

The Right to Seek Asylum of ‘Climate Refugees’

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Although the issue of climate change mitigation and adaptation is fortunately evermore widely discussed, the problems facing ‘climate refugees’ only appears sporadically in the discussions adding to the current confusion. Taking recent and forecasted trends into account, the UN declares that states have serious moral obligations to provide humanitarian protection to all those displaced. The question which the international community and international lawyers face is whether states have more than just a moral obligation to provide protection. In this paper I will assess whether or not there are any roots in the various sources of international law – such as conventional law, customary international law, or the fundamental principles of international law – for the legal definition of ‘climate refugees.’

Keywords: climate refugees, climate displacement, migration, climate change

As the public and political discourse on climate change gains momentum, and slowly but surely creates consensus to act among the members of the international community, the issue of ‘climate refugees’ only appears sporadically, causing more confusion than resolution.

According to UNHCR and the Internal Displacement Monitoring Center (IDMC), only in 2017, altogether 30.6 million people were newly displaced globally. Interestingly, almost half of these people were displaced due to conflict and over half were ‘internally displaced due to natural disasters.’ Overall, between 2008–2018 there were around 265 million people ‘displaced due to natural disasters’² According to the International Federation of the Red Cross and Red Crescent Societies,³ there are 210 million people ‘affected by natural hazards’, and according to the World Bank, considering a global warming of an average 2–3 degrees (Celsius), by 2050, there may be as many as 200 million people ‘forced to migrate due to environmental causes.’ Consequently, the position of the International Organisation for Migration (IOM) is that by 2050,

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2 *Global Report on Internal Displacement*, Internal Displacement Monitoring Center, 2019.

3 *World Disaster Report: Focus on Recovery*, International Federation of Red Cross and Red Crescent Societies, 2001. Available: www.ifrc.org/Global/Publications/disasters/WDR/21400_WDR2001.pdf (05. 05. 2020.)

the number of ‘climate migrants’ may range from 25 million people to as many as 1 billion.

Taking these trends into account, the UN declares that states have serious moral obligations to provide humanitarian protection to all those displaced.⁴ The question facing the international community and international legal experts on migration and displacement, is whether states have more than just a moral obligation to provide protection and whether international law obliges them in any way to provide these people with some kind of protection. In this paper I will assess whether the legal definition or a legal definition of “climate refugees” can be derived from the various sources of international law – such as conventional law, customary international law, or the fundamental principles of international law.

According to the World Bank, the international community lacks the legal institutions and processes to address the needs of the affected populations and ‘to cope with the resulting migration from the affected areas.’⁵ Without an appropriate legal definition, the phenomenon to be defined cannot be implanted into an appropriate branch of law, which can leave states impotent and unable to act legally. Moreover, an inappropriate definition cannot fulfil its purpose and function effectively within a given legal framework, leaving vulnerable people without protection. In order to be able to come up with a relevant and practically applicable definition, we must assess those systems of norms within international law that could potentially accommodate the regularisation of ‘climate change induced migration’ or ‘environmental displacement’.

In this article I aim to present some of the concurrent non-legal definitions for ‘climate refugees’ in order to assess whether this phenomenon could be regularised under international law. When assessing international refugee law, one must start by assessing the historical context within which this branch of international law was born. This is essential in order for us to understand why displaced persons are under – or at least should enjoy – international protection. After this contextual analysis, one must establish those fundamental definitions which construct the current system of norms and identify points of distinction. Finally, it is into this theoretical framework that I will attempt to embed the term “environmentally displaced person” and test their compatibility.

1. Fleeing from climate – the right to seek asylum

The term ‘climate refugees’ was first used in 2011, in a report commissioned by the U.K. government, which defines them as ‘people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-

4 *Global Report on Internal Displacement 2018*, Internal Displacement Monitoring Centre, 2019. Available: www.internal-displacement.org/global-report/grid2018/ (01. 07. 2020.)

5 *Migration and Remittances. Recent Developments and Outlook*, World Bank Group, KNOMAD. Migration and Development Brief, 26 April 2016, iii.

level rise, extreme weather events, and drought and water scarcity.⁶ Although this definition seems fairly comprehensible at first, its practical application would prove difficult. It is unclear what 'having to leave' means, to what extent 'alterations in their natural environment' are acceptable, and how the adverse effects of climate change may be distinguished legally from anthropogenic environmental deterioration.

