

Closing the Gap: Towards Rights-Based Protection for Climate-Induced Displacement in Low-Lying Small Island States

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It is predicted that in the next few decades millions of people around the world could face displacement due to climate change. Even with increasing recognition of the links between climate change and migration, the recognition of “environmental refugees” has remained problematic, with conflicting views on how those facing environmental displacement can be given legal protection. People in low-lying small island developing states are at the front line of climate change displacement, facing unique challenges environmentally and legally. This article examines the current international legal framework as it relates to people facing climate-induced displacement in these states and particularly in relation to human rights. The article then argues that the best first step for closing the current legal protection gap is through establishing a human rights-based “soft law” framework of guiding principles for cross-border displacement, in anticipation of increased displacement. This framework would reflect and consolidate current international law on cross-border displacement due to climate change. It is argued that this approach will allow for international, regional and national norms and policies to develop to address the protection needs of these displaced or relocated populations.

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1. INTRODUCTION

Climate change is already occurring and will be a substantial threat to the world in the coming decades.¹ A scientific consensus is developing that the earth's climate system is unequivocally warming and that it is extremely likely anthropogenic influences are the dominant cause.² Unless the world makes concerted efforts to mitigate the effects of climate change, there will likely be significant issues for human health, economic and social impacts, and challenging new security concerns.³ The focus on mitigating anthropogenic climate change has commonly been on managing its physical effects, such as ecological damage and biodiversity loss.⁴ Internationally it is also recognised that preventing climate change is necessary for natural ecosystem adaption, food security and sustainable economic development.⁵

Climate change, however, will not only influence the physical environment. It will also have human rights implications.⁶ Indeed, human rights law ought to be relevant whenever rights violations occur, including in a climate change context.⁷ Yet the interconnectedness of human rights and climate change has only recently gained prominence in academic discourse,⁸ and in policy considerations at domestic and at international levels.⁹

Within these issues, displacement from climate change effects is particularly concerning. Early reports by the Intergovernmental Panel on Climate Change (IPCC) warned of the grave effects climate change may have on human

1 B Burson (ed) *Climate Change and Migration: South Pacific Perspectives* (Institute of Policy Studies, Wellington, 2010) at 9.

2 Intergovernmental Panel on Climate Change "Summary for Policymakers" in *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge and New York, 2013) at 17.

3 American Physical Society "Climate Change Policy Statement" (18 November 2007) <www.aps.org> at 7.1; United States Department of Defense *2014 Climate Change Adaptation Roadmap* (13 October 2014) at 1.

4 For example, the Designation by United Nations of 2011–2020 as Decade of Biodiversity: *Convention on Biological Diversity* GA Res 65/161, A/RES/65/161 (2011).

5 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994), art 2.

6 United Nations Environment Programme "Climate Change And Environmentally Induced Migration" <www.unep.org>.

7 United Nations High Commissioner for Human Rights *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights* (A/HRC/10/61, 2009) at 7 [OHCHR 2009 Report].

8 S Humphreys (ed) *Climate Change and Human Rights: A Rough Guide* (Rough Guides, London, 2008) at 3.

9 Burson, above note 1, at 7.

migration.¹⁰ Additionally, they noted that many low-lying small island developing states (SIDS) could find out-migration to be their only option.¹¹ More recent reports by the IPCC have also warned that climate-induced migration is likely to be one of the most devastating human consequences of climate change.¹²

Common predictions suggest that by 2050 climate change could lead to the worldwide displacement of as many as 200 million people.¹³ In the Pacific, it could be as many as 665,000 to 1.7 million people.¹⁴ Quantitative assessments are, however, problematic, due to methodological problems and issues with the attribution of environmental causes to displacement.¹⁵ Yet while the tone of IPCC reports has softened in recent years, possibly due to increased political scrutiny, recent assessments have found, with medium evidence and high agreement, that displacement due to climate change is still projected to increase.¹⁶ While these complexities make quantitative assessments difficult, it remains clear that there could be severe impacts from climate change on human migration. Additionally, while quantitative assessments may be useful for policy-makers or from a political and ethical standpoint, the protection deficit itself remains a pressing legal problem necessitating a response.¹⁷ There is also a lack of universal agreement on terminology resulting in inconsistent definitions for people displaced by climate change factors.¹⁸

10 Intergovernmental Panel on Climate Change *Climate Change: The IPCC Impacts Assessment — Report prepared for IPCC by Working Group II* (Australian Government Publishing Service, Canberra, 1990) at 3.

11 At 2–22.

12 A Kraler, T Cernei and M Noack “*Climate refugees*” — *Legal and policy responses to environmentally induced migration* (European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Brussels, 2011) at 9; R McLeman “Climate change, migration and critical international security considerations” (International Organization for Migration Research Series, No 42, 2011) at 9.

13 McLeman, above note 12, at 13.

14 J Campbell “Climate Change and Population — Movement in Pacific Island Countries” in B Burson (ed) *Climate Change and Migration: South Pacific Perspectives* (Institute of Policy Studies, Wellington, 2010) 29 at 38.

15 F Biermann and I Boas “Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees” (2010) 10 *Global Environ Polit* 60 at 67–72.

16 Intergovernmental Panel on Climate Change “Summary for Policymakers” in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge and New York, 2014) at 20 [IPCC 5th Report Part A Summary].

17 J McAdam “Environmental Migration Governance” (University of New South Wales Faculty of Law Research Series, No 1, 2009) at 3.

18 Kraler and others, above note 12, at 28.

The protection deficit is particularly relevant for people living in the SIDS group, who face specific problems, requiring more urgent measures for their protection. This group of people will be uniquely affected,¹⁹ with few alternatives to out-migration,²⁰ due to their physical vulnerabilities and other exacerbating economic factors.²¹ Despite increasing recognition of the growing climate displacement problems, there is a current absence of a comprehensive legal framework or normative protection for people from SIDS facing displacement,²² as well as deficits regarding the interpretation and application of current international human rights law.²³

This article does not conduct a detailed analysis into specific human rights applicable to climate-induced displacement, nor does it assess the general efficacy of human rights-based approaches for environmental protection. Rather, it seeks to establish where there may be gaps in legal protection and how these could be addressed. By adopting a human rights-based approach to the problems of climate change the issues affecting the individual can be kept at the centre of inquiry. It could also assist in the building of effective policy mechanisms to best protect those at risk.²⁴

Therefore, the purpose of this article is to examine the current protection framework to establish what gaps exist for climate-induced migrants from SIDS. It argues that the best way to address the deficit is through international cooperation and by using a human rights-based approach to create a more consistent framework for protecting individuals, based on existing obligations. To achieve this, the article argues for the development of a “soft law” set of “Cross-Border Guiding Principles on Climate Change-Related Movement”, based on the Guiding Principles on Internal Displacement (Internal Principles).²⁵ This approach could allow for the development of new norms and act as a guide for future changes to the international legal system or for other new instruments.

The article will begin by highlighting terminology and conceptual issues for use in this article. It will then establish the nexus between climate change and human rights law, and climate-induced displacement. The article will then

19 Biermann and Boas, above note 15, at 8.

20 Kraler and others, above note 12, at 27.

21 Humphreys, above note 8, at 96.

22 R Zetter “Protecting Environmentally Displaced People: Developing the Capacity of Legal and Normative Frameworks” (Refugee Studies Centre, Oxford, 2011) at 44.

23 M Naser “Protection of Climate-Induced Displacement: Towards a Rights-Based Normative Framework” (2013) 8(4) HRR at 1.

24 Burson, above note 1, at 19.

25 F Deng, United Nations Representative of the Secretary-General *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement* (United Nations Commission on Human Rights, E/CN.4/1998/53/Add.2, 11 February 1998) [Internal Principles].

go on to clarify the lack of protection as a “refugee” arising from displacement due to environmental change, before examining the current legal framework under international human rights law and applying this rights basis to issues of non-refoulement, before briefly addressing the issue of statelessness. The article will then argue for the human rights-based approach outlined above, as the most realistic and immediate way of addressing the structural protection deficits. It will also argue that this approach can strengthen the normative framework by giving a structure for potentially kick-starting regional agreements. The weaknesses of this approach will also be examined before the conclusions.

2. TERMINOLOGY AND CONCEPTUAL ISSUES

There is currently no universal agreement on what terminology should apply to people displaced by climate change factors.²⁶ This article adopts the terms “climate-induced displacement” or “climate-induced displaced person” and “climate-induced migrant” as proposed by the European Union Policy Department for Citizens’ Rights and Constitutional Affairs.²⁷ These definitions have also been adopted in other European Union documents due to their broad application and to purposefully be less restrictive in order to facilitate further analysis.²⁸

In a European Union paper on legal and policy responses to climate-induced migration, “environmentally induced displacement” was defined as the circumstance where people leave their place of residence “to save their lives” and characterised by having no alternative, encompassing both slow-onset and rapid-onset events, including sea-level rises.²⁹ The paper defined “environmentally induced migration” as “voluntary” migration where “at least some alternative quality options are available”.³⁰ It was stressed that this definition is only available where the environmental change is the “root cause”, identifiable as “significantly separated” from social, economic or other factors.

