-361.
1545 Docherty and Giannini 2009 HELR 369-370.
1546 Docherty and Giannini 2009 HELR 370.
1547 Docherty and Giannini 2009 HELR 370.
1548 Docherty and Giannini 2009 HELR 374.
1549 2010 MULR 89-91.

ensure the conservation of identity and culture.[1487] In correspondence with the 1951 Refugee Convention, the abovementioned authors indicate that provision must be made for refugee status to be terminated in certain circumstances, and the protection of civil, political, economic, social and cultural human rights should be guaranteed.[1488]

Furthermore, climate refugees may not be treated unfairly or be discriminated against. Receiving states should treat them as foreigners, and in certain circumstances, it is even argued that treatment as nationals is justified.[1489] More specifically, it is important that climate refugees' right to movement is protected and that states be obligated to provide humanitarian relief to those who have been forcefully

displaced.[1490]

Docherty and Giannini propose that the responsibility for climate refugees should be shared between the national state, the receiving state and other international states.[1491] Although receiving states bare the primary responsibility for providing protection and assistance as the climate refugees are within that territory, the national state from which they fled has an obligation to assist with return and hosting where possible and necessary.[1492] More so, as progressively argued by other academic authors, local states have the duty to prevent climate induced displacement by implementing the necessary precautionary measures, and if they are unable to do so, they have to get the required assistance.[1493] As the actions of other international states contribute to climate change, they should also take responsibility for climate refugees

[1487] Docherty and Giannini 2009 HELR 374-375.
[1488] Docherty and Giannini 2009 HELR 375-377.
[1489] Docherty and Giannini 2009 HELR 376-377.
[1490] Docherty and Giannini 2009 HELR 377-379.
[1491] Docherty and Giannini 2009 HELR 379-383; see also Hodgkinson et al 2010 MULR 79.
[1492] Docherty and Giannini 2009 HELR 380-381.
[1493] Docherty and Giannini 2009 HELR 381-382.

and provide assistance to receiving and local states in this regard. International protection and assistance will be guaranteed by providing for obligatory financial contributions.[1494]

Docherty and Giannini propose[1495] that three bodies be created that will each have their own functions and liabilities to ensure that the provisions of the suggested documents are implemented and monitored. Firstly, as proposed by many other arguments discussed below, a universal fund should be established to collect and allocate contributory funds. As is argued by the authors of the Draft Convention for Persons Displaced by Climate Change, the scale of financial contributions of each state will be determined by its level of contribution to climate change and its financial ability to pay. Secondly, it is suggested that a body similar to the UNHCR be created that can communicate directly with climate refugees, domestic regimes, as well as other associations to enable them to effectively evaluate the situation on the ground and to assist in fulfilling obligations, delivering aid and protecting refugees. Lastly, it is proposed that a body consisting of scientists be created that can investigate climate change to deliver data and guidance. The experts will then be better equipped to determine which climate change events can be included in the definition of a climate refugee, which states contribute more to climate change to determine their scale of obligatory financial contributions, as well as the effects of climate change on displacement.[1496]

Academics from the University of Australia conducted a study on the issue of climate refugees and proposed the creation of a Draft Convention for Persons Displaced by

[1494] Docherty and Giannini 2009 HELR 382-383.

[1495] Docherty and Giannini 2009 HELR 380-387. This concept is better known as the principle of common but differentiated responsibilities (CDR) as included in environmental law. See Hodgkinson et al 2010 MULR 95-100; see also UNFCCC (1992); see also Rio Declaration on Environment and Development (1992).

[1496] Docherty and Giannini 2009 HELR 390-391.
Hodgkinson et al 2010 MULR

Climate Change.[149714981499] This proposed convention caters for both internal and external climate change displacement, as well as both temporary and permanent relocation. It recognises that more assistance should be provided to poorer states to deal with climate change displacement.[1561] The proposed convention acknowledges that it is difficult to prove the link between certain events and climate change or the extent to which humans contribute to climate change. It therefore provides for a standard of

[1497] Perez "Beyond the shortcomings of international law" 221; see also Hodgkinson et al 2010 MULR [1498] .

[1499] -83.

"very likely" to be met, thus rendering it more applicable to displacement caused by slow-onset climate events rather that imminent weather events.[1500] Although the proposed convention proposes a definition for climate refugees, it does not require strict fulfilment of the requirements contained in the definition and protection and assistance will be determined by a "status designation" of groups instead of focusing on individuals.[1501]

The proposed convention provides for the establishment of an organisation consisting of different bodies that each have their own functions and responsibilities and from which states can formally request assistance.[1502] Provision is made for regional committees to be created that can report on the situation in that specific area.[1503] It even provides for the creation of an organisation that will scientifically monitor climate change and its effects on communities to advise the organisation accordingly, and for groups that can implement the convention by focusing on resettlement.[1504]

The proposed convention includes a displacement fund that will largely rely on financial contributions from states in relation to their level of contribution to climate change.[1505] It is proposed that provision be made for the liability of states to assist and to protect the rights of those displaced internally or externally as a result of climate change, regardless of it being permanent or temporary.[15061507] Although it suggests that those displaced internally should be a national and international responsibility, it recognises the importance of distinguishing this category from those displaced externally. It also

[1500] Hodgkinson et al 2010 MULR 84-87.
[1501] Hodgkinson et al 2010 MULR 87-91.
[1502] Hodgkinson et al 2010 MULR 93-95.
[1503] Hodgkinson et al 2010 MULR 95.
[1504] Hodgkinson et al 2010 MULR 96.
[1505] See Hodgkinson et al 2010 MULR 95-100; see also UNFCCC (1992); see also Rio Declaration on Environment and Development (1992).
[1506] Hodgkinson et al 2010 MULR 100-104.
[1507] -104.
Hodgkinson et al 2010 MULR

provides for local and regional participation through research and incorporation in domestic laws.[1569]

The proposed convention provides for what the authors of the convention refer to as "pre-emptive adaptive resettlement" and it ensures that "bottom-up" approaches shall be taken.[1508] It is based on the principle that states have to protect and assist their nationals, and in the event that it becomes an international crises, the international community has a duty to respond.[1509] As climate change is a global issue, the international community is also responsible for helping those internally displaced in these circumstances as they are entitled to human rights and protection under other branches of international law.[1510] The authors of the proposed convention supports the argument that a protection mechanism for external displacement due to climate change should be based on the existing 1951 Refugee Convention as it already gives a complete and solid framework for refugees.[1511]

Based on this argument, the proposed convention will ensure the protection of core human rights.[1512] More importantly, it protects the right to non-refoulement[1513] and what the authors of the proposed convention refers to as the "principle of proximity," which is the "least separation of persons from their cultural area".[1514] By providing for slow-onset events, the proposed convention specifically ensures that protection and assistance be granted to those who are affected by the disappearance of territory due to rising sea levels.[1515] In this regard, it suggests the conclusion of regional agreements between island states that cater for the principles of "proximity, selfdetermination and preservation of intangible culture".[1516] These principles will ensure that those who choose or are forced to leave small islands will be relocated to states that are not far

[1508] Hodgkinson et al 2010 MULR 109.
[1509] Hodgkinson et al 2010 MULR 106.
[1510] Hodgkinson et al 2010 MULR 107.
[1511] Hodgkinson et al 2010 MULR 109-110.
[1512] Hodgkinson et al 2010 MULR 110.
[1513] See 2.7 for an explanation of the concept of non-refoulement.
[1514] Hodgkinson et al 2010 MULR 110.
[1515] Hodgkinson et al 2010 MULR 111-112.
[1516] Hodgkinson et al 2010 MULR 112-113.

removed from their original homes so that they are not alienated from their home state.[1517] Furthermore, supported by the realm of associated rights contained in the 1951 Refugee Convention, the reservation and protection of freedom, identity, culture and property of these people are safeguarded.[1518] The authors propose the active participation of states and other groups that play a pivotal role in the community during the negotiation and acceptance of the proposed convention.

The Draft Convention on the International Status of Environmentally Displaced Persons formulated by the University of Limoges can provide a guideline for a new treaty.[1519] It contains numerous provisions that directly address the issue of environmentally induced displacement. In this regard, Prieur has stated that:[1520]

> The Draft Convention on Environmentally Displaced Persons is not an abstract utopia. It is a concrete response to a concrete reality. It creates an impetus for us to make an appeal, loudly and strongly, for respect for human rights even in cases of disaster, in the name of universal and effective human rights, and on the basis of solidarity between peoples and nations, which imposes a collective responsibility upon us.

Article 2 of the Draft Convention on the International Status of Environmentally Displaced Persons defines an environmentally displaced person as:[1521]

> Individuals, families, groups and populations confronted with sudden or gradual environmental disaster that inexorably impacts their living conditions, resulting in their forced displacement, at the outset or throughout, from their habitual residence.

Article 1 indicates that the objective of the Draft Convention on the International Status of Environmentally Displaced Persons is to ensure that the rights of environmentally displaced persons are guaranteed and protected, and that these refugees are received and ultimately returned. It creates original human rights and applies to both internal

---

[1517] 113.

[1518] Hodgkinson et al 2010 MULR 113-114.

[1519] Scissa Recognition and protection of environmental migrants in international law 2; see also Draft Convention on the International Status of Environmentally Displaced Persons (2008).

[1520] Prieur "Towards an international legal status of environmentally displaced persons" 242.

[1521] Article 2(2) of the Draft Convention on the International Status of Environmentally Displaced Persons (2008); see also Attapattu "A new category of refugees?" 46.
Hodgkinson et al 2010 MULR

and external displacement.[1522] The rights may not be granted selectively, and the Draft Convention on the International Status of Environmentally Displaced Persons provides for the right to freely move if living conditions are affected by climate change, as well as the right to refuse to be displaced and the right return

[1522] Article 2(2), Article 3 and chapter 4 of the Draft Convention on the International Status of Environmentally Displaced Persons (2008).

once the place of origin becomes liveable.[1523] The Draft Convention on the International Status of Environmentally Displaced Persons secures the granting and protection of several other important rights such as the right to be assisted, access to health care, sufficient housing, to work and study, property and even the right to maintain original nationality.[1524]

Unlike the existing refugee law framework that provides for the protection of individuals, this Draft Convention on the International Status of Environmentally Displaced Persons grants joint rights to an individual, families and groups of people.[1525]

The Draft Convention on the International Status of Environmentally Displaced Persons also recognises the principle of unity and places an obligation on states to receive environmentally displaced persons and to reserve funding for this.[1526] Article 14 provides for the recognition of the special status of those displaced due to environmental degradation and guarantees the protection of the rights provided for in the Draft Convention on the International Status of Environmentally Displaced Persons. In terms of Article 15, states may not proceed with criminal procedures against such displaced person where the state was entered illegally but the person reported to the local police.

Although the Draft Convention on the International Status of Environmentally Displaced Persons provides that states must implement procedures for applications to be made, it clearly stipulates that an interim residence permit must be issued pending the decision.[1527] Furthermore, it provides that the applicant or group of applicants must be granted a proper hearing with the provision of information, translation,

[1523] Article 7, Article 10, Article 11 and Article 12(7) of the Draft Convention on the International Status of Environmentally Displaced Persons (2008).

[1524] Article 12(1)-(14) and Article 13 of the Draft Convention on the International Status of Environmentally Displaced Persons (2008).

[1525] Article 2(2) of the Draft Convention on the International Status of Environmentally Displaced Persons (2008).

[1526] Article 4 of the Draft Convention on the International Status of Environmentally Displaced Persons (2008).

[1527] Article 16(1) and (2) of the Draft Convention on the International Status of Environmentally Displaced Persons (2008).

representation and eventually reasons for the decision that has been made.[1528] In terms of Article 17, states that accede to the convention have to establish a commission that can deal with applications from this category of people.[1529] Provision must be made for a High Authority to which appeals can be lodged and a World Agency for Environmentally Displaced Persons (WAEP) will be created to monitor the implementation of this Draft Convention on the International Status of Environmentally Displaced Persons.[1530] Article 23 provides for the creation of a World Fund for the Environmentally Displaced (WFED) that will provide financial assistance for the acceptance and return of environmentally displaced persons, and these funds will be obtained from state donations and taxes.

Mayer also argues in favour of a new international instrument to deal with what he refers to as climate migrants, as existing local and international actions are inadequate.[1531] Such an instrument will be based on important principles, including a global approach that ensures timeous and preventative responses, the protection of human rights, subsidiarity, and CDR.[1532] As a possible means for enforcement, Mayer suggests that not only must the mandate of the UNHCR be extended to cover climate refugees but it should work with other established organisations to provide sufficient protection. Litigation should be instituted to enforce state responsibility.[1533]

Despite Huang et al also supporting the below arguments regarding the UNGA and the UN Security Council (UNSC), they propose that a new International Convention on Climate Refugees be drafted and adopted to provide for the obligation to protect

[1528] Article 16(3)-(6) of the Draft Convention on the International Status of Environmentally Displaced Persons (2008).

[1529] Article 17 of the Draft Convention on the International Status of Environmentally Displaced Persons (2008).

[1530] Article 18 to Article 21 of the Draft Convention on the International Status of Environmentally Displaced Persons (2008).

[1531] Mayer 2011 CJIELP 369.

[1532] Mayer 2011 CJIELP 388-398.

[1533] Mayer 2011 CJIELP 402-405.

climate refugees and for states to conclude agreements between each other to regulate the presence and safeguarding of climate refugees.[1534]

6.3.2 Expanding existing conventions

Instead of creating a new instrument, academic author Sciaccaluga[1535] suggests that the existing UNFCCC[1536] be used to address the issue of climate induced displacement. If the advances, achievements and the incorporation and recognition of obligations flowing from the UNFCCC are considered, it can become an important instrument in dealing with movement caused by climate change.

On the other hand, it has been proposed that the issue of climate refugees be addressed by merely adopting a protocol to the UNFCCC. Such a protocol can emphasise the topic and promote collaboration.[1537] In this regard, Biermann and Boas propose a definition for climate refugees that is restricted to three categories of climate change events, being rising sea levels, extreme weather events, drought and water shortage.[1538] It provides for both internal and external displacement as a result of immediate and slow-onset climate change events.[1539] It does not, however, cover climate change events that cannot be linked to displacement, or movement caused by events that can be mitigated or adapted to, or movement caused by other events such as pollution for example, and movement from conflicts caused by the negative effects of climate change.[1540] Furthermore, the authors argue that the definition of a climate refugee must not distinguish between voluntary, forced, temporary and permanent

---

[1534] Huang et al "Research on legal regulation" 1708.

[1535] Sciaccaluga International Law and the protection of "climate refugees" 143-150.

[1536] See 5.2.1 for a discussion on the UNFCCC (1992).

[1537] Proposed UNFCCC Protocol on Recognition, Protection and Resettlement of Climate Refugees; see also Biermann and Boas 2010 GEP 76; see also Perez "Beyond the shortcomings of international law" 221; see also Shamsuddoha Climate induced displacement and migration: Policy gaps and policy alternative 9.

[1538] Biermann and Boas 2010 GEP 64.

[1539] Hodgkinson et al 2010 MULR 78-79.

[1540] Biermann and Boas 2010 GEP 63-64.

movement.[1541] According to Biermann and Boas,[1542] this document has to specifically address the problem and it must be based on the concepts of recognition, protection and relocation. The authors propose the core principles of enduring prearranged relocation, permanent resettlement, the protection of rights of groups as a whole, international assistance for states to deal with the problem locally, and international responsibility to provide protection and assistance to be incorporated. They argue that such a protocol can be adopted and implemented more easily as states already support the UNFCCC and such a protocol can address the issue of climate refugees by building on the solid content of the UNFCCC itself. It will also ensure the incorporation of the responsibility aspect with respect to contributions to climate change.

In terms of the suggested protocol, a committee will be established that can list identified or proposed affected areas. A panel of scientists will have to be appointed to advise the parties on climate change. Such a protocol will also make provision for groups residing in identified affected areas to be protected, supported and relocated.[1543] Unlike with international refugee law that has appointed the UNHCR to deal with the protection of refugees and the implementation of refugee law, Biermann and Boas propose that several such operational bodies are needed, especially where relocation is required.[1544] In comparison with other authors, they emphasise the importance of international funding to effectively support the implementation of the provisions of the proposed protocol and to ensure the protection of climate refugees.[1545] Although existing funds can adapt to include the category of climate refugees, a specialised and unique fund will have to be created to deal with climate refugees.[1546] Existing funds are insufficient to deal with the climate refugee issue, contributions are voluntary, an increase in funding is not possible, and this project will combine with others, resulting in the disappearance of the distinctive attention it

[1541] Biermann and Boas 2010 GEP 65-66.

[1542] Biermann and Boas 2010 GEP 75-77; see also Hodgkinson et al 2010 MULR 79; see also Perez "Beyond the shortcoming of international law" 221.

[1543] Biermann and Boas 2010 GEP 77.

[1544] Biermann and Boas 2010 GEP 79.

[1545] Biermann and Boas 2010 GEP 79.

[1546] Biermann and Boas 2010 GEP 80-81.

requires.[1547] The proposed Climate Refugee Protection and Resettlement Fund will be funded from contributions made by the international community and it will be used to resettle and assist specifically identified climate refugees, whereafter repayments will be made in the form of grants.[1548]

The UN Special Rapporteur, Ian Fry, has suggested that the "human rights council should prepare a resolution for submission to the UN General Assembly urging the body to develop an optional Protocol under the Convention Relating to the Status of Refugees to address displacement and legal protection for people all over the world affected by the climate crisis".[1549] The possibility of such a protocol was already identified by Jolly and Ahmad during the course of 2014 and 2015.[1550] They investigated an Additional Protocol on Global Climate Refugees (GCR) that, among other things, could cater for the employment, education and non-refoulement of climate refugees and ensure the adoption of appropriate domestic laws and capability to attend to climate emergencies.[1551]

However, the German Advisory indicated in 2007 already that a protocol to the 1951 Refugee Convention is not advisable. They pointed out that climate change can intensify extreme events and conditions that can cause conflict due to resource scarcity, and this can effect life quality and even the capacity to adapt.[1552] This will cause uncertainty in states, especially those that are unstable, poor and fragile.[1553] They argue that climate change presents a threat to international security for several reasons, including the intensification of instability, destruction of economies, clashes between developed and developing states, human rights violations and even displacement.[1554] All of this will have international and regional negative consequences

[1547] Biermann and Boas 2010 GEP 80-81.
[1548] Biermann and Boas 2010 GEP 81-82.
[1549] Fry 2023 https://ohchr.org.
[1550] Jolly and Ahmad 2014-2015 ISIL YBHRL 244.
[1551] Jolly and Ahmad 2014-2015 ISIL YBHRL 244-245.
[1552] WBGU World in transition: Climate change as a security risk 1-2 and 11.
[1553] WBGU World in transition: Climate change as a security risk 1-2.
[1554] WBGU World in transition: Climate change as a security risk 5-6.

that should be addressed universally with a focus on mitigation, prevention and adaptation.[1555] The importance of the UN and its bodies for implementation has been considered, and the authors argue that the UNSC could play an important role by holding states responsible. They also suggest that a specialised Council be established within the UN.[1556] The German Advisory acknowledged that the existing international refugee and migration law does not provide sufficient protection for those displaced due to climate change and therefore suggested that a "cross-sectoral multilateral convention" should rather be adopted with the assistance of the UNHCR.[1557]

The focus is on early warning, prevention, mitigation, more funding and international cooperation and assistance to enable developing states to sufficiently adapt to the consequences of climate change.[1558] The German Advisory suggest that a fund be established for what is referred to in this document as environmental migrants and that the contributions to the fund be determined in relation with a state's contribution to climate change and its capacity to pay the funds.[1559] Even though Huang et al does not agree that the existing refugee law and multilateral agreements are the answer to dealing with climate refugees, they do agree that the UNSC can address the issue as it presents a threat to international peace and security.[1560] The UNSC have many functions that can be used to address this concern, such as the power to make policies, to establish organisations to deal with a specific problem, and even to apply a range of measures that could ensure implementation.[1561]

6.3.3 Regional and soft law measures

Since the adoption of a new treaty with strict responsibilities seems unlikely, some academic authors such as Williams, Sciaccaluga and McAdam consider the

[1555] WBGU World in transition: Climate change as a security risk 6.
[1556] WBGU World in transition: Climate change as a security risk 7.
[1557] WBGU World in transition: Climate change as a security risk 11; see also Biermann and Boas 2010 GEP 63-64.
[1558] WBGU World in transition: Climate change as a security risk 11-12.
[1559] WBGU World in transition: Climate change as a security risk 12-13.
[1560] Huang et al "Research on legal regulation" 1704-1706.
[1561] Huang et al "Research on legal regulation" 1706-1707.

implementation of regional and soft law frameworks as a way to address climate change displacement.[1562] In her article, Williams[1563] suggests that regional agreements be adopted under the auspice of the UNFCCC, as this will allow for responses to be adopted timeously in accordance with relationships and abilities. States will rather commit to such agreements than to an international framework, as climate change displacement will likely take place within a specific region and preferably so, it keeps people in relatively familiar territory. This will also allow for the adoption of policies that address the needs and, as McAdam indicates, even the common challenges in a particular region.

The UNFCCC and the Kyoto Protocol[1564] require party states to adopt local and regional mitigation and adaptation policies and measures.[1565] A new agreement will have to be concluded that specifically provides for displacement caused by climate change, creates obligations for states to deal with the issue, and offers implementation tactics.[1566] Regional bodies can help draft policies and responses in this regard, and a body within the UNFCCC can provide assistance to these organisations.[1567] Recognition and protection can determined by way of a sliding scale based on the severity of the circumstances from which people are fleeing.[1568]

Academic authors such as Mayer and Schloss[1569] have argued that the issue of climate change movement should be addressed by adopting soft law instruments. These

[1562] Mayer 2011 CJIELP 407; see also Biermann and Boas 2010 GEP; see also Docherty and Giannini 2009 HELR 388-389; see also Prieur "Towards an international legal status of environmentally displaced persons" 233; see also Williams 2008 Law and Policy 514-517; see also Hodgkinson et al 2010 MULR 78; see also Schloss "Cross-border displacement due to environmental disaster" 247; see also Sciaccaluga International Law and the protection of "climate refugees" 143-144.

[1563] Williams 2008 Law and Policy 518-521; see also Hodgkinson et al 2010 MULR 78; see also PACOE Report on environmentally induced migration and displacement: A 21st century challenge para 24.6.

[1564] See 5.2.1 for a discussion on the UNFCCC (1992) and the Kyoto Protocol to the UNFCC (1997).

[1565] Article 4(1)(b) of the UNFCCC (1992); see also Article 19(b) of the Kyoto Protocol to the UNFCC (1997); see also Williams 2008 Law and Policy 519.

[1566] Williams 2008 Law and Policy 520.

[1567] Williams 2008 Law and Policy 520-521.

[1568] Williams 2008 Law and Policy 522; see also Hodgkinson et al 2010 MULR 78.

[1569] Mayer 2011 CJIELP 408-409; see also Schloss "Cross-border displacement due to environmental disaster" 243.

measures can include resolutions and principles established and adopted by the UN for example. Despite these arguments, the UNSC has indicated that they are not the correct platform to deal with climate change displacement as they have the duty of maintaining peace and security.[1570] However, the UNGA is the best forum to establish such a resolution as it includes all member states of the UN, which makes it the best platform for a universally acceptable response.[1633] As indicated before, such a resolution can explicitly illustrate the existing concern and gradually ensure that the required measures to address the issue are included. It can promote protection of the basic human rights of climate refugees.[1571]

Huang et al suggest that the UNGA establish a body similar to the UNHCR that can focus on climate refugees. This body should then promote the conclusion of regional agreements and implementation of domestic laws to deal with the issue.[1572] The UNGA adopted Resolution 63/281 in 2009, which simply recognises that climate change can present a threat to security and that action must be taken.[1573] Today, Resolution 77/276, which was adopted in March of 2023 as discussed in Chapter 5 above, recognises that climate change is intensifying extreme conditions and weather events. The resolution requests the ICJ to deliver an opinion on state responsibility with respect to climate change.[1574] Other advantages of soft law, according to Schloss, include that it does not create state duties, it can be adopted quickly, it raises awareness about an issue, it allows states to properly consider and address the issue, it guides the wording of policies and advances international cooperation, and it can establish customary international law.[1575]

Schloss argues that the existing soft law mechanism referred to as the UN Guiding

---

[1570] Article 24(1) of the Charter of the United Nations (1954). [1633]
Mayer 2011 CJIELP 409.

[1571] Mayer 2011 CJIELP 409; see also Huang et al "Research on legal regulation" 1708.

[1572] Huang et al "Research on legal regulation" 1708.

[1573] UNGA Resolution on Climate change and its possible security implications A/Res/63/281 1-2.

[1574] UNGA Request for an advisory opinion of the ICJ on the obligations of States in respect of climate change A/Res/77/276.

[1575] Schloss "Cross-border displacement due to environmental disaster" 248; see also Dugard and Tladi "Sources of International Law" 42.