Within the United Nations and its associated organisations, the term 'climate refugees' as such has never been used or referred to due to the nature of refugee law – as described later. However, in a 1985 United Nations Environment Programme policy paper titled *Environmental Refugees*, the author El-Hinnawi defines 'environmental refugees' as 'those people 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 the quality of their life. By »environmental disruption« in this definition any physical, chemical, and/or biological changes in the ecosystem (or resource base) is meant that render it, temporarily or permanently, unsuitable to support human life.⁷ This very wide definition encompasses both internal and international migration, as well as temporary and permanent migration. The definition, however, focuses on forced displacement, and does not address mobility as such. It addresses all types of environmental changes, and not only those induced by climate change. The definition was vividly criticised because of its large scope: amongst others, Bates notes that this definition makes no distinction between refugees who flee volcanic eruptions and those who gradually leave their homes as soil quality declines.⁸

At this point it must be highlighted that 'climate refugees' are not the same as 'environmental refugees'. Our climate system is just one of the major components of our natural environment,⁹ therefore the adverse effects of climate change are

6 *Migration and Global Environmental Change*, Foresight, Final Project Report. London, The Government Office for Science, 2011, 151.

7 E El-Hinnawi, *Environmental Refugees*, Nairobi, United Nations Environment Programme, 1985. 'Environmental refugees' have alternative definitions as well, making the whole problem of legally defining this phenomenon even more complex. According to Myers: 'Environmental refugees are persons who can no longer gain a secure livelihood in their traditional homelands because of environmental factors of unusual scope, notably drought, desertification, deforestation, soil erosion, water shortages and climate change, also natural disaster such as cyclones, storm surges and floods. In face of these environmental threats, people feel they have no alternative but to seek sustenance elsewhere, whether within their own countries or beyond and whether on a semi-permanent or permanent basis.' Betsy Hartmann, 'Rethinking climate refugees and climate conflict: rhetoric, reality and the politics of policy discourse', *Journal of International Development* 22 (2010), 235.

8 F Gemenne, 'Why the numbers don't add up: A review of estimates and predictions of people displaced by environmental changes', in *Migration and Global Environmental Change – Review of Drivers of Migration*, ed. by R Black, N Arnell and S Dercon. Special issue of *Global Environmental Change* 21, Supplement 1 (2011), 42.

9 See Encyclopedia Britannica: 'Environment: the complex of physical, chemical, and biotic factors that act upon an organism or an ecological community and ultimately determine its form and survival. Some of its major components are the atmosphere, the climate, the soil, the hydrosphere and the oceans.' Available: www.britannica.com/science/environment (29. 06. 2020.)

examples of environmental degradation; however, the latter encompasses a much wider variety of biophysical alterations in our natural environment.¹⁰ Therefore, the distinction between ‘climate refugees’ and ‘environmental refugees’ is intentional, as climate refugees are just a sub-group of displaced persons within the broader group of environmental refugees. Additionally, according to the Climate And Migration Coalition,¹¹ environmental degradation can manifest itself in rapid on-set events such as natural disasters (earthquakes, extreme weather events, and so on) and slow on-set events that involve a gradual deterioration of the environment (such as salinisation, land degradation, and so on). As part of the broader environmental system, the adverse effects of climate change can manifest themselves in rapid on-set events (such as forest fires, cyclones, floods) and slow on-set events (such as sea-level rise, droughts, melting ice). It is essential to make these distinctions, since the occurring event will determine the type of ‘displacement’ it causes. The consequences of rapid on-set events are displacement – internal displacement in particular, since people tend to move towards the nearest safe place –, permanent or temporary migration flows with a bigger probability of return and participation in rebuilding. Slow on-set events result in displacement as well as voluntary migration – as migrants have more time to deliberate on where to move –, international migration is characteristic – since the displaced have more time to plan –, and their move may be permanent, temporary or even circular.

For the purposes of this paper, I will use the term ‘environmental refugees’ in order to assess the legal context, as it is a broader definition, including climate refugees, and it seems to be easier to manoeuvre within the current heated political climate surrounding climate change and migration.

International refugee law derives from a range of – universal and regional – treaties, rules of customary international law, general principles of law, and national laws and standards. Examples are the 1951 (Geneva) Convention relating to the Status of Refugees and its 1967 (New York) Protocol, subsequent regional instruments such as the 1969 OAU Convention on Refugees, the 1984 Cartagena Declaration, the EU Qualification Directive and other relevant instruments of the EU *asylum acquis communautaire* building on universal foundations, as well as the statutes of the UNRWA, the UNHCR and IOM, and the 1966 Bangkok Principles.

The Geneva Convention was drawn up after the horrific events of the Second World War, with an aim to prevent its repetition by prohibiting the events that led to it, namely persecution.¹² As such, a ‘refugee’ is ‘a person who, owing to a well-

10 Environmental degradation can be natural or caused by disproportionate human intervention. Environmental degradation can be slow and rapid on-set, for instance, salinisation of land or the devastation of a natural disaster, such as an earthquake. Within the scope of environmental degradation the adverse effects of climate change may also be rapid or slow on-set, for instance, the huge devastation of a tidal wave or gradual sea-level rise.