This article will not readily distinguish between those displaced and those migrating in a voluntary or involuntary sense, as it is accepted that distinguishing between the two would present unique challenges beyond the scope of this article. These definitions will therefore represent the circumstance for where climate change factors can be sufficiently separated from other types of migration. The analysis will focus on the needs and rights of individuals, as

26 Kraler and others, above note 12, at 28.

27 At 28–34.

28 European Commission *Climate change, environmental degradation, and migration* (16 April 2013) at 15.

29 Kraler and others, above note 12, at 32.

30 At 33–34.

well as highlighting the issues of using a cause-based focus for protection from climate change factors.

The difficulties in establishing universal terms reflect the complex and multi-causal nature of climate change effects and their typically context-specific nature.³¹ These categories are adopted for their ability to be examined against current human rights-based approaches and for identifying future rights-based legal and policy responses. It is accepted that current categorisations, including those adopted, only reflect the aims of the particular assessment.³² These terms are therefore considered appropriate for this assessment, however, as they allow for the assessing of rights-based approaches and how they can be applied to those displaced due to climate change in SIDS.

3. CLIMATE-INDUCED DISPLACEMENT AFFECTING PEOPLE IN LOW-LYING SMALL ISLAND DEVELOPING STATES AND THE CONNECTION WITH HUMAN RIGHTS

People from particular regions, such as the polar regions and low-lying small island states, face unique challenges due to climate change.³³ People from these islands in particular could face a range of impacts including rapid-onset events from storm surges, slow-onset events from gradual environmental degradation, and issues arising from people having to leave high-risk zones, violence and upheaval.³⁴ While people in these islands will have to deal with a multitude of challenging effects, the slow-onset disasters are the most likely cause of damage,³⁵ and the risks they pose are also uniquely challenging from an environmental and legal standpoint.³⁶ Their circumstances are such that their entire nations are at risk of disappearing either partially or totally, or becoming otherwise uninhabitable, within the coming decades.³⁷ Indeed, their problems are distinct enough that it has led to calls for long-term group-specific protection responses.³⁸

31 European Commission, above note 28, at 14.

32 Kraler and others, above note 12, at 34.

33 M Doelle "Climate Change and Human Rights: The Role of the International Human Rights in Motivating States to take Climate Change Seriously" (2004) 1(2) *MqJLICEnvLaw* 179 at 182.

34 *Summary of Deliberations on Climate Change and Displacement* (United Nations High Commissioner for Refugees, April 2011) at 7 [UNHCR Summary of Deliberations].

35 OHCHR 2009 Report, above note 7, at 6.

36 At 17.

37 F Biermann and I Boas "Protecting Climate Refugees: The Case for a Global Protocol" (November–December 2008) <www.environmentmagazine.org>.

38 For example: M Burkett "The Nation Ex-Situ: On climate change, deterritorialized nationhood and the post-climate era" (2011) 2(3) *Clim Law* 345 at 374; B Mayer and

3.1 Small Island Developing States

At a climate conference in Indonesia, United Nations Secretary-General Ban Ki-moon told delegates, “Climate change affects us all, but does not affect us all equally.”³⁹ The unequal effects are due to: the unique physical vulnerabilities of some areas, such as Arctic sea-ice and the coral-reef systems addressed above,⁴⁰ which are exacerbated by economic vulnerabilities, such as poorer countries having less resilience than richer ones to deal with the aggravating effects of climate change.⁴¹ This means the Arctic regions and SIDS are at a disproportionately higher risk.⁴² The unique risks of SIDS including the particular impacts climate change will have,⁴³ limited adaption prospects⁴⁴ and specific human rights issues⁴⁵ make their migration issues immediate and real. The physical characteristics of these areas also make them especially vulnerable to the warming oceans and rising sea levels due to their low elevations and small size.

It is virtually certain that atolls and low-lying coastal areas will be threatened by sea-level rises.⁴⁶ Most SIDS are in tropical or subtropical regions,⁴⁷ making them higher-risk areas due to a disproportionate warming in these areas in comparison to other regions.⁴⁸ SIDS typically also have substantial low-lying areas, such as the Maldives with the highest elevation only

C Counil “Climate Change, Migration and Human Rights: Towards Group-Specific Protection?” in O Quirico and M Boumghar (eds) *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, Abingdon, Oxfordshire, 2015).

39 Ban Ki-moon, Secretary-General of the United Nations “Address to the High-Level Segment of the UN Climate Change Conference” (Speech to the United Nations Climate Change Conference, Bali, 12 December 2007).

40 SJ Hassol *Impacts of a Warming Arctic: Arctic Climate Impact Assessment* (Cambridge University Press, Cambridge and New York, 2004).

41 IPCC 5th Report Part A Summary, above note 16, at 6–7.

42 At 12.

43 At 32; T Neroni “A warning from the frontline of climate change” (7 September 2015) The Elders <www.theelders.org>.

44 IPCC 5th Report Part A Summary, above note 16, at 24; J Barnett and J Campbell *Climate Change and Small Island States: Power, Knowledge and the South Pacific* (Routledge, Abingdon, Oxfordshire, 2015) at 109.

45 OHCHR 2009 Report, above note 7, at 13.

46 Intergovernmental Panel on Climate Change *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Chapter 29: Small Islands. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge and New York, 2014) at 1616 [IPCC 5th Report Part B Chapter 29 Small Islands].

47 At 1628.

48 At 1619.

2.4 metres above sea level.⁴⁹ Sea-level rises will lead to greater damage from storm surges, increased erosion and flooding, as well as saltwater intrusion, even before inundation.⁵⁰ These effects will be exacerbated by the acidification and warming of the oceans, leading to coral bleaching and reef destruction,⁵¹ which in turn will make coastal losses more rapid due to their role in reef protection.⁵² This will have economic impacts from destruction of coastal infrastructure and, due to their small physical sizes, limited internal relocation prospects. The seawater intrusions will alter soil salinity, lowering its quality for crops and degrading their freshwater sources,⁵³ leading to potential health impacts. This will be further exacerbated by the inhabitants' heavy reliance on the sea for their livelihoods,⁵⁴ affecting tourism, fisheries and agriculture.

Many of these states also have economic vulnerabilities from being relatively underdeveloped small economies. Their limited resources and high population densities, coupled with their comparative lack of economic development, will limit their adaption abilities arising from the costs relative to GDP.⁵⁵ They also have limited adaption capacities due to their isolation and their limited capacities for coping with rapid-onset disasters such as storm surges or cyclones.⁵⁶ As potential climate-induced migrants their situation is unique, due to the predictable nature of displacement, their disproportionate suffering relative to their climate change contributions, and out-migration with few chances of return possibly being their only long-term option.⁵⁷ Further, while sea-level rises leading to migration are a climate change problem,⁵⁸ the slow-onset nature of the displacement means that long before inundation people may begin to leave through gradual displacement.⁵⁹

Additionally, developing a response has been complicated due to a lack of empirical evidence on the numbers of people likely to be affected.⁶⁰ John Campbell, an associate professor from the University of Waikato, has estimated 665,000 to 1.7 million people in the Pacific could face displacement by 2050

49 Central Intelligence Agency "The World Factbook — South Asia: Maldives" (2 November 2015) <www.cia.gov>.

50 M Burkett "In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier" AsiaPacific Issues No 98 (East-West Center, Honolulu, January 2011) at 4–5.

51 IPCC 5th Report Part B Chapter 29 Small Islands, above note 46, at 1616.

52 Burkett, above note 50, at 2.

53 IPCC 5th Report Part B Chapter 29 Small Islands, above note 46, at 1616.

54 J Campbell "Climate Change Migration in the Pacific" (2014) 26 *The Contemporary Pacific* 1 at 3; IPCC 5th Report Part B Chapter 29 Small Islands, above note 46, at 1616.

55 IPCC 5th Report Part B Chapter 29 Small Islands, above note 46, at 1626.

56 Doelle, above note 33, at 4.

57 Burkett, above note 38, at 351.

58 At 352.

59 UNHCR Summary of Deliberations, above note 34, at 7.

60 McAdam, above note 17, at 4.

due to climate change.⁶¹ Yet a lack of case studies currently prevents an accurate assessment on the link between sea-level rises and migration,⁶² even though it is exceedingly plausible that one affects the other.⁶³ Quantitative assessments have generally been based on the using of information on sea-level rises as well as currently known land elevations.⁶⁴ However, even though more research is needed for establishing numbers, the likely impacts to SIDS should nevertheless underscore the importance of addressing these threats. Therefore, the factors affecting SIDS will make their displacement different from other affected groups. This outline shows they will face a combination of sea-level rises, coastal deterioration, reduced water and food supplies, and greatly limited options for return due to the aggravations brought about by climate change.