Principles on Internal Displacement can be used to fill the protection gap in the law.[1576] The Resolution and Recommendation adopted by the Parliamentary Assembly of the Council of Europe (PACOE) during the course of 2009 is also worth mentioning in this regard. The Resolution considers that there has been an increase in movement caused by climate change events, that poorer countries are affected more, that this is an issue that should be addressed internationally and not just locally, and that there is a protection gap in the existing legal frameworks.[1577] As a result, it is proposed that the international community, and more specifically Europe, assist with implementing measures for adaptation and prevention. The Resolution recognises that there is a gap in the law and it supports the extension and implementation of these UN Guiding Principles on Internal Displacement.[1578] The Recommendation expresses concern about the lack of protection for those who are displaced due to the effects of climate change.[1579] It asks that states consider and research the issue and advance a legal framework that could address the issue with specific international focus to prevent, adapt and develop.[1580] Although it was suggested that this reform could be done by adopting a new convention or even a protocol to existing law, states are still encouraged to domestically integrate and use the UN Guiding Principles on Internal Displacement.[1581] The suggestion is that the extension of the UN Guiding Principles on

Internal Displacement include those displaced across borders as in the Recommendation.[1582] During 2019, a new Resolution was issued that recognises that climate change displacement is a reality and that failure to recognise those who suffer as refugees does not abscond the international community from granting this category of people the necessary protection.[1583] A response is required that includes the implementation of measures and methods that can prepare populations and help them

[1576] Schloss "Cross-border displacement due to environmental disaster" 247-248.

[1577] PACOE Report on environmentally induced migration and displacement: A 21st century challenge paras 1-7 and 15-18.

[1578] PACOE Report on environmentally induced migration and displacement: A 21st century challenge paras 17-19.

[1579] PACOE 2019 https://assembly.coe.int paras 4-5.

[1580] PACOE 2019 https://assembly.coe.int paras 6.1-6.2.

[1581] PACOE 2019 https://assembly.coe.int paras 6.3-6.4.

[1582] PACOE 2019 https://assembly.coe.int para 6.5.

[1583] PACOE 2019 https://assembly.coe.int para 1-3.

react, manage, adapt and to be resistant to disasters.[1584] Domestic law must provide for acceptance, assistance and protection of climate refugees, a fund must be created, and data must constantly be collected on this topic to predict and to prepare for these movements.[1585]

Many states have used these principles as a guideline. It has aided in the approval of several regional instruments, and based on this, it is argued that similar principles have to be adopted that can cater to external displacement in these circumstances.[1586] Schloss proposes the requirement that a person should be forced or obliged to flee his home externally directly due to or in avoidance of a natural disaster to claim protection in terms of the suggested UN Guiding Principles on Cross-Border Displacement due to Environmental Disasters.[1587] A definition and explanation of a natural disaster is set out to set the bar for qualification. The events have to be natural, must cause "widespread loss of life, great human suffering or large-scale damages," result in the inability of the domestic state to assist, and cause a serious disruption of order.[1588] It includes displacement caused by both sudden and slow-onset events but it does not include voluntary movement. In order to determine whether a person was forced to leave in these circumstances, the effect on an individual's life must be considered objectively.[1589] The disaster has to force the person to leave or if they flee in avoidance, the disaster must at least be anticipated. Unlike the proposals that suggest a collective consideration, the last-mentioned Principles consider cases on an individual basis.[1590] It will also incorporate the norm of non-refoulement by stating that no person may be returned to a state where he faces the possibility of harm due to natural disasters.[1591] In line with the UN Guiding Principles on Internal Displacement, it incorporates the

[1584] PACOE 2019 https://assembly.coe.int paras 5.1-5.2
[1585] PACOE 2019 https://assembly.coe.int paras 5.2-5.3.
[1586] Schloss "Cross-border displacement due to environmental disaster" 247-249.
[1587] Schloss "Cross-border displacement due to environmental disaster" 250.
[1588] Schloss "Cross-border displacement due to environmental disaster" 251-254.
[1589] Schloss "Cross-border displacement due to environmental disaster" 252-254.
[1590] Schloss "Cross-border displacement due to environmental disaster" 255-256.
[1591] Schloss "Cross-border displacement due to environmental disaster" 256-257.

protection of human rights, which includes access to information, documentation and residence.[1592]

6.3.4 Problems with a unique legal framework for climate refugees

Taimur advocates, however, that all of the abovementioned proposals and mechanisms be used in combination to protect climate refugees. This will include the formation of protection and assistance guidelines, the qualification of those affected by climate change as refugees and eventually the drafting of a convention.[1656] Granting that the aforementioned suggestions and proposals are progressive in nature, they have not been free of criticism. The creation and adoption of a new treaty is ambitious but not immediately feasible, as it can take time for states to agree on the content and wording of such an instrument. Until an agreement has been reached, the problem will not be addressed.[1593] With regard to the Draft Convention on the International Status of Environmentally Displaced Persons, as indicated by Atapattu,[1594] the use of the word disaster provides for a limited scope of application despite the fact that it includes both internally and externally displaced persons. Furthermore, the inclusion of a right to be displaced is in contradiction with existing human rights law. The creation of higher degree of responsibility and expectations will affect sovereignty, and requiring states to contribute financially according to their degree of involvement with climate change will also require states to acknowledge guilt and to pay the costs.[1595] As this is currently a controversial issue, it will also be difficult to reach consensus on a universal term to describe and define this category of persons.[1596]

Biermann and Boas highlight that the process of granting assistance to certain states may be difficult and there is also a possibility of a misappropriation of funds.[1597] Also,

---

[1592] Schloss "Cross-border displacement due to environmental disaster" 257. [1656] Taimur 2021 RSILLR 134.

[1593] Schloss "Cross-border displacement due to environmental disaster" 247.

[1594] Attapattu "A new category of refugees?" 46, 47.

[1595] Williams 2008 Law and Policy 517; see also Hodgkinson et al 2010 MULR 78.

[1596] Williams 2008 Law and Policy 517-518.

[1597] Biermann and Boas 2010 GEP 83.

the issue of climate refugees cannot be inserted in existing law frameworks as these instruments were not created for this purpose and it is a topic that deserves its own response.[1598] Furthermore, Mayer as well as Docherty and Giannini argue in response to the suggestion to expand the UNFCCC or 1951 Refugee Convention, that the existing legal frameworks do not address climate change movement and they do not contain the essential elements that may be inherent to an original climate refugee treaty.[1599] The last mentioned includes a minimum provision for a definition of a climate refugee, an obligation to protect, assist, adapt and relocate and to share responsibility, as well as implementation measures and agencies.[1664]

The suggestion that the issue of climate refugees be addressed by regional responses and policies that are context-specific leaves the concern that this may result in inconsistency and the possibility that regions will not be held equally responsible.[1600] Soft law measures merely act as guidelines as they are non-binding, do not establish concrete obligations for recognition, protection and contribution, and they do not have to be adopted in domestic legislation.[1601]

6.4 Challenges

The arguments and opinions above clearly show that the main challenge in granting protection to climate refugees is the lack of consensus on the appropriate response and the failure of the international community to reach consensus about a suitable term to describe those displaced as a result of climate change.[1667] With regard to the former issue, it is clear that the existing international refugee law is not sufficient to include and protect climate refugees. The proposed extension or broader interpretation to include it is not viable either as such an approach could affect the view and will of

[1598] Mayer 2011 CJIELP 405-408.

[1599] Jolly and Ahmed 2014-2015 ISIL YBIHL 230; see also Mayer 2011 CJIELP 405-408; see also Docherty and Giannini 2009 HELR 391. [1664] Mayer 2011 CJIELP 406-407.

[1600] Sciaccaluga International Law and the protection of "climate refugees" 154; see also Mayer 2011 CJIELP 400.

[1601] Dugard and Tladi "Sources of International Law" 41-42; see also Mayer 2011 CJIELP 409. [1667] Biermann and Boas 2010 GEP 62; see also Attapattu "A new category of refugees?" 41.

current party states to accept and protect refugees in general. States may feel that they did not initially sign up for such an extended obligation and this may result in withdrawal and the weakening of the instrument.

Such a wider interpretation could also affect the exclusivity of refugees and result in mass movements that will affect the resources and capacities of arriving or hosting states. Other measures, such as the adoption of protocols, regional approaches and soft law mechanism, can definitely be ancillary and complimentary to a convention but it is not sufficient to deal with this issue. It requires a more forceful, binding and global response. Therefore, a unique and innovative treaty is needed to protect this category of refugees by catering for their needs, by ensuring their acceptance and warranting their protection, and by providing for comprehensive state obligations, duties and responsibilities. The elements that are considered to be important and that should therefore be included in such an instrument, are discussed below.

With regard to definitions, the terms that are currently in use include, but are not limited to the following: environmentally displaced persons, environmental refugees, environmental migrants, climate migrants, forced climate migrants, and climate change induced migrants. The first term is preferred by the IOM, the UNHCR, the OHCHR, the UN Secretary-General and it was also chosen as the term to be used in the Draft Convention on the International Status of Environmentally Displaced Persons discussed above.[1602] Environmentally displaced persons are defined as persons who are "displaced within their country of habitual residence or who has crossed an international border and for whom environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one".[1603] An environmentally displaced person has also been defined as "one who leaves his or her home and seeks refuge elsewhere for reasons relating to the

[1602] Sciaccaluga International and the protection of "climate refugees" 66; see also Draft Convention on the International Status of Environmentally Displaced Persons (2011); see also Prieur "Towards an international legal status of environmentally displaced persons" 233.

[1603] Gil et al 2022 https://bakersinstitute.org; see also Sciaccaluga International and the protection of "climate refugees" 66.

environment". This group includes those who leave voluntarily or involuntarily due to sudden or gradual events.[1604]

Many authors have used the term environmental refugees. Several characteristics form this category.[1605] These include that the movement can be temporary, permanent or voluntary, internal or external, caused by imminent or slow-onset environmental events, and is induced naturally or due to the actions of humans.[1672] Primarily, environmental refugees are defined as "those who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected their quality of life".[1606] Myers has defined them as those "who can no longer gain a secure livelihood in their erstwhile homelands and who are in desperation feel that they have no alternative but to seek sanctuary elsewhere".[1607] It also includes those who are "displaced from or who feel obliged to leave their usual place of residence, because their lives and welfare have been placed at serious risk as a result of adverse environmental, ecological or climatic processes and events".[1608] When considering the definitions provided for the categories discussed above, it is clear that those who are pushed to move willingly due to climate events are excluded.[1609] Therefore, some prefer to use the term migrant, and more specifically environmental migrants. Environmental migrants are defined as "persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so either temporarily or permanently, and who move either

[1604] Sciaccaluga International law and the protection of "climate refugees" 66-67; see also Hodgkinson et al 2010 MULR 89.

[1605] Williams 2008 Law and Policy 506; see also Hodgkinson et al 2010 MULR 88. [1672] Hodgkinson et al 2010 MULR 88.

[1606] Priovashini and Mallick 2022 https://ncbi.nlm.nih.gov.

[1607] Hodgkinson et al 2010 MULR 87; see also Myers 2001 The Royal Society 609; see also Sciaccaluga International law and the protection of "climate refugees" 64.

[1608] Sciaccaluga International law and the protection of "climate refugees" 64; see also Van Wormer and Besthorn Human behavior and social environment 279.

[1609] Sciaccaluga International law and the protection of "climate refugees" 68.

within their country or abroad".[1610] The IOM indicates that the term includes "persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently and who move either within their country or abroad".[1611]

During 2019, the UN even suggested that the term climate migrant be used instead of climate refugees.[1612] Mia Prange defines a climate migrant as a person who "leaves his home due to extreme weather events, including floods, heat waves, droughts and wildfires, as well as slower-moving climate challenges such as rising seas and intensifying water stress".[1613] The author Sumudu Anopama Atapattu prefers to use the term forced climate migrant, which he defines as a person who is "forced to leave his home or land either temporarily or permanently due to significant environmental damage associated with climate change or where his national sate is no longer habitable".[1614] In these circumstances it should be considered whether it would be appropriate to return the person to their home state.[1615]

It is clear from the discussion above that there is no consensus among organisations, institutions and academic authors on the terms and definition to describe this matter. As illustrated, some prefer to use the term migrant instead of refugee and others choose to associate movement with environmental events instead of climate change. Different actors have presented a range of objections to the use of these narrow terms. First of all, a migrant is not forced to leave his home state and he is usually protected by the resident state.[1616] A refugee, on the other hand, is of international concern as

[1610] IOM 2017 https://publications.iom.int; see also Sciaccaluga International law and the protection of "climate refugees" 66-68.

[1611] Sciaccaluga International law and the protection of "climate refugees" 68; see also IOM 2017 https://publications.iom.int.

[1612] Ionesco 2019 https://un.org.

[1613] Prange 2022 https://cfr.org; see also Mayer 2011 CJIELP 367-369.

[1614] Attapattu "A new category of refugees?" 41.

[1615] Hodgkinson et al 2010 MULR 89.

[1616] Biermann and Boas 2010 CEP 66; see also Sciaccaluga International law and the protection of "climate refugees" 58, 68.

they are forced to seek protection as their home state is unable or unwilling to do so. Consequently, a refugee requires a much higher form of protection than a migrant.[1617] Both of these factors will then require forced climate migrants to justify why they require a higher standard of protection.[1618] Moreover, limiting the definition to environmental events disregards those driven to movement by climate change and its negative effects. Mayer aptly argues that this also has an effect on the attribution of state responsibility. It cannot be argued that states contributed to environmental

changes in such a manner that it would require them to protect those displaced as a result, as is the case with climate change.[1619]

The question perhaps remains why it is important to agree on a term. In this regard the words of Oli Brown have to be considered:[1620]

> Labels are important. One immediately contentions issue is whether people displaced by climate change should be defined as climate refugees or climate migrants. This is not just semantics – which definition becomes generally accepted will have very real implications for the obligations of the international community under international law.

The failure to achieve universal consensus in this regard has resulted in the exclusion and non-protection of climate refugees. The fact that the UNHRC recognised this term in a landmark decision indicates that it has become a matter of concern that justifies a global response. There are several reasons why provision has to be made for the recognition, inclusion and protection of climate refugees as a separate category. First of all, Chapter 5 traced the increase in climate-related events in the contemporary world that is driving people to cross borders to escape these extreme conditions and to seek safety.[1621] This means that this category of people is becoming of international concern and require a higher level of protection.

[1617] Biermann and Boas 2010 CEP 66; see also Sciaccaluga International law and the protection of "climate refugees" 58.

[1618] Sciaccaluga International law and the protection of "climate refugees" 58.

[1619] Mayer 2011 CJIELP 381-383.

[1620] Brown 2007 https://iisd.org; see also Attapattu "A new category of refugees?" 48.

[1621] See 5.2.2 and 5.3.

Secondly, the non-recognition of this category of person and non-existence of a legal framework to protect them leaves them unprotected and vulnerable to human rights violations and even statelessness. Thirdly, it is clear that the term refugee can no longer only be reserved for political refugees, as recent events have illustrated that climate change and the related events have a negative effect on people's lives.[1622] Fourthly, the express recognition and labelling of those displaced as a result of climate change as refugees emphasises the gravity of this contentious issue.[1623] Lastly, Schloss shows that the recognition and protection is supported by fundamental principles found in international law, including respect for dignity, humanitarian assistance where necessary, and an international duty to cooperate in addressing the

issue.[1624]

6.5 Conclusion

As illustrated in the previous chapter,[1625] climate change is a serious issue that affects people's livelihoods and as a result forces people to abandon their homes in search of assistance and protection.[1626] In some cases, people have been forced to cross borders and since they are not protected by law, they are vulnerable to human rights violations.[1627] The UNHRC labelled these people as climate refugees,[1628] thus indicating that they are of international concern and in dire need of recognition and protection. However, as discussed in the previous chapter,[1629] there is no global legal framework that provides for the recognition and protection for those who cross borders to escape the negative effects of climate change.[1630] As a result, legal reform is required to rectify

[1622] Biermann and Boas 2010 GEP 67; see also Ghaly 2021 ANU URJ 92.

[1623] Biermann and Boas 2010 GEP 67.

[1624] Schloss "Cross-border displacement due to environmental disaster" 246; see also Ghaly 2021 ANU URJ 93-94.

[1625] See 5.2 for an explanation of the term climate change and see 5.2.2 for a discussion on the effects of climate change on the environment.

[1626] See 2.3, 3.3 and 4.3 for a discussion and climate change and disaster displacement.

[1627] See 5.4 and 5.5 for an analysis of the matter of Mr Teitiota.

[1628] Su 2020 https://climatechangenews.com.

[1629] See 2.3, 3.3 and 4.3 for a discussion and climate change and disaster displacement. See 5.4.

[1630] d'Orsi and Naldi 2022 IRRC 1030; see also d'Orsi 2023 https://theconversation.com.

this gap in the law. This being said, there are several academic scholars, bodies or organisations that contend that the existing legal frameworks are sufficient to provide for the protection of climate refugees.[1631] Some argue that the existing international, African and Latin American refugee instruments, human rights law, state responsibility, environmental law and other local and regional initiatives are sufficient to address this issue.[1632]

This chapter has pointed out, however, that each of these arguments attracts its own criticism with regard to interpretative and political challenges it presents when specifically applied to climate refugees.[1633] On considering these arguments, it is clear that existing legal frameworks or other branches of law are not adequate to provide for the recognition and protection of climate refugees. For that reason, another school of thought argues[1634] that a new treaty or extensive protocols to existing conventions be adopted.[1635] The provisions contained in the proposed draft conventions in response to this crisis provide a comprehensive guideline as to the important elements that should be contained in such a new treaty.[1636]

Since the UNFCCC and the 1951 Refugee Convention already provide comprehensive environmental and refugee law frameworks, some argue that they can easily be augmented by adding protocols.[1637] However, it will be difficult to obtain global

[1631] Amongst others, it includes Ghaly 2021 ANU URJ 100; see also Perez "Beyond the shortcomings of international law" 218; see also Cooper 1998 NYUELJ 487-489; see also Attapattu "A new category of refugees?" 43; see also Sussmann 2023 CJIL 64; see also Cooper 1998 NYUELJ 496; see also McAdam et al 2016 UNSWLRS para 86; see also OHCHR FAQ on human rights and climate change 1; see also Mayer 2011 CJIELP 382-383; see also McAdam and Limon Policy Report: Human rights, climate change and cross-border displacement: The role of the international human rights community in contributing to effective and just solutions.

[1632] See 6.2.1 to 6.2.6.

[1633] See 6.2.7 for an explanation on the problems with existing law when applied to climate refugees.

[1634] Amongst others, these include Mayer 2011 CJIELP 369-370; see also Prieur "Towards an international legal status of environmentally displaced persons" 236; see also Perez "Beyond the shortcoming of international law" 221; see also Biermann and Boas 2010 GEP; see also Docherty and Giannini 2009 HELR.

[1635] See 6.3.

[1636] See 6.3.1.

[1637] See 6.3.2. [1705]
See 6.3.3.

consensus regarding the adoption of a new treaty or such protocols, as member states may not be keen to have their obligations extended to include a broader category of refugees. Consequently, the adoption of regional agreements and soft law measures is proposed by some as a solution to the problem.[1705] However, as regional agreements are context-specific and soft law measures are non-binding, these measures are described as being complimentary at best.[1638]

The main objective of the analysis of the different arguments in respect of legal reform was to determine whether the existing legal frameworks are sufficient to protect climate refugees or whether a unique instrument should be adopted. One of the main reasons why this continues to be a contentious issue is the international community has no consensus regarding the term to be used to describe those who are displaced externally as a result of climate change.[1639] An analysis of the different terms assisted in detecting the important elements that will have to be considered when attempting to compose a proper definition of a climate refugee.[1640] The term climate refugee seems to be preferable as it accentuates the importance of this universal issue.[1641]

The next chapter concludes this study by suggesting the adoption of a new treaty that specifically addresses the category of climate refugees. Such an instrument will have to contain a proper and inclusive definition of a climate refugee. It should consider the elements of the different terms already in use to refer to those displaced by climate change. The provisions contained in the existing draft conventions regarding principles such as state obligation, adaptation and mitigation should also be absorbed in such an original treaty. Such an instrument cannot function on its own and should therefore be complimented by the adoption of regional and domestic measures.

[1638] Sciaccaluga International law and the protection of "climate refugees" 154; see also Mayer 2011 CJIELP 409; see also Dugard and Tladi "Sources of International Law" 41-42.

[1639] See 6.4. Biermann and Boas 2010 GEP 62; see also Attapattu "A new category of refugees?" 41.

[1640] See 6.4.

[1641] See 6.4.

CHAPTER 7

CONCLUSION

7.1 Introduction

Since the beginning of history, people have been known to migrate[1642] internationally or internally, voluntarily or forcefully, temporarily or permanently, regularly or irregularly. Migration is influenced by many factors and occurs for several political, economic and social reasons. In recent times, however, people have been moving to escape climate change[1643] and the negative impact it has on the environment.[1644] In response to this, the international community has adopted instruments and negotiated agreements to address the issue of climate change.[1645] Still, gas emissions are getting higher and as a result the earth's temperature is continuing to increase at a rapid rate.[1714] As illustrated in Chapter 5,[1646] this increase in temperatures exacerbate heat waves, drought, heavy rainfall, flooding and has resulted in more intense and frequent natural disasters.[1647] These circumstances affect food and water security[1648] as well as the habitability[1649] of states, which in turn negatively affects people's human rights.[1650]

[1642] See 2.2, 3.2 and 3.3 for a historical analysis of international, African regional and South African migration as well as the development of migration law.

[1643] See 5.2 for an explanation of the term climate change.

[1644] See 5.2 for an analysis of the negative effects of climate change on the environment as well as the natural disasters that have been occurring more frequently and more intensely as a result.

[1645] See 5.1 for a discussion on the different instruments and agreements addressing climate change.

[1714] UN 2022 https://news.un.org.

[1646] See 5.2 for a discussion on extreme weather events and natural disasters exacerbated by climate change.

[1647] IPCC Working Group II contribution to the Sixth Assessment Report paras 1.2.2, 6.5.4 and 15.6.4; see also UN 2022 https://news.un.org.

[1648] UN date unknown https://www.un.org/en/climatechange/science/climate-issues/water.

[1649] Balesh 2015 EELJ 80-84.

[1650] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 5-7; see also UNHRC Resolution adopted by the Human Rights Council A/HRC/Res/48/13; see also UN 2021 https://news.un.org.

People are consequently forced to leave their homes to escape these conditions and to seek protection and assistance.[1651] As discussed before,[1652] people who are displaced internally in these circumstances are protected by law.[1653] In contrast, people who are forced to cross borders due to these conditions, do not enjoy the same protection.[1654] This is mainly because they are not explicitly recognised in law. Until 2019, climate change was only seen as a driver of movement in as much as it overlaps with other factors, such as conflict.[1655] As illustrated by the matter of Mr Teitiota and his family who fled the island of Kiribati, which is disappearing due to rising sea levels, external climate induced displacement is a reality and it continues to present legal challenges to the international community.[1656] In this case, NZ rejected the applicant's claim for refugee status since the state was of the opinion that the applicant did not qualify as a refugee as he did not have a well-founded fear of persecution.[1657] Conversely, the UNHRC found[1658] that the circumstances on the island did threaten his right to life and that his return will therefore violate the principle of non-refoulement.[1659] With this verdict, the UNHRC explicitly recognised the existence of climate refugees as a category for the first time.[1729]

[1651] IDMC 2022 https://internal-displacement.org.

[1652] See 2.3, 3.3 and 4.3 for a discussion on climate change and disaster displacement on international, African regional and South African level.

[1653] See 5.3 for a discussion on the UN Guiding Principles for Internal Displacement (1998) and see 3.2 for a discussion on the Kampala Convention (2012).

[1654] Mayer 2011 CJIELP 379-380; see also McAdam 2020 AJIL 712. Those who are internally displaced as a result of the negative effects of climate change are protected by existing frameworks such as the UN Guiding Principles on Internal Displacement (1998) and the Kampala Convention (2012); see also d'Orsi and Naldi 2022 IRRC 1030; see also d'Orsi 2023 https://theconversation. com. See 2.3, 3.3 and 4.3 for a discussion on climate change and disaster displacement on international, African regional and South African level. See also 5.4.

[1655] Thompson 2019 https://unhcr.org; Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change 4, 10.

[1656] See 5.3 and 5.4 for a discussion on the Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107.

[1657] See 5.4. Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107 paras 7-12.

[1658] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 paras 8.6 and 9.11.

[1659] See 2.7 for an explanation of the principle of non-refoulement. [1729] Su 2020 https://climatechangenews.com.