11 See Climate and Migration. Available: <http://climatemigration.org.uk/> (07. 05. 2020.)

12 Angela Williams, ‘Turning the tide: Recognizing Climate Change Refugees in International Law’, *Law & Policy* 30, no 4 (2008), 502–529.

founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned before, is unable or, owing to such fear, unwilling to return to it.' Furthermore, analysing the legal text, it must be established that the list of definitive elements of a 'refugee' is exhaustive and as such – as mentioned above – the most difficult prerequisite to fulfil to be qualified as a refugee would be the 'fear of persecution'. Since the term 'persecution' implies an 'element of intent to harm or failure to prevent harm from occurring',¹³ we must accept that the term refugee is unsuitable for describing those displaced by environmental factors – under universal conventional law. Consequently, the authors of the above cited policy papers use the term 'refugees' casually, since the Geneva Convention provides an uncontested definition.

Looking at the regional contexts, while there is no regional convention on refugees in Europe – and even the EU applies the same refugee definition as the Geneva Convention in its *acquis* –, the refugee definition in Africa and America is broader than the universal definition. According to Article 1 and Paragraph 2 of the African Refugee Convention (signed in 1969): 'The term »refugee« shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or 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 or nationality.'¹⁴ Moreover, according to the Cartagena Declaration on Refugees: 'the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.'¹⁵ It can easily be argued that an 'event seriously disturbing public order' may include natural hazards, whether these be rapid or slow on-set, since public order can easily be disrupted by environmental disasters and slow-on set biophysical degradation.¹⁶ Although this reasoning has not yet been put forward as legal argument, and has not yet provided a legal basis for a case, these documents – at least – provide a model for

13 F Renaud et al., 'Environmental Degradation and Migration' (Berlin: Berlin Institut für Bevölkerung und Entwicklung, 2016). 2.

14 OAU Convention, Governing the Specific Aspects of Refugee Problems in Africa. UNHCR.

15 Ibid; R Zetter, *Protecting environmentally displaced people. Developing the capacity of legal and normative frameworks*, Research Report (Refugee Studies Centre, Oxford Department of International Development: University of Oxford, 2011).

16 OAU Convention; Zetter, *Protecting*, 19.

legalising the term ‘environmental refugees’.¹⁷ Meanwhile in Europe, as Zetter pointed it out,¹⁸ EU member states have implemented the practice of restricting the application of the refugee status. Moreover, although the number of irregular migrants entering the EU has plummeted since the 2015 Refugee Crisis, the securitisation of migration continues.¹⁹ This recent trend therefore substantiates that the legal interpretation of the definitions of the Geneva Convention will continue to be restrictive in the region.

Nevertheless, it must also be established that just because the members of the affected population do not qualify as refugees according to the strict application of the definition, and therefore their right to asylum is restricted, this does not mean that these people do not enjoy the right to seek asylum, and could enjoy international protection – based on customary international law, rather than conventional law.

Some experts suggest that ‘environmental refugees’ should be dealt with within the international human rights regime, rather than refugee law, which proves to be more strict and less flexible.²⁰ International law as a whole is based on the so-called Human Rights Based Approach,²¹ enshrined in the UN Charter. This means that the international human rights regime is a legal framework that cannot be superseded. As stated by the UNHCR, for example, this conventional refugee law is complemented by international human rights law, which makes up the international refugee protection regime, collectively.²² More specifically, it is evident that a state must not only protect its constituents, but also non-citizens, that is, migrants or those displaced. First, the UN Charter and the concept of state sovereignty oblige a state to refrain from harming the citizens of another state, even if these people are within their territory. Secondly, the essence of human rights is that they are inalienable from any person, therefore these must be granted and respected by all states regardless of the person’s citizenship, or even the lack thereof. Consequently, the international human rights regime, as a framework, provides the legal foundations for the protection of ‘environmental refugees’ and prescribes an international legal obligation on states – at least in principle.