It is also clear that there is a complex interrelationship between climate change and human rights, meaning there could be a wide range of human rights implications.⁶⁵ In particular, their deteriorating conditions and any relocation efforts could have serious human rights implications ranging from the rights to life, dignity, liberty and security as well as general cultural and economic rights.⁶⁶ Human rights law may therefore have a role to play in protecting people facing climate-induced displacement living in SIDS.

3.2 Human Rights and Climate Change

Although climate change will undoubtedly impact upon the physical environment, the range of potential human rights implications have increasingly been recognised,⁶⁷ including civil, economic, cultural, political and social rights among others.⁶⁸ Yet until recently the human rights implications of climate change did not receive the same level of attention as its physical effects,⁶⁹ due in part to the difficulties in establishing a causal nexus between climate

61 Campbell, above note 14, at 38.

62 S Perch-Nielsen "Understanding the Effect of Climate Change on Human Migration: The Contribution of Mathematical and Conceptual Models" (Diploma Thesis, Swiss Federal Institute of Technology, 2004) at 95.

63 At 72.

64 Kraler and others, above note 12, at 9.

65 Doelle, above note 33, at 182.

66 UNHCR Summary of Deliberations, above note 34, at 8.

67 OHCHR 2009 Report, above note 7, at 7; Kyung-wha Kang, Deputy High Commissioner for Human Rights "Climate Change, Migration and Human Rights" (Address to Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities, Geneva, 19 February 2008).

68 M Nazer and T Afroz "Human Rights Implications of Climate Induced Displacement" (2009) 21(3) BLR 137 at 145.

69 L Rajamani "The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change" (2010) 22 J Env'tl L 391; Doelle, above note 33, at 216.

change and human rights.⁷⁰ Further, an inappropriate use of law risks causing legal feedbacks which, similar to natural feedback loops, could exacerbate the suffering caused by climate change.⁷¹ Accordingly, any approach taken should facilitate societal adaption rather than making it worse.

The legal academic Jane McAdam, for example, argues that the complexities of climate change displacement necessitate a multidisciplinary response given the interconnectedness of its effects.⁷² While this may hold true on a larger scale, the interconnected nature of its effects also means that there are multiple human rights at risk of violation.⁷³ These rights implications, it is argued, should necessitate using a human rights-based approach to allow the individual to be at the centre of the inquiry, thereby keeping the focus on individual welfare.⁷⁴ Although this has led to some concerns regarding the prioritising of anthropogenic issues over those of the environment,⁷⁵ they should at least be relevant in the context of the human impacts of climate change displacement. Unfortunately, climate-induced migration currently has normative and legal gaps regarding the application of rights obligations for protecting displaced individuals.⁷⁶ Therefore, the examination of protection deficits for climate-induced migrants should involve a human rights perspective.

Firstly, human rights law already has standards of legal and moral language for assessing the risks from climate change against its standards to identify gaps and establish consensus.⁷⁷ Secondly, these standards may in some cases correspond to state obligations. Identifying these could help with the interpretation of current legal policy as well as for providing rules to establish future standards for law and policy or for constructing new frameworks or other instruments.⁷⁸ Thus, since every person is a human being capable and deserving of having their rights protected from all phenomena, including from negative changes to their environment, examining the problem for solutions to climate-induced displacement should involve a human rights-based assessment.

70 S Sminzadeh "A Moral Imperative: The Human Rights Implications of Climate Change" (2007) 30(2) *HICLR* 231 at 241.

71 D Caron "When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level" (1990) 17 *Ecology LQ* 621 at 652.

72 McAdam, above note 17, at 6.

73 Doelle, above note 33, at 182.

74 Rajamani, above note 69.

75 Sminzadeh, above note 70, at 263.

76 A Betts "Towards a 'soft law' framework for the protection of vulnerable migrants" (United Nations High Commissioner for Refugees, Research Paper No 162, August 2008) at 3 and 11.

77 Nazer and Afroz, above note 68, at 152; McAdam, above note 17, at 14.

78 Nazer and Afroz, above note 68, at 153; McAdam, above note 17, at 14; Rajamani, above note 69.

4. THE INTERNATIONAL LEGAL FRAMEWORK

Currently, protection deficits exist at international law for people induced into migrating across borders due to climate change.⁷⁹ These deficits exist with regard to requirements for refugee status,⁸⁰ and for protected person status under humanitarian grounds,⁸¹ among others. The lack of protection available to this large and vulnerable group has been extensively studied,⁸² and has also been recognised in recent years by the United Nations High Commissioner for Refugees (UNHCR) as being a growing concern.⁸³ This part of the article outlines the general protection deficits existing for cross-border climate-induced displacement, before turning to a more detailed examination of international human rights law implications and any possible corresponding rights obligations.

4.1 1951 Refugee Convention

At present, international refugee law provides insufficient protection for most people facing climate-induced displacement, including those from SIDS. The 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) is a specific instrument separate from human rights law for refugees as defined by the Convention, aimed at providing substitutive protection for when a person's state cannot or does not provide it.⁸⁴ For people covered by the Convention, they benefit from more protection than under general human rights law due to its specific rather than general nature.⁸⁵ A refugee under the Convention is a person who, being outside their country, is unwilling to avail themselves of protection from that country "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".⁸⁶

79 J McAdam *Climate Change Displacement and International Law: Complementary Protection Standards* (United Nations High Commissioner for Refugees, PPLA/2011/03, 1 May 2011) at 4–7.

80 Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 21 March 1954) [1951 Refugee Convention].

81 McAdam, above note 17, at 22 and 23.

82 Authors include: Alexander Betts; Christel Cournil; Jane McAdam; Maxime Burkett; Benoit Mayer; Kerstin Walter; Nina Schrepfer; Walter Kälin.

83 For a complete list of policy papers produced: United Nations High Commissioner for Refugees "Climate Change: Protection Challenge" <www.unhcr.org>.

84 K Walter "Mind the Gap — Exposing the Protection Gaps in International Law for Environmentally Displaced Citizens of Small Island States" (LLB (Hons) Thesis, University of Aberdeen, 2010) at 15.

85 At 15.

86 1951 Refugee Convention, above note 80, art 1A(2).

A climate-induced migrant would face several major difficulties before they could be granted asylum as a refugee. Firstly, a claimant would need to show that the change in climate amounted to “persecution”. The effects of climate change, such as storm surges or seawater intrusions, would typically not fit the Convention definition of “persecution” at international or domestic law,⁸⁷ which requires a degree of human agency.⁸⁸ Secondly, the claimant would need to show that this fear of persecution was “for reason of” or because of one of the five Convention grounds. It would be difficult for a claimant to establish a sufficient enough connection to fall within one of these grounds due to the inherently general nature of environmental destruction.⁸⁹

Even so, climate-induced migrants from SIDS could still face similar issues to those falling under the 1951 Refugee Convention, particularly with regard to threats to life, health and access to water.⁹⁰ From a legal standpoint, however, this would not assist in establishing the elements of “persecution” and, especially, persecution because of one of the five grounds needed under the Convention. In New Zealand this scenario was tested in 2013 by a resident from Kiribati, who sought asylum by arguing he was a refugee based on “changes to his environment ... caused by sea-level-rise associated with climate change”.⁹¹ His refugee claim was brought under s 129(1) of the New Zealand Immigration Act 2009, which recognises a refugee within the meaning of the 1951 Refugee Convention.⁹² Upon having a refugee and protection officer decline to grant refugee status or protected person status, an appeal was made to the New Zealand Immigration and Protection Tribunal (IPT). In dismissing this appeal the IPT cited the general nature of environmental degradation.⁹³ The claim was subsequently rejected by the High Court, the Court of Appeal and finally by the Supreme Court.⁹⁴ These decisions are critically important as recent decisions and as representing potentially some of the most in-depth analyses in

87 G Goodwin-Gill and J McAdam *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford, 2007) at 90–134.

88 J McAdam *Climate Change, Forced Migration and International Law* (Oxford University Press, Oxford, 2012) at 43.

89 McAdam, above note 17, at 13; McAdam, above n 88, at 44.

90 W Kälin and N Schrepfer *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* (UN High Commissioner for Refugees, PPLA/2012/01, February 2012) at 34.

91 *AF (Kiribati)* [2013] NZIPT 800413 at [2].

92 Immigration Act 2009, s 121(1).

93 *AF (Kiribati)*, above n 91, at [75].