Although this finding has since been complimented by many others, it has created several legal challenges for the international community because the existing refugee law does not explicitly recognise those displaced by climate change as refugees. The 1951 Refugee Convention and its 1967 Protocol discussed in Chapter 2[1660] outline the characteristics of a refugee.[1661] These instruments determine that a refugee is a person who flees their country due to a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group or political opinion, and who, based on this fear, is unable or unwilling to avail themselves to protection by his country.[1662] These frameworks were created with the events of WW I and WW II in mind,[1663] and therefore the interpretation of the elements of the definition is mainly political in nature.[1664] A fear is seen to be well-founded[1665] when the subjective reaction of a person is supported by the existence of an objective situation in the country from which that person has fled. The fear must also be linked to one of the grounds identified in the definition.[1666] Persecution[1667] is interpreted as being a threat to one's life or freedom that would exist across the entire country or any other serious violation of human rights[1668] committed by the government as persecutor.

[1660] See 2.4 for a discussion on the development of international refugee law.

[1661] See 2.5 for the definitional elements of a refugee.

[1662] Introductory note and Article 1A(2) and 1B(1) of the Convention Relating to the Status of Refugees (1951). See 2.4 for the definition of a refugee as provided for by international refugee law. See 2.5 for the definitional elements of a refugee and how it is interpreted and applied.

[1663] A guide to international refugee protection and building state asylum systems (2017) 16.

[1664] See 2.4 for a discussion on the historical development of the international refugee law framework.

[1665] See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) for guidelines on interpreting the definitional elements of a refugee. See 2.5.1 for an explanation of a well-founded fear element.

[1666] See 2.5.1 for an explanation of for reasons of element.

[1667] See 2.5.1 for an explanation of persecution element. See 2.5.2 to 2.5.4 for a comprehensive analysis of the grounds race, religion, nationality, membership of particular social group and political opinion.

[1668] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019 re-issue) para 51; see also Article 33 Convention Relating to the Status of Refugees (1951).

In applying these elements to the category of climate refugees,[1669] the argument is that climate change and resulting conditions such as rising sea levels for example could affect people's human rights and thus it could amount to persecution.[1670] If the government has failed to mitigate and prevent the degradation of the environment,[1671] or it has failed to provide assistance or it has discriminated,[1672] it can still be seen to be the persecutor.[1673] Still, a person in these circumstances will have to indicate that they fear persecution based on one of the grounds stipulated in the definition. Some argue[1674] in this regard that those who are affected by climate change are members of a social group[1675] and the conditions can make it impossible for them to return[1676] to their home country. Nevertheless, as was discussed in this study, these arguments have been widely criticised.[1677]

Given this criticism, the extended definition of a refugee as included in both the African and Latin American regional refugee law was also investigated as a possible response to this contemporary category of refugees.[1678] The 1969 OAU Convention and the 1984 Cartagena Declaration both aimed to address the specific circumstances on the two continents.[1679] As such, in addition to the traditional definition, they both define a refugee as a person who flees external aggression, occupation, foreign domination or events seriously disturbing public order in the whole or part of the country, and who is

---

[1669] See 2.6 for an application of the definitional elements of a refugee to climate change and disaster displacement.

[1670] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters 9.

[1671] Cooper 1998 NYUELJ 502-521.

[1672] Mayer 2011 CJIELP 383; see also d'Orsi "Environmental Refugees in Africa: Doctrinaire reflections, questions of practical protection and challenges remaining" 19; see also Sussman 2023 CJIL 62-63.

[1673] See 2.6 for an application of the definitional elements of a refugee to climate change and disaster displacement.

[1674] See 2.6 for an application of the definitional elements of a refugee to climate change and disaster displacement.

[1675] Cooper 1998 NYUELJ 526.

[1676] Alexander and Simon 2014 FJIL 572.

[1677] See 6.2.7 for a discussion on the problems with existing law in response to climate refugees.

[1678] See Chapter 3 for an investigation of the historical context and development of the African and Latin American regional refugee law framework.

[1679] See 2.4 for a discussion on the development of the African refugee law framework and for an analysis of the 1984 Cartagena Declaration.

compelled to leave their place of habitual residence to seek protection abroad.[1680] The extended elements of the African and Latin American regional definition of a refugee means that the breakdown of the proper functioning or stability of a state is seen as a disruption of public order.[1681] A person is also compelled to leave and to seek protection abroad when there is a risk of serious harm.[1682]

It is under the auspices of this element that some argued that those displaced by climate change or natural disasters can be protected.[1683] The rules of interpretation supports a broad approach when interpreting the existing definition.[1684] Still, a person will have to indicate that the particular event affected his circumstances in such a manner that he was compelled or forced to leave his place of residence.[1685] As was illustrated in Chapter 3,[1686] this extended definition was used to recognise and protect those who fled famine in Somalia[1687] and those who were displaced as a result of the earthquake that struck Haiti.[1688] However, similar to the international position, these arguments are not free of extensive criticism either.[1689]

[1680] See 3.5 for a discussion on the definitional elements of a refugee under African regional law.

[1681] See 3.5.1 for an analysis of the definitional element of disruption of public order.

[1682] See 3.5.2 for an evaluation of the definitional element of being compelled to leave and seeking protection abroad.

[1683] Addaney, Jegede and Matinda 2019 AHRY 250; see also UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters paras 13-16. See 3.6 for the application of the African and Latin American regional definitional elements of a refugee to climate change and disaster displacement.

[1684] Wood 2019 IJRL 311.

[1685] UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters para 17. See 3.6 for the application of the African and Latin American regional definitional elements of a refugee to climate change and disaster displacement.

[1686] See 3.6 for the application of the African and Latin American regional definitional elements of a refugee to climate change and disaster displacement.

[1687] UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia 41.

[1688] Weerasinghe Legal and protection policy research series: Refugee law in a time of climate change, disaster and conflict 63; see also UNHCR 2010 https:/unhcr.org.

[1689] See 6.2.7 for a discussion on the problems with existing law in response to climate refugees.

As SA is a state party to the 1951 Refugee Convention and its 1967 Protocol as well as the 1969 OAU Convention,[1690] its domestic refugee law framework also had to be considered.[16911692] After abolishing the restrictive Aliens Control Act,[1762] SA adopted the South African Refugees Act and its Regulations to incorporate the important refugee

[1690] See 4.4 for a discussion on the development of the South African refugee law framework. Katz and Maluwa "Refugees and Stateless Persons" 507. SA became a part to the 1969 OAU Convention during the course of 1995 and to the 1951 Refugee Convention and its 1967 Protocol during the course of 1996.

[1691] See 4.4 for an analysis of the South African refugee law framework.

[1692] of 1991; see also Handmaker and Parsley 2001 CJR 46. See 4.2 and 4.3 for an analysis of the Aliens Control Act 96 of 1991.

provisions of the international and regional instruments and to give effect to its obligations towards refugees.[1693] It also incorporated the international and African regional definition of a refugee.[1694] The South African Refugees Act and its Regulations provides for the asylum application procedure, hearings, and prescribed turn-around times, the issuing of permits to reside in SA as well as procedures for appeals against decisions.[1695] It also recognises the rights to employment, basic health services and the education of refugees.[1696] As certain amendments were made to the Act and its Regulations during the course of 2020,[1697] the positions before and after amendment had to be compared.[1698]

Although domestic refugee law has not yet been applied to climate refugees, SA has been identified as being vulnerable[1699] to climate change.[1700] Since it has also been negatively affecting the African continent as a whole,[1701] SA can become a destination for people who want to escape these harsh conditions. Nevertheless, SA's restrictive approach to refugees complicates this situation and has been criticised as being insufficient for several reasons.[1702]

In addition to the aforementioned, Chapter 6 indicated[1703] that academic authors and other bodies or organisations have suggested alternative approaches that could be followed in this regard. On the one hand, some suggest that existing documents or

---

[1693] See 4.4.1 for a discussion of the South African Refugees Act and its Regulations.

[1694] Katz and Maluwa "Refugees and Stateless Persons" 519; see also s 3 of the South African Refugees Act 130 of 1998.

[1695] See 4.4.1 for a discussion of the South African Refugees Act and its Regulations.

[1696] Section 27 of the South African Refugees Act 130 of 1998. See 4.4.1 for a discussion of the South African Refugees Act and its Regulations.

[1697] Ziegler 2020 CCR 67. See 4.4.2 for a discussion on the South African Refugees Amendment Act 11 of 2017 and its Regulations.

[1698] See 4.4.1. and 4.4.2 for a comparison of the South African Refugees Act and its Regulations before and after amendment.

[1699] Institute at UC Berkeley 2023 https://belonging.berkeley.edu; see also World Bank Group Climate risk country profile: SA 5.

[1700] See 4.3 for an explanation on climate change and disaster displacement in South Africa.

[1701] See 3.3 for a discussion on climate change and disaster displacement in Africa.

[1702] See 4.5 for a discussion on the insufficiency of South African refugee law.

[1703] See Chapter 6 for an investigation of the different arguments presented for the reformation of law in order to provide for climate refugees. [1774] See 6.2.

branches of law are sufficient, while[1774] on the other hand, others recommend that existing law be extended or new laws or measures be adopted.[1704] In addition to the international, African regional and South African refugee law framework, other regional documents, human rights law, state responsibility, environmental law and other local and regional initiatives and frameworks were investigated in response to climate refugees.[1705]

The regional document that was examined was the Kampala Convention.[1706] As argued, this is existing legislation that addresses environmental displacement. As it already contains all the essential provisions dealing with these circumstances, other regions and the international community can use it as a guideline to formulate responses to this issue.[1707] As indicated before, climate induced displacement also automatically triggers the application of human rights law as it affects the enjoyment of human rights, and in the event that a person finds himself in another state, the protection of human rights have to be ensured.[1708] These events and conditions also affect the right to life, thus triggering the application of the principle of non-refoulement.[1709]

Closely linked to non-refoulement, is the environmental law precautionary principle[1710] and state responsibility.[1711] States have an obligation to prevent and mitigate harm to

[1704] See 6.3.

[1705] See 6.2.2 to 6.2.6.

[1706] See 3.2 for a discussion on the Kampala Convention.

[1707] See 6.2.2. Schloss "Cross-border displacement due to environmental disaster" 249; see also Dos Santos Soares 2018 RCDA 42.

[1708] See 2.4 and 3.4 for a discussion on human rights law and see 6.2.3. Perez "Beyond the shortcomings of international law" 217; see also Sciaccaluga International law and the protection of "climate refugees" 106; see also Mayer 2011 CJIELP 386-388.

[1709] See 2.7 for an explanation of the principle of non-refoulement. Sciaccaluga International law and the protection of "climate refugees" 119-123.

[1710] See 6.2.3. Poon "Drawing upon international refugee law" 158; see also Sciaccaluga International law and the protection of "climate refugees" 137-138, 158, 162.

[1711] See 6.2.4.

the environment[1712] and in the event that they do contribute to the degradation of the environment, they should be held liable for their actions.[1713] The other local and regional initiatives and frameworks that were investigated as a complimentary avenue included the Dhaka Principles, the Nansen Initiative, the Protection Agenda, the

Peninsula Principles and the Brazil Declaration.[1714]

With regard to the arguments in favour of the expansion of existing laws or the adoption of new laws, the expansion of existing conventions through the adoption of protocols,[1715] the adoption of other regional agreements and soft law measures were also examined.[1787] The UNFCCC and the 1951 Refugee Convention already properly caters for the issue of climate change and refugees. It would therefore be easier to expand these instruments through protocols to protect climate refugees. Also, states already support these primary documents and this will facilitate the adoption of the protocols.[1716] Furthermore, regional agreements and UN resolutions could establish universal responses and bring global cooperation. The UN Guiding Principles on Internal Displacement[1717] was therefore also suggested as a guideline to address the problem.

As indicated in this study, the lack of universal consensus on this matter is further complicated by the use of different terms[1718] to refer to those displaced as a result of climate change. Although each of these diverse terms contain important elements, it is important that one term be accepted, as this will establish consistency and global cooperation. The adoption of an original treaty was investigated in Chapter 6,[1719] with

---

[1712] Attapattu "A new category of refugees?" 42; see also Poon "Drawing upon international refugee law" 164-165; see also Sciaccaluga International law and the protection of "climate refugees" 84, 108.

[1713] See 6.2.4.

[1714] See 6.2.6.

[1715] See 6.3.2. [1787]
See 6.3.3.

[1716] Biermann and Boas 2010 GEP 75-77; see also Hodgkinson et al 2010 MULR 79; see also Perez "Beyond the shortcoming of international law" 221.

[1717] See 2.3 for an analysis of the UN Guiding Principles on Internal Displacement (1998).

[1718] See 6.4.

[1719] See 6.3.1.

specific reference to the proposed Draft Conventions[1720] in this regard. As discussed, each of these proposed conventions contain important provisions that could be adopted as part of a new instrument specifically catering for climate refugees.[1793]

This being said, the central research question this study aimed to answer was how refugee law should be reformed at the international, regional and South African domestic levels to accommodate the UN's recognition of climate refugees? In answering this question, the chapters dealt with the following objectives:

(a) to investigate the history of international migration to explore the concept of migration, the different types of migration, and the factors that influence international movement. The objective was also to identify the reasons for migration with specific reference to the challenges migration driven by climate change and its negative effects on the environment have for the international arena;

(b) to identify and critically analyse the 1951 Refugee Convention and its 1967 Protocol with an emphasis on the elements of the definition, recognition and protection of refugees. This also entails the application of the elements of the international definition of a refugee to climate change displacement to determine whether the current framework is sufficient to protect this category of refugees or whether reform is required;

(c) to examine of the history of migration in Africa and the factors that drive movement on the continent, with specific reference to the contemporary challenges of climate change and the resulting displacement;

(d) to identify and critically analyse the 1969 OAU Convention, with an emphasis on the extended definition, recognition and protection of refugees and the extended definition as absorbed in the 1984 Cartagena Declaration. The ultimate purpose of the analysis of both these instruments is to apply the elements of the definition to climate change displacement in both Africa and Latin America to determine

[1720] See 6.3.1 for an investigation of the Draft Convention for Persons Displaced by Climate Change and the Draft Convention on the International Status of Environmentally Displaced Persons. [1793] See 6.3.1.

whether the present framework is adequate to cover this category of refugees or whether reform is required;

(e) to explore the history of migration in SA, the factors that drive movement to and from the country, and the possible effect of climate change. The analysis examines the possibility that migration to and from SA can be influenced by climate change as the continent and the country are vulnerable to the negative effects of climate change on the environment;

(f) to identify and critically analyse the domestic South African refugee law framework with an emphasis on the application of the provisions of the South African Refugees Act before and after amendment. The insufficiency of the local refugee law framework was also investigated to determine whether SA follows a narrow approach to refugees and if the inclusion and protection of climate refugees likely;

(g) to examine and explain the term climate change with specific reference to the international instruments that have been adopted to address this modern-day challenge. This discussion was necessary for the identification and evaluation of the accepted term "climate refugees" as recognised by the UNHRC and to determine whether there is a sufficient legal protection for this category of refugees;

(h) to investigate and analyse whether the current international, African regional and South African refugee law frameworks or other areas of law or documents are sufficient to provide for the recognition and protection of the category of climate refugees. This assisted in ultimately determining whether these frameworks can be amended or extended to cater for this contemporary challenge or whether reform or the adoption of a unique treaty is necessary.

7.2 Key findings

With the research question and the objectives in mind, Chapter 2 analysed the existing international refugee law framework with the main objective of establishing whether

the definition of a refugee and its elements are broad enough to include climate refugees. After analysing the elements of the definition and applying the provisions to external climate induced displacement,[1721] it is clear that the existing 1951 Refugee Convention will not be effective in protecting the category of climate refugees[1722] and that it does not provide for their recognition and protection. The international refugee law framework was created for political reasons[1723] and the definition of a refugee provided for by the 1951 Refugee Convention and its 1967 Protocol therefore does not explicitly recognise climate refugees or see climate change and related events as persecution.[1724] The extension of these obligations to climate refugees will place a greater obligation on states and will put strain on their resources and infrastructure.[1725] As this is a wider and more complex refugee group than any other group in history,[1726] this will make states more reluctant to allow, accept and assist refugees.[1727] Consequently, these actions and responses will negatively affect the rights of legitimate refugees who flee political situations.[1728]

However, as the international law applies regionally, the provisions of the African and Latin American refugee law framework also had to be analysed before coming to a conclusive finding on the non-application of the existing refugee law framework. The main objective of this analysis in Chapter 3 was to determine whether climate refugees could be accommodated by the extended definition of a refugee provided in these

[1721] See 6.2.7 for an analysis of problems with existing law.

[1722] See 6.2.7 for an analysis of the problems with existing law in application to climate induced displacement.

[1723] Article 1 of the Convention Relating to the Status of Refugees (1951); see also Mayer 2011 CJIELP 380-383; see also Sciaccaluga International law and the protection of "climate refugees" 157; see also Biermann and Boas 2010 GEP 72; see also Ghaly 2021 ANU URJ 91; see also Prieur "Towards an international legal status of environmentally displaced persons" 235.

[1724] See 2.5 for an explanation on the definitional elements of a refugee. See 6.2.7 for an analysis of the problems with existing law in application to climate induced displacement.

[1725] See 6.2.7 for an analysis of the problems with existing law when applied to climate induced displacement.

[1726] Biermann and Boas 2010 GEP 74.

[1727] See 6.2.7 for an analysis of the problems with existing law in application to climate induced displacement.

[1728] Ghaly 2021 ANU URJ 91; see also Hartmann 2010 JID 236; see also Scissa 2021 Recognition and protection of environmental migrants in international law; see also Addaney, Jegede and Matinda 2019 AHRY 251.

frameworks. By evaluating these frameworks, especially the elements of the extended definition of a refugee, the study found, as with the international position, that the 1969 OAU Convention and the 1984 Cartagena Declaration will not be sufficient to protect climate refugees.[1729] These instruments were created in response to the circumstances on these continents at the time.[1730] Therefore, it was not the intention to include climate refugees under the regional definitions of a refugee.[1731] Furthermore, these documents do not apply internationally[1732] and it does not provide for extended protection.[1733] Also, the 1984 Cartagena Declaration is soft law, which means that it is non-binding.[1734] In addition, the extended definition has led to several interpretation issues and there is no state practice regarding its interpretation and application.[1735]

As the international law and the African regional law applies to SA, it was also important to evaluate the South African domestic law on refugees in Chapter 4. The objective of this analysis was to determine whether the South African refugee law framework is sufficient to address the category of climate refugees. By investigating South African refugee law and SA's attitude towards refugees, it is safe to argue that the South African domestic refugee law framework will not be sufficient to protect climate refugees and that the accommodation of the category of climate refugees by SA is highly unlikely.[1809] The recent the developments in SA regarding refugees show that SA prefers to follow a restrictive and narrow approach to refugees. This is found to be in direct contrast to the welcoming and accommodating approach that is being followed by the international law.

[1729] See 6.2.7 for an analysis of the problems with existing law when applied to climate induced displacement.

[1730] See 3.4 for a discussion on the development of the African and Latin American regional refugee law framework. Biermann and Boas 2010 GEP 73.

[1731] Cooper 1998 NYUELJ 497; see also Biermann and Boas 2010 GEP 73.

[1732] Addaney, Jegede and Matinda 2019 AHRY 250; see also Cooper 1998 NYUELJ 499.

[1733] Cooper 1998 NYUELJ 498.

[1734] Addaney, Jegede and Matinda 2019 AHRY 250; see also Cooper 1998 NYUELJ 499.

[1735] See 3.4. Anastasiou "Public international law's applicability to migration as adaptation" 178-179.

[1809] See 4.5 for an investigation on the insufficiency of South African refugee law.

As was discussed in Chapter 4, SA adopted certain amendments[1736] to the South African Refugees Act and its Regulations, despite the fact that it is struggling to realise its obligations towards refugee. As was the case during the apartheid era,[1737] SA has decided to restrict the rights of refugees and to complicate the asylum application procedure with these amendments.[1738] SA is one of the countries hosting the most refugees[1813] and in recent years, the prescribed turn-around times have not been met. The rights of refugees have been violated due to harsh conditions in which they reside pending the outcomes of their application. Yet, SA proceeded to close several RO, an act for which it has been criticised.[1739] Although the government defends these restrictions as safeguarding state security, it has resulted in locals embracing a hostile attitude towards foreigners.[1740] This has escalated to violent xenophobic attacks being launched against immigrants in SA.[1741] Some of the amendments have been challenged before court as being unconstitutional since SA is not considering the importance of international law as provided for in the Constitution[1742] and is not complying with its international obligations.[1743] The CC confirmed this position in December 2023.[1744] Still, the Minister of Home Affairs announced that SA should withdraw from the existing refugee law frameworks and that it should re-enter these instruments with

[1736] Ziegler 2020 CCR 67. See 4.4.2 for a discussion on the South African Refugees Amendment Act and its Regulations.

[1737] See 4.2 and 4.4 for the historical development of the South African migration and refugee law frameworks.

[1738] See 4.4.2 for a discussion on the South African Refugees Amendment Act and its Regulations. [1813] UNHCR date unknown https://unhcr.org/countries/south-africa.

[1739] See 4.5 for an investigation on the insufficiency of South African refugee law.

[1740] See 4.5 for an investigation on the insufficiency of South African refugee law.

[1741] Kiewit 2020 https://mg.co.za; see also BBC 2020 https://bbc.com; see also Shoba 2020 https://dailymaverick.co.za; see also Shoba and Tobias 2019 https://dailymaverick.co.za; see also HRW 2019 https://hrw.org.

[1742] Sections 39, 231, 232 and 233 of the Constitution of the Republic of South Africa, 1996. See 4.2.

[1743] Minister of Home Affairs v Scalabrini Centre [2013] ZASCA 134; 2013 6 SA 421 (SCA). See 4.5 in chapter 4.

[1744] Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC).

reservations,[1745] thus deciding which obligations to comply with and which to disregard.

Given these findings, the concept of climate change,[1746] international responses to the problem and the impact it has on the environment were analysed in Chapter 5. The main objective was to determine whether people in fact do cross borders to escape climate change and in the event that they do, whether they are protected by law. After considering the facts, the study found that climate change is a reality and that it continues to affect all aspects of life.[1747] Although the international community has committed to addressing the issue, increased gas emissions have resulted in the rise of the earth's temperature.[1748] This increase in temperature has been found to exacerbate and intensify harsh events and conditions, which continues to affect people's livelihoods and human rights.[1749] As a result, people are forced to leave their homes and when they move externally to escape these conditions, they are not protected by law.[1750] This is despite the fact that the UNHRC, in response to the matter of Mr Teitiota,[1751] explicitly recognised the existence of climate refugees.[1752]

Considering the warnings from scientists and the current conditions in certain regions,[1753] it is clear that external displacement due to climate change is a crisis that

[1745] Merten 2023 https://dailymaverick.co.za; see also Gen Not 4061 in GG of 10 November 2023 White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa No 4061 (2023).

[1746] See 5.2 for an explanation of the term climate change.

[1747] See 5.2.2 for an analysis of extreme weather events and natural disasters exacerbated by climate change.

[1748] UN 2021 https://news.un.org/en/story/20021/08/1097362.

[1749] See 5.2 for a discussion on climate change.

[1750] d'Orsi and Naldi 2022 IRRC 1030; see also d'Orsi 2023 https://theconversation.com. See 2.3, 3.3 and 4.3 for a discussion on climate change and disaster displacement. See 5.3 for a discussion on the lack of legal protection of climate refugees.

[1751] See 5.3 and 5.4 for an investigation on the matter of Mr Teitiota. Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107.

[1752] UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/ 2016 paras 9.4 and 9.8.

[1753] See 5.2 for a discussion on climate change.

the international community is likely going to face on a more regular basis.[1754] The existing refugee law framework is outdated and has to be adapted to provide for modern day challenges such as climate refugees. It is clear that circumstances have changed and that refugees no longer only include those who are forced to flee for political reasons as was historically the case. Therefore, reform is required to provide for the recognition and protection of this category of refugees.

Chapter 6 analysed the different arguments in favour of legal reform to provide for the recognition and protection of climate refugees. The main objective of this investigation was to determine whether existing legal frameworks are sufficient to protect climate refugees or whether a new treaty will have to be adopted. An analysis of alternative documents and branches of law in relation to climate refugees showed that these avenues are not sufficient as they present their own challenges.[1755] The Kampala Convention[1756] only applies to internal displacement.[1757] Human rights law does not address environmental issues[1833] and it does not assign a specific status to those displaced by climate change.[1758] Furthermore, there is a lack of measures to enforce state liability[1759] and the existing environmental law was not created for the purpose of protecting climate refugees.[1760] Other local and regional initiatives only apply locally or regionally, mainly cater for migrants, and are not binding.[1761]

[1754] See 5.3 for a discussion on the lack of legal protection of climate refugees.

[1755] See 6.2.2 to 6.2.6 for a discussion of regional documents, human rights law, state responsibility, environmental law and other local and regional initiatives and frameworks as possibilities to address climate refugees.

[1756] See 3.2 for a discussion on the Kampala Convention (2012).

[1757] Abebe The Kampala Convention and environmentally displacement in Africa 7. [1833] Cooper 1998 NYUELJ 495; see also Gonzalez 2020 WLIJ 373.

[1758] Behrman and Kent Overcoming the legal impasse? Setting the scene 5-8.