At this point, it must also be established that the international human rights regime provides for the protection of the human rights of ‘environmental refugees’ but not for

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- 17 It must be noted that only the OAU Refugee Convention is legally binding upon its member states, the Cartagena Declaration is merely a political statement made by the member states of the OAS, without any legal obligations. See Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.
- 18 R Zetter, ‘More labels, fewer refugees: remaking the refugee label in an era of globalization’, *Journal of Refugee Studies* 20, no 2 (2007), 172–192.
- 19 Tamirace Fakhoury, ‘Tangled Connections between Migration and Security in the Wake of the Arab Uprisings: A European Perspective’, IAI Working Papers, 16.06.2016. 6.
- 20 Hartmann, ‘Rethinking climate refugees’, 238.
- 21 TA Aleinikoff, ‘International legal norms on migration: substance without architecture’, in *International Migration Law*, ed. by R Cholewinski, R Perruchoud and E MacDonald (The Hague: TMC Asser Press, 2007), 469.
- 22 The refugee concept under international law (Global Compact for safe, orderly and regular migration), UNHCR Statement, New York, 12–15 March, 2018.

that of their right to seek asylum, in particular. Article 14 of the Universal Declaration on Human Rights specifically declares that 'everyone has the right to seek and to enjoy in other countries asylum from persecution.' Building on this, regional human rights conventions and declarations also apply this specification when defining the right to seek asylum. Article 12 of the African Human Rights Charter states that: 'every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.' Article 22 of the American Charter of Human Rights states that: 'every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.' Article 28 of the Arab Charter of Human Rights proclaims that: 'Everyone shall have the right to seek political asylum in other countries to escape persecution. This right shall not be enjoyed by persons facing prosecution for an offense under ordinary criminal law. Political refugees shall not be extraditable.' Article 16 of the ASEAN Human Rights Declaration states that: 'Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.' Interestingly, neither the European Convention on Human Rights, nor the EU Fundamental Rights Charter include particular provisions on the right to seek asylum. This clearly demonstrates that when the Geneva Convention was drawn up, it was tailored to the specifics of the European context at the time so that there was no further need to elaborate on the right to seek asylum in the subsequent regional conventions.

It may thus be concluded that under current international conventions or under customary international law, it is impossible to qualify 'environmental refugees' as 'refugees.' However, as demonstrated above, this does not mean that the vulnerable are left without (international) protection.

Besides the international human rights regime, some experts suggest that the UNFCCC²³ could accommodate this novel need for a completely new legal instrument that addresses climate change induced migration. Such protection of the rights of vulnerable people could thus be granted even to certain groups of people – such as the populations inhabiting the affected areas –, rather than to individual persons as per the Geneva Convention.²⁴ Dealing with the issues of 'climate refugees' and viewing it as a single complex phenomenon, as suggested by migration theories such as the migrant trajectory or migrant life-cycle approach,²⁵ may render long-term solutions. Assessing human mobility as a process enables regulations that address

23 The Cancun Adaptation Framework (adopted at the 2010 UNFCCC Conference in Cancun) 'calls upon states to enhance their action on adaptation by pursuing a range of measures, including to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.'

24 *Migration and Global Environmental Change*, 151.

25 Anne-Grethe Nielsen, 'Cooperation Mechanisms', in *International Migration Law*, ed. by R Cholewinski, R Perruchoud and E MacDonald (The Hague: TMC Asser Press, 2007), 407.

the double needs of the stakeholders; namely the process of moving away from a place and arriving – and integrating – in a new place.²⁶

2. Displacement – the point of intersection of international migration law and environmental law

Although at this point in time, it would be an overstatement to call the loose bundle of international legal norms related to the status of refugees, migrants workers, and displaced persons a regime of international migration law, according to Aleinikoff,²⁷ undoubtedly there is a budding new field of international law in the form of international conventions on certain forms of migration (such as the Geneva Convention relating to the Status of Refugees, the Palermo protocol on trafficking, the international Convention on the Protection of the Rights of All Migrant Workers and their Families), other relevant conventions (such as the Vienna Convention on Consular Relations), regional conventions (such as the right to free movement in certain economic areas superseding state borders, as well as regional refugee conventions), customary international law (such as the right to leave and return to the country of origin in the non-binding Universal Declaration of Human Rights), and fundamental and other principles of international law (such as the Guiding Principles on Internal Displacement and the ILO multilateral framework on labour migration).²⁸ Additionally, the international community is on the road to a global governance of migration via a wide range of cooperative multi-state processes, which I will present in more detail and with a focus on the topic of ‘environmental refugees’.

International cooperation in the field of migration law thus far took various forms ranging from dialogue and sharing information, experiences and practices, to cooperation in policy development and operational implementation, since the management of human mobility is a sovereign right and responsibility of states, and consequently, migration policies have traditionally been developed at the national level,²⁹ with a focus on national (state) security, rather than operating within the human security paradigm. At this stage of development of international migration law, the relevance to ‘environmental refugees’ within these mechanisms is not emphasised much – neither in politics, nor in research –, although Fischer describes a definitely noticeable spill-over effect, whereby humanitarian activism spilled over to other issues such as environmental deterioration³⁰ ever since the international community realised that environmental pollution is borderless. Coupled by now with the slow acknowledgement of the adverse effects of anthropogenic climate

26 Zoltán Hautzinger, ‘A magyar idegenjog rendszere és az idegenjogi (szak)igazgatás’, *Pro publico bono – Magyar Közigazgatás* no 2 (2014), 69.