94 *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 [*Teitiota* (HC)]; *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173; *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 [*Teitiota* (SC)].

international jurisprudence of refugee law and human rights law as it applies to climate-induced displacement facing SIDS.⁹⁵

An additional argument raised in academic discourse against asylum is that the claim would involve the person moving to the same country they might also be claiming was persecuting them via their greenhouse gas emissions, rather than their home state.⁹⁶ Indeed, the wording in art 1A(2) is “unwilling to avail himself of the protection of his country”. In *AF (Kiribati)*, to the contrary, the evidence suggested that the Kiribati Government had actually been taking active steps towards protecting its people from the dangers of climate change.⁹⁷ The High Court acknowledged this point, where it noted “the claimant is seeking refuge within the very countries that are allegedly persecuting him”, before concluding there was no persecution.⁹⁸ A similar conclusion was also reached in an Australia Refugee Review Tribunal decision, finding no basis for this form of alleged persecution.⁹⁹

Both the IPT and the High Court found that the concept of being persecuted required human agency.¹⁰⁰ The High Court then went on to explain that people fleeing natural disaster could therefore not obtain protection due to the natural disaster alone,¹⁰¹ but that a “tenable pathway” could involve environmental degradation assuming human agency was involved, given the right circumstances.¹⁰² Although the Supreme Court also confirmed that there may be a pathway to protection as a refugee,¹⁰³ submissions in the High Court suggest that there is limited or no international jurisprudence accepting climate change as a pathway to protection for climate change refugees.¹⁰⁴ These decisions confirm the general academic consensus that persecution requires human agency and on the difficulties posed by the general nature of environmental destruction in making out the five grounds in the 1951 Refugee Convention. Thus, international refugee law generally fails to provide sufficient protection for climate-induced migrants, including those in SIDS.

95 V Rive “Safe Harbours, Closed Borders? New Zealand Legal and Policy Responses to Climate Displacement in the South Pacific” (Conference Contribution, 2013 IUCN Academy of Environmental Law Annual Colloquium, Waikato University, June 2013) at 6.

96 Kālin and Schrepfer, above note 90, at [31]–[32].

97 *AF (Kiribati)*, above n 91, at [20]; *Teitiota* (SC), above n 94, at [12].

98 *Teitiota* (HC), above n 94, at [55].

99 0907346 [2009] RRTA 1168 (10 December 2009) at [51].

100 *AF (Kiribati)*, above n 91, at [54]; *Teitiota* (HC), above n 94, at [11], [25] and [55].

101 *Teitiota* (HC), above n 94, at [26].

102 At [27].

103 *Teitiota* (SC), above n 94, at [13].

104 *Teitiota* (HC), above n 94, at [45].

4.2 International Human Rights Law

As outlined in previous sections, human rights law is important for setting out minimum protection standards and what the corresponding state obligations may be. It can also serve as a useful basis for seeking protection in another state under the customary law principle of complementary protection, specifically non-refoulement. Climate-induced displacement facing people in SIDS could have multiple human rights implications.¹⁰⁵ Indeed, there may be more rights implications arising from this type of displacement than corresponding obligations.¹⁰⁶

This section will outline several specific human rights including the right to life, health, food and water, and the right to cultural participation, before examining the principle of non-refoulement for filling the protection gaps. There are likely to be other rights implications for people living in SIDS than those examined in this section, including the right to property or education if infrastructure is damaged,¹⁰⁷ or freedom of movement,¹⁰⁸ due to deteriorating physical conditions. The problems may also lead to economic and political structures deteriorating to the point where a number of other civil and political rights are threatened.¹⁰⁹ The rights examined in this section are looked at for the purposes of establishing what obligations may exist.

4.2.1 Specific human rights implications

(i) Right to life

For reasons mentioned above, including sea-level rises, stormwater surges and saltwater intrusion, among others, the issues facing SIDS could ultimately affect the lives of its residents. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) enshrine the right to life in art 3¹¹⁰ and art 6(1) respectively,¹¹¹ while a right to life is enshrined for children in the Convention on the Right of the Child in art 6.¹¹² The United Nations Human Rights Committee has

¹⁰⁵ Nazer and Afroz, above note 68, at 144.

¹⁰⁶ McAdam, above note 79, at 16.

¹⁰⁷ *Universal Declaration of Human Rights* GA Res 217 A, A/RES/3/217 A (1948), arts 17 and 26 [UDHR]; *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 13 [ICESCR].

¹⁰⁸ UDHR, above note 107, art 13; ICESCR, above note 107, art 12.

¹⁰⁹ Walter, above note 84, at 49.

¹¹⁰ UDHR, above note 107, art 3.

¹¹¹ ICESCR, above note 107, art 6(1).

¹¹² *Convention on the Right of the Child* 1577 UNTS 3 (signed 20 November 1989, entered into force 2 September 1990), art 6.

supported a less restrictive interpretation of this right.¹¹³ Further, the academic Bertrand Ramcharan has suggested that a right to life includes a right to a safe environment, where the environmental deterioration or risk threatens the quality or loss of life.¹¹⁴ The people from SIDS could face multiple threats in their islands. Some, such as increased disease, extreme weather events and other health effects from a lack of drinking water or food, could eventually lead to losses of life. Further, if the islands do become inundated, then those remaining would undoubtedly face acute threats to their lives.

(ii) Right to health

The UDHR and the ICESCR recognise the right to health in art 25¹¹⁵ and art 12 respectively,¹¹⁶ although the ICESCR further extends this to a right to “enjoyment of the highest attainable standard” of physical and mental health.¹¹⁷ Climate change may increase the instances of various infectious diseases particularly for SIDS due to the particular climate near the equator, with diseases more easily spread due to temperature increases such as malaria, dengue, filariasis and schistosomiasis.¹¹⁸ Further, the expected shortages of drinking water, combined with decreased food supplies, will clearly impact on people’s health.

(iii) Right to adequate food including water

The gradual coastal erosion due to increased acidification of the oceans impacts on fishing stocks, and the increase in the frequency and intensity of rapid storm events, as well as saltwater contamination of agricultural stocks, will likely impact on access to food and water for people living in SIDS. For this outline, the right to water is implied as part of a right to food,¹¹⁹ given that there is likely to be a severe lack of fresh water in SIDS due to the contamination of freshwater supplies combined with decreased rainfall.¹²⁰ The ICESCR enshrines a right to adequate food in art 11, including that “an adequate standard of living

113 United Nations Human Rights Committee CCPR *General Comment No. 6: Article 6 (Right to Life)* HRI/GEN/1/Rev.9 (1982).

114 B Ramcharan “The Concept and Dimensions of the Right to Life” in B Ramcharan (ed) *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1985) at 13.

115 UDHR, above note 107, art 25.

116 ICESCR, above note 107, art 12.

117 Article 12(a).

118 K Ebi, N Lewis and C Corvalán *Climate Change, Small Island Developing States* (UNFCCC Secretariat, Bonn, Germany, 2005) at 21.

119 ICESCR, above note 107, art 11; United Nations Economic and Social Council *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)* E/C.12/2002/11 (2003).

120 Ebi and others, above note 118, at 17.

includes food”,¹²¹ and a right to be “free from hunger”.¹²² The crop yields are likely to be affected in SIDS by extreme weather events and heat stress caused by temperature changes.¹²³ This will majorly affect crop production in SIDS impacting upon the nutrition of those living in the islands.

(iv) Right to cultural participation

The right to cultural participation is found in a number of instruments including the International Covenant on Civil and Political Rights (ICCPR) under art 27, art 15 under the ICESCR and the Declaration on the Rights of Indigenous People.¹²⁴ Climate-induced displacement, especially if it occurred on a large scale, could result in the slow but gradual destruction of their way of life, through cultural and language loss.

(v) The limits of applying specific human rights

These outlines demonstrate some of the potential human rights implications for people from SIDS. However, only some rights are recognised under the current category for complementary protection by way of non-refoulement. The scope of this will be discussed in the next section. The main legal issue for human rights is in establishing what obligations exist for the fulfilment of these rights. The ICESCR, for example, requires the duty bearers to respect, protect and fulfil the rights it contains.¹²⁵ This means that states must not themselves, or allow other actors to, interfere with the enjoyment of the rights contained and take active steps to allow people to progressively realise the enjoyment of those rights.¹²⁶

Citizens from SIDS would, however, need to have some way of enforcing the rights being infringed for this approach to successfully address the protection gaps. Unlike the specific instrument of the 1951 Refugee Convention, international human rights does not allow for entry into and subsequent remaining in a foreign state territory for all human rights violations,¹²⁷ except for specific circumstances of complementary protection under human rights-based principles. Further, while bringing a claim for a breach of human rights may help a particular individual, it would still not address the protection deficits existing in international law.

121 ICESCR, above note 107, art 11(1).

122 Article 11(2).

123 Ebi and others, above note 118, at 19.

124 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/RES/61/295 (2008).

125 Nazer and Afroz, above note 68, at 150.

126 At 150.

127 W Kälin “Conceptualising Climate-Induced Displacement” in J McAdam (ed) *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, Oxford, 2010) 81 at 84.