[1759] Sciaccaluga International law and the protection of "climate refugees" 92; see also Eckersley 2015 EJPT 15.

[1760] Docherty and Giannini 2009 HELR 358; see also Behrman and Kent "Overcoming the legal impasse? Setting the scene" 6.

[1761] Attapattu "A new category of refugees?" 45.

The expansion of existing conventions by adopting protocols[1762] or the adoption of regional agreements or soft law measures[1763] would not be sufficient to protect climate refugees either. It would be difficult to build on the UNFCCC and the 1951 Refugee Convention as the principle instruments do not contain a definition of a climate refugee and they do not contain provisions on the obligations of states in these circumstances.[1764] Regional agreements will be context specific and may therefore differ from continent to continent, resulting in discrepancies.[1765] Soft law measures do not create state obligations as they are not binding.[1766] Similar to the Kampala Convention, the UN Guiding Principles on Internal Displacement will not be sufficient to address this modern day issue as it only applies to internal displacement.[1767] At most, all of these suggested instruments or branches of law could be used as complimentary[1844] measures to climate refugee law.

Furthermore, an analysis of the different terms used to refer to those displaced by climate change revealed the importance of consensus on one term to establish cooperation and consistency. The term climate refugees seems preferable as it indicates the seriousness of the issue and it triggers a higher standard of protection.

7.3 Conclusion and recommendations

The existing facts show that people are being forcefully displaced as a result of the negative impact of climate change on the environment. For that reason, the UNHRC recognised the concept of climate refugees. The recognition of this concept is applauded as it acknowledges that human beings are vulnerable to the effects of

---

[1762] See 6.3.2 for an investigation into the expansion of existing Conventions through the adoption of protocols.

[1763] See 6.3.3 for an analysis of regional agreements and soft law measures.

[1764] Jolly and Ahmed 2014-2015 ISIL YBIHRL 230; see also Mayer 2011 CJIELP 406-408; see also Docherty and Giannini 2009 HELR 391.

[1765] Sciaccaluga International law and the protection of "climate refugees" 154; see also Mayer 2011 CJIELP 399-400.

[1766] Dugard and Tladi "Sources of International Law" 41-42; see also Mayer 2011 CJIELP 408-409.

[1767] See 5.3 for a discussion on the UN Guiding Principles for Internal Displacement (1998). [1844] Pere "Beyond the shortcomings of international law" 222.

climate change and that this is a serious modern issue that is of international concern. It identifies the connection between the contributions of states to the degradation of the environment, the effect it has on individuals and the enjoyment of their human rights, and the responsibility of states. As states contribute to the greenhouse gas emissions that result in climate change, they are responsible to assist and protect those affected by the negative impact of climate change on the environment. Still, climate refugees are not protected by law and by analysing the existing international, African regional and South African domestic refugee law frameworks, it is clear that it has to be reformed to provide for the explicit recognition and protection of climate refugees.

By thoroughly scrutinising the arguments and opinions in favour of reform, this study suggests that a new treaty be drafted that contains a comprehensive definition of a climate refugee. It should provide for the international protection of this category of people through the implementation of principles such as recognition, acceptance, assistance, responsibility, adaptation, prevention and relocation. The study considered the different elements that define this category of refugees[1768] and found that it is important to include these elements in such a definition. This includes the recognition of a person as a "climate refugee" who is: 1. forced to move; 2. across borders; 3. temporarily or permanently; 4. to seek protection and assistance; 5. as their home state is unable to assist or their home state has become uninhabitable; 6. due to an occurring or imminent extreme weather event or slow-onset climate event; 7. which is scientifically proven to be caused or intensified by or linked to climate change.

Voluntary movement should be excluded from this definition as an element since such an open requirement can result in people leaving their countries for the simplest reasons.[1769] This can cause international problems. Also, provision should not be made for internal displacement since this can potentially violate the sovereignty principle,[1770] and the inherent character of the concept of a refugee. Furthermore, if relocation within a state is possible, home states can most likely assist the IDPs in these

[1768] See 6.4.
[1769] Docherty and Giannini 2009 HELR 368-369.
[1770] Docherty and Giannini 2009 HELR 369.

situations. There is a range of existing international and regional legal frameworks and guidelines that have already proven to be effective in dealing with IDPs.[1771] This is also why the elements of assistance seeking and the inability of the home state is specifically referred to as qualification requirements. Unlike with political refugees, displacement is not necessarily caused by the state's reluctance to assist.[1772]

The study agrees with Docherty and Giannini that it does not matter whether the displacement is temporary or permanent, as protection and assistance is equally required in both cases.[1773] Modern-day events have illustrated that communities are equally negatively affected by sudden weather events such as floods, cyclones and tsunamis for example, and long-term events such as disappearance of land and drought for example. Those who are displaced temporarily must, however, be enabled and assisted to return to their home states once the circumstances that led to the movement has improved. On the other hand, sustainable measures have to be adopted to assist those who are permanently displaced[1851] in these situations to adapt and to be integrated into society, with specific consideration of reunions with families and preservation of culture and religion. Similar to other authors, the study argues here that the events that drive movement have to be linked to climate change.[1774] The last-mentioned is a topic of international concern in respect of which several instruments have already been created to establish global state obligations. Several

[1771] For example, the UN Guiding Principles on Internal Displacement (1998) and the Kampala Convention (2012).

[1772] Docherty and Giannini 2009 HELR 381.

[1773] Docherty and Giannini 2009 HELR 369. [1851]
Mayer 2011 CJIELP 389-391.

[1774] Docherty and Giannini 2009 HELR 370.

states have made pledges and financial contributions towards this cause, illustrating their willingness to cooperate in attempting to eliminate this threat. It should be proven scientifically that the event causing the movement is linked to or at least intensified by climate change, as it is still a reality that this is not the case with allweather events and some can still occur naturally.

In determining whether a person should be recognised as a climate refugee, this study recommends that each case be evaluated on a collective basis without disregarding the individual case-by-case approach. Although it is true that these climate change events usually affect a whole community, it must not be assumed that it does not still affect each person in a different way and that some people are less capable of coping and adapting than others. As argued, group determination is a less time-consuming and expensive exercise than individual consideration.[1775] This can be effective when preventatively determining the allocation of assistance and possible relocation. States have to be obligated to recognise and protect the basic human rights of climate refugees.[1854] The important rights include [1776] the right to life, liberty, nondiscrimination, housing, food, work, education, health care, water, allocation of documents and residency. Also, in these specific circumstances, special consideration has to be given to the right to culture and religion, especially when climate refugees are permanently relocated. As with the existing 1951 Refugee Convention, it is important that climate refugees not be subjected to refoulement, captivation and deportation if they enter illegally or without the necessary documents. Provision should be made for the international responsibility of states to accept, protect and assist climate refugees. This should include the duty to assist and to cooperate with each other in preventing, adapting and dealing with these situations. With regard to adaptation obligations, these include the adoption of preventative measures to possibly postpone the effects of climate change. As illustrated by Mayer, this can

[1775] Docherty and Giannini 2009 HELR 374-375. [1854] Mayer 2011 CJIELP 391.

[1776] Docherty and Giannini 2009 HELR 376-378. Mayer 2011

include the building of mechanisms to prevent flooding, for example.[1777] Where adaptation is impossible or difficult, further assistance can also be granted by relocating climate refugees.

It is agreed that assistance should be granted to states to enable them to resettle their people in other parts of their countries. However, this research does not suggest that international relocation should be done in these circumstances. If this is done, states will have to offer locations where people can be resettled, which will jeopardise the support for the instrument. Mayer's argument as to the justification of the inclusion of state responsibility insofar as it relates to the requirement by law, the humanity principle, and threat to peace and security is supported by this research.[1778]

Nevertheless, even though the CDR or polluter-must-pay principles are progressive concepts contained in numerous instruments and documents, it is advised that the inclusion of this principle in an instrument addressing climate refugees be carefully considered as this might severely affect the support and ratification of such an instrument.[1779] States that have a larger carbon footprint than others will most likely not commit to a treaty that requires a higher standard of action from them. The incorporation and implementation of the content of such a document must be monitored by a newly created body, which should regularly assess the situation by working closely with regional bodies and local governments. States must have the obligation to report to the agency on a regular basis regarding the progress made. A fund must be created[1780] to which states can willingly make donations in support of this crisis. The fund will have to be controlled and procedures will have to be implemented to enable the allocation of funds to meet obligations. An agency similar to the UNHCR must also be created[1781] to provide assistance to climate refugees and to work with them directly in order to improve their circumstances and to have them

[1777] CJIELP 370-371.
[1778] Mayer 2011 CJIELP 375-379.
[1779] Mayer 2011 CJIELP 394-397.
[1780] Mayer 2011 CJIELP 413; see also Docherty and Giannini 2009 HELR 384-388.
[1781] CJIELP 414; see also Docherty and Giannini 2009 HELR 384, 388-389.
Mayer 2011

heard. As also indicated by other authors, it is important for scientists to be appointed to constantly assess the changing circumstances, to advise the observing and implementing body to act timeously, to assist them in identifying problem areas, and to facilitate in the classification of persons as climate refugees.[1782]

As it can be argued that such a comprehensive document will definitely assist in mitigating the situation of climate refugees, it must be emphasised that it cannot function alone in addressing this issue. Regional, domestic and even soft law measures will have to be implemented as the vehicles to drive and improve the effectiveness of this suggested universal response.[1783]

This study has contributed by furthering the debate on climate refugees by critically analysing the problem of the recognition and protection of this category at the international, regional and domestic levels. It identified the current limits, shortcomings and challenges of the existing legal frameworks and investigated the different solutions that have been suggested by scholars. This culminates in recommendations with respect to this matter, which is admittedly still in need of future research, review and debate.

Issues related to this study that could possibly be investigated in the future include the creation of a proper definition of a climate refugee, the creation of a comprehensive treaty to safeguard the rights of climate refugees and the investigation of the obligations of states towards climate refugees.

[1782] Docherty and Giannini 2009 HELR 389-391.

[1783] CJIELP 409-410.
Mayer 2011

BIBLIOGRAPHY

Literature

Addaney, Jegede and Matinda 2019 AHRY

Addaney M, Jegede AO and Matinda MZ "The protection of climate refugees under the African Human Rights system: Proposing a value-driven approach"

2019 AHRY 242-259

Adepoju 2008 ISSJ

Adepoju A "Linkages between internal and international migration: The African situation" 2008 ISSJ 387-395

Alexander and Simon 2014 FJIL

Alexander H and Simon J "Unable to return in the 1951 Refugee Convention: Stateless refugees and climate change" 2014 FJIL 532-574

Allain 2001 IJRL

Allain J "The jus cogens nature of non-refoulement" 2001 IJRL 533-558

Amadi and Vundamina 2023 LDD

Amadi VT and Vundamina MND "Migration and climate change in Africa: A differentiated approach through legal frameworks on the free movement of people" 2023 LDD 31-54

Anastasiou "Public international law's applicability to migration as adaptation"

Anastasiou T "Public international law's applicability to migration as adaptation: Fit for purpose?" in Behrman S and Kent A (eds) Climate Refugees: Beyond the Legal Impasse? (Routledge New York 2018) 172-193

Arboleda 1995 IJRL

Arboleda E "The Cartagena Declaration of 1984 and its similarities to the 1969 AOU Convention – A comparative perspective" 1995 IJRL 87-101

Attapattu "A new category of refugees?"

Attapattu SA "A new category of refugees? Climate refugees and a gaping hole in international law" in Behrman S and Kent A (eds) Climate Refugees: Beyond the Legal Impasse? (Routledge New York 2018) 34-51

Baker-Jones and Baker-Jones 2015 QUT LR

Baker-Jones M and Baker-Jones M "Teitiota v The Chief Executive of Ministry of Business, Innovation and Employment – a person displaced" 2015 QUT LR 102-121

Bakewell "Unsettling the boundaries between forced and voluntary migration"

Bakewell O "Unsettling the boundaries between forced and voluntary migration" in Carmel E, Lenner K and Paul R (eds) Handbook on the politics and governance of migration (Edward Elgar Massachusetts 2021) 124-136

Balesh 2015 EELJ

Balesh R "Submerging islands: Tuvalu and Kiribati as case studies illustrating the need for a climate refugee treaty" 2015 EELJ 78-112

Behrman and Kent "Overcoming the legal impasse? Setting the scene"

Behrman S and Kent A "Overcoming the legal impasse? Setting the scene" in Behrman S and Kent A (eds) Climate Refugees: Beyond the Legal Impasse? (Routledge New York 2018) 3-15

Bekker 2013 AHRLJ

Bekker G "The protection of asylum seekers and refugees within the African regional human rights system" 2013 AHRLJ 1-29

Bennett and Strug Introduction to International Law

Bennett TW and Strug J Introduction to International Law (Juta Cape Town 2013)

Biermann and Boas 2010 GEP

Biermann F and Boas I "Preparing for a warmer world: Towards a global governance system to protect climate refugees" 2010 GEP 60-88

Bryne 2018 UCILR

Bryne C "Climate change and human migration" 2018 UCILR 762-788

Carlin 1982 MJIL

Carlin JL "Significant refugee crises since World War II and the response of the international community" 1982 MJIL 3-25

Castelli 2018 JTM

Castelli F "Drivers of migration: Why do people move?" 2018 JTM 1-7

Clark Human Migration

Clark WAV Human Migration (Regional Research Institute West Virginia 2020)

Connell "Nothing there atoll? Farewell to the Carteret Islands"

Connell J "Nothing there atoll? Farewell to the Carteret Islands" in Crook T and Rudiak-Gould P Pacific Climate Culture (De Gruyter Warsaw 2018) 73-87

Connell 2006 APV

Connell J "Last days in the Carteret Islands? Climate change, livelihoods and migration on coral atolls" 2006 APV 3-15

Cooper 1998 NYUELJ

Cooper JB "Environmental refugees: Meeting the requirements of the refugee definition" 1998 NYUELJ 480-529

Costello and Foster 2015 NYIL

Costello M and Foster H "Non-refoulement as custom and jus cogens? Putting the prohibition to the test" 2016 NYIL 273-327

Czaika and Reinprecht "Migration drivers: Why do people migrate?"

Czaika and Reinprecht "Migration drivers: Why do people migrate?" Scholten P (eds) in Introduction to migration studies (Springer Cham 2022)

Dinbabo and Nyasulu 2015 AHMR

Dinbabo MF and Nyasulu T "Macroeconomic immigration determinants: an analysis of pull factors of international migration in South Africa" 2015 AHMR 27-52

Docherty and Giannini 2009 HELR

Docherty B and Giannini T "Confronting a rising tide: A proposal for a Convention on Climate Change Refugees" 2009 HELR 349-403

d'Orsi "Environmental refugee in Africa: Doctrinaire reflections, questions of practical protection and challenges remaining"

d'Orsi C "Environmental refugee in Africa: Doctrinaire reflections, questions of practical protection and challenges remaining" in Mbengue M (eds) (Pedone, to be published) d'Orsi and Naldi 2022 IRRC

d'Orsi C and Naldi GJ "Climate-induced displacement in Sahel: A question of classification" 2022 IRRC 1029-1065

Dos Santos Soares 2018 RCDA

Dos Santos Soares A "Protecting environmentally displaced persons under the Kampala Convention: A brief assessment" 2018 RCDA 1-48

Dugard et al International Law

Dugard J et al International Law: A South African Perspective 4th ed (Juta Cape Town 2011)

Dugard "State responsibility, diplomatic protection and the treatment of aliens"

Dugard "State responsibility, diplomatic protection and the treatment of aliens" in Dugard J et al Dugard's International Law: A South African Perspective 5th ed (Juta Cape Town 2018) 502-535

Dugard and Dugard "Human Rights"

Dugard J and Dugard J "Human Rights" in Dugard J et al (eds) Dugard's International Law: A South African Perspective 5th ed (Juta Cape Town 2018) 454-501

Dugard and Tladi "International Environmental Law"

Dugard J and Tladi O "International Environmental Law" in Dugard J et al (eds) Dugard's International Law: A South African Perspective 5th ed (Juta Cape Town 2018) 586-607

Dugard and Tladi "Sources of International Law"

Dugard and Tladi "Sources of International Law" in Dugard J et al Dugard's International Law: A South African Perspective 5th ed (Juta Cape Town 2018) 28-49

Eckersley 2015 EJPT

Eckersley R "The common but differentiated responsibilities of states to assist and receive 'climate refugees'" 2015 EJPT 481-500

Feller 2001 WUJLP

Feller E "The Evolution of the International Refugee Protection Regime" 2001 WUJLP 129-143

Foster International refugee law and socio-economic rights

Foster M International refugee law and socio-economic rights: Refuge from deprivation (Cambridge University Press Cambridge 2007)

Francis 2019 SCCCL

Francis A "Free movement agreements and climate-induced migration: A Caribbean case study" 2019 SCCCL 1-28

Garlick, Franck and Bower "Enhancing legal protection"

Garlick M, Franck M and Bower E "Enhancing legal protection for people displaced in context of disasters and climate change" in Behrman S and Kent A (eds) Climate Refugees: Beyond the Legal Impasse? (Routledge New York 2018) 118-125

Ghaly 2021 ANU URJ

Ghaly S "Climate displacement and the need for legal protection" 2021 ANU URJ 89-107

Gillard 2008 IRRC

Gillard EC "There's no place like home: states' obligations in relation to transfers of persons" 2008 IRRC 703-750

Ginsburg et al 2021 BMC Public Health

Ginsburg C et al "Internal migration and health in South Africa: determinants of healthcare utilisation in a young adult cohort" 2021 BMC Public Health 1-15

Gonzalez 2020 WILJ

Gonzalez CG "Climate justice and climate displacement: Evaluating the emerging legal and policy responses" WILJ 2020 366-396

Goodwin-Gill and McAdam The refugee in international law

Goodwin-Gill GS and McAdam J The refugee in international law 4th ed (Oxford University Press Oxford 2021)

Handmaker and Parsley 2001 CJR

Handmaker J and Parsley J "Migration, refugees and racism in South Africa" 2001 CJR 40-51

Harvey 2015 RSQ

Harvey C "Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law" 2015 RSQ 43-60

Hathaway and Foster The law of refugee status

Hathaway JC and Foster M The law of refugee status (Cambridge University Press Cambridge 2014)

Hicks 1999 IJGLS

Hicks TF "The Constitution, Aliens Control Act and xenophobia: The struggle to protect South Africa's Pariah-the undocumented immigrant" 1999 IJGLS 393417

Hodgkinson et al 2010 MULR

Hodgkinson D, Burton T, Anderson H and Young L "The hour when the ship comes in: A Convention for persons displaced by climate change" 2010 MULR

69-120
Huang et al "Research on legal regulation"

Huang B, Ma Y, Ruan J and Tang J "Research on legal regulation of the UNSC's addressing the issue of climate refugees" in Proceedings of the 4th

International Conference on Humanities Education and Social Sciences (ICHESS 2021) 1704-1709

Jacobsen 2007 FFWA

Jacobsen K "Migration within Africa: The view from South Africa" 2007 FFWA 203-214

Jolly and Ahmad 2014-2015 ISIL YBIHRL

Jolly S and Ahmad N "Climate refugees under international climate law and international refugee law: Towards addressing the protection gaps and exploring the legal alternatives for criminal justice" 2014-2015 ISIL YBIHRL 216-248

Kanamugire 2020 Juridical Tribune

Kanamugire JC "Historical development of refugee framework in Africa" 2020 Juridical Tribune 308-327

Kapindu 2020 CCR

Kapindu RE "No return to persecution or danger: Judicial application of the principle of non-refoulement in refugee law in South Africa and Malawi" 2020 CCR 107-127

Katz and Maluwa "Refugees and Stateless Persons"

Katz A and Maluwa T "Refugees and Stateless Persons" in Dugard J et al (eds) Dugard's International Law: A South African Perspective 5th ed (Juta Cape Town 2018) 502-535

Kavuro 2022 Obiter

Kavuro C "The disappearance of refugee rights in South Africa" 2022 Obiter 4978

Khan "The evolution of refugee law in South Africa"

Khan F "The evolution of refugee law in South Africa" in Khan F and Schreier T (eds) Refugee Law in South Africa 2nd ed (Juta Cape Town 2023) 1-13

Lewis 2005 IJRL

Lewis C "UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution" 2005 IJRL 67-90

Liu 2011 ELR

Liu J "Legislation and policy: The Cancun Agreements" 2011 ELR 43-49

Lwabukuna 2012 SAPL

Lwabukuna O "Internal displacement in South Africa: Reflections on law, contemporary and memory of forced removals" 2012 SAPL 210-230

Maluwa and Katz 2020 IJGLS

Maluwa T and Katz A "Who is a refugee? Twenty-five years of domestic implementation and judicial interpretation of the 1969 OAW and 1951 UN Refugee Conventions in post-apartheid South Africa" 2020 IJGLS 129-205

Mayer 2011 CJIELP

Mayer B "The international legal challenges of climate-induced migration: Proposals for an international legal framework" 2011 CJIELP 357-416

McAdam 2009 MJIL

McAdam J "From economic refugees to climate refugees?" 2009 MJIL 579-595
McAdam 2020 AJIL

McAdam J "Protecting people displaced by the impacts of climate change: The UN Human Rights Committee and the Principle of non-refoulement" 2020 AJIL 708-725

McAdam 2010 UNSWLRS

McAdam J "Disappearing states, statelessness and the boundaries of international law" 2010 UNSWLRS 1-23

McAdam et al 2016 UNSWLRS

McAdam J, Burson B, Kalin W and Weerasinghe S "International law and sealevel rise: Forced migration and human rights" 2016 UNSWLRS 1-47

McAdam Climate change, forced migration and international law

McAdam J Climate change, forced migration and international law (Oxford University Press Oxford 2012)

McAdam 2010 UNSWLRS

McAdam J "'Disappearing states': Statelessness and the boundaries of international law" University of New South Wales Faculty of Law Research Series Paper 2 2010 1-23

Metzger "The League of Nations, Refugees and Individual Rights"

Metzger B "The League of Nations, Refugees and Individual Rights" in Frank MJ and Reinisch J (eds) Refugees in Europe, 1919-1959: A Forty Years' Crisis? (Bloomsbury Academic London 2017) 101-120

Moyo and Botha "Refugee policy as infrastructure"

Moyo K and Botha C "Refugee policy as infrastructure: The Gulf between policy intent and implementation for refugees and asylum seekers in South Africa" in Rugunanan P and Xulu-Gama N (eds) Migration in Southern Africa (Springer Cham 2022) 77-90

Myers 2001 The Royal Society

Myers N "Environmental refugees: a growing phenomenon in the 21st century" 2001 The Royal Society 609-613

Nirmal 2001 ISIL YBIHRL

Nirmal BC "Refugees and Human Rights" 2001 ISIL YBIHRL 94-117

Ottonelli and Torresi 2013 IMR

Ottonelli V and Torresi T "When is migration voluntary?" 2013 IMR 783-813

Oyelade 2006 ISIL YBIHRL

Oyelade OS "A critique of the rights of refugees under the OAU Convention governing the specific aspects of refugees' problems in Africa" 2006 ISIL YBIHRL 201-232

PDD "State-led, regional, consultative process"

Platform on Disaster Displacement (PDD) "State-led, regional, consultative process: Opportunities to develop legal frameworks on disaster displacement" in Behrman S and Kent A (eds) Climate Refugees: Beyond the Legal Impasse? (Routledge New York 2018) 126-154

Perez "Beyond the shortcomings of international law"

Perez BF "Beyond the shortcomings of international law: a proposal for the legal protection of climate migrants" in Behrman S and Kent A (eds) Climate Refugees: Beyond the Legal Impasse? (Routledge New York 2018) 214-229

Poon "Drawing upon international refugee law"

Poon "Drawing upon international refugee law: The precautionary approach to protecting climate change-displaced persons" in Behrman S and Kent A (eds) Climate Refugees: Beyond the Legal Impasse? (Routledge New York 2018) 157171

Prieur "Towards an international legal status of environmentally displaced persons"

Prieur M "Towards an international legal status of environmentally displaced persons" in Behrman S and Kent A (eds) Climate Refugees: Beyond the Legal Impasse? (Routledge New York 2018) 233-242

Rwelamira 1989 IJRL

Rwelamira MR "Two decades of the 1969 OAU Convention Governing the Aspects of the Refugee Problem in Africa" 1989 IJRL 557-561

Rystad 1992 IMR

Rystad G "Immigration history and the future of international migration" 1992 IMR 1168-1199

Sharpe 2013 AJICL

Sharpe M "Organization of African Unity and African Union engagement with refugee protection: 1963-2011" 2013 AJICL 50-94

Schindlmayr 2003 IM

Schindlmayr T "Sovereignty, legal regimes and international migration" 2003 IM 109-123

Schloss "Cross-border displacement due to environmental disaster"

Schloss C "Cross-border displacement due to environmental disaster: A proposal for UN Guiding Principles to fill the legal protection gap" in Behrman S and Kent A (eds) Climate Refugees: Beyond the Legal Impasse? (Routledge New York 2018) 243-264

Sciaccaluga International law and the protection of "climate refugees"