27 Aleinikoff, ‘International legal norms’, 474.

28 *Ibid.* 472–473.

29 Nielsen, ‘Cooperation Mechanisms’, 405.

30 PB Fisher, ‘Climate change and human security in Tuvalu’, *Global Change, Peace & Security* 23, no 3 (2011), 295.

change, this culminated in the current, mainstream global environmental and climate movements. Moreover, with the introduction of the Sustainable Development agenda, first proclaimed by the Limits of Growth report commissioned by the Club of Rome in 1972, the international community started to pay more attention to the social, economic, political and interstate implications environmental deterioration may have, which require international cooperation for a resolution.

As mentioned above, although the principal subjects are still sovereign states, there has been a noticeable shift in the focus of international legal instruments to the human security paradigm away from the traditional state (or national) security approach.³¹ The United Nations Development Program acknowledged, for the first time in 1994, that environmental deterioration causes human insecurity which may lead to 'migration'.³² Contesting – to some extent – the reigning security paradigm, the UNDP identified seven categories of threats to human security and proclaimed that disruptions in the economic lives of individuals and their families, food insecurity, dislocation due to environmental disasters, political conflict – related to climate change and changes in the natural environment – all contribute to human insecurity that drive 'migration on a mass scale'.³³ Moreover, the World Bank has stated multiple times that apart from persecution, armed conflict, generalised violence or human rights violations, 'forced migrants' are displaced also by natural or environmental disasters, human-made chemical or nuclear disasters, and famine. And while forced displacement is typically viewed as a humanitarian issue, it also has – among other economic, social, political implications – important environmental impacts on the places of origin and destination.³⁴ Finally, the IPCC then went on as far as to report that 'migration and resettlement may be the most threatening short-term effects of climate change on human settlements'.³⁵ To sum up, it is the effects of natural hazards, including the adverse impacts of climate change, that may overwhelm the resilience or adaptive capacity of an affected community or society, thus leading to a disaster that potentially results in 'displacement'.³⁶

In 2001, the Swiss government initiated an intergovernmental cooperation for managing international migration on a national, regional and global level. The Berne Initiative not only started building regional capacity but also allowed for

31 Aramide Oduyayo, 'Human security and the international refugee crisis', *Journal of Global Ethics* 12 no 3 (2016), 375.

32 *Human Development Report 1994*, UNDP.

33 With that said, Hammerstad states that although (forced) migration can have serious implications on state security, migration has become so 'over-securitised' that it procreates novel security threats that have not existed before, and undermines the fundamentals of our international regimes on migration, such as refugee protection. Oduyayo, 'Human security', 366.

34 *Migration and Remittances*, 15.

35 *Report prepared for Intergovernmental Panel on Climate Change by Working Group II*, ed. by WJMcG Tegart, GW Sheldon and DC Griffiths (Canberra, Australia: Australian Government Publishing Service, 1991), 294.

36 *Agenda for the protection of cross-border displaced persons in the context of disasters and climate change*, Vol. 1, The Nansen Initiative, 2015, 16.

the assessment of the regional migration situation. In the initiative's final document titled International Agenda for Migration Management (IAMM), natural hazards, man-made disasters and ecological degradation are identified as causes for 'population displacement'.³⁷ Without any legal obligations, the participating states agreed on the following: Consider 'the link between natural and man-made disasters, man-made catastrophes and ecological degradation on one side and population displacement on the other in national migration policies'; promote 'the need to reduce the causes and consequences of natural disasters and environmental degradation'; intensify 'international cooperation and efforts among States, international organizations and other interested stakeholders to protect and improve the environment'; implement 'measures to reduce the incidence and scope of natural disasters and the displacements associated with them'; promote 'activities to avoid serious environmental impacts of population displacement, in particular the impacts of prolonged stay'; sensitise 'migrants to the importance of environmental preservation'. The IAMM also stated that: 'Irregular migration results from the voluntary choices of individuals seeking better opportunities for themselves and their families as well as compulsion resulting from armed conflicts, human rights violations, environmental degradation, or severe lack of economic opportunity'.³⁸

The acquis of the IAMM has also been incorporated into the International Dialogue on Migration launched by the IOM. The Dialogue has run for about 20 years now as an informal, legally non-binding consultational mechanism with a pre-set topic. The IDM has put 'environmental migration' on its agenda in 2007, and 'climate change induced migration' in particular in 2011.