4.2.2 Complementary protection

In the event of the Refugee Convention not providing a tenable pathway, protection may be sought under the concept of “complementary protection”, specifically the principle of non-refoulement, or protection from forced return.¹²⁸ It is an obligation of states to protect those falling outside the Refugee Convention’s protection framework who nonetheless face serious human rights violations should they return.¹²⁹ This form of protection works in parallel to refugee law,¹³⁰ by way of treaties, human rights law generally, or customary law.¹³¹ The 1951 Refugee Convention explicitly contains the principle of non-refoulement under art 33; however, this is limited to refugees facing persecution.¹³²

Current practice of the wider non-refoulement principle under human rights law suggests protection may be sought where a person is at risk of torture, exposure to cruel, inhuman or degrading treatment or punishment, arbitrary threats to life or being subjected to the death penalty.¹³³ Some of the international treaty sources for complementary protection include the Convention Against Torture (CAT) under art 3,¹³⁴ the European Convention on Human Rights (ECHR) under art 3,¹³⁵ and the ICCPR under art 7.¹³⁶ Complementary protection has also seen widespread domestic implementation.¹³⁷ While these sources do not expressly prohibit protection from environmental degradation, it is questionable whether those protected would realistically extend to climate-induced migrants, within the above-mentioned protection limits.¹³⁸

128 J McAdam “The Evolution of Complementary Protection” in J McAdam *Complementary Protection in International Refugee Law* (Oxford, Oxford University Press, 2007) at 21.

129 N Dicker and J Mansfield “Filling the protection gap: current trends in complementary protection in Canada, Mexico and Australia” (The UN Refugee Agency, Research Paper No 238, May 2012) at 1 and 3; Executive Committee of the High Commissioner’s Programme, Standing Committee *Providing International Protection Including Through Complementary Forms of Protection* (United Nations High Commissioner for Refugees, EC/55/SC/CRP.16, 2 June 2005) at 6 [UNHCR Standing Committee].

130 Goodwin-Gill and McAdam, above note 87, at 285.

131 Dicker and Mansfield, above note 129, at 3; McAdam, above note 128, at 21.

132 1951 Refugee Convention, above note 80, art 33.

133 McAdam, above note 17, at 18.

134 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 3 [CAT].

135 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (signed 4 November 1950, entered into force 3 September 1953), art 3.

136 ICESCR, above note 107, art 7.

137 McAdam, above note 79, at 17.

138 McAdam, above note 17, at 18.

Climate-induced migrants from SIDS may attempt to seek protection by either their circumstances falling within the above-mentioned grounds, or by attempting to recharacterise their harm as suffering falling within these grounds. However, the courts have generally resisted the call to recharacterise socio-economic rights to fit within the recognised grounds such as “inhuman or degrading treatment or punishment”.¹³⁹ Within the recognised grounds, torture is of little relevance to people facing climate-induced displacement as it requires “instigation of or with the consent or acquiescence of a public official” or those acting in an official capacity.¹⁴⁰ Secondly, while the UNHCR has recognised that natural or ecological disasters might reach the level of inhuman or degrading treatment or punishment required for protection from non-refoulement under human rights instruments, it acknowledges the standard of proof is typically very high, likely requiring “exceptional circumstances”.¹⁴¹ Jane McAdam suggests this standard is due to a balancing of the interests of the state against the interests of the individual occurring for all but the most serious human rights violations,¹⁴² rather than due to any derogation of obligations to protect under the above-mentioned circumstances.

Indeed, mixed jurisprudence on this issue highlights some of the complications with using non-refoulement to address climate-induced displacement. Further, there is currently limited jurisprudence with the specific circumstances facing people from SIDS,¹⁴³ with many cases concerning actors within the home states causing the rights violations,¹⁴⁴ or extreme circumstances arising from lack of medical treatment options.¹⁴⁵ One such medical case was *D v United Kingdom*, concerning the application of art 3 under the ECHR by the European Court of Human Rights (ECtHR). The Court had to decide whether there was a real risk that the applicant’s removal would be contrary to the standards of art 3.¹⁴⁶ This required assessing whether humanitarian factors amounted to “exceptional circumstances” such that removal should be avoided. The Court considered that there were indeed very exceptional circumstances arising from the patient suffering from AIDS, being terminally ill and close to death, and facing “conditions of adversity” including a lack of medical support and insufficient levels of food and shelter should he return to his home in St Kitts,¹⁴⁷

139 At 17; *D v United Kingdom* (1997) 24 EHRR 423 (ECHR); *N v United Kingdom* (2008) 47 EHRR 39 (Grand Chamber).

140 CAT, above note 134, art 1.

141 UNHCR Standing Committee, above note 129, at 6.

142 McAdam, above note 17, at 18; McAdam, above note 79, at 17.

143 Walter, above n 84, at 90.

144 Kälın and Schrepfer, above note 90, at [35].

145 Walter, above n 84, at 89.

146 *D v United Kingdom*, above n 139, at [50].

147 At [53].

sufficient to amount to inhuman or degrading treatment or punishment.¹⁴⁸ In a similar scenario where equally strong humanitarian grounds arose for people in SIDS due to environmental degradation, it would seem arguable that this reasoning could be applied to reach the threshold of “exceptional circumstances”. However, while the Court did note the environmental issues in St Kitts, including “coastal zone degradation, fish depletion and health problems”, these were considered insufficient for protection under art 3,¹⁴⁹ with his terminal illness and lack of treatment options being considered the crucial factors.

More recently, the decision in *D v United Kingdom* was analysed by the ECtHR in *N v United Kingdom* involving a similar fact situation of a woman with AIDS facing deportation where she would likely face pain and eventual death through lack of treatment.¹⁵⁰ The Court observed that principles from *D v United Kingdom* related to ensuring human dignity at the end of life rather than prolonging it.¹⁵¹ Most importantly for environmental degradation, the Court reasoned that a high threshold was appropriate given the alleged harm was from a natural illness rather than state act or omission and considering the receiving state’s lack of resources for providing treatment.¹⁵² Further, it was argued that the Court is right to balance the interests of the state against those of the individual,¹⁵³ given the Convention’s socio-economic implications are not directly enforceable rights. The Court reasoned that it would be too great a burden to obligate the receiving state with “free and unlimited health care to all aliens”,¹⁵⁴ necessitating this high threshold.

Given the potentially large numbers of people who will face climate-induced displacement in SIDS and the myriad of causes leading to eventual migration, it is therefore unlikely that current customary scope would extend protection, with courts seemingly wary of opening the “floodgates” to claims of a socio-economic nature.¹⁵⁵ Thus, seeking protection under the principles of non-refoulement may be simply untenable for many of the circumstances inducing people to displacement in SIDS. Although there may be limited protection as a last resort for rapid-onset storm surge type events, this still exposes a significant protection gap. Although a judicial extension to the principle of non-refoulement seems tenable, *N v United Kingdom* highlights the high threshold required before “exceptional circumstances” will be considered

148 At [55].

149 At [32] and [52]–[54].

150 *N v United Kingdom*, above n 139, at [23].

151 At [22].

152 At [43].

153 At [44].

154 At [44].

155 Walter, above n 84, at 90.

for humanitarian reasons.¹⁵⁶ Further, the focus on the natural source of the harm to defeat a claim could hinder an extension of this principle to cover climate change events given the complex causal nexus. This analysis unfortunately does not reveal current appetite for the extension of non-refoulement to cover the situation of climate-induced displacement in SIDS. Regarding the threat to life, Jane McAdam has suggested that findings from the United Nations Human Rights Committee reveal that under art 6 of the ICCPR, a threat would need to be actual or imminent, rather than hypothetical, and it would need to personally affect the claimant. It seems unlikely that this could apply to all the scenarios of environmental degradation, especially from slow-onset events due to the lack of imminence.

The ECtHR has also recognised the duty as a positive one, where the risks have been known and imminent environmental hazards.¹⁵⁷ This has also been recognised in the New Zealand context in the important decision of *AF (Kiribati)*.¹⁵⁸ Articles 6 and 7 in the ICCPR are incorporated into s 131 of the New Zealand Immigration Act 2009, in respect of arbitrary deprivation of life.¹⁵⁹ In this decision, the Tribunal stated that chances of the event had to be “above mere speculation and conjecture, but sitting below the civil balance of probability standard”¹⁶⁰ before finding that increased chances of climate change events was well below the threshold of posing a substantial danger of arbitrary deprivation of life.¹⁶¹ Lastly, despite the Tribunal’s acceptance of a state’s positive obligations to protect the right to life, extending to threats from environmental degradation, it found that the Kiribati Government was in fact “active on the international stage concerning the threats posed” and locally, meaning there was no derogation of their positive duty to protect.¹⁶² The Tribunal also found that the requirements for “cruel treatment” were also not citing developments in the ECtHR regarding art 7 of the ICCPR and the “exceptional circumstances” required.¹⁶³ This decision demonstrates the challenges with recognising threats to life in the climate change context, given the complicated causal nexus in attributing state derogation of obligations and particularly the lack of imminence of the environmental effects.