Sciaccaluga G International law and the protection of "climate refugees" (Palgrave Macmillan Cham 2020)

Scott 2016 RSQ

Scott M "Finding agency in adversity: Applying the Refugee Convention in the context of disasters and climate change" 2016 RSQ 26-57

Strydom et al International Law

Strydom H et al (eds) International Law (Oxford University Press Cape Town 2016)

Suli et al 2023 WCE

Suli S, Barriopedro D, Garcia-Herrera R and Rusticucci M "Regionalisation of heat waves in southern South America" 2023 WCE 1-14

Sussman 2023 CJIL

Sussman CM "A global migration framework under water: How can the international community protect climate refugees" 2023 CJIL 41-68

Taimur 2021 RSILLR

Taimur A "Climate change refugees: Should applicants escaping the sudden, disastrous onset of climate change be accorded the same protection as those escaping persecution?" 2021 RSILLR 118-150

Tsegay 2023 Genealogy

Tsegay SM "International migration: Definition, causes and effects" 2023 Genealogy 1-10

Van Garderen and Ebenstein "Regional developments: Africa"

Van Garderen J and Ebenstein J "Regional developments: Africa" in Zimmerman A (ed) The 1951 Convention Relating to the Status of Refugees and its 1967

Protocol: A commentary (Oxford University Press Oxford 2011) 185-203

Van Krieken 1979 NILR

Van Krieken P "The High Commissioner for Refugees" 1979 NILR 24-35

Van Wormer and Besthorn Human behaviour and the social environment

Van Wormer KS and Besthorn FH Human behaviour and the social environment, Macro Level: Groups, Communities and Organizations (Oxford University Press Oxford 2011)

Vinuales 2011 LJIL

Vinuales JE "Balancing effectiveness and fairness in the redesign of the climate change regime" 2011 LJIL 223-252

Weis 1982 MJIL

Weis P "The Development of Refugee Law" 1982 MJIL 27-42

Williams 2008 Law and Policy

Williams A "Turning the tide: Recognizing climate change refugees in international law" 2008 Law and Policy 502-529

Wood 2014 IJRL

Wood T "Expanding protection in Africa? Case studies of the implementation of the 1969 African Refugee Convention's expanded refugee definition" 2014 IJRL 555-580

Wood 2015 FMR

Wood T "Developing temporary protection in Africa" 2015 FMR 23-25

Wood 2019 IJRL

Wood T "Who is a refugee in Africa? A principled framework for interpreting and applying Africa's expanded refugee definition" 2019 IJRL 290-320

Wood 2022 FMR

Wood T "The role of free movement agreements in addressing climate mobility" 2022 FMR 62-64

Zeller "The role of legal and normative frameworks for protection of environmentally displaced people"

Zeller R "The role of legal and normative frameworks for protection of environmentally displaced people" in Laczko F and Aghazarm C (eds) Migration, environment and climate change: Assessing the evidence (International Organization for Migration Geneva 2009) 385-434

Ziegler 2020 CCR

Ziegler R "Access to effective refugee protection in South Africa: Legislative commitment, policy realities, judicial rectifications?" 2020 CCR 65-106

Case law

Abdi v Minister of Home Affairs (734/10) [2011] ZASCA 2 (15 February 2011)

Ahmed v Minister of Home Affairs 2019 1 SA 1 (CC)

AK Pitcherskaia v Immigration and Naturalization Service (INS) 118 F 3d (9th Circuit) (1997)

Arse v Minister of Home Affairs 2012 4 SA 544 (SCA)

Cf INS v Elias-Zacarias 502 US 478 (1992)

Chahal v United Kingdom 70/1995/576/662

Chan v Minister of Immigration and Ethnic Affairs (1989) 169 CLR 379 (HCA)

Charles Chitat Ng v Canada UN Human Rights Committee (UNHRC) CCPR/C/49/D/469/1991 (UN Human Rights Committee) 1994

Chihomba v Chairperson: Refugee Appeal Board (16418/2012) [2015] ZAGPPHC 444 (16 June 2015)

Chorzow Factory Case PCIJ Reports Series A no 17

Corfu Channel (UK v Albania) [1949] ICJ Rep 4

Etugh v INS 921 F 2n 36 (3d Circuit) (1990)

Fang v Refugee Appeal Board 2007 2 SA 432 (T)

Governing Body of the Juma Musjid Primary School v Essay 2011 8 BCLR 761 (CC) (11 April 2011)

Harerimana v The Chairperson of the Refugee Appeal Board 10972/2013 [2013] ZAWCHC 209

Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment SC 7/2015 [2015] NZSC 107

Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal ex parte Shah [1999] Imm AR 283

Jacob van Garderen v Refugee Appeal Board (2008) 33 SAYIL 511

Katshinga v Chairperson of Standing Committee for Refugee Affairs (19726/2010) [2011] ZAWCHC 480 (2 November 2011)

Kiliko v Minister of Home Affairs 2006 4 SA 114 (C)

Mafhoud Brada v France CAT/C/34/D/195/2002 (UN Committee against Torture) 2005

Mansour Ahani v Canada CCPR/80/D/1051/2002 (UN Human Rights Committee) 2004

Minister of Home Affairs v Scalabrini Centre [2013] ZASCA 134; 2013 6 SA 421 (SCA)
Minister of Home Affairs v Somali Association of South Africa Eastern Cape [2015] ZASCA 35, 2015 3 SA 545 (SCA)

Minister of Home Affairs v Watchenuka [2004] 1 All SA 21 (SCA) (28 November 2003)

Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening) 2001 3 SA 893 (CC)

Mzalisi v Ochugwu [2019] ZASCA 138 (SCA)

North Sea Continental Shelf, Judgment ICJ Reports 1969

Pembele v Appeal Board for Refugee Affairs Case number 15931/96 (SCA Cape of Good Hope Provincial Division)

Q.A. v Sweden CCPR/C/127/D/3070/2017 (UN Human Rights Committee) 2020

R v Immigration Appeal Tribunal, Ex Parte Shah (UNHCR intervening) [1999] 2 All ER 545 (HL)

Radjabu v Chairperson of the Standing Committee for Refugee Affairs in South Africa 8830/2010 [2014] ZAWCHC 134

Re Inzunza and Orellana Mei (1970) 103 DLR (3 d) 105 (FCA)

Ruta v Minister of Home Affairs 2019 2 SA 329 (CC)

Saidi v Minister of Home Affairs 2018 4 SA 333 (CC)

Scalabrini Centre of Cape Town v Minister of Home Affairs (CCT 51/23) [2023] ZACC 45 (12 December 2023)

Scalabrini Centre of Cape Town v Minister of Home Affairs 2023 4 SA 249 (WCC)

Scalabrini Centre, Cape Town v Minister of Home Affairs [2017] 4 All SA 686 (SCA)

Secretary of State for the Home Department (Respondent) v K (FC) (Appellant) [2006] UKHL 46; ILDC 732 (UK 2006)

Somali Association of South African v Limpopo Department of Economic Development, Environment and Tourism (48/2014) [2014] ZASCA 143 (26 September 2014)

Tantoush v Refugee Appeal Board 2008 1 SA 232 (T)

Trail Smelter Arbitration (USA v Canada) (1938-1941) 3 RIAA 1095, 1965

Tshiyombo v Members of the Refugee Appeal Board 2016 4 SA 469 (WCC)

Legislation

Aliens Control Act 96 of 1991

Climate Change Bill (2023)

Constitution of the Republic of South Africa, 1996

Immigration Act 13 of 2002

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

Regulations to the South African Refugees Act (2000)

Regulations to the South African Refugees Amendment Act (2020)

South African Refugees Act 130 of 1998

South African Refugees Amendment Act 11 of 2017

International instruments

A guide to international refugee protection and building state asylum systems (2017)

African Charter on Human and Peoples' Rights (1986)

African Charter on the Rights and the Welfare of the Child (1999)

African Common Position on Migration and Development (2006)

Agreement between the Government of the Republic of South Africa and the UNHCR governing the legal status, privileges and immunities of the UNHCR office and its personnel in South Africa (1991)

AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2012)

Brazil Declaration: A framework for cooperation and regional solidarity to strengthen the international protection of refugees, displaced and stateless persons in Latin America and the Caribbean, Brasilia (2014)

Cancun Adaptation Framework Doha Amendment (2012)

Cancun Agreements (2010)

Cartagena Declaration on Refugees (1984)

Charter of the United Nations (1945)

Chicago Convention on International Civil Aviation (1944)

Constitutive Act of the AU (2002)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Convention on the Elimination of All Forms of Racial Discrimination (1965)

Convention on the Reduction of Statelessness (1961)

Convention on the Rights of Persons with Disabilities (2006)

Convention on the Rights of the Child (1989)

Convention Relating to the Status of Refugees (1951)

Convention Relating to the Status of Stateless Persons (1954)
Covenant of the League of Nations (1924)

Dhaka Principles for migration with dignity (2012)

Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2012)

Draft African Guiding Principles on the Human Rights of all Migrants, Refugees and Asylum Seekers (2023)

Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)

Draft Convention on the International Status of Environmentally Displaced Persons (2008)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997)

Montevideo Convention (1933)

Nansen-Initiative Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (2015)

Nansen-Initiative: Disaster-induced cross-border displacement (2012)

OAU Charter (1963)

OAU Convention governing the specific aspects of refugee problems in Africa (1969)

Paris Agreement (2015)

Proposed UNFCCC Protocol on Recognition, Protection and Resettlement of Climate Refugees

Protocol on free movement of persons in the IGAD region (2021)
Protocol Relating to the Status of Refugees (1967)

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

Protocol to the Treaty establishing the AEC relating to Free Movement of Persons, Right of Residence and Right of Establishment (2018)

Rio Declaration on Environment and Development (1992)

SADC Protocol on Facilitation of Movement of Persons (2005)

Statute of the Office of the United Nations High Commissioner for Refugees (1950)

Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise (2018)

The Peninsula Principles on climate displacement within states (2013)

Treaty establishing the AEC (1991)

Treaty of the Community of Sahel-Saharan States (CEN-SAD) (1998) (as revised in 2013)

UN Declaration on Territorial Asylum (1967)

UN Guiding Principles on Internal Displacement (1998)

United Nations Framework Convention on Climate Change (1992)

Universal Declaration of Human Rights (1948)

Vienna Convention on the Law of Treaties (1969)

Government publications

GN 4061 in GG 49690 of 10 November 2023 White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa No 4061 (2023)

GN 849 in GG 18033 of 30 May 1997 Green Paper on International Migration (1997)

White Paper on International Migration (2017)

Internet sources

Abidellaoui 2023 https://reuters.com

Abidellaoui J 2023 As drought withers Tunisian fields, state feel financial punch https://www.reuters.com/world/africa/drought-withers-tunisian-fields-statefeels-financial-pinch-2023-05-25/ accessed 25 June 2023

Abubakar 2022 https://phys.org

Abubakar A 2022 Heavy floods ravage West Africa farmlands https://phys.org/news/2022-09-heavy-ravage-west-africa-farmlands.html accessed 15 March 2023

ACF 2023 https://africanclimatefoundation.org

African Climate Foundation (ACF) 2023 South Africa's Climate Change Bill: A landmark in climate action https://africanclimatefoundation.org/news_and_analysis/south-africas-climate-change-bill-a-landmark-in-climate-action/ accessed 22 January 2024

ACHPR date unknown https://achpr.au.int

African Commission on Human and Peoples' Rights (ACHPR) date unknown History https://achpr.au.int/en/about/history accessed 15 January 2024

ACSS 2023 https://africacenter.org

Africa Center for Strategic Studies (ACSS) 2023 African migration trends to watch in 2023 https://africacenter.org/spotlight/african-migration-trends-to-watch-in-2023/ accessed 10 January 2024

AFP 2023 https://citizen.co.za

Agence France Presse (AFP) 2023 World warming at record 0.2C per decade, scientists warn https://www.citizen.co.za/news/news-world/global-warming-world-warming-at-record-0-2c-per-decade/ accessed 08 August 2023

Aljazeera 2021 https://aljazeera.com

Aljazeera 2021 Floods hit Turkey's north after south ravaged by wildfires https://www.aljazeera.com/news/2021/8/11/floods-hit-turkeys-north-aftersouth-ravaged-by-wildfires accessed 28 June 2023

Aljazeera 2022 https://aljazeera.com/news/2022/7/20-europe-counts-cost-of-heat wave-as-spain-pm-says-more-than-500-die

Aljazeera 2022 Europe counts cost of heatwave, Spain PM says more than 500 died https://www.aljazeera.com/news/2022/7/20/europe-counts-cost-of-heat wave-as-spain-pm-says-more-than-500-die accessed 28 March 2023

Aljazeera 2022 https://www.aljazeera.com/news/2022/9/10/never-seen-climatecarnage-like-in-pakistan-un-chief

Aljazeera 2022 'Never seen climate carnage' like Pakistan floods, says UN chief https://www.aljazeera.com/news/2022/9/10/never-seen-climate-carnage-likein-pakistan-un-chief accessed 25 July 2023

Aljazeera 2022 https://www.aljazeera.com/news/2022/10/18/somalia-faces-worstfamine-in-half-a-century-un-warns

Aljazeera 2022 Somalia faces worst famine in half a century, UN warns https://www.aljazeera.com/news/2022/10/18/somalia-faces-worst-famine-inhalf-a-century-un-warns accessed 15 January 2023

Aljazeera 2023 https://www.aljazeera.com/news/2023/4/14/australia-buffeted-byrecord-winds-as-cyclone-hits-northwest

Aljazeera 2023 Australia buffeted by record winds as cyclone hits northwest https://www.aljazeera.com/news/2023/4/14/australia-buffeted-by-recordwinds-as-cyclone-hits-northwest accessed 18 June 2023

Aljazeera 2023 https://www.aljazeera.com/news/2023/7/19/heatwaves-set-morerecords-across-europe-asia-and-usa

Aljazeera 2023 Heatwaves set more records across Europe, Asia and US https://www.aljazeera.com/news/2023/7/19/heatwaves-set-more-recordsacross-europe-asia-and-usa accessed 05 October 2023

Aljazeera 2023 https://www.aljazeera.com/news/2023/7/18/heavy-rains-causelandslides-in-colombia-killing-at-least-eight

Aljazeera 2023 Heavy rains cause landslides in Colombia, killing at least 12 https://www.aljazeera.com/news/2023/7/18/heavy-rains-cause-landslides-incolombia-killing-at-least-eight accessed 25 September 2023

Aljazeera 2023 https://www.aljazeera.com/gallery/2023/9/6/photos-heavy-rain storms-trigger-flooding-in-greece-turkey-bulgaria

Aljazeera 2023 Heavy rainstorms trigger flooding in Greece, Turkey, Bulgaria https://www.aljazeera.com/gallery/2023/9/6/photos-heavy-rainstormstrigger-flooding-in-greece-turkey-bulgaria accessed 12 August 2023

Aljazeera 2023 https://www.aljazeera.com/news/2023/8/23/mapping-the-scale-ofcanadas-record-wildfires

Aljazeera 2023 Mapping the scale of Canada's record wildfires https://www.aljazeera.com/news/2023/8/23/mapping-the-scale-of-canadas-record-wildfires accessed 05 October 2023

Aljazeera 2023 https://www.aljazeera.com/news/2023/3/4/state-of-emergency-declared-in-vanuatu-as-second-cyclone-hits

Aljazeera 2023 State of emergency declared as two cyclones hit Vanuata in 24 hours https://www.aljazeera.com/news/2023/3/4/state-of-emergency-declared-in-vanuatu-as-second-cyclone-hits accessed 15 June 2023

Aljazeera 2023 https://www.aljazeera.com/gallery/2023/12/13/photos-living-deadtunisian-villages-suffer-drought-climate-change

Aljazeera 2023 'We are the living dead': Drought-hit Tunisian villages battle isolation https://www.aljazeera.com/gallery/2023/12/13/photos-living-deadtunisian-villages-suffer-drought-climate-change accessed 25 June 2023

Aljazeera 2023 https://www.aljazeera.com/news/2022/4/19/20-million-risk-starva tion-as-horn-of-africa-drought-worsens-un

Aljazeera 2023 WFP: 20 million risk starvation as Horn of Africa drought worsens https://www.aljazeera.com/news/2022/4/19/20-million-risk-starvation-as-hornof-africa-drought-worsens-un accessed 25 May 2023

Amaro et al 2023 https://europerl.europe.eu

Amaro Á, Rangel P, Fernandes JM and Monteiro de Aguiar C 2023 Drought in Portugal https://www.europarl.europa.eu/doceo/document/E-9-2023-001770_EN.html accessed 25 June 2023

Anon 2022 https://theguardian.com

Anon 2022 Horn of Africa drought places 22 million people at risk of starvation, says UN https://www.theguardian.com/world/2022/aug/20/drought-in-horn-of-africa-places-22m-people-at-risk-of-starvation-says-un accessed 25 March 2023

Anon 2023 https://reuters.com

Anon 2023 Europe sees another year of drought and wildfires https://www.reuters.com/world/europe/europe-sees-another-year-droughts-wildfires-202307-18/ accessed 10 October 2023

Anon 2023 https://theguardian.com

Anon 2023 Seven dead as severe storms trigger flooding in Greece, Turkey and Bulgaria https://www.theguardian.com/environment/2023/sep/05/seven-dead-as-severe-storms-trigger-flooding-in-greece-turkey-and-bulgaria accessed 12 August 2023

Arnold-Fernandez 2023 https://frontiersin.org

Arnold-Fernandez EE 2023 The Global Compact on Refugees: inadequate substitute or useful complement? https://www.frontiersin.org/articles/10.3389/fhumd.2023.1238186/full accessed 26 February 2024

AU date unknown https://au.int/en/overview#

African Union (AU) date unknown About the African Union: History https://au.int/en/overview# accessed 25 September 2023

AU 2020 Humanitarian and Pledging Conference

AU 2020 Humanitarian and Pledging Conference – Background paper for theme 1 – Climate change, disasters and displacement in Africa https://au.int/sites/default/files/newsevents/workingdocuments/40515-wd-HHS52396_E_Theme_1Climate_change_disasters_and_forced_displacement_in_Africa.pdf accessed 26 July 2022

Australian Government 2023 https://dfat.gov.au

Australian Government 2023 Pacific Engagement Visa https://www.dfat.gov.au/geo/pacific/people-connections/people-connections-in-the-pacific/pacificengagement-visa accessed 5 September 2023

Avvocati 2023 https://lexology.com

Avvocati L 2023 The principle of reciprocity in international law: equity and cooperation among states https://www.lexology.com/library/detail.aspx?g=96f89629-d509-4dda-924a-a24e0c0c8623 accessed 25 November 2023

BBC 2020 https://bbc.com

British Broadcasting Corporation (BBC) 2020 Refugees in South Africa: 'Give us a place where we can be safe' https://www.bbc.com/news/world-africa-51284576 date accessed 15 September 2021

Borunda 2020 https://nationalgeographic.com

Borunda A 2020 The science connecting wildfires to climate change https://www.nationalgeographic.com/science/article/climate-change-increases-riskfires-western-us accessed 20 September 2023

Brown 2007 https://iisd.org

Brown O 2007 Climate change and forced migration: Observations, protections and implications https://www.iisd.org/system/files/publications/climate_forced_migration.pdf accessed 28 April 2023

CCES date unknown https://www.c2es.org/content/drought-and-climate-change/

Center for Climate and Energy Solutions (CCES) date unknown Drought and climate change https://www.c2es.org/content/drought-and-climate-change/ accessed 19 August 2023

CCES date unknown https://www.c2es.org/content/heat-waves-and-climate-change/

Center for Climate and Energy Solutions (CCES) date unknown Heat waves and climate change https://www.c2es.org/content/heat-waves-and-climate-change/ accessed 25 March 2023

CDC 2022 https://cdc.gov

Centers for Disease Control and Prevention (CDC) 2022 Climate and infectious diseases https://www.cdc.gov/ncezid/what-we-do/climate-change-and-infectious-diseases/index.html accessed 23 February 2024

Davies 2022 https://floodlist.com

Davies R 2022 Iran – deadly floods and landslides in Tehran province https://floodlist.com/asia/iran-floods-tehran-province-july-2022 accessed 28 June 2023

Dawson, Gandar and Ekambaram 2019 https://dailymaverick.co.za

Dawson A, Gandar S and Ekambaram SS 2019 Xenophobia fuelled by Minister Motsoaledi's scapegoating https://www.dailymaverick.co.za/article/2019-1006-xenophobia-fuelled-by-minister-motsoaledis-scapegoating/ accessed 25 April 2022

De Haas and Frankema 2023 https://aehnetwork.org

De Haas M and Frankema E 2023 Migration in Africa: Shifting patterns of mobility from the 19th to the 21st century https://www.aehnetwork.

org/blog/migration-in-africa-shifting-patterns-of-mobility-from-the-19th-tothe-21st-century/ accessed 15 January 2024

De Wet 2022 https://news24.com

De Wet P 2022 KZN floods ranked among the world's top 10 most expensive climate events in 2022, says new report https://www.news24.com/news24/biarchive/the-2022-kwazulu-natal-and-eastern-cape-floods-were-among-themost-expensive-in-the-world-says-christian-aid-2022-12 accessed 20 March

2023

Dickie 2022 https://reuters.com

Dickie G 2022 Carbon emissions from French wildfires hit record https://www.reuters.com/world/europe/carbon-emissions-french-wildfires-hit-record-2022-

08-12/ accessed 10 March 2023 d'Orsi

2023 https://theconversation.com

d'Orsi C 2023 Environmental disasters and climate change force people to cross borders, but they're not recognized as refugees – they should be https://theconversation.com/environmental-disasters-and-climate-change-force-people-tocross-borders-but-theyre-not-recognised-as-refugees-they-should-be-212979 accessed 25 August 2023

DSSA 2018 https://statssa.gov.za

Department Statistics South Africa (DSSA) 2018 Migrants flock to Gauteng https://www.statssa.gov.za/?p=11331 accessed 25 January 2024

Duggan 2009 https://poemhunter.com

Duggan F 2009 Climate refugees poem by Francis Duggan https://www.poemhunter.com/poem/climate-refugees/ accessed 27 April 2023

EC date unknown https://climate.ec.europa.eu/climate-change/causes-climatechange_en#

European Commission (EC) date unknown Causes of climate change https://climate.ec.europa.eu/climate-change/causes-climate-change_en# accessed 17 February 2024

EC date unknown https://climate.ec.europa.eu/climate-change/consequencesclimate-change_en

European Commission (EC) date unknown Consequences of climate change https://climate.ec.europa.eu/climate-change/consequences-climate-change_en accessed 20 August 2023

EEA 2023 https://eea.europa.eu

EEA 2023 Extreme weather: floods, droughts and heatwaves https://www.eea.europa.eu/en/topics/in-depth/extreme-weather-floods-droughts-andheatwaves accessed 29 November 2023

EJF 2018 https://ejfoundation.org

Environmental Justice Foundation (EJF) 2018 The new refugees https://ejfoundation.org/news-media/the-new-refugees accessed 10 January 2022

EMM date unknown https://emm.iom.int

Essentials of Migration Management (EMM) date unknown The global context of international migration: Types of movement https://emm.iom.int/handbooks/global-context-international-migration/types-movements-0 accessed 05 October 2023

EU 2021 https://trust-fund-for-africa.europa.eu

European Union (EU) 2021 EUTF supports the Protocol on the Free movement of Persons in the IGAD region https://trust-fund-for-africa.europa.eu/news/eutf-supports-protocol-free-movement-persons-igad-region-2021-12-13_en# accessed 20 September 2023

EU 2023 https://climate.copernicus.eu

European Union (EU) 2023 Summer 2023: the hottest on record https://climate.copernicus.eu/summer-2023-hottest-record accessed 05 October 2023

Evans 2024 https://dailymaverick.co.za

Evans J 2024 Too dam hot – what to expect as global climate crisis heats up in 2024 https://www.dailymaverick.co.za/article/2024-01-07-too-damn-hotwhat-to-expect-as-global-climate-crisis-heats-up-in-2024/ accessed 18 January 2024

France Diplomacy 2023 https://diplomatie.gouv.fr

France Diplomacy 2023 France calls for adoption of a New Global Financing Pact https://www.diplomatie.gouv.fr/en/french-foreign-policy/developmentassistance/events-and-news/2023/article/france-calls-for-the-adoption-of-anew-global-financing-pact-22-23-06-23 accessed 27 August 2023

Freedom House 2020 https://freedomhouse.org

Freedom House 2020 South Africa: Authorities must improve treatment of refugees and asylum seekers https://freedomhouse.org/article/south-africa-authorities-must-improve-treatment-refugees-and-asylum-seekers accessed 26 April 2021

Fry 2023 https://ohchr.org

Fry I 2023 UN expert calls for full legal protection for people displaced by climate change https://www.ohchr.org/en/press-releases/2023/06/un-expert-calls-full-legal-protection-people-displaced-climate-change date accessed 25 August 2023