Meanwhile in 2013, as the result of High-Level Dialogue on International Migration and Development, the UN General Assembly issued a declaration³⁹ which stated that states should: 'recognize that international migration is a multidimensional reality of major relevance for the development of origin, transit and destination countries, and in this regard recognize that international migration is a crosscutting phenomenon

37 At the same time, the document also establishes that migratory processes also have an impact on our natural environment, especially in urban areas.

38 In 2003, Kofi Annan, Secretary General of the UN at the time, initiated a core group – with Brazil, Morocco, The Philippines, Sweden and Switzerland – and established the Global Commission on International Migration. The mandate of the global commission of 19 independent migration experts was to provide recommendations for a comprehensive and coherent, global response to international migration. After 18 months of research and reporting building on regionalism and multistakeholder approach, the Global Commission submitted its final report to the UN General Assembly. Interestingly enough the only mention of the topic discussed in the present article was the following. As the report states: 'The states of the former Soviet Union have experienced a particularly complex pattern of human mobility', where, among other types of migration patterns, 'ecological migrants' are defined as 'people who have been forced to move by environmental disaster'. The report also mentions that 'a growing number of small farmers [in developing countries] must also cope with the problem of environmental degradation, as well as the appropriation of agricultural land by the state and private enterprise'. GCIM Report 2005.

39 *Migration, human rights and governance*, Handbook for Parliamentarians No. 24. Inter-Parliamentary Union, 2015, 189, 191.

that should be addressed in a coherent, comprehensive and balanced manner, integrating development with due regard for social, economic and environmental dimensions and respecting human rights'; and 'recognize the need to consider the role that environmental factors may play in migration'. Following this in 2016, 193 states declared at the UN General Assembly that it is absolutely necessary for the international community to regulate human mobility globally and comprehensively, and so in Annex 2 of the New York Declaration on Migrants and Refugees a new intergovernmental consultation process was recommended. The process ended on December 10, 2018, and the UN General Assembly approved the Global Compact for Safe, Orderly and Regular Migration on December 19. The Global Compact identified 23 objectives, two of which specifically deals with the topic of the present paper. These are Objective 2:⁴⁰ minimise the adverse drivers and structural factors that compel people to leave their country of origin: Natural disasters, the adverse effects of climate change, and environmental degradation; and Objective 5:⁴¹ enhance availability and flexibility of pathways for regular migration.

In the process described above, climate change, environmental degradation, natural disasters are all mentioned to some extent, and usually this is why a specific document raises one specific issue but not the other. Nevertheless, there are processes

40 'Strengthen joint analysis and sharing of information to better map, understand, predict and address migration movements, such as those that may result from sudden-onset and slow-onset natural disasters, the adverse effects of climate change, environmental degradation, as well as other precarious situations, while ensuring effective respect for and protection and fulfilment of the human rights of all migrants; Develop adaptation and resilience strategies to sudden-onset and slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise, taking into account the potential implications for migration, while recognizing that adaptation in the country of origin is a priority; Integrate displacement considerations into disaster preparedness strategies and promote cooperation with neighbouring and other relevant countries to prepare for early warning, contingency planning, stockpiling, coordination mechanisms, evacuation planning, reception and assistance arrangements, and public information; Harmonize and develop approaches and mechanisms at the subregional and regional levels to address the vulnerabilities of persons affected by sudden-onset and slow-onset natural disasters, by ensuring that they have access to humanitarian assistance that meets their essential needs with full respect for their rights wherever they are, and by promoting sustainable outcomes that increase resilience and self-reliance, taking into account the capacities of all countries involved; Develop coherent approaches to address the challenges of migration movements in the context of sudden-onset and slow-onset natural disasters, including by taking into consideration relevant recommendations from consultative processes, such as the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, and the Platform on Disaster Displacement.' Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, Marrakech, Morocco, 10 and 11 December 2018 – Draft outcome document of the Conference. Global Compact for Migration. 8. Available: <https://undocs.org/A/CONF.231/3> (30. 07. 2020.)

41 'Cooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin owing to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise, including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible.' Global Compact for Migration, 11.

which focus on the climate change – migration nexus specifically. By now, both the UN and the World Bank recognise ‘migration’ as a means of adaptation to climate change.⁴² According to the IPCC, ‘people may decide to migrate in any of the following cases:

- loss of housing (because of river or sea flooding or mudslides);
- loss of living resources (like water, energy and food supply or employment affected by climate change);
- loss of social and cultural resources (loss of cultural properties, neighbourhood or community networks, particularly in the case of a devastating flood).⁴³