It is possible that over time an expansion of the non-refoulement principle could allow alternative protection to refugee-based asylum for small island

156 J McAdam “The Scope of Ill-Treatment under the ECHR and ICCPR” in J McAdam *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford, 2007) at 144–145; *N v United Kingdom*, above n 139, at [42]–[45].

157 *Öneryıldız v Turkey* [2004] ECHR 657 (Grand Chamber) at [89].

158 *AF (Kiribati)*, above n 91, at [87].

159 Immigration Act 2009, s 131.

160 *AF (Kiribati)*, above n 91, at [90].

161 At [91].

162 At [88].

163 At [93]–[95].

state citizens.¹⁶⁴ It is not clear, however, what form this would take. While it has been suggested that these changes could occur through some lines of existing reasoning already present in international jurisprudence,¹⁶⁵ this would still represent a significant departure from the currently stringently applied legal thresholds.¹⁶⁶ These controversies have been recognised by the courts,¹⁶⁷ with inclusion of socio-economic rights already being termed “an extension of an extension” in English case law.¹⁶⁸ This analysis therefore confirms the view that complementary protection is generally insufficient protection for those facing displacement in SIDS due to climate change. An expansion of the concept may also be difficult unless the principle is substantially reimagined, which could require legislative change or regional and international measures.

4.2.3 Humanitarian grounds

In the context of environmentally induced displacement, humanitarian grounds may refer to the specific regime of international humanitarian law, grounds falling under customary international law, or grounds separate to customary international law.

International humanitarian law generally law relates to armed conflict, which may be relevant for some circumstances of climate-induced displacement. This form of protection is predominantly for instances of ensuring safety or security. Consequently, relief would generally be reactionary, relating to an evacuation, relocation and return.¹⁶⁹ For people facing largely slow-onset conditions relating to climate change, it may provide limited protection, but only in specific circumstances.

Separate from humanitarian considerations as complementary protection, broad protection on compassionate or practical grounds could also be granted by a country as a matter of humanitarian relief. However, this relief would be outside the laws of complementary protection.¹⁷⁰ Given the potential for large-scale displacement from SIDS, this ad hoc protection is clearly insufficient to address the protection deficit.

164 Walter, above n 84, at 90–91.

165 M Foster “Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law” [2009] NZ L Rev 257 at 269.

166 Walter, above n 84, at 92; McAdam, above note 156, at 144–145.

167 For example: *N v United Kingdom*, above n 139, at [42]–[45]; *AF (Kiribati)*, above n 91, at [93].

168 *AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736 at [12].

169 McAdam, above note 17, at 22–23.

170 E Karlsen “Complementary protection for asylum seekers: overview of the international and Australian legal frameworks” (Australian Department of Parliamentary Services Research Publications, No 10, 2009) at 18.

Therefore, while it is clear that climate-induced displacement will have multiple rights implications for those living in SIDS, international human rights frameworks appear to only offer limited protection capacities, with significant deficits remaining in establishing who bears what obligations and regarding enforcement. Current obligations to respect human rights are not easily applied to the specific group of people from SIDS in need of lasting rights protections in another state. Further, judicial approaches can only offer individual piecemeal solutions to what is a multifactorial and polycentric problem. Judicial solutions should not be relied on for the long-term protection of climate-induced migrants.

4.2.4 Statelessness

Finally, the 1954 Convention relating to the Status of Stateless Persons (1954 Statelessness Convention) is a specific instrument outlining broadly similar rights as those covered by the 1951 Refugee Convention,¹⁷¹ but concerning the rights of individuals deprived of their nationality.¹⁷² The right to nationality and to not be arbitrarily deprived of this right is affirmed in the UDHR,¹⁷³ yet neither this instrument nor international customary law confer a positive duty on states to provide nationality.¹⁷⁴ Unlike the 1951 Refugee Convention, there is no provision relating specifically to non-refoulement, yet while complementary protection may seem generally unnecessary given the protection conferred by the 1954 Statelessness Convention, it could be so in cases where a person is seeking protection in a state which has not ratified the Convention.¹⁷⁵

For people facing climate-induced displacement in SIDS it is relevant to ask whether international law on statelessness can offer protection, and also whether the law on statelessness would apply to their circumstances. Protection outside the 1954 Statelessness Convention would generally have to come from humanitarian principles or general international human rights law, as examined above. On this basis, the case of “disappearing” small island states as low-lying states vulnerable to rising sea levels leads to the potential need for permanent resettlement.¹⁷⁶ This is unlikely to be sufficiently addressed by current international law on statelessness,¹⁷⁷ since even if de jure statelessness

171 At 14.

172 Convention relating to the Status of Stateless Persons 360 UNTS 117 (adopted 28 September 1954, entered into force 6 June 1960).

173 UDHR, above note 107, art 15.

174 J McAdam “‘Disappearing States’, Statelessness and the Boundaries of International Law” (University of New South Wales Faculty of Law Research Series, No 2, 2010) at 13.

175 Karlson, above note 170, at 14.

176 Kälin, above note 127, at 85.

177 McAdam, above note 79, at 11.

occurred, the rights conferred by the 1954 Statelessness Convention do not cover admission into a foreign state.¹⁷⁸

Additionally, a focus on statelessness may be equally misplaced. Firstly, people moving from their home states are currently moving from states which still currently exist. Eventually this may not be the case, but an analysis of this scenario would still fail to address the protection gaps in general humanitarian principles or international human rights law as they exist currently. Secondly, it is questionable whether people from these states would eventually become stateless. Contrary to assertions of “disappearing” states,¹⁷⁹ there remains a strong presumption of continuity of state at international law.¹⁸⁰ Statelessness could instead occur through a long process of waning international recognition and is therefore not related to the current plight of climate-induced migrations from SIDS.¹⁸¹ It is recognised, however, that this issue should be addressed in the long term.

Therefore, what is clear is that protection gaps already exist for people currently facing displacement. Eventually SIDS will risk losing their territory and this will raise new and interesting questions on what identity can be afforded to these states and their citizens.¹⁸² However, in terms of protection, people will likely face displacement long before these states are inundated.¹⁸³ While addressing questions on statehood and statelessness is legally important and may eventually be practically necessary, it is clear that current protection deficits remain for climate-induced migrations from SIDS. Given the slow-onset nature of the problem, current displacement strategies may be more pressing than long-term questions of statehood, to best protect the rights of displaced individuals.

4.2.5 Conclusion

It is therefore clear that there is a current lack of consensus at a normative and legal level on how people facing cross-border climate-induced displacement can be afforded protection.¹⁸⁴ This article will argue that a human rights-based approach offers a promising initial pathway towards the legal protection of

178 Kälin and Schrepfer, above note 90, at 37–38.

179 Burkett, above note 38, at 354; McAdam, above note 17, at 16.

180 UNHCR Summary of Deliberations, above note 34, at 7; McAdam, above note 174, at 6 and 21.

181 McAdam, above note 174, at 9.

182 For an interesting proposal on evolving statehood and citizenship see, for example, Burkett, above note 38, at 354.

183 McAdam, above note 174, at 2 and 4; Kälin and Schrepfer, above note 90, at 37.

184 Betts, above note 76, at 5, 11, 13.

climate-induced migrants in SIDS, establishing benchmarks for future policy responses. The next part of the article will explore the efficacy of this approach further.

5. A NORMATIVE RESPONSE

It is critical to respond to the challenges of climate-induced displacement before it is too late. The complex impacts of climate change, however, means there can be no “one size fits all” approach to protecting those in need.¹⁸⁵ A successful response should not conflict with other protection strategies. With this growing international crisis, the most effective and immediate step should involve a global normative response consolidating and clarifying current international law. Developing a set of international guiding principles for climate-induced displacement based on existing international law could be crucial for clarifying obligations, providing authority for positive state actions, and ultimately for assisting in the implementation of norms and even by helping the crafting of international instruments in future.

Firstly, it is clear that protection gaps exist for cross-border climate-induced migrants at international law.¹⁸⁶ The 1951 Refugee Convention generally only offers specific protection,¹⁸⁷ while complementary protection under the non-refoulement principle is currently limited to specific grave circumstances generally beyond environmental disasters.¹⁸⁸ Similarly, not all human rights implications transfer to protection obligations, including in the complementary protection context, with courts only being able to offer piecemeal solutions to what is a multifarious issue. The advantage of an international normative response is that it would clarify human rights obligations and act as a benchmark for states to measure their domestic regimes against. It could also assist in the present implementation of norms and may help in the crafting of future treaties, conventions and other migration agreements.