Gil et al 2022 https://bakersinstitute.org

Gil AM, Cruz PL, Norman K and Cruz I 2022 How can we protect 'climate refugees'? https://www.bakerinstitute.org/research/how-can-we-protect-climate-refugees accessed 05 May 2023

Greenpeace International 2023 https://greenpeace.org

Greenpeace International 2023 Dutch citizens launch legal action against The Netherlands over climate impacts on Caribbean island Bonaire https://www.greenpeace.org/international/press-release/59658/dutch-citizens-launch-

legalaction-against-the-netherlands-over-climate-impacts-on-caribbean-islandbonaire/ accessed 2 September 2023

Guterres date unknown https://un.org

Guterres A date unknown COP 26: Together for our planet https://www.un.org/en/climatechange/cop26 accessed 25 March 2022

Guterres 2022 https://news.un.org

Guterres A 2022 UN chief sees 'great heights' of human endurance and heroism amid 'climate carnage' in Pakistan https://news.un.org/en/story/2022/09/1126411 accessed 25 July 2023

Harvey and E&E News 2022 https://scientificamerican.com

Harvey C and E&E News 2022 Climate change doubled the likelihood of devastating South African floods https://www.scientificamerican.com/article/climate-change-doubled-the-likelihood-of-devastating-south-african-floods/ accessed 18 January 2024

Hochul 2023 https://governor.ny.gov

Hochul K 2023 Governor Hochul urges New Yorkers to take appropriate precautions as smoke from Canadian fires is expected to significantly impact air quality in New York this week https://www.governor.ny.gov/news/governor-hochul-urges-new-yorkers-take-appropriate-precautions-smoke-canadianwildfires accessed 05 October 2023

HRW 2019 https://hrw.org

Human Rights Watch (HRW) 2019 South Africa: Punish xenophobic violence https://www.hrw.org/news/2019/09/13/south-africa-punish-xenophobicviolence# accessed 25 April 2022

Hulton 2023 https://theguardian.com

Hulton F 2023 Weather tracker: Libya floods caused by storm Daniel medicane https://www.theguardian.com/environment/2023/sep/15/weather-trackerlibya-floods-storm-daniel-medicane accessed 24 October 2023

ICJ 1997 https://icj-cij.org

International Court of Justice (ICJ) 1997 Gabčíkovo-Nagymaros Project (Hungary/Slovakia) - Overview of the case https://www.icj-cij.org/case/92 accessed 25 July 2022

ICJ 2023 https://icj-cij.org

International Court of Justice (ICJ) 2023 Obligations of states in respect of climate change: Latest Developments https://www.icj-cij.org/case/187

accessed 28 September 2023

IDMC date unknown https://internal-displacement.org

Internal Displacement Monitoring Centre (IDMC) date unknown Country Profile: South Africa data profile https://www.internal-displacement.org/countries/ south-africa/ accessed 18 January 2024

IDMC 2020 https://internal-displacement.org

Internal Displacement Monitoring Centre (IDMC) 2020 Global report on internal displacement 2020 https://www.internal-displacement.org/global-report/grid 2020/ accessed 20 March 2022

IDMC 2022 https://internal-displacement.org

Internal Displacement Monitoring Centre (IDMC) 2022 Science warns us that climate change will drive more people from their homes. So what should we do about it? https://www.internal-displacement.org/policy-analysis/science-

warns-us-that-climate-change-will-drive-more-people-from-their-homes-so/ accessed 29 October 2023

IDMC 2023 https://internal-displacement.org

IDMC 2023 2023 Global Report on Internal Displacement https://www.internaldisplacement.org/global-report/grid2023/ accessed 20 September 2023

IDMC 2023 https://reliefweb.int

IDMC 2023 Global Report on Internal Displacement 2023 (GRID 2023): Internal displacement and food security https://reliefweb.int/report/world/globalreport-internal-displacement-2023-grid-2023-internal-displacement-and-foodsecurity accessed 20 September 2023

IFRC 2021 https://reliefweb.int

International Federation of Red Cross (IFRC) 2021 Nicaragua: Hurricanes Eta & Iota – Emergency appeal MDR43009, Operation update no 2 https://relief web.int/report/nicaragua/nicaragua-hurricanes-eta-iota-emergency-appeal-nmdr43007-operation-update-no-2 accessed 27 June 2023

Ighobor date unknown https://un.org

Ighobor K date unknown Horn of Africa: tackling the evils of famine https://www.un.org/africarenewal/web-features/horn-africa-tackling-evilsfamine accessed 10 April 2022

Institute at UC Berkeley 2023 https://belonging.berkeley.edu

Institute at University of California, Berkeley 2023 Climate crisis, displacement, and the right to stay https://belonging.berkeley.edu/climatedisplacement/case-studies/south-africa accessed 15 January 2024

IOM date unknown https://www.iom.int/iom-history#

International Organization for Migration (IOM) date unknown IOM history https://www.iom.int/iom-history# accessed 28 August 2023

IOM date unknown https://www.iom.int/who-migrant-0#

International Organization for Migration (IOM) date unknown Who is a migrant? https://www.iom.int/who-migrant-0# accessed 05 October 2023

IOM 2017 https://publications.iom.int

International Organization for Migration (IOM) 2017 Environmental migrants and global governance: Facts, policies and practices https://publications.iom.int/system/files/pdf/environmental_migrants.pdf accessed 18 March 2023

IOM 2019 https://environmentalmigration.iom.int

International Organization for Migration (IOM) 2019 Environmental migration https://environmentalmigration.iom.int/environmental-migration# accessed 18 March 2023

IOM 2023 https://iom.int

International Organization for Migration (IOM) 2023 Record number of 60.9 million internal displacements in 2022: IDMC report https://www.iom.int/news/record-number-609-million-internal-displacements-2022-idmc-report accessed 23 February 2024

Ionesco 2019 https://un.org

Ionesco D 2019 Let's talk about climate migrants, not climate refugees https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-aboutclimate-migrants-not-climate-refugees/ accessed 20 March 2023

JRC 2023 https://joint-research-centre.ec.europa.eu

Joint Research Centre (JRC) 2023 Wildfires in the EU: 2022 was the secondworst year, a warning from a changing climate https://joint-researchcentre.ec.europa.eu/jrc-news-and-updates/wildfires-eu-2022-was-secondworst-year-warning-changing-climate-2023-11-22_en accessed 25 November 2023

Kaczmarska and Ono date unknown https://undrr.org

Kaczmarska R and Ono M date unknown Disaster https://undrr.org/terminology/disaster accessed 23 October 2023

Kaminski 2023 https://aljazeera.com

Kaminski I 2023 Dutch Caribbeans to sue Netherlands for climate crisis failure https://www.aljazeera.com/features/2023/5/25/dutch-caribbeans-to-suenetherlands-for-climate-crisis-failure accessed 08 September 2023

Kaya 2023 https://migrationpolicy.org

Kaya A 2023 The world's leading refugee host, Turkey has a complex migration history https://www.migrationpolicy.org/article/turkey-migration-history accessed 15 January 2024

Keshen and Lazickas 2022 https://jia.sipa.columbia.edu

Keshen S and Lazickas S 2022 Non-refoulement: A human rights perspective on environmental migration from small island developing states https://jia.sipa.columbia.edu/content/non-refoulement-human-rightsperspective-environmental-migration-small-island-developing-states accessed 15 April 2023

Keshen, Lazickas and Solórzano 2021 https://multilateralism.sipa.columbia.edu

Keshen S, Lazickas S and Solórzano L 2021 Non-refoulement: A legal hope for the protection of environmental migrants and their rights https://multilateralism.sipa.columbia.edu/news/non-refoulement-legal-hope-protectionenvironmental-migrants-and-their-rights accessed 15 April 2023

Khadka 2023 https://bbc.com

Khadka NS 2023 Himachal Pradesh floods: More rain, less snow are turning Himalayas dangerous https://www.bbc.com/news/world-asia-india-66519698 accessed 26 September 2023

Kiewit 2020 https://mg.co.za

Kiewit L 2020 Refugees safe for now but what about after lockdown? https://mg.co.za/article/2020-04-23-refugees-safe-for-now-but-what-aboutafter-lockdown/ date accessed 20 September 2023

Ki-Moon date unknown https://un.org

Ki-Moon B date unknown Famine in Somalia https://www.un.org/africarenewal/web-features/famine-somalia accessed 20 January 2022

Lau 2023 https://edition.cnn.com

Lau C 2023 Beijing swelters during hottest June day on record https://edition.cnn.com/2023/06/23/asia/hottest-june-day-beijing-china-intl-hnk/index.html accessed 25 July 2023

Lewsey 2023 https://cam.ac.uk

Lewsey F 2023 Seeking climate justice at 'world court' https://www.cam.ac.uk/stories/climate-ICJ accessed 26 July 2023

Maclean 2023 https://reuters.com

Maclean W 2023 Wildfire on French-Spanish border destroys 1000 hectares https://www.reuters.com/world/europe/wildfire-french-spanish-borderdestroys-1000-hectares-2023-04-17/ accessed 25 June 2023

Masiko-Mpaka and Seibert 2023 https://hrw.org

Masiko-Mpaka N and Seibert L 2023 South Africa mulls major immigration overhaul https://www.hrw.org/news/2023/11/20/south-africa-mulls-major-immigration-overhaul accessed 25 January 2024

Mastrorillo date unknown https://climatemigration.org.uk

Mastrorillo M date unknown Climate change and migration in South Africa https://climatemigration.org.uk/climate-change-and-migration-in-south-africa/ accessed 18 January 2024

Matza 2023 https://bbc.com

Matza M 2023 Canada wildfire smoke leaves millions under air quality advisory https://www.bbc.com/news/world-us-canada-66229511 accessed 05 October 2023

McAllister 2022 https://zurich.com

McAllister S 2022 There could be 1.2 billion climate refugees by 2050. Here's what you need to know https://www.zurich.com/en/media/magazine/2022/

there-could-be-1-2-billion-climate-refugees-by-2050-here-s-what-you-need-toknow accessed 20 January 2024

McDonnell 2018 https://npr.org

McDonnell T 2018 The refugees the world barely pays attention to https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/therefugees-that-the-world-barely-pays-attention-to accessed 30 March 2022

McGarvey and Guinto 2023 https://bbc.com

McGarvey E and Guinto J 2023 Typhoon Talim lashes China as extreme weather grips Asia https://www.bbc.com/news/world-asia-66229532 accessed 12 August 2023

Merten 2023 https://dailymaverick.co.za

Merten M 2023 Motsoaledi proposes temporary exit from UN Refugee Convention and overhaul of immigration regime https://www.dailymaverick.co.za/article/2023-11-12-motsoaledi-proposes-temporary-exit-from-un-refugee-convention-and-overhaul-of-immigration-regimen/ accessed 25 January 2024

Migration Data Portal 2023 https://migrationdataportal.org

Migration Data Portal 2023 Environmental migration https://www.migrationdataportal.org/themes/environmental_migration_and_statistics accessed 23 February 2024

Mohamed 2023 https://aljazeera.com

Mohamed E 2023 Climate change displacement: 'One of the defining challenges' https://www.aljazeera.com/news/2023/9/15/explainer-climate-changes-effects-on-global-migration# accessed 17 February 2024

Moyo 2021 https://migrationpolicy.org

Moyo K 2021 South Africa reckons with its status as top immigration destination, Apartheid history, and economic challenges https://www.migrationpolicy.org/article/south-africa-immigration-destination-history accessed 20 January 2024

MSF 2021 https://msf.org.za

Medecins Sans Frontieres (Doctors without Borders) (MSF) 2021 MSF study finds that migrants are being paused on their journeys. With significant health consequences https://www.msf.org.za/news-and-resources/patient-and-staff-stories/msf-study-finds-migrants-are-being-paused-their accessed 15 January 2024

Muniz 2023 https://phys.org

Muniz R 2023 Number of fires in the Brazilian Amazon in August-September 2022 was highest since 2010 https://phys.org/news/2023-02-brazilianamazon-august-september-highest.html# accessed 25 March 2023

NASA 2022 https://earthobservatory.nasa.gov

National Aeronautics and Space Administration (NASA) 2022 Worst drought on record parches Horn of Africa https://earthobservatory.nasa.gov/images/150712/worst-drought-on-record-parches-horn-of-africa accessed 26 May 2023

NASA 2023 https://earthobservatory.nasa.gov/images/151463/cyclone-biparjoychurns-toward-india-and-pakistan

National Aeronautics and Space Administration (NASA) 2023 Cyclone Biparjou churns toward India and Pakistan https://earthobservatory.nasa.gov/images/151463/cyclone-biparjoy-churns-toward-india-and-pakistan accessed 10 June 2023

NASA 2023 https://eol.jsc.nasa.gov/ESRS/Disasters/ShowIDCTracking.pl

National Aeronautics and Space Administration (NASA) 2023 International disaster charter activations https://eol.jsc.nasa.gov/ESRS/Disasters/ShowIDCTracking.pl accessed 25 June 2023

NASA 2023 https://earthobservatory.nasa.gov/images/151743/the-ocean-has-afever#

National Aeronautics and Space Administration (NASA) 2023 The ocean has a fever https://earthobservatory.nasa.gov/images/151743/the-ocean-has-a-fever# accessed 18 October 2023

Nasser, Lau and Kwon 2023 https://ccn.com

Nasser I, Lau C and Kwon J 2023 More than 26 dead and thousands evacuated in South Korea due to torrential rain and landslides https://edition.cnn.com/2023/07/15/asia/south-korea-rain-flood-evacuation-intl-hnk/index.html accessed 20 August 2023

Natarajan, Moslimani and Lopez 2022 https://pewresearch.org

Natarajan A, Moslimani M and Lopez MH 2022 Key facts about recent trends in global migration https://www.pewresearch.org/short-reads/2022/12/16/key-facts-about-recent-trends-in-global-migration/ accessed 25 August 2023

Ndebele 2023 https://news24.com

Ndebele L 2023 A record 282 million people are undernourished in Africa due to climate change, FOA reports https://www.news24.com/news24/africa/news/a-record-282-million-people-are-undernourished-in-africa-due-to-climatechange-fao-reports-20231209 accessed 25 October 2023

Needham 2023 https://reuters.com

Needham K 2023 After twin cyclones leave thousands homeless, Vanuata takes climate plea to world stage https://www.reuters.com/business/environment/after-twin-cyclones-leave-thousands-homeless-vanuatu-takes-climate-pleaworld-2023-03-24/ accessed 10 June 2023

News24 2023 https://www.news24.com/fin24/climate_future/news/climate-changemakes-cyclones-more-intense-destructive-scientists-20230515

News24 2023 Climate change makes cyclones more intense, destructive – scientists https://www.news24.com/fin24/climate_future/news/climate-change-makes-cyclones-more-intense-destructive-scientists-20230515 accessed 10 August 2023

News24 2023 https://www.news24.com/fin24/climate_future/news/denmark-goestwo-weeks-without-rain-for-first-time-since-2006-20230607

News24 2023 Denmark goes two weeks without rain for first time since 2006 https://www.news24.com/fin24/climate_future/news/denmark-goes-twoweeks-without-rain-for-first-time-since-2006-20230607 accessed 28 July 2023 News24 2023 https://www.news24.com/fin24/climate_future/news/fish-rescuedfrom-dried-out-river-as-drought-torrid-heat-hit-spain-20230426

News24 2023 Fish rescued from dried-out river as drought, torrid heat hit Spain https://www.news24.com/fin24/climate_future/news/fish-rescued-from-driedout-river-as-drought-torrid-heat-hit-spain-20230426 accessed 05 October 2023

News24 2022 https://www.news24.com/fin24/climate_future/news/heatwavetriggers-false-autumn-in-uk-20220824

News24 2022 Heatwave triggers 'false autumn' in UK https://www.news24.com/fin24/climate_future/news/heatwave-triggers-false-autumn-in-uk-20220824 accessed 25 March 2023

News24 2023 https://www.news24.com/fin24/climate_future/news/india-to-getheatwaves-this-year-after-hottest-february-on-record-20230302

News24 2023 India to get heatwaves this year after hottest February on record https://www.news24.com/fin24/climate_future/news/india-to-get-heatwavesthis-year-after-hottest-february-on-record-20230302 accessed 04 April 2023

News24 2022 https://www.news24.com/fin24/climate_future/news/nothing-left-toburn-wildfires-blaze-through-the-arctic-20220908

News24 2022 'Nothing left to burn': Wildfires blaze through the Arctic https://www.news24.com/fin24/climate_future/news/nothing-left-to-burnwildfires-blaze-through-the-arctic-20220908 accessed 28 March 2023

News24 2023 https://www.news24.com/fin24/climate_future/news/somalia-droughtcould-lead-to-135-deaths-a-day-un-study-20230320

News24 2023 Somalia drought could lead to 135 deaths a day, UN warns https://www.news24.com/fin24/climate_future/news/somalia-drought-couldlead-to-135-deaths-a-day-un-study-20230320 accessed 15 April 2023

News24 2023 https://www.news24.com/news24/world/news/typhoon-talim-leavesbehind-crushed-vehicles-beached-whale-in-southern-china-20230718

News24 2023 Typhoon Talim leaves behind crushed vehicles, beached whale in southern China https://www.news24.com/news24/world/news/typhoon-talim-leaves-behind-crushed-vehicles-beached-whale-in-southern-china-20230718 accessed 12 August 2023

Nimubona 2023 https://thenewhumanitarian.org

Nimubona D 2023 Reporter's diary: Documenting the toll of Burundi's climate disasters https://www.thenewhumanitarian.org/2023/10/31/reporters-diary-documenting-toll-burundi-climate-disasters accessed 15 January 2024

NOAA 2023 https://noaa.gov

National Oceanic and Atmospheric Administration (NOAA) 2023 Earth just had its second-warmest March on record https://www.noaa.gov/news/earth-just-had-its-second-warmest-march-on-record#:~:text=by%20the%20numbers,March%202023,climate%20record%2C%20behind%20March%202016 accessed 15 July 2023

NOAA 2023 https://oceanservice.noaa.gov

National Oceanic and Atmospheric Administration (NOAA) 2023 What are El Niño and La Niña? https://oceanservice.noaa.gov/facts/ninonina.html accessed 25 October 2023

NOAA 2023 https://ncei.noaa.gov

National Oceanic and Atmospheric Administration (NOAA) 2023 Global drought overview https://www.ncei.noaa.gov/access/monitoring/monthly-report/global-drought/202305 accessed 25 June 2023

NRC/IDMC 2016 https://refworld.org

Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC) 2016 Global Report on Internal Displacement – Haiti's earthquake IDP's https://www.refworld.org/reference/annualreport/idmc/2016/en/111500 accessed 05 August 2022

Nutt 2022 https://news.cornell.edu

Nutt D 2022 Book: Policymakers are failing climate refugees https://news.cornell.edu/stories/2022/09/book-policymakers-are-failing-climate-refugees accessed 24 February 2024

OHCHR date unknown https://ohchr.org

Office of the High Commissioner for Human Rights (OHCHR) date unknown Universal Declaration of Human Rights (1948) https://www.ohchr.org/en/resources/educators/human-rights-education-training/universaldeclaration-human-rights-1948 accessed 25 August 2021

OHCHR 2022 https://ohchr.org

Office of the High Commissioner for Human Rights (OHCHR) 2022 Climate change the greatest threat the world has ever faced, UN expert warns

https://www.ohchr.org/en/press-releases/2022/10/climate-change-greatestthreat-world-has-ever-faced-un-expert-warns accessed 17 February 2024

PACOE 2019 https://assembly.coe.int

Parliamentary Assembly Council of Europe (PACOE) 2019 Resolution 2307 – A legal status for 'climate refugees' https://assembly.coe.int/nw/xml/XRef/Xref-

XML2HTML-en.asp?fileid=28239&lang=en accessed 05 April 2023

Panda 2010 https://papers.ssrn.com

Panda A 2010 Climate induced migration from Bangladesh to India: Issues and challenges https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186397 accessed 15 July 2022

PDD Stakeholder workshop report: The role of free movement of persons' agreements in addressing disaster displacement in Africa with focus on ECOWAS, IGAD and SADC regions

Platform on Disaster Displacement (PDD) Stakeholder workshop report: The role of free movement of persons' agreements in addressing disaster displacement in Africa with focus on ECOWAS, IGAD and SADC regions (2019) available at https://disasterdisplacement.org/wp-content/uploads/2020/07/ PDD-Free-Movement-Stakeholder-Workshop-Report-2019.pdf accessed 20 August 2022

Phys Org 2022 https://phys.org

Phys Org 2022 Europe's record 2022 wildfires sent carbon emissions soaring: monitors https://phys.org/news/2022-12-europe-wildfires-carbon-emissions-soaring.html accessed 25 March 2023

Pokharel, Mawad and Paddison 2023 https://edition.cnn.com

Pokharel S, Mawad D and Paddison L 2023 18 bodies found as fires rage in Greece and Europe suffers another heat wave https://edition.cnn.com/2023/08/22/europe/greece-wildfires-france-heat-climate-change-intl/index.html accessed 10 October 2023

Prange 2022 https://cfr.org

Prange M 2022 Climate change is fuelling migration. Do climate migrants have legal protections? https://www.cfr.org/in-brief/climate-change-fueling-migration-do-climate-migrants-have-legal-protections accessed 25 September 2023

Preiser et al 2023 https://preventionweb.net

Preiser W, Baxter C, Tegally H, Moir M and De Oliveira T 2023 Climate change risks triggering a spike in infectious disease outbreaks: Three reasons why

https://www.preventionweb.net/news/climate-change-risks-triggering-spikeinfectious-disease-outbreaks-three-reasons-why accessed 23 February 2024

Priovashini and Mallick 2022 https://ncbi.nlm.nih.gov

Priovashini C and Mallick B 2022 A bibliometric review on the drivers of environmental migration https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8651838/#CR18 accessed 25 May 2023

Reliefweb 2019 https://reliefweb.int

Reliefweb 2019 Horn of Africa: Floods in Ethiopia, Kenya and Somalia https://reliefweb.int/report/ethiopia/horn-africa-floods-ethiopia-kenya-andsomalia-un-ocha-national-authorities-fao-red accessed 25 June 2022

Reliefweb 2022 https://reliefweb.int/disaster/ff-2022-000274-irn

Reliefweb 2022 Iran: Flash floods – Jul 2022 https://reliefweb.int/disaster/ff-2022-000274-irn accessed 30 June 2023

Reliefweb 2022 https://reliefweb.int/disaster/fl-2022-000271-nga

Reliefweb 2022 Nigeria: Floods – Jun 2022 https://reliefweb.int/disaster/fl2022-000271-nga accessed 30 June 2023

Reliefweb 2022 https://reliefweb.int/map/republic-korea/northeast-asia-andphilippines-typhoon-hinnamnor-dg-echo-daily-map-05092022

Reliefweb 2022 Northeast Asia and Philippines – Typhoon Hinnamnor https://reliefweb.int/map/republic-korea/northeast-asia-and-philippines-typ

hoon-hinnamnor-dg-echo-daily-map-05092022 accessed 15 March 2023

Reliefweb 2022 https://reliefweb.int/report/somalia/

Reliefweb 2022 Somalia: Famine already present and killing thousands in Somalia https://reliefweb.int/report/somalia/famine-already-present-andkilling-tens-thousands-somalia accessed 15 May 2023

Reliefweb 2022 https://reliefweb.int/disaster/fl-2022-000277-sdn

Reliefweb 2022 Sudan: Floods – June 2022 https://reliefweb.int/disaster/fl-2022-000277-sdn accessed 30 June 2023

Reliefweb 2023 https://reliefweb.int/disaster/fl-2023-000200-zaf

Reliefweb 2023 South Africa: Floods – Sep 2023 – Disaster description https://reliefweb. int/disaster/fl-2023-000200-zaf accessed 18 January 2024

Reliefweb 2023 https://reliefweb.int/disaster/tc-2023-000023-mdg

Reliefweb 2023 Tropical cyclone Freddy – Feb 2023 https://reliefweb. int/disaster/tc-2023-000023-mdg accessed 08 June 2023

SACN date unknown https://sacities.net

South African Cities Network (SACN) date unknown Climate change https://www.sacities.net/climate-change/ accessed 25 January 2024

Saifi, Suri and Mogul 2023 https://edition.cnn.com

Saifi S, Suri M and Mogul R 2023 Tens of thousands evacuated as India and Pakistan brace for Cyclone Biparjoy https://edition.cnn.com/2023/06/14/

asia/india-pakistan-cyclone-biparjoy-evacuations-intl-hnk/index.html accessed 10 June 2023

Salgado 2023 https://reuters.com

Salgado L 2023 Intensifying heat waves prompt health warnings for Europe, US https://www.reuters.com/world/wmo-warns-risk-heart-attacks-deaths-heat wave-intensifies-2023-07-18/ accessed 05 October 2023

Schauwinhold 2015 https://bpb.de

Schauwinhold B 2015 History of Migration: South Africa https://www.bpb.de/ themen/migration-integration/laenderprofile/english-version-country-profiles/ 200462/history-of-migration/ accessed 20 January 2024

Shoba 2019 https://dailymaverick.co.za

Shoba S 2019 No papers, no rights: The plight of undocumented foreign children in SA https://www.dailymaverick.co.za/article/2019-08-07-no-papers- no-rights-the-plight-of-undocumented-foreign-children-in-sa/ accessed 16 September 2021

Shoba and Tobias 2019 https://dailymaverick.co.za

Shoba S and Tobias N 2019 UNHCR urges refugees to stay in South Africa, despite their circumstances https://www.dailymaverick.co.za/article/2019-1106-unhcr-urges-refugees-to-stay-in-south-africa-despite-their-circumstances/ accessed 15 May 2021

Siddiqui and Fareed 2023 https://aljazeera.com.