Climate change could translate into migration of impoverished people from rural to urban areas (developing countries), from coastal lowlands (particularly densely inhabited delta areas) to inland areas, and possibly across national boundaries. The most vulnerable populations are those exposed to natural hazards.⁴⁴ The Cancun Climate Change Adaptation Framework (within the UNFCCC) identified three forms of movement: a) displacement, understood as primarily forced movement of persons; b) migration, understood as the primarily voluntary movement of persons; and c) planned relocation, understood as planned process of settling persons or groups of persons to a new location.⁴⁵ Such displacement can occur a) within a country (internal displacement), or b) across international borders (cross-border displacement).⁴⁶

Building on the Cancun Framework, the Nansen Initiative was launched as a state-led, bottom-up consultative process intended to identify effective practices and build consensus on fundamental principles to address the protection and assistance needs of persons displaced across borders in the context of disasters, including climate change. The Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (the Protection Agenda) consolidated the outcomes of a series of regional intergovernmental consultations and civil society meetings.⁴⁷ The Protection Agenda introduced a new definition. The term ‘disaster displacement’ refers to situations where people are forced or obliged to leave their homes or places of habitual residence as a result of a disaster or in order to avoid the impact of an immediate and foreseeable natural hazard. Disaster displacement is a multi-causal phenomenon, where population growth, underdevelopment, weak governance, armed conflict, violence, poor urban planning in rapidly expanding cities as well as climate change, natural hazards and environmental degradation, all come into play. Such displacement results from the fact that affected persons are exposed to natural hazards in a situation where they are too vulnerable and lack the resilience to

42 Kayly Ober, ‘Migration as adaptation – exploring mobility as a coping strategy for climate change’, The UK Climate Change and Migration Coalition, 2014, 4.

43 *Report prepared for IPCC*, 5–9.

44 *Report prepared for IPCC*, 5–11.

45 Protection Agenda, 17.

46 Ibid.

47 Ibid. 15.

withstand the impacts of that hazard.⁴⁸ Most of the disaster displacement takes place within the borders of a country, however, some displaced persons do cross borders to seek safety, protection and assistance (hence refuge). The Nansen Initiative identified around 50 countries which have received or refrained from returning people in the aftermath of disasters, in particular those caused by natural hazards.⁴⁹

According to the Protection Agenda, persons who have moved across international borders in disaster contexts are protected by human rights law, and where applicable, refugee law. However, the Protection Agenda reaffirms that international law does not address admission, access to basic services during temporary or permanent stay, and conditions for return. Only a few states have national, bilateral or (sub-) regional agreements that address these issues, the vast majority of countries lack any such normative framework⁵⁰ and states not only act individually – without any international coordination in practice – but relevant institutions and operational responses revealed a general lack of preparedness leading to ad hoc responses in most cases.⁵¹ As cited above, the World Bank has stated before that the international community still lacks the legal institutions and processes to address the needs of the affected populations. Nonetheless, disaster displacement law conceptualises a comprehensive approach to cross-border disaster displacement, which covers (a) the protection of cross-border disaster-displaced persons, as well as internally displaced persons, (b) measures to manage disaster displacement risks in the country of origin, such as preventing displacement, and (c) helping people to stay, or when movement is unavoidable, to allow people to move away from the danger from areas facing high levels of disaster risk.⁵²

In an attempt to summarise the outcomes and the legal acquis of these processes, the IOM distilled two working definitions and referred to these people as “environmentally displaced persons” and “environmental migrants”. Building on the definition of “internally displaced person” formulated in the Guiding Principles on Internal Displacement by the UNHCR and the IDMC, an environmentally displaced person is a person who is 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.⁵³ This term must be distinguished from the European Migration Network’s definition of ‘environmentally displaced person’, which simply refers to ‘a person subject to forced migration as a result of sudden, drastic environmental changes.’⁵⁴ The other term defined by IOM is ‘environmental migrant’ referring to ‘persons or groups of persons who, predominantly for reasons

48 Ibid. 16.

49 Ibid. 16.

50 Ibid. 18.

51 Ibid.

52 Ibid. 19.

53 MECLEP Glossary, International Organisation for Migration, 2014, 13.

54 Asylum and Migration Glossary 6.0. European Migration Network (EMN), 2018.

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 within their country or abroad.' According to IOM this term is used as a less controversial alternative to 'environmental refugee' or 'climate refugee' that have no legal basis in international law, to refer to a category of environmental migrants whose movement is of a clearly forced nature.⁵⁵

It can be established from all of the processes introduced above, that there is no single definition or description even for the phenomenon that is currently referred to as the issue of climate or environmental refugees. The definitions put forward by the UNHCR, IDMC and IOM are just as broad as El-Hinnawi's definition submitted to UNEP back in the 1970s, which may prove to be difficult to apply for states within their national immigration policy, but which at least gave the mandate for UNHCR and other relevant international organisations to provide protection to people in unregularised, vulnerable situations. Moreover, international cooperation will most certainly contribute to more effective national policy development, avoiding overlap and duplication and facilitating a more efficient use of resources at national, regional and international levels.⁵⁶

3. State practice(s)

International legal developments are necessary but insufficient on their own to serve as sources of international law. Cooperation mechanisms, guidelines and directives must be backed up by state practice. As mentioned above, state practice is ad hoc, inconsistent and totally autonomous. As it was also pointed out above, precisely defined legal definitions are necessary for national immigration and asylum authorities to fulfil their (international) legal obligations and provide the protection needed.