It should seem clear that problems such as extreme weather events, rising sea levels, saltwater intrusion, and general coastal and agricultural destruction will have grave human rights implications for the inhabitants of SIDS induced to migrate. Therefore, a human rights basis, even if one supports the view that a multidisciplinary approach could ultimately have merit,¹⁸⁹ will help focus attention on the plight of the individual, bringing to the forefront issues that an

185 McAdam, above note 79, at 54.

186 Kraler and others, above n 12.

187 McAdam, above note 79, at 12.

188 UNHCR Standing Committee, above note 129, at 5.

189 Burkett, above note 38, at 372; McAdam, above note 17, at 6.

economic or environmental analysis alone could obscure.¹⁹⁰ This would guide the response towards maximising the protection of the individual.

As explored through this article and alluded to above, those in SIDS will face unique and challenging climate change events from rapid-onset disasters and slow-onset climate causes, increased loss of resources from territory reduction and even the risk of eventual loss of state territory.¹⁹¹ The response suggested would assist by clarifying existing human rights obligations and identifying the specific needs and rights of those displaced by climate change, rather than focusing on the causes of their displacement.¹⁹² Distinct from its human rights dimension, it could also assist by distinguishing between the type of event and response most appropriate to the resulting type of movement.¹⁹³

One of the biggest issues with SIDS is the immediacy of their threat. Pursuing managed migration strategies or definitions of statehood and statelessness will of course be critically important. This immediacy, however, could also make an international normative response especially pertinent. If a “soft law” approach is taken, clarifying existing rights obligations would not create additional burdens on individual states, which a more “hard law” convention or treaty could do. This would make it a useful first step,¹⁹⁴ giving states time to implement such norms and to facilitate in the creating of future instruments.¹⁹⁵ Further, pursuit of such an instrument should not impact on other strategies,¹⁹⁶ which in fact could be assisted by this response and its clarification of existing norms.

Therefore, given the negative impact that climate-induced displacement will likely have on established human rights for people living in SIDS and the current general lack of legal protection, there should be an immediate international response based on people’s rights and needs rather than focusing on the causes of displacement,¹⁹⁷ especially given how climate change will aggravate rapid disasters and slow-onset climate events. It is critical that any approach taken can adequately respond to these complex challenges. The next part of the article therefore, will outline what form this international response should take.

190 McAdam, above note 79, at 55.

191 Zetter, above note 22, at 5.

192 McAdam, above note 79, at 49.

193 At 67–68.

194 At 55 and 60.

195 At 60; J McAdam “The Normative Framework of Climate Change-Related Displacement” (Paper presented to “Addressing the Legal Gaps in Climate Change Migration, Displacement and Resettlement: From Sinking Islands to Flooded Deltas”, The Brookings Institution, 3 April 2012) at 4.

196 McAdam, above note 79, at 58.

197 At 61.

6. A CROSS-BORDER GUIDING FRAMEWORK

This article recommends that the quickest and most effective way of giving protection to climate-induced migrants in low-lying SIDS involves developing a “soft law” human rights-based framework establishing normative rights standards based predominantly on existing international law. This framework would operate as a cross-border guiding framework on climate-induced movement.¹⁹⁸ Given the complex nature of climate change and its specific effects on different groups, there are different meritorious approaches for providing protection to climate-induced migrants. These include treaties or conventions, migration pathways, relocation strategies, or indeed, more “soft law” instruments like guiding or normative frameworks.¹⁹⁹ It is also accepted that such a framework could be constructed to address the needs and rights alone or to address climate change specifically.²⁰⁰ This article argues in favour of a climate-specific framework as it could then include climate change-specific elements, and within those, group-specific elements, including those affecting people from SIDS. The former, if it addressed all vulnerable migrants, could risk being overly broad in construction, as well as being more politically challenging to implement effectively.²⁰¹

Developing a cross-border guiding framework was explored by the UNHCR in Bellagio, Italy in 2011. There, an expert roundtable on climate change and displacement suggested a need to develop a global guiding framework or instrument using the Guiding Principles on Internal Displacement (Internal Principles) as a possible template.²⁰² This possibility has since been explored by Jane McAdam in more depth, who has elaborated on the provisions this framework could include.²⁰³ She suggests that older proposals relating to protection, along with principles derived from climate change treaty proposals, may also be useful for highlighting relevant elements and themes for inclusion in such a framework.²⁰⁴ This part of the article will outline some suggested principles, using the Internal Principles, before then outlining other elements useful for an effective protection framework.

198 At 57.

199 At 60.

200 At 61.

201 Mayer and Cournil, above note 38, at 12.

202 UNHCR Summary of Deliberations, above note 34, at 1 and 4.

203 McAdam, above note 79, at 61.

204 At 61.

6.1 The Guiding Principles on Internal Displacement

Firstly, the Internal Principles serve as a useful template for a new set of guiding principles covering cross-border climate-induced displacement. They would require few adjustments and already address three phases relevant to this discussion: pre-displacement; actual displacement; and resettlement.²⁰⁵ The Internal Principles “reflect and consolidate” international law,²⁰⁶ recognising rights within the three displacement phases, including in the case of natural disasters or human-made disasters.²⁰⁷ The Internal Principles were created for internally displaced persons, using international human rights and humanitarian law to address identified gaps.²⁰⁸ Since their formation they have become almost universally recognised as possibly the most important framework for the protection of internally displaced persons.²⁰⁹ The situation of cross-border displacement represents a similar gap, which should necessitate a response similar to the forming of the Internal Principles, but for cross-border climate-induced displacement.

6.1.1 Identification of rights

The Internal Principles are important for their identification of rights at each phase of displacement. At pre-displacement, these include respecting the right to life, dignity, liberty and security,²¹⁰ as well as outlining the need for displaced people to have access to full information on their displacement, on compensation where applicable and regarding possible relocation.²¹¹ During displacement these principles recognise economic, social, political, civil and cultural rights among others.²¹² After displacement, during the return, resettlement and integration phase, the principles outline that competent authorities should assist with compensation, property recovery, access to aid and integration if necessary.²¹³ At both pre-displacement and the return, resettlement and integration phase, the principles also outline that people should be involved in planning movement where it has been planned,²¹⁴ and for their return, resettlement or integration.²¹⁵

205 Internal Principles, above note 25, at 9.

206 UNHCR Summary of Deliberations, above note 34, at 4.

207 Internal Principles, above note 25, at introductory para 2.

208 Betts, above note 76, at 13.

209 Naser, above note 23, at 2.

210 Internal Principles, above note 25, principles 7–9.

211 Principle 7(3)(b).

212 Principles 10–27; McAdam, above note 79, at 62.

213 Internal Principles, above note 25, principles 28–30.

214 Principle 7(3)(d).

215 Principle 28(2).

While the principles outlined above give only a brief outline of the rights in the Internal Principles, they highlight the benefits of identifying the phases of displacement and for their inclusion of a wide range of human rights. Clearly, a major issue with cross-border displacement is that states are generally only responsible for people within their territory under international human rights law.²¹⁶ Since a new framework would deal with cross-border migration, it would be crucial, as outlined by the UNHCR, for protection solutions to work within a human rights-based framework and according to underlying humanitarian norms such as “fundamental principles of humanity, human dignity, human rights and international cooperation”.²¹⁷ Indeed, the International Law Commission has stressed the importance of these principles in the case of international disasters,²¹⁸ which are critical given the aggravating effects climate change will likely have. Therefore, the Internal Principles should serve as a useful template for ensuring protection for climate-induced migrants based on an already workable protection framework extended to a cross-border climate-induced displacement context.

6.1.2 Other principles

Jane McAdam, in an annex to her report on complementary protection standards at international law, has suggested that a global guiding framework should address relevant actors, the phases and nature of movement, the rights of the parties involved, as well as any climate change-specific elements.²¹⁹ The principles outlined below offer practical elements for a future cross-border framework focused on climate-induced displacement, with additional elements, including how such a framework could specifically address the unique displacement pressures facing SIDS.

Firstly, such a framework should specifically address actors likely to be involved in the climate-induced displacement regarding their duty to cooperate, given the cross-border nature of the displacement. Actors could include the home state and the receiving state or other non-state parties who could potentially be at the front line of dealing with a response.²²⁰ This would be of critical importance particularly for SIDS, given that out-migration could become their only viable option. Secondly, the framework should be formulated, similar to the Internal Principles, to address the legal gaps existing in international

216 McAdam, above note 17, at 17.

217 UNHCR Summary of Deliberations, above note 34, at 5; McAdam, above note 195, at 6.

218 See, for example, International Law Commission “Protection of persons in the event of disasters” (19 November 2015) <www.legal.un.org>.

