



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

L Louw-Nel

 **orcid.org 0000-0001-5469-3330**

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ABSTRACT

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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 be investigated in more depth in the future.

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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
HELRL	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 Reduction
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 Refugees¹

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 droughts⁷ in several regions, leading to famine⁸ 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 Turrall, 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 assistance¹⁷ 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 Commissioner²⁴ 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 Agreement⁴² 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 an 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 migration⁴⁵ 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 change⁵⁴ has proven to intensify these events⁵⁷ 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.

Natarajan et al. reported in 2020 that the "majority of migrants (54.9%) lived within their region of origin".⁵⁹ As discussed below⁶⁰ 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 Teitiota⁶³ 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 principle⁶⁶ 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 framework⁷⁰ 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 1A(2) 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 regional⁷⁵ and the South African⁷⁶ 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 duration¹⁰³ 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 choice¹¹³ 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 unemployment¹²³ 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 Byrne 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-displacement>.

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 principle¹⁴⁸ 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>.

migrants¹⁵⁰ 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 Sciacaluga 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 CDR 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 Nations¹⁶⁸ 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 (ICCR) 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 1945¹⁷⁵ 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 profession²⁰⁰ 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 be 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 Préparatoires 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 requires²¹¹ 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 to 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 descent". 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 person 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 (FGM) 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 USA²⁸⁹ 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 granting 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 CJIEP 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 Kaczmarek 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 considerations³¹³ 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 1A(2) 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 Cooper³¹⁹ 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 Convention³³⁰ 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 interfering³³⁷ 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 measures³³⁹ 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 YBIHLRL 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 penalty³⁴⁸ 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 ICCPR³⁵⁵ 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 principle³⁶⁰ 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 above³⁶² 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 issue³⁶⁹ 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 reported³⁹¹ 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, Alexandria, 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 vulnerable³⁹² 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 1963³⁹⁶ 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 rights³⁷³ 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 criteria³⁸⁰ 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 law³⁸¹ 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://aehnwork.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 commonalities.

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 advantages³⁹⁰ 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 "remittances³⁹¹³⁹² 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 challenges³⁹⁴ 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 xenophobia⁴²² 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 MPF³⁹⁹ 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 Preamble⁴⁰⁵ 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 displaced⁴¹² 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 IRR 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).

regulations⁴⁴⁵ 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 place⁴⁴⁹ 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-refoulement⁴⁵³ 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 drought⁴⁸⁷ 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 rights⁴⁷⁹ 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 than 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 1964⁴⁸⁷ 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) 1965⁴⁹⁸ 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 Court⁵¹⁹ 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 similar⁵³² 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 definition⁵³⁴ 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 Africa⁵³⁹

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 life, 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 act 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 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 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

Oyelade⁵⁹² 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.⁶¹⁶⁶¹⁷ 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

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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 Weerasinghe⁶²² 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's way: International protection in the context of nexus dynamics between 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.⁶²⁴⁶²⁵

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

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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.

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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 letter⁶³⁶ 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

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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://refworld.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.

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by refugee law.⁶³⁸ More specifically, the relevant consideration offices⁶³⁹⁶⁴⁰ 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

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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 values⁶⁴⁵ 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 rights⁶⁵¹ 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, Jegede 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.⁶⁶² 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 migration⁶⁶³ 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 chapter⁷¹² 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 occasions 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, Mastorille 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 occurrences.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 Mastorillo 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 democracy, 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 women⁷⁰⁶ 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 temporarily⁷⁰⁸ and irregular⁷⁰⁹ in nature.⁷¹⁰ Migration is temporary in that most migrants apply for temporary residence permits and work visas to fill jobs in SA. Irregular migration⁷¹¹ 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 xenophobic⁷¹² 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 Paper⁷²⁹ 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 1998.⁷³⁰⁷³¹ 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 establishment 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 occurring, temperatures have been rising, and precipitation has been decreasing in certain areas, resulting in drought.⁷⁴⁵ In 2022, extreme flooding in KwaZulu-Natal caused by heavy rainfall resulted in 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 University⁷⁵⁵ 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 legislation⁷⁵⁷ 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 Displacement⁷⁵⁹ 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 3,⁷⁶¹⁷⁶² 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.

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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.
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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 provisions⁷⁷⁵ 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 be 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.

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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.⁷⁸¹⁷⁸² 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.

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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.