According to the Protection Agenda, providing protection abroad to cross-border disaster-displaced person can take two forms: a) states can either admit such persons to their territory and allow them to stay at least temporarily, or b) states can refrain from returning these foreigners to a disaster affected country who were already present in the receiving state when the disaster occurred. Either way, such humanitarian protection measures are usually provided temporarily, giving rise to the need to find lasting solutions for them.⁵⁷ In the event of a devastating disaster that induces the cross-border movement of the affected people, the receiving states use ad hoc measures, such as humanitarian visas issued to individuals, or temporary protection measures applied to a group of people in case of mass migratory flows. Recently though, acknowledging that adapting to the adverse of climate change and

⁵⁵ MECLEP Glossary, 13.

⁵⁶ Nielsen, 'Cooperation Mechanisms', 405.

⁵⁷ Protection Agenda, 7.

their social consequences is inevitable, and needs a more institutionalised form of management, New Zealand introduced the so-called Pacific Access Category Resident visa in 2018, which is issued to citizens of Tuvalu (75 visas per year), Kiribati (75 visas per year), Tonga (250 visas per year), and Fiji (250 visas per year). In this way, New Zealand identified highly vulnerable geographical areas within its vicinity, where people will be affected the most and which may serve as countries of origin vis-a-vis the state of New Zealand, a country of destination. Not going into any further detail on their personal contexts though, perhaps ignoring the emergency of the situation for now, the government decided to issue these visas in a lottery system.⁵⁸ This new visa regime is based on the sovereign decision of New Zealand to act and provide (national) protection to vulnerable people arriving to their country, regardless of their international legal obligations to provide protection.

A more practical point of view on whether or not 'environmental refugees', 'climate refugees', 'environmentally displaced persons' or 'environmental migrants' must be provided international protection (complementary protection), is the simple fact that these people cannot return home. Complementary protection is a form of legal protection accorded to a person who is not entitled to protection under the Geneva Convention, but cannot be returned to their country of origin based on expanded non-refoulement obligations under international human rights law. As has been suggested before by both Zetter and Nagy,⁵⁹ among others, the principle of non-refoulement may also apply to these novel categories of displaced persons. Most recently this theory has been confirmed by the decision of the UN Human Rights Committee (HRC) pursuant to the *Teitiota v. New Zealand* case offers, which recognises that climate change impacts affecting migrants in their State of origin can trigger obligations of non-refoulement binding on the States they enter,⁶⁰ not leaving anyone in vulnerable position without protection. Considering the trends in international law, this case offers a possible solution on how the international community with its international legal system is going to address climate change displacement.

Conclusions

The Geneva Convention in its current form is unsuitable to provide international protection to 'climate refugees' however, there is nothing prohibiting the international community from amending the Convention in order to accommodate new historic needs, and as I have presented it above, there are model regional initiatives in force already which could serve as examples for the international community. In the past two decades international environmental law has gained momentum, and especially

58 See www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/pacific-access-category-resident-visa (31. 07. 2018.)

59 Zetter, *Protecting*, 20; Boldizsár Nagy, *A magyar menekültjog és menekültügy a rendszerváltozástól az Európai Unióba lépésig* (Budapest: Gondolat, 2012), 59.

60 UN Human Rights Committee, Views Adopted on *Teitiota* Communication, 2015.

in the past decade the call for global governance on international migration has also strengthened launching numerous international, regional, bilateral intergovernmental cooperation mechanisms complemented by consultations with international and other relevant civil society organisations. Although for the time being the definitions of ‘climate refugees’, ‘environmental refugees’, ‘environmental displacement’, ‘environmental migration’, as well as ‘disaster displacement’ are broad or too vague, are applied interchangeably, inconsistently or in consistence with the political agendas of the negotiation platforms, there is definite consensus regarding the environmental deterioration (and climate change in particular) – migration nexus. And although at first international lawyers may urge for a single, uniform definition, since that would be the most legally sound response, there are some institutional and international legal means of providing protection to vulnerable people, without having to engage in uncomfortable political debates.

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