219 McAdam, above note 79, at 67–70.

220 At 67.

law.²²¹ The type of event, whether slow or rapid onset, should be differentiated, as well as the response most appropriate for the resulting type of movement.²²² Thirdly, the nature of movement is relevant given that people crossing borders will have a different status from those internally displaced. To address this, the framework could contain provisions recognising non-refoulement obligations including non-rejection at the border as well as a process for providing people with a legal status.²²³ McAdam argues that this should be achieved in the preamble, outlining the characteristics that migration in a cross-border climate change context will have. These could include emphasising: the importance of planned migration strategies; the multi-causal nature of climate change; and accepting migration can be a rational and adaptive response or a forced one.²²⁴ This preamble would clearly not alter any existing obligations, but it could be useful to characterise the principles under a needs basis instead of focusing on the causes of the migration, which would be problematic given the multi-causal nature of climate-induced displacement.

This framework should be consistent with international refugee, human rights and humanitarian law, including customary law. It should recognise any groups with particular vulnerabilities, respect cultural rights and be non-discriminatory. There should be respect for the family unit, as well as provision for participation and for affording people with a legal status. Lastly, people should be assisted in being able to return where possible or otherwise have access to information regarding their resettlement. A climate change-specific cross-border guiding framework should mainly focus on adaption, acknowledging the responsibility of the home state and other states which could possibly be affected, to plan for and assist in planning adaption strategies where the climate pressures exceed the capacity of the state.

Since this cross-border framework could address specific actors, there is potential for addressing particular sub-groups in specific circumstances. Thus, provisions could be made addressing the circumstances facing SIDS, namely states which face potential displacement or relocation.²²⁵ This could help clarify obligations under their unique circumstances according to current international law. Firstly, in contrast to the view of “disappearing” states,²²⁶ there is a strong presumption of continuity of state at international law,²²⁷ meaning loss of

221 Internal Principles, above note 25, at 3.

222 McAdam, above note 79, at 67–68.

223 At 68–69.

224 At 68.

225 At 67.

226 Burkett, above note 38, at 354; McAdam, above note 17, at 16.

227 UNHCR Summary of Deliberations, above note 34, at 7; McAdam, above note 174, at 6 and 21.

territory in the case of SIDS would not automatically imply loss of statehood.²²⁸ This presumption should therefore be expressly stated, rejecting terms such as “sinking” or “disappearing” islands.²²⁹ Secondly, these elements should go beyond the general climate change provisions, and clarify any obligations arising at a regional level, from long-term inevitable cross-border movements due to a graduated deterioration of conditions. Although this framework would clarify existing international law, its soft law nature could also give it some flexibility²³⁰ yet retain its normative strength. It could, for example, encourage states to allocate funds towards burden-sharing arrangements and encourage the coordination of relief strategies with other states in anticipation of future events.

All these suggested elements are admittedly only based on simple clarifications of existing international laws or norms. The unfortunate conclusion is that there may need to be long-term changes to the international legal system as well as specific instruments to address the plight of climate-induced migrants and specifically those from SIDS. What these elements also show, however, is that clarifying these rules may help the formulation of more firm protection strategies by acting as a kind of “scaffolding” of existing rights implications and state obligations, both home and abroad. These could then be used for developing national or regional standards, or at least to increase the political motivation to make more sound agreements in anticipation of these displacement events, instead of reacting in a non-coordinated manner once they occur.

6.1.3 General elements

A cross-border framework should emphasise the need to collaborate, through international cooperation, given the size of the problem, and to be proactive with forming burden-sharing arrangements. This is especially crucial for the circumstances facing SIDS given they could have out-migration as their only viable option. The Internal Principles and the states applying them gain legitimacy by being sourced from already binding law,²³¹ thereby increasing their authority as a normative instrument. For example, the Internal Principles were formed with the intention of acting as a practical non-binding guide for policy-makers,²³² yet these principles have subsequently seen substantial adoption — for example, in the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, which recognises

228 McAdam, above n 174, at 12.

229 UNHCR Summary of Deliberations, above note 34, at 7.

230 Kälin and Schrepfer, above note 90, at 71.

231 Kälin, above note 127, at 93.

232 Internal Principles, above note 25, introduction para 11.

the Internal Principles as an important international framework,²³³ that this Convention extends even further to protection from climate change-related events.²³⁴ It would be crucial, given the soft law nature of this framework, that it was adequately disseminated to national governments and other non-government actors to maximise their implementation.²³⁵

6.1.4 Alternatives, criticisms and responses

Clearly, multiple approaches have advantages and disadvantages, including the establishing of a cross-border guiding framework. The major advantage, however, of a global guiding framework is, as Jane McAdam has pointed out, that it could act as a “first step” giving states clarification on existing legal obligations to build consensus,²³⁶ with the possibility of even assisting in the implementation of other approaches or to guide any other future policy initiatives. While a specific instrument for people from SIDS facing displacement could ultimately address the legal gaps and apply them to the specific needs of this group, an international guiding framework, it is argued, is a crucial primary step. An awareness of other potential approaches is still crucial for understanding what further developments may arise.

(i) Managed migration

The President of Kiribati has advocated for “migration with dignity”,²³⁷ to prevent the much tougher task of mass relocation of the people of Kiribati.²³⁸ Jane McAdam also argues managed migration pathways may be better suited to slow-onset impacts.²³⁹ While a detailed examination of this approach is beyond the scope of this discussion, a range of options should indeed be used to address the group-specific needs most effectively. This article instead argues that a cross-border guiding framework could assist by clarifying existing obligations thereby facilitating other options, including managed migration.

233 McAdam, above note 79, at 55; African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (opened for signature 23 October 2009, entered into force 6 December 2012) at 2 [Kampala Convention].

234 Kampala Convention, above n 233, art 5(4).

235 UNHCR Summary of Deliberations, above note 34, at 6.

236 McAdam, above note 79, at 60.

237 “Relocation” Kiribati Climate Change <www.climate.gov.ki>.

238 Anote Tong, President of the Republic of Kiribati “Statement by his Excellency Anote Tong President of the Republic of Kiribati” (The General Debate of the 63rd Session of the United Nations General Assembly, 25 September 2008).

239 McAdam, above note 79, at 57.

(ii) Relocation

Maxine Burkett has passionately argued for the recognition of deterritorialised nation-states, which she has termed nations “*ex-situ*”, as vital for the protection of people forced to migrate from SIDS to overcome the challenges from being rendered stateless if or when their islands disappear.²⁴⁰ Relocation strategies may also need to be explored, given the serious vulnerabilities of those from SIDS. However, a reimagining of statehood may not be easily achieved in the ways envisioned by Burkett. Given that states may also not necessarily lose their statehood by losing territory alone, more immediate protection strategies are needed to address displacement as it occurs. Cross-border guiding principles to kick-start other initiatives such as managed migration strategies may therefore be more effective in the short to near medium term, rather than grand legal theories.

(iii) Treaties or conventions

Treaties or conventions would also have a number of benefits, including aspects where firm normative gaps exist, due to their potentially binding nature and since they would represent a kind of consensus of the international community.²⁴¹ Yet this last element could make it politically challenging to pass. Although this is a political rather than a legal consideration, the people of SIDS do need real protection. A legal solution, no matter how perfect, would need to be politically viable. A soft law framework would have authority by being based on existing laws. Thus it would be authoritative at some level, without needing to be negotiated extensively.²⁴²

It is also questionable how beneficial a firm instrument would be even from a legal standpoint, while terminology and conceptual issues remain. A binding treaty could run the risk of being overly prescriptive, unnecessarily carving up groups into artificial legal categories.²⁴³ Thus, a soft law framework may actually be a better approach than a hard law conception until these issues are addressed. As well as the general benefits a soft law approach can offer, there are also the additional benefits that a soft law cross-border framework specifically may provide, as outlined above. Therefore, a cross-border Guiding Framework on Climate Change Displacement would be a useful first step in protecting people around the world facing climate-induced displacement, including in the case of people from SIDS.

It has also been pointed out that managed migration may be the best practical solution for protecting people from SIDS, to allow them to “migrate with dignity”. A cross-border guiding framework could assist with this process,

240 See generally Burkett, above n 38.

241 McAdam, above note 79, at 60; Kälin and Schrepfer, above note 90, at 69.

242 Betts, above note 76, at 13.

243 Kälin and Schrepfer, above note 90, at 70–71.

by clarifying the existing obligations of the home state and for states around or proximate to these nations. Provisions could be made explicitly addressing aspects relevant to their migration, including their rights in need of protection and the adaptation measures, which acknowledge the responsibilities of the various actors. Express provisions could state that finances should be directed towards possible relocation, where cross-border movement is inevitable — for example, through the concept of burden sharing. Lastly, the strong presumption of continuity of state should be expressly stated, rejecting terms such as “sinking” or “disappearing” islands. The unfortunate conclusion from this analysis is that there may need to be long-term changes to the international legal system as well as specific instruments to address their plight.

7. CONCLUSION

Climate change will have complex and wide-ranging effects on the earth’s environment, but it will also have grave consequences for humanity and particularly the human rights of affected individuals. Few consequences will be as devastating as for those who face displacement from climate change factors. This