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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.⁷⁹⁰⁷⁹¹

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 disregarded 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 themselves⁷⁹⁹ 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 considered⁸⁴⁴ 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 applicant⁸⁰⁹ and provide the applicant with a date to appear for an interview. They also have to 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 provide 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 SA⁸¹⁸ 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 possibility 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 lapse⁸²⁶ 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.⁸²⁸⁸²⁹

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 application⁸³¹ 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, identity⁸³⁵ 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 3⁸⁴⁷ 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 5⁸⁴⁹ stipulates that competent interpreting must be provided where necessary and practicable. In the event that the provision of interpreting 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 10⁸⁵¹ 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-by-case 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 qualification⁸⁷⁴ in the original 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 12⁸⁸⁹ 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 be 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 interpreting 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 activities⁹¹⁷ 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 points⁹¹⁹ 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 Obitar 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 attacks⁹³¹ 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 Masjid 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 Constitution⁹⁵⁰ 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.⁹⁵¹⁹⁵²

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 court⁹⁵⁴ 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 well-established 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.⁹⁶³⁹⁶⁴ 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 principal 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 39⁹⁶⁸ and section 233⁹⁶⁹ 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 expression⁹⁷³ 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 arbitrary".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.⁹⁸⁷⁹⁸⁸ The Minister argued that the main reason for this suggestion is that legislation should cater for the new challenges SA is facing.¹⁰³³ The new act should include the "best international practices in dealing with refugee protection".⁹⁸⁹⁹⁹⁰ 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 principle⁹⁹¹ 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 complications⁹⁹⁴ 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 incorporated 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 SA¹⁰⁰⁵ 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 an 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 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 before¹⁰³² 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 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-change/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 1997¹⁰⁴² 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 2005¹⁰⁴⁴ 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/kyoto_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 CJIEP 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 2008¹⁰⁶¹ 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 year¹⁰⁷² 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://unccllearn.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 19¹⁰⁷⁸ 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 migrants¹⁰⁸² 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 Sciacaluga 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 Sciacaluga International law and protection of "climate refugees" 148.

The Doha Amendment was ratified by two more states during October 2020¹⁰⁸⁶ 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-major-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-and-major-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 Niño¹¹¹⁵ 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 people¹¹²⁵ 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 survive¹¹²⁷ 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-record#>.

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 carbon¹¹³⁶ 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 famine¹¹⁴¹ 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-in-half-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-may-have-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-typhoonhinannor-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 Korea¹¹⁷³ 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-buffed-by-record-winds-as-cyclone-hits-northwest>.

¹¹⁶⁸ News24 2023 https://www.news24.com/fin24/climate_future/news/climate-change-makescyclones-more-intense-desctuctive-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 Guinea¹²⁰³¹²⁰⁴ 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 region¹²⁰⁹ 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 creates¹²¹³ 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 *Gabčíkovo-Nagymaros 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 NZ¹²²⁴ 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 case¹²²⁶ 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 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 11¹²²⁹ 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 Convention¹²³³ 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 time¹²³⁶. 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 48/13¹²³⁸ 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 COP¹²⁴⁴ 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 organisations¹²⁴⁹ 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

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 found¹²⁸⁴¹²⁸⁵ 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

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-refoulement¹²⁹⁵ "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 Resolution¹³⁰¹ 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 change¹³⁰⁷ is a universal modern-day issue that presents a continuous challenge to the international community. This chapter¹³⁰⁸ 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 instruments¹³⁰⁹ 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-of-climate-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 UNFCCC¹³³⁴ 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, Sciacaluga, 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 chapter¹³³⁷ 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 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 Sciacaluga International law and the protection of "climate refugees" 79, 117.

¹³⁴⁵ Sciacaluga 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 NYU ELJ 487-489.

¹³⁵⁴ Perez "Beyond the shortcomings of international law" 218; see also Gonzalez 2020 WLJ 381.

¹³⁵⁵ Cooper 1998 NYU ELJ 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 Kaczmarek 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

Convention¹³⁷⁶ that was adopted in the African region has also been suggested as a guideline to address external environmental displacement¹³⁷⁷ 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-refoulement¹³⁸⁸ 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 Sciacaluga 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 Sciacaluga 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 Sciacaluga International law and the protection of "climate refugees" 108, 126.