Siddiqui U and Fareed R 2023 'In a hot oven': India heatwaves take a toll on most vulnerable https://www.aljazeera.com/news/2023/5/30/in-a-hot-oven-india-heatwaves-take-a-toll-on-most-vulnerable accessed 16 June 2023

Siegfried 2023 https://unhcr.org

Siegfried K 2023 Climate change and displacement: The myths and facts https://www.unhcr.org/news/stories/climate-change-and-displacementmyths-and-facts accessed 25 November 2023

Stober 2023 https://globalnews.ca

Stober E 2023 Australia will take in people fleeing climate change from Pacific island nation https://globalnews.ca/news/10084172/australia-tuvalu-climate-change/ accessed 23 October 2023

Su 2020 https://climatechangenews.com

Su Y 2020 UN ruling on climate refugees could be gamechanger for climate action https://www.climatechangenews.com/2020/01/29/un-ruling-climate-refugees-gamechanger-climate-action/# accessed 14 September 2021

Tanner date unknown https://un.org

Tanner A date unknown Will there be climate migrants en masse? https://www.un.org/en/chronicle/article/will-there-be-climate-migrants-enmasse accessed 21 July 2021

Tati 2008 https://journals.openedition.org

Tati G 2008 The immigration issues in the post-apartheid South Africa: Discourses, policies and social repercussions https://journals.openedition.org/eps/3496 accessed 20 January 2024

Telsac and Telsac 2022 https://researchgate.net

Telsac C and Telsac ÖY 2022 Causes of migration and its effects https://www.researchgate.net/publication/359438780_CAUSES_OF_MIGRATION_AND_ITS_EFFECTS accessed 18 October 2023

Thompson 2019 https://unhcr.org

Thompson B 2019 Climate change and displacement https://www.unhcr.org/news/stories/climate-change-and-displacement accessed 25 June 2022

Thompson 2022 https://unhcr.org

Thompson B 2022 Climate change and displacement: How conflict and climate change form a toxic combination that drives people from their homes https://www.unhcr.org/news/stories/climate-change-and-displacement accessed 26 June 2022

Tigre and Bañuelos 2023 https://blogs.law.columbia.edu

Tigre MA and Bañuelos JAC 2023 The ICJ's advisory opinion on climate change: What happens now? https://blogs.law.columbia.edu/climatechange/2023/03/29/the-icjs-advisory-opinion-on-climate-change-what-happens-now/ accessed 26 May 2023

UN date unknown https://www.un.org/en/global-issues/migration#

UN date unknown Global issues: International migration https://www.un.org/en/global-issues/migration# accessed 25 November 2023

UN date unknown https://un.org/en/about-us/udhr/history-of-the-declaration#

UN date unknown History of the Declaration https://www.un.org/en/aboutus/udhr/history-of-the-declaration# accessed 18 March 2021

UN date unknown https://un.org/climatechange/science/climate-issues/ocean-im pacts

UN date unknown How is climate change impacting the world's ocean? https://un.org/climatechange/science/climate-issues/ocean-impacts accessed 4 May 2022

UN date unknown https://un.org/en/about-us/un-charter

UN date unknown United Nations Charter https://www.un.org/en/about-us/uncharter accessed 15 March 2021

UN date unknown https://www.un.org/en/climatechange/science/climate-issues/ water

UN date unknown Water – at the center of the climate crisis https://www.un.org/en/climatechange/science/climate-issues/water 19 August 2023

UN date unknown https://www.un.org/en/climatechange/what-is-climate-change

UN date unknown What is climate change? https://www.un.org/en/climatechange/what-is-climate-change accessed 17 February 2024

UN 2021 https://news.un.org/en/story/2021/09/1098662

UN 2021 Climate and weather related disasters surge five-fold over 50 years, but early warnings save lives – WMO report https://news.un.org/en/story/

2021/09/1098662 accessed 17 August 2022

UN 2021 https://news.un.org/en/story/2021/10/1102582

UN 2021 Access to healthy environment, declared a human right by UN rights council https://news.un.org/en/story/2021/10/1102582 date accessed 31

March 2022

UN 2021 https://press.un.org/en/2021/sc14445.doc.htm

UN 2021 Climate change 'biggest threat modern humans have ever faced', World Renowned Naturalist tell Security Council, Calls for greater global cooperation https://press.un.org/en/2021/sc14445.doc.htm accessed 17 February 2024

UN 2021 https://news.un.org/en/story/2021/08/1097362

UN 2021 IPCC report: 'Code red' for human driven global heating, warns UN Chief https://news.un.org/en/story/2021/08/1097362 accessed 25 January 2022

UN 2021 https://news.org/en/story/2021/03/1087702#

UN 2021 Natural disasters occurring three times more often than 50 years ago: a new FAO report https://news.un.org/en/story/2021/03/1087702# accessed

21 October 2021

UN 2022 https://news.un.org

UN 2022 UN climate report: It's 'now or never' to limit global warming to 1.5 degrees https://news.un.org/en/story/2022/04/1115452 accessed 25 May 2023

UN 2022 https://un.org

UN 2022 Horn of Africa: Extreme drought deepens hunger in a region facing conflict https://www.un.org/africarenewal/magazine/november-2022/horn-africa-extreme-drought-deepens-hunger-region-facing-conflict accessed 25 September 2023

UN 2023 https://news.un.org/en/story/2023/01/1132387

UN 2023 2022 confirmed as one of the warmest years on record: WMO https://news.un.org/en/story/2023/01/1132387 accessed 25 February 2023

UN 2023 https://press.un.org/en/2023/sgsm21926.doc.htm

UN 2023 Climate breakdown has begun with hottest summer on record, Secretary-General warns, calling on leaders to 'turn up the heat now' for climate solutions https://press.un.org/en/2023/sgsm21926.doc.htm accessed 05 October 2023

UN 2023 https://news.un.org/en/story/2023/05/1136897

UN 2023 Extreme weather caused two million deaths, cost $4 trillion over last 50 years https://news.un.org/en/story/2023/05/1136897 accessed 25 July 2023

UNCC Learn 2015 https://uncclearn.org

UNCC Learn 2015 Understanding human rights and climate change https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf accessed 16 September 2023

UNDESA 2022 https://un.org

UNDESA 2022 UNDESA Policy Brief No 133: Migration Trends and Families https://www.un.org/development/desa/dpad/publication/un-desa-policy-briefno-133-migration-trends-and-families/# accessed 29 November 2023

UNEP 2022 https://unep.org

United Nations Environment Programme (UNEP) 2022 Spreading like wildfire: The rising threat of extraordinary landscape fires https://www.unep.org/resources/report/spreading-wildfire-rising-threat-extraordinary-landscapefires accessed 25 March 2023

UNESCO 2023 https://unesco.org

United Nations Educational, Scientific and Cultural Organization (UNESCO) 2023 UNESCO takes part in Summit for a New Global Financing Pact https://www.unesco.org/en/articles/unesco-takes-part-summit-new-globalfinancing-pact accessed 27 August 2023

UNHCR date unknown https://www.unhcr.org/comprehensive-refugee-responseframework

United Nations High Commissioner for Refugees (UNHCR) date unknown Comprehensive Refugee Response Framework https://www.unhcr.org/comprehensive-refugee-response-framework accessed 30 March 2022

UNHCR date unknown https://www.unhcr.org/countries/south-africa

United Nations High Commissioner for Refugees (UNHCR) date unknown South Africa https://www.unhcr.org/countries/south-africa accessed 19 January 2024

UNHCR 2018 https://unhcr.org

UNHCR 2018 Climate change and disaster displacement in the Global Compact on Refugees accessed 28 March 2021

UNFCCC date unknown https://unfccc.int/process-and-meetings/the-paris-agreement

United Nations Framework Convention on Climate Change (UNFCCC) date unknown The Paris Agreement: What is the Paris Agreement? https://unfccc. int/process-and-meetings/the-paris-agreement accessed 25 May 2021

UNFCCC date unknown https://unfccc.int/kyoto_protocol#

United Nations Framework Convention on Climate Change (UNFCCC) date unknown What is the Kyoto Protocol? https://unfccc.int/kyoto_protocol# accessed 17 February 2024

UNFCCC 2011 https://unfccc.int

United Nations Framework Convention on Climate Change (UNFCCC) 2011 The Cancun Agreements https://unfccc.int/tools/cancun/index.html accessed 24 February 2023

UNFCCC 2020 https://unfccc.int/news/climate-change-is-an-increasing-threat-toafrica#

United Nations Framework Convention on Climate Change (UNFCCC) 2020 Climate change is an increasing threat to Africa https://unfccc.int/news/ climate-change-is-an-increasing-threat-to-africa# accessed 25 September 2023

UNFCCC 2020 https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment

United Nations Framework Convention on Climate Change (UNFCCC) 2020 The Doha Amendment: Background https://unfccc.int/process/the-kyoto-protocol/ the-doha-amendment accessed 27 May 2021

UNFCCC 2022 https://unfccc.int

United Nations Framework Convention on Climate Change (UNFCCC) 2022 Five key takeaways from COP 27 https://unfccc.int/process-and-meetings/conferences/sharm-el-sheikh-climate-change-conference-november-2022/five-keytakeaways-from-cop27 accessed 4 May 2022

UNFCCC 2023 https://unfccc.int

United Nations Framework Convention on Climate Change (UNFCCC) 2023 UN Climate Change Conference – United Arab Emirates https://unfccc.int/cop28 accessed 17 February 2024

UNHCR 2004 https://refworld.org

United Nations High Commissioner for Refugees (UNHCR) 2004 UNHCR letter to Attorney-General relating to the matter of Rodi Alvarado Peña

https://www.refworld.org/docid/43e9f6e64.html accessed 28 September 2021

UNHCR 2010 https://unhcr.org

United Nations High Commissioner for Refugees (UNHCR) 2010 Haiti situation response 2010 https://www.unhcr.org/media/haiti-situation-response-2010-

april-2010 accessed 15 August 2022

UNHCR 2015 https://unhcr.org

United Nations High Commissioner for Refugees (UNHCR) 2015 Warsaw International Mechanism Executive Committee (WIM ExCom) Work Plan Action Area 6 on Migration, Displacement and Human Mobility https://www.unhcr.

org/media/warsaw-international-mechanism-executive-committee-wimexcom-work-plan-action-area-6 accessed 20 October 2022

UNHCR 2016 https://unhcr.org

United Nations High Commissioner for Refugees (UNHCR) 2016 Frequently asked questions on climate change and disaster displacement https://www.un

hcr.org/news/stories/frequently-asked-questions-climate-change-and-disasterdisplacement accessed 25 October 2021

UNHCR 2020 https://unhcr.org/news/stories/climate-change-defining-crisis-our-timeand-it-particularly-impacts-displaced#

United Nations High Commissioner for Refugees (UNHCR) 2020 Climate change is the defining crisis of our time and it particularly impacts the displaced

https://www.unhcr.org/news/stories/climate-change-defining-crisis-our-timeand-it-particularly-impacts-displaced# accessed 28 November 2023

UNHCR 2020 https://unhcr.org/news/stories/how-climate-change-multiplying-risksdisplacement

United Nations High Commissioner for Refugees (UNHCR) 2020 How climate change is multiplying risks for displacement https://www.unhcr.org/news/stories/how-climate-change-multiplying-risks-displacement accessed 28 November 2023

UNHCR 2021

https://www.unhcr.org/news/briefing/2021/11/618e36334/unhcrworld-must-turn-cop26-words-action-forcibly-displaced-stateless-people.html

United Nations High Commissioner for Refugees (UNHCR) 2021 UNHCR: World must turn COP 26 words into action for forcibly displaced and stateless people

https://www.unhcr.org/news/briefing/2021/11/618e36334/unhcr-world-mustturn-cop26-words-action-forcibly-displaced-stateless-people.html accessed 21 March 2022

UNHCR 2023 https://unhcr.org

United Nations High Commissioner for Refugees (UNHCR) 2023 Climate change and disaster displacement https://www.unhcr.org/what-we-do/build-better-futures/environment-disasters-and-climate-change/climate-change-and accessed 17 February 2024r

UNICEF 2023 https://www.unicef.org/emergencies/devastating-floods-pakistan-2022

United Nations Children's Fund (UNICEF) 2023 Devastating floods in Pakistan https://www.unicef.org/emergencies/devastating-floods-pakistan-2022 accessed 10 May 2023

UNICEF 2023 https://www.unicef.org/press-releases/new-study-finds-43000-excessdeaths-may-have-occurred-2022-drought-somalia

United Nations Children's Fund (UNICEF) 2023 New study finds that 43,000 'excess deaths' may have occurred in 2022 from the drought in Somalia https://www.unicef.org/press-releases/new-study-finds-43000-excess-deathsmay-have-occurred-2022-drought-somalia accessed 15 April 2023

UNOCHA 2019 https://unocha.org

United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) 2019 2018-2019 Mozambique humanitarian response plan – revised following Cyclone Idai, March 2019 https://www.unocha.org/publications/report/mozambique/2018-2019-mozambique-humanitarian-response-plan-november-2018-june-2019-revised accessed 24 May 2023

UNOCHA 2019 https://reliefweb.int

United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) 2019 Mozambique: Two cyclones: Idai and Kenneth (as of May 2019) https://reliefweb.int/report/mozambique/mozambique-two-cyclones-idai-andkenneth-22-may-2019 accessed 26 June 2023

UNOCHA 2022 https://reliefweb.com

United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) 2022 Pakistan: 2022 Monsoon floods – Situation report No 11 https://relief web.int/report/pakistan/pakistan-2022-monsoon-floods-situation-report-no-

11-11-november-2022 accessed 20 May 2023

UNRIC 2020 https://unric.org

UNRIC 2020 2010-2019 confirmed as warmest decade in history https://un ric.org/en/2010-2019-confirmed-as-warmest-decade-in-history/# accessed 25 April 2021

UNTC date unknown https://treaties.un.org

United Nations Treaty Collection (UNTC) date unknown Chapter III Privileges and immunities, diplomatic and consular relations, etc https://treaties.un.org/

pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-2-10&chapter=3&clang=_en accessed 25 July 2021

WHO 2023 https://who.int

World Health Organization (WHO) 2023 Climate change: Key facts https://www.who.int/news-room/fact-sheets/detail/climate-change-andhealth# accessed 17 February 2024

Wilkinson 1998 https://unhcr.org

Wilkinson R 1998 Refugees Magazine Issue 112 https://www.unhcr.org/publications/refugees-magazine-issue-112-going-home-mozambique-revisitedhome-sweet-home accessed 20 September 2021

Williams and Huber 2022 https://spia.princeton.edu

Williams R and Huber BR 2022 Extreme climate fluctuation drives South African domestic migration https://spia.princeton.edu/news/extreme-climate-fluctuation-drives-south-african-domestic-migration accessed 18 January 2024

Wits University 2023 https://wits.ac.za

Wits University 2023 The 2022 Durban floods were the most catastrophic yet recorded in Kwa-Zulu Natal https://www.wits.ac.za/news/latest-news/general-news/2023/2023-04/the-2022-durban-floods-were-the-most-catastrophic-yetrecorded-in-kwazulu-natal.html accessed 22 January 2024

WMO 2021 https://wmo.int/news/media-centre/2020-was-one-of-three-warmestyears-record#

World Meteorological Organization (WMO) 2021 2020 was one of the three warmest years on record https://wmo.int/news/media-centre/2020-was-oneof-three-warmest-years-record# accessed 28 March 2022

WMO 2021 https://wmo.int/news/media-centre/state-of-climate-2021-extremeevents-and-major-impacts

World Meteorological Organization (WMO) 2021 State of climate in 2021: Extreme events and major impacts https://wmo.int/news/media-centre/stateof-climate-2021-extreme-events-and-major-impacts accessed 25 March 2022

WMO 2021 https://wmo.int/media/news/weather-related-disasters-increase-overpast-50-years-causing-more-damage-fewer-deaths#

World Meteorological Organization (WMO) 2021 Weather-related disasters increase over past 50 years, causing more damage but fewer deaths

https://wmo.int/media/news/weather-related-disasters-increase-over-past-50years-causing-more-damage-fewer-deaths# accessed 28 November 2023

WMO 2022 https://wmo.int

World Meteorological Organization (WMO) 2022 Climate change likely increased intense rainfall in Pakistan: study https://wmo.int/media/news/climate-changelikely-increased-intense-rainfall-pakistan-study accessed 25 July 2023

WMO 2023 https://wmo.int/news/media-centre/el-nino-expected-last-least-untilapril-2024

World Meteorological Organization (WMO) 2023 El Niño expected to last at least until April 2024 https://wmo.int/news/media-centre/el-nino-expected-last-

least-until-april-2024 accessed 28 November 2023

WMO 2023 https://wmo.int/news/media-centre/past-eight-years-confirmed-be-eightwarmest-record#

World Meteorological Organization (WMO) 2023 Past eight years confirmed to be the eight warmest on record https://wmo.int/news/media-centre/pasteight-years-confirmed-be-eight-warmest-record# accessed 28 March 2022

WMO 2023 https://wmo.int/media/news/tropical-cyclone-freddy-may-set-new-record

World Meteorological Organization (WMO) 2023 Tropical cyclone Freddy may set new record https://wmo.int/media/news/tropical-cyclone-freddy-may-set-

new-record accessed 08 June 2023

WMO 2024 https://wmo.int

World Meteorological Organization (WMO) 2024 WMO confirms that 2023 smashes global temperature record https://wmo.int/media/news/wmo-con

firms-2023-smashes-global-temperature-record# accessed 17 February 2024

Wood 2020 https://disasterdisplacement.org

Wood T 2020 New pact waves way for innovative solutions to disaster and climate change displacement in Africa https://disasterdisplacement.org/

perspectives/new-pact-paves-way-for-innovative-solutions-to-disaster-andclimate-change-displacement-in-africa/ accessed 15 August 2022

WWA 2022 https://worldweatherattribution.org

World Weather Attribution (WWA) 2022 Climate change likely increased extreme monsoon rainfall, flooding highly vulnerable communities in Pakistan

https://www.worldweatherattribution.org/climate-change-likely-increasedextreme-monsoon-rainfall-flooding-highly-vulnerable-communities-inpakistan/ accessed 10 May 2023

Yeung 2021 https://edition.cnn.com

Yeung J 2021 Death toll from China floods jumps to 302, as Covid outbreak complicates recovery https://edition.cnn.com/2021/08/03/china/china-zhengz

hou-flood-deaths-covid-intl-hnk/index.html accessed 15 March 2023

Zia (ed) 2017 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5519075/

Zia A (ed) 2017 How issue frames shape beliefs about the importance of climate change policy across ideological and partisan groups https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5519075/ accessed 28 April 2022

Zoni 2023 https://unhcr.org

Zoni I 2023 Recurring floods in Sudan displace refugees and their host communities https://www.unhcr.org/news/recurring-floods-sudan-displace-refugees-and-their-host-communities accessed 18 June 2023

Other literature sources

Abebe The Kampala Convention and environmentally displacement in Africa

Abebe AM The Kampala Convention and environmentally displacement in Africa (2011) available at https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/climate-change-2011/SessionIII-Paper-Allehone-Mulugeta-Abebe.pdf accessed 05 May 2023

Aleinikoff Membership in a particular social group: Analysis and proposed conclusions

Aleinikoff TA Membership in a particular social group: Analysis and proposed conclusions (2001) available at https://www.unhcr.org/media/membership-particular-social-group-analysis-and-proposed-conclusions accessed 25 May 2021

Aleksandrova, Schraven and Serraglio A real game changer? The implications of the UN's ruling on 'climate refugees'

Aleksandrova M, Schraven B and Serraglio D A real game changer? The implications of the UN's ruling on 'climate refugees' (2020) available at

https://www.idos-research.de/uploads/media/German_Development_Institute_Aleksandrova_Schraven_Serraglio_24.02.2020.pdf accessed 18 February 2024

AU Migration Policy Framework for Africa and Plan of Action (2018-2030)

AU Migration Policy Framework for Africa and Plan of Action (2018-2030) (2018) available at https://au.int/sites/default/files/documents/35956-doc-au-mpfaexecutive-summary-eng.pdf accessed 20 March 2022

AU Resolutions and Recommendations of the Second Ordinary Session of the Council of Ministers Held in Lagos Nigeria CM/Res 19 (II)

AU Resolutions and Recommendations of the Second Ordinary Session of the Council of Ministers Held in Lagos Nigeria CM/Res 19 (II) (1964) https://au.int/sites/default/files/decisions/9575-council_en_24_29_february_1964_council_ministers_second_ordinary_session.pdf accessed 30 September 2023

AU Resolutions and Recommendations adopted by the Third Ordinary Session of the Council Ministers held in Cairo CM/Res 31 (III)

AU Resolutions and Recommendations adopted by the Third Ordinary Session of the Council Ministers held in Cairo CM/Res 31 (III) (1964) https://au.int/sites/default/files/decisions/9569-council_en_13_17_july_1964_council_ministers_third_ordinary_session.pdf accessed 30 September 2023

AU Resolution of the Fourth Ordinary Session of Council of Ministers held at Nairobi CM/Res 4 (IV)

AU Resolution of the Fourth Ordinary Session of Council of Ministers held at Nairobi CM/Res 4 (IV) (1965) https://au.int/sites/default/files/decisions/9576council_en_26_february_9_marc

h_1965_council_ministers_fourth_ordinary_s ession.pdf accessed 30 September 2023

AU Resolutions of the Seventh Ordinary Session of the Council of Ministers CM/Res 77 (VII)

AU Resolutions of the Seventh Ordinary Session of the Council of Ministers CM/Res 77 (VII) (1966) https://au.int/sites/default/files/decisions/9578council_en_31_october_4_nove mber_1966_council_ministers_seventh_ordina ry_session.pdf accessed 30 September 2023

AU Resolutions adopted by the Council of Ministers at its Ninth Ordinary Session CM/Res 100 (IX)

AU Resolutions adopted by the Council of Ministers at its Ninth Ordinary Session CM/Res 100 (IX) (1967) https://au.int/sites/default/files/decisions/9566council_en_4_10_september_19 67_council_ministers_ninth_ordinary_session. pdf accessed 30 September 2023

AU Resolutions and Statement of the Nineteenth Ordinary Session of the Council of Ministers held at Rabat CM/Res 266 (XIX)

AU Resolutions and Statement of the Nineteenth Ordinary Session of the Council of Ministers held at Rabat CM/Res 266 (XIX) (1972) https://au.int/sites/default/files/decisions/9581-council_en_5_12_june_1972_ council_ministers_nineteenth_ordinary_session.pdf accessed 05 October 2023 AU Resolutions and Statement of the Twentieth Ordinary Session of the Council of Ministers held at Addis Ababa CM/Res 290 (XX)

AU Resolutions and Statement of the Twentieth Ordinary Session of the Council

of Ministers held at Addis Ababa CM/Res 290 (XX) (1973) https://au.int/sites/default/files/decisions/9580-council_en_5_9_february_1973_council_ministers_twentieth_ordinary_session.pdf accessed 05 October 2023

Bhorat, Meyer and Mlatsheni Skilled labour migration from developing countries

Bhorat H, Meyer JB and Mlatsheni C Skilled labour migration from developing countries: Study on South and Southern Africa (2002) https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_201781.pdf accessed 22 January 2024

Brown Migration and climate change

Brown O Migration and climate change (2008) available at https://www.iisd.org/system/files/publications/migration_climate.pdf accessed 22 May 2022

Cantor Law, policy and practice concerning the humanitarian protection of aliens on a temporary basis in the context of disaster

Cantor DJ Law, policy and practice concerning the humanitarian protection of aliens on a temporary basis in the context of disaster (2015) available at https://disasterdisplacement.org/wp-content/uploads/2015/07/150715_FINAL_BACKGROUND_PAPER_LATIN_AMERICA_screen.pdf accessed 04 April 2023

Clarke and Otto Reporting extreme weather and climate change: A guide for journalists

Clarke B and Otto F Reporting extreme weather and climate change: A guide for journalists (2022) https://www.worldweatherattribution.org/wp-content/uploads/ENG_WWA-Reporting-extreme-weather-and-climate-change.pdf accessed 25 April 2023

Doan et al Migration and labor mobility from Pacific Island countries

Doan D, Dornan M, Doyle J and Petrou K Migration and labor mobility from Pacific Island countries (2023) available at https://thedocs.worldbank.org/en/doc/511bd7fb799a3379242b5c151b2a14d5-0050062023/original/WDR-Pacific-Islands-case-study-FORMATTED.pdf accessed 24 August 2023