¹³⁸⁷ Sciacaluga 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 Poon¹³⁹⁶ 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 Sciacaluga 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 Sciacaluga 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 Sciacaluga 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 UNFCCC¹⁴¹⁴ can be amended or

¹⁴⁰⁷ Sciacaluga *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 Sciacaluga *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 Refugees¹⁴¹⁶ and the GCM were also adopted. In combination Sciacaluga 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 Sciacaluga 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 Initiative¹⁴²³ 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 Sciacaluga 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 CJELP 380-383; see also Sciacaluga 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 Sciacaluga 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 effects¹⁴⁴¹ 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 or 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 NYUJL 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 refugees¹⁴⁵¹ 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 Convention¹⁴⁶⁷ 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 Mayer¹⁵²⁴ 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 WLII 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 complimentary¹⁴⁸¹ 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.

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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 propose¹⁴⁹⁵ 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 than 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-refoulement¹⁵¹³ 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 timely 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 Sciaccaluga¹⁵³⁵ suggests that the existing UNFCCC¹⁵³⁶ 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, Sciacaluga 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, Williams¹⁵⁶³ 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 Protocol¹⁵⁶⁴ 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 be 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 Schloss¹⁵⁶⁹ 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 Sciacaluga 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 UNFCCC (1997).

¹⁵⁶⁵ Article 4(1)(b) of the UNFCCC (1992); see also Article 19(b) of the Kyoto Protocol to the UNFCCC (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 Atapattu "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 Sciacaluga 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 Sciacaluga 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 Sciacaluga 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 Sciacaluga 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 Sciacaluga International law and the protection of "climate refugees" 64.

¹⁶⁰⁸ Sciacaluga International law and the protection of "climate refugees" 64; see also Van Wormer and Besthorn Human behavior and social environment 279.

¹⁶⁰⁹ Sciacaluga 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 state 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 Sciacaluga International law and the protection of "climate refugees" 66-68.

¹⁶¹¹ Sciacaluga 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 Atapattu "A new category of refugees?" 41.

¹⁶¹⁵ Hodgkinson et al 2010 MULR 89.

¹⁶¹⁶ Biermann and Boas 2010 CEP 66; see also Sciacaluga 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 contentious 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 Sciacaluga International law and the protection of "climate refugees" 58.

¹⁶¹⁸ Sciacaluga 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 argues¹⁶³⁴ 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 Sciacaluga 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 migrate¹⁶⁴² 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 change¹⁶⁴³ 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 security¹⁶⁴⁸ as well as the habitability¹⁶⁴⁹ 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 found¹⁶⁵⁸ 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 2¹⁶⁶⁰ 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-founded¹⁶⁶⁵ 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 Persecution¹⁶⁶⁷ 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 rights¹⁶⁶⁸ 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 argue¹⁶⁷⁴ in this regard that those who are affected by climate change are members of a social group¹⁶⁷⁵ and the conditions can make it impossible for them to return¹⁶⁷⁶ 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 Somalia¹⁶⁸⁷ 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 vulnerable¹⁶⁹⁹ 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 indicated¹⁷⁰³ 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, while¹⁷⁷⁴ 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 principle¹⁷¹⁰ 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 Sciacaluga 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. Sciacaluga International law and the protection of "climate refugees" 119-123.

¹⁷¹⁰ See 6.2.3. Poon "Drawing upon international refugee law" 158; see also Sciacaluga International law and the protection of "climate refugees" 137-138, 158, 162.

¹⁷¹¹ See 6.2.4.

the environment¹⁷¹² 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 Displacement¹⁷¹⁷ 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 terms¹⁷¹⁸ 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 Sciacaluga 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 Conventions¹⁷²⁰ 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 refugees¹⁷²² and that it does not provide for their recognition and protection. The international refugee law framework was created for political reasons¹⁷²³ 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 CJIEP 380-383; see also Sciacaluga 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 internationally¹⁷³² 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 amendments¹⁷³⁶ 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 refugees¹⁸¹³ 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 Constitution¹⁷⁴² 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 Convention¹⁷⁵⁶ only applies to internal displacement.¹⁷⁵⁷ Human rights law does not address environmental issues¹⁸³³ 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 liability¹⁷⁵⁹ 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 protocols¹⁷⁶² or the adoption of regional agreements or soft law measures¹⁷⁶³ 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 complimentary¹⁸⁴⁴ 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 refugees¹⁷⁶⁸ 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 displaced¹⁸⁵¹ 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 created¹⁷⁸⁰ 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 created¹⁷⁸¹ 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.

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