EJF On the frontlines: Climate change in Bangladesh

Environmental Justice Foundation (EJF) On the frontlines: Climate change in Bangladesh (2018) available at https://ejfoundation.org/resources/downloads/Climate-Displacement-Bangladesh-briefing-2018-v20.pdf accessed 5 July 2022

FAO Africa regional overview of food security and nutrition: Statistics and trends

Food and Agriculture Organization of the United Nations (FAO) Africa regional overview of food security and nutrition: Statistics and trends (2023) https://www.fao.org/3/cc8743en/cc8743en.pdf accessed 25 October 2023

Hirsch A strategic consideration of the African Union Free Movement of Persons Protocol and the other initiatives towards the freer movement of people in Africa

Hirsch A A strategic consideration of the African Union Free Movement of Persons Protocol and the other initiatives towards the freer movement of people in Africa (2021) available at https://saiia.org.za/wp-content/uploads/2021/ 01/WP_A-Hirsch_Regularising-migration-in-Africa_20210122-002.pdf accessed 25 March 2022

UNHRC Resolution adopted by the Human Rights Council A/HRC/Res/48/13

United Nations Human Rights Council (UNHRC) Resolution adopted by the Human Rights Council A/HRC/Res/48/13 (2021) available at

https://documents.un.org/doc/undoc/gen/g21/289/50/pdf/g2128950.pdf?token=AMU3M7Jac6G5DmMs7b&fe=true accessed 14 August 2022

UNHRC Resolution HRC 7/23 – submission of the Maldives to the OHCHR

United Nations Human Rights Council (UNHRC) Resolution HRC 7/23 – submission of the Maldives to the OHCHR (2008) available at https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf accessed 25 March 2023

OHCHR Summary report of the OHCHR on the outcome of the full day discussion on specific themes relating to human rights and climate change H/HRC/29/19

Office of the High Commissioner for Human Rights Council (OHCHR) Summary report of the OHCHR on the outcome of the full day discussion on specific themes relating to human rights and climate change H/HRC/29/19 (2015) available at https://documents.un.org/doc/undoc/gen/g15/087/40/pdf/g1508740.pdf?token=4JuPEN9qSw0YoCWf8O&fe=true accessed 25 September 2021

HRW Neighbors in need: Zimbabweans Seeking Refuge in South Africa

Human Rights Watch (HRW) Neighbors in need: Zimbabweans Seeking Refuge in South Africa (2008) available at https://www.hrw.org/report/2008/06/20/neighbors-need/zimbabweans-seeking-refuge-south-africa accessed 25 June 2022

IDMC GRID 2019: Global Report on Internal Displacement

Internal Displacement Monitoring Centre (IDMC) GRID 2019: Global Report on Internal Displacement (2019) available at https://api.internal-displacement.org/sites/default/files/publications/documents/2019-IDMC-GRID.pdf accessed

14 March 2022

IEP Ecological threat register 2020: Understanding ecological threats, resilience and peace

Institute for Economics and Peace (IEP) Ecological threat register 2020: Understanding ecological threats, resilience and peace available at https://www.visionofhumanity.org/wp-content/uploads/2020/10/ETR_2020_web-1.pdf accessed 14 April 2023

IEP Over one billion people at threat of being displaced by 2050 due to environmental change, conflict and civil unrest

Institute for Economics and Peace (IEP) Over one billion people at threat of being displaced by 2050 due to environmental change, conflict and civil unrest (2020) available at https://www.economicsandpeace.org/wp-content/uploads/2020/09/Ecological-Threat-Register-Press-Release-27.08-FINAL.pdf accessed 25 August 2023

IOM International Migration Law: Glossary on migration

International Organization for Migration (IOM) International Migration Law: Glossary on migration (2019) available at https://publications.iom.int/system/files/pdf/iml25_1.pdf accessed 05 October 2023

IOM Migration and climate change No 31

International Organization for Migration (IOM) Migration and climate change No 31 (2008) available at https://publications.iom.int/system/files/pdf/mrs31_en.pdf accessed 28 June 2022

IPCC Working Group I contribution to the Sixth Assessment Report of the IPCC Climate Change 2021: The physical science basis

IPCC Working Group I contribution to the Sixth Assessment Report of the IPCC Climate Change 2021: The physical science basis (2021) available at https://report.ipcc.ch/ar6/wg1/IPCC_AR6_WGI_FullReport.pdf accessed 22 March 2022
IPCC Working Group II contribution to the Sixth Assessment Report

Intergovernmental Panel on Climate Change (IPCC) Working Group II contribution to the Sixth Assessment Report (2022) available at https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf accessed 25 March 2022

Laczko and Aghazarm (eds) Migration, environment and climate change: Assessing the evidence

Laczko F and Aghazarm C (eds) Migration, environment and climate change: Assessing the evidence (2009) available at https://publications.iom.int/system/files/pdf/migration_and_environment.pdf accessed 21 May 2022

Masson-Delmotte et al (eds) (IPCC) Working Group I contribution to the Sixth Assessment Report of the IPCC Climate Change 2021: The physical science basis

Masson-Delmotte V et al (IPCC) Working Group I contribution to the Sixth Assessment Report of the IPCC Climate Change 2021: The physical science basis (2021) available at https://report.ipcc.ch/ar6/wg1/IPCC_AR6_WGI_FullReport.pdf accessed 25 March 2022

McAdam and Limon Policy Report: Human rights, climate change and cross-border displacement: The role of the international human rights community in contributing to effective and just solutions

McAdam J and Limon M Policy Report: Human rights, climate change and crossborder displacement: The role of the international human rights community in contributing to effective and just solutions (2015) available at https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/cc_hr_displacement_urg.pdf accessed 10 April 2023 Maxwell, Kim and Majid Planning from the future: Case study: The Somalia famine of 2011-12

Maxwell D, Kim JJ and Majid N Planning from the future: Case study: The Somalia famine of 2011-12 (2015) available at https://fic.tufts.edu/wpcontent/uploads/somalia_case_study_jan_6_2016.pdf accessed 25 July 2022

Migrants Refugees Migration Profile: South Africa

Migrants Refugees Migration Profile: South Africa (2021) available at https://migrants-refugees.va/it/wp-content/uploads/sites/3/2021/12/2021-CP-South-Africa.pdf accessed 19 January 2024

New Zealand: Refugee Status Appeals Authority Refugee Appeal Nos 76508 & 76509

New Zealand: Refugee Status Appeals Authority Refugee Appeal Nos 76508 & 76509 (2010) available at https://www.refworld.org/cases,NZL_RSAA,4ccfd40f2.html accessed 20 March 2022

NOAA The impact of wildfires on climate and air quality

National Oceanic and Atmospheric Administration (NOAA) The impact of wildfires on climate and air quality (date unknown) available at https://csl.noaa.gov/factsheets/csdWildfiresFIREX.pdf accessed 30 April 2021

NWF Climate change, natural disasters, and wildlife

National Wildlife Federation (NWF) Climate change, natural disasters, and wildlife (2019) https://www.nwf.org/-/media/Documents/PDFs/EnvironmentalThreats/Climate-Change-Natural-Disasters-fact-sheet.ashx accessed 28 November 2023

OECD and ILO How immigrants contribute to SA's Economy

Organisation for Economic Cooperation and Development (OECD) and International Labour Organization (ILO) How immigrants contribute to South Africa's Economy (2018) available at https://www.oecd-ilibrary.org/docserver/9789264085398-en.pdf?expires=1708456262&id=id&accname=guest&checksum=B139E07C2B5A86FA0504A8700BD58B6D accessed 22 January 2024

OHCHR FAQ on human rights and climate change

Office of the High Commissioner for Human Rights (OHCHR) FAQ on human rights and climate change (2021) available at ohchr.org/sites/default/files/2021-09/FSheet38_FAQ_HR_CC_EN_0.pdf accessed 05 April 2023

OHCHR Report of the UNHCR on 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 A/HRC/38/21

Office of the High Commissioner for Human Rights (OHCHR)Report of the UNHCR on 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 A/HRC/38/21 (2018) available

at https://www.ohchr.org/en/documents/reports/ahrc3821addressing-human-rights-protection-gaps-context-migration-and accessed 10 April 2023

OHCHR Understanding human rights and climate change

Office of the High Commissioner for Human Rights (OHCHR) Understanding human rights and climate change (2015) available at https://www.ohchr.org/ sites/default/files/Documents/Issues/ClimateChange/COP21.pdf accessed 21

August 2021

Oppenheimer et al Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities in IPCC Special Report on the Ocean and Cryosphere in a Changing Climate

Oppenheimer M et al Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities in IPCC Special Report on the Ocean and Cryosphere in a Changing Climate (2019) available at https://www.ipcc.ch/srocc/chapter/

chapter-4-sea-level-rise-and-implications-for-low-lying-islands-coasts-andcommunities/ accessed 25 June 2023

PACOE Report on environmentally induced migration and displacement: A 21st century challenge

Parliamentary Assembly Council of Europe (PACOE) Report on environmentally induced migration and displacement: A 21st century challenge (2008) available

at https://www.refworld.org/reference/themreport/coepace/2008/en/67972 accessed 28 May 2023

Rankin New issues in refugee research - Working paper no 113

Rankin MB New issues in refugee research - Working paper no 113 – Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on (2005) available at https://www.refworld.org/reference/re

search/unhcr/2005/en/87268 accessed 08 March 2022

Ratha et al Leveraging migration for Africa: Remittances, skills and investments

Ratha D et al Leveraging migration for Africa: Remittances, skills and investments (2011) available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Leveraging%20Migration-P4-rev-3.31.2011.pdf accessed 20 January 2024

Refugee Appeal Board Decision (Nigeria) South Africa: Refugee Appeal Board

Refugee Appeal Board Decision (Nigeria) South Africa: Refugee Appeal Board Appeal against the decision of the Refugee Status Determination Officer of the Department of Home Affairs declining the grant of refugee status available at https://refworld.org/cases,SA_RAB,4b0e98fc2.html accessed 17 May 2022

SACN Migration, mobility and urban vulnerabilities

South African Cities Network (SACN) Migration, mobility and urban vulnerabilities (2014) available at https://www.sacities.net/wp-content/uploads/2020/03/Migration-Urban-Vulnerabilities-FINAL2014-1.pdf accessed 14 January 2024

Scissa Recognition and protection of environmental migrants in international law

Scissa C Recognition and protection of environmental migrants in international law (2021) available at https://www.e-ir.info/pdf/91948 accessed 30 April 2023

Shamsuddoha Climate-induced displacement and migration: Policy gaps and policy alternative

Shamsuddoha Md Climate-induced displacement and migration: Policy gaps and policy alternative (2015) https://unfccc.int/files/adaptation/groups_com

mittees/loss_and_damage_executive_committee/application/pdf/briefing_paper_climate_induced_displacement_and_migration.pdf accessed 10 May 2023

Tallmeister Is immigration a threat to security?

Tallmeister J Is immigration a threat to security? (2013) available at https://www.e-ir.info/pdf/42342%20accessed%2015%20October%202023 accessed 20 October 2023

TFD Report of the TFD – September 2018

Task Force on Displacement (TFD) Report of the Task Force on Displacement (TFD) – September 2018 (2018) available at https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf accessed 25 May 2021

Turral, Burke J and Faurès Climate change, water and food security

Turral H, Burke J and Faurès JM Climate change, water and food security available at https://www.fao.org/3/i2096e/i2096e00.pdf accessed 17 March 2023

UN Global Compact on Refugees

United Nations (UN) Global Compact on Refugees (2018) available at https://globalcompactrefugees.org/sites/default/files/2019-12/Global%20compact%20on%20refugees%20EN.pdf accessed 26 March 2022

UN Population and development: Programme of action adopted at international conference on population and development

United Nations (UN) Population and development: Programme of action adopted at international conference on population and development (1994) available at https://www.un.org/development/desa/pd/sites/www.un.org.de

velopment.desa.pd/files/files/documents/2020/Jan/un_1995_programme_of_action_adopted_at_the_international_conference_on_population_and_development_cairo_5-13_sept._1994.pdf accessed 08 September 2023

UN Recommendations on Statistics of International Migration

United Nations (UN) Recommendations on Statistics of International Migration (1998) available at https://unstats.un.org/unsd/publication/seriesm/seriesm_58rev1e.pdf accessed 05 October 2023

UNFCCC Fact sheet: Climate change science the status of climate change science today

United Nations Framework Convention on Climate Change (UNFCCC) Fact sheet: Climate change science the status of climate change science today (2011) available at https://www.uncclearn.org/wp-content/uploads/library/unfccc01.pdf accessed 25 August 2023

UNFCCC Human Mobility in the Context of Climate Change UNFCCC-Paris COP21: Recommendations from the Advisory Group on Climate Change and Human Mobility

United Nations Framework Convention on Climate Change (UNFCCC) Human Mobility in the Context of Climate Change UNFCCC-Paris COP21:

Recommendations from the Advisory Group on Climate Change and Human Mobility (2015) available at https://environmentalmigration.iom.int/sites/environmentalmigration/files/Research%20Database/Paris_COP21-Human_Mobility-AdvisoryGroup.pdf accessed 11 September 2021

UNFCCC Outcome of the first global stocktake – Draft decision -/CMA.5 Proposal by the President

United Nations Framework Convention on Climate Change (UNFCCC) Outcome of the first global stocktake – Draft decision -/CMA.5 Proposal by the President

(2023) available at https://unfccc.int/documents/636608 accessed 17 February 2024

UNFCCC Report of the Conference of the Parties on its twenty-first session

United Nations Framework Convention on Climate Change (UNFCCC) Report of the Conference of the Parties on its twenty-first session (2016) available at https://unfccc.int/resource/docs/2015/cop21/eng/10.pdf accessed 25 March 2022

UNFCCC Report of the Conference of the Parties on its twenty-second session, held in Marrakech from 7 to 18 November 2016

United Nations Framework Convention on Climate Change (UNFCCC) Report of the Conference of the Parties on its twenty-second session, held in Marrakech from 7 to 18 November 2016 (2016) available at https://unfccc.int/documents/9672 accessed 25 February 2022

UNGA Agreement concerning the relationship between the UN and the IOM A/70/976

United Nations General Assembly (UNGA) Agreement concerning the relationship between the United Nations (UN) and the International Organization for Migration (IOM) A/70/976 (2016) available at https://www.un.org/pga/70/wp-content/uploads/sites/10/2015/08/Briefingon-UN-IOM-relations-19-July-2016.pdf accessed 25 August 2023

UNGA New York Declaration for Refugees and Migrants A/Res/71/1

United Nations General Assembly (UNGA) New York Declaration for Refugees and Migrants A/Res/71/1 (2016) available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf accessed 28 September 2023

UNGA Request for an advisory opinion of the ICJ on the obligations of States in respect of climate change A/Res/77/276

United Nations General Assembly (UNGA) Request for an advisory opinion of the International Court of Justice (ICJ) on the obligations of States in respect of climate change A/Res/77/276 (2023) available at https://digitallibrary.un.

org/record/4008332?ln=en accessed 28 May 2023

UNGA Resolution adopted by the General Assembly A/Res/73/151

United Nations General Assembly (UNGA) Resolution adopted by the General Assembly A/Res/73/151 (2018) available at https://documents.un.org/doc/undoc/gen/n18/446/08/pdf/n1844608.pdf?token=1KapEexX6LjSBLEf5v&fe=true accessed 25 February 2022

UNGA Resolution on Climate change and its possible security implications A/Res/63/281

United Nations General Assembly (UNGA) Resolution on Climate change and its possible security implications A/Res/63/281 (2009) available at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/res%2063%20281.pdf accessed 28 May 2023

UNGA Resolution on Global Compact for Safe, Orderly and Regular Migration A/Res/73/195

United Nations General Assembly (UNGA) Resolution on Global Compact for Safe, Orderly and Regular Migration A/Res/73/195 (2018) available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_73_195.pdf accessed 28 September 2023

UNGA Resolution on Transforming our world: the 2030 Agenda for Sustainable Development A/Res/70/1

United Nations General Assembly (UNGA) Resolution on Transforming our world: the 2030 Agenda for Sustainable Development A/Res/70/1 (2015) available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf accessed 10 September 2023

UNGA Resolution on Progress Declaration of the International Migration Review Forum

United Nations General Assembly (UNGA) Resolution on Progress Declaration of the International Migration Review Forum (2022) available at https://migrationnetwork.un.org/resources/progress-declaration-internationalmigration-review-forum accessed 08 September 2023

UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol

UN High Commissioner for Refugees (UNHCR) Advisory Opinion on the Extraterritorial Application of Non-Refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007) available at https://www.refworld.org/docid/45f17a1a4.html accessed 25 September 2021

UNHCR A guide to international refugee protection and building state asylum systems

UN High Commissioner for Refugees (UNHCR) A guide to international refugee protection and building state asylum systems (2017) available at

https://www.unhcr.org/media/refugee-protection-guide-international-refugeelaw-handbook-parliamentarians accessed 04 September 2021

UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia

UN High Commissioner for Refugees (UNHCR) Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia (2010) available at https://www.refworld.org/policy/countrypos/unhcr/2010/en/72976 accessed 15 August 2022

UNHCR

Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity without the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees

UN High Commissioner for Refugees (UNHCR) Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity without the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2012) available at

https://www.unhcr.org/media/unhcr-guidelines-international-protection-no-9claims-refugee-status-based-sexual-orientation accessed 20 March 2022

UNHCR Guidelines on International Protection No 1: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees

UN High Commissioner for Refugees (UNHCR) Guidelines on International Protection No 1: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002) available at https://www.unhcr.org/sites/default/files/legacypdf/3d58ddef4.pdf accessed 25 November 2021

UNHCR Guidelines on International Protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions

UN High Commissioner for Refugees (UNHCR) Guidelines on International Protection No 12: Claims for Refugee Status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967

UNHCR

Protocol Relating to the Status of Refugees and the Regional Refugee Definitions (2016) available at https://www.refworld.org/docid/583595ff4.html accessed 23 October 2021

Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection

UN High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection (2019 re-issue) available at https://www.unhcr.org/sites/default/files/legacy-pdf/4d93528a9.pdf accessed 25 October 2021

UNHCR Joint submission: Forced displacement in the context of climate change

UN High Commissioner for Refugees (UNHCR) Joint submission: Forced displacement in the context of climate change (2009) available at

https://www.unhcr.org/fr-fr/en/media/forced-displacement-context-climatechange-challenges-states-under-international-law accessed 30 April 2023

UNHCR Legal and Protection Policy Research Series: UNHCR and De Facto Statelessness

UN High Commissioner for Refugees (UNHCR) Legal and Protection Policy Research Series: UNHCR and De Facto Statelessness (2010) available at https://www.unhcr.org/4bc2ddeb9.pdf accessed 04 September 2021

UNHCR Legal considerations on refugee protection for people fleeing conflict and famine affected countries

UNHCR

UNHCR Legal considerations on refugee protection for people fleeing conflict and famine affected countries (2017) available at https://www.refworld.org/policy/legalguidance/unhcr/2017/en/116529 accessed 28 June 2021

UNHCR Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters

UN High Commissioner for Refugees (UNHCR) Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters (2020) available at https://www.refworld.org/policy/legalguidance/unhcr/2020/en/123356 accessed 24 June 2021

Protecting the Rights of Stateless Persons: The 1954 Convention Relating to the Status of Stateless Persons

UN High Commissioner for Refugees (UNHCR) Protecting the Rights of Stateless Persons: The 1954 Convention Relating to the Status of Stateless Persons (2014) available at https://www.refworld.org/pdfid/4cad88292.pdf accessed 04 September 2021

UNHCR Summary of deliberations: Climate change and displacement: Identifying gaps and responses: Expert roundtable, Bellagio Conference Centre

UN High Commissioner for Refugees (UNHCR) Summary of deliberations: Climate change and displacement: Identifying gaps and responses: Expert roundtable, Bellagio Conference Centre (2011) available at https://www.unhcr.org/fr-fr/en/media/summary-deliberations-climate-change-and-displacement-identifying-gaps-and-responses-expert accessed 25 March 2023

UNHCR The Principle of Non-Refoulement as a Norm of Customary International Law Response to Questions Posed to UNHCR by the Federal Constitutional Court of the

UN High Commissioner for Refugees (UNHCR) The Principle of NonRefoulement as a Norm of Customary International Law Response to Questions

Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/92, 2 BvR 1953/93, 2 BvR 1954/9 (1994) available at https://www.refworld.org/docid/437b6db64.html accessed 23

October 2021

UNHRC Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/2016

UN High Commissioner for Refugees (UNHCR) Views Adopted by the UN Committee under Article 5(4) of the Optional Protocol concerning communication No 2728/2016 Ioane Teitiota v New Zealand CCPR/C/127/D/2728/2016 (2019) available at https://climatecasechart.com/wpcontent/uploads/non-us-case-documents/2020/20200107_CCPRC127D27282

016_opinion.pdf accessed 25 April 2021

USAID South Africa Climate change country profile

United States Agency for International Development (USAID) South Africa Climate change country profile (date unknown) available at https://www.

usaid.gov/sites/default/files/2023-11/2023-USAID-South-Africa-Climate-Change-Profile.pdf accessed 22 January 2024

Vitorino World Migration Report 2022

Vitorino A World Migration Report 2022 (2022) available at https://reliefweb.int/report/world/world-migration-report-2022?gad_source=1 accessed 29 November 2023

Weeramantry Separate opinion of Vice-President Weeramantry in response to the Gabčíkovo-Nagymaros Project

Weeramantry CG Separate opinion of Vice-President Weeramantry in response to the Gabčíkovo-Nagymaros Project (1997) available at https://jusmundi.com/en/document/pdf/opinion/en-gabcikovo-nagymaros-project-hungary-slovakiaseparate-opinion-of-vice-president-weeramantry-thursday-25th-september-1997 accessed 30 July 2022

Weerasinghe Legal and protection policy research series: Refugee law in a time of climate change, disaster and conflict

Weerasinghe S Legal and protection policy research series: Refugee law in a time of climate change, disaster and conflict (2020) available at https://www.refworld.org/pdfid/5ff43e894.pdf accessed 25 April 2022

Weerasinghe In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change

Weerasinghe S In harm's way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change (2018) available at https://www.unhcr.org/media/no-39-harms-way-internationalprotection-context-nexus-dynamics-between-conflict-or-violence accessed 25 April 2022

Weis The Refugee Convention, 1951 The Travaux Preparatoires analysed with a commentary

Weis P The Refugee Convention, 1951 The Travaux Preparatoires analysed with a commentary by Dr Paul Weis (1990) available at https://www.refworld.org/reference/research/unhcr/1990/en/100962 accessed 25 March 2022

WGBU World in transition: Climate change as a security risk

Wissenschaftlicher Beirat der Bundesregierung Globale Umweltveränderungen (WBGU) (The German Advisory Council on Global Change) World in transition: Climate change as a security risk (2007) available at https://www.wbgu.de/fileadmin/user_upload/wbgu/publikationen/hauptgutachten/hg2007/pdf/wbgu_jg2007_kurz_engl.pdf accessed 25 May 2023

WMO State of Global Climate Provisional Report

World Meteorological Organization (WMO) State of Global Climate Provisional Report (2021) available at https://library.wmo.int/viewer/56300?medianame=1290_Statement_2021_en_#page=1&viewer=picture&o=bookmark&n=0&q= accessed 31 March 2022

WMO State of the climate in Africa

World Meteorological Organization (WMO) State of the climate in Africa (2021) available at https://library.wmo.int/viewer/58070/download?file=1300_State_of_the_Climate_in_Africa_2021_en.pdf&type=pdf&navigator=1 accessed 25 June 2022

Wood Protection and disasters in the Horn of Africa: Norms and practice for addressing cross-border displacement in disaster contexts

Wood T Protection and disasters in the Horn of Africa: Norms and practice for addressing cross-border displacement in disaster contexts (2013) available at https://disasterdisplacement.org/wp-content/uploads/2015/03/190215_Technical_Paper_Tamara_Wood.pdf accessed 25 March 2023

World Bank Group Climate investment opportunities in India's cooling sector

World Bank Group Climate investment opportunities in India's cooling sector (2022) available at https://documents1.worldbank.org/curated/en/099920011222212474/pdf/P15743300f4cc10380b9f6051f8e7ed1147.pdf accessed 28 April 2023

World Bank Group Climate risk country profile: SA

World Bank Group Climate risk country profile: South Africa (2021) available at https://climateknowledgeportal.worldbank.org/sites/default/files/countryprofiles/15932-WB_South%20Africa%20Country%20Profile-WEB.pdf accessed 15 January 2024

World Bank Group Groundswell Preparing for internal climate migration: Policy note #2

World Bank Group Groundswell Preparing for internal climate migration: Policy note #2 (2018) https://documents1.worldbank.org/curated/en/401511522303177090/pdf/124722-BRI-PUBLIC-NEWSERIES-Groundswell-note-PN2.pdf accessed 07 June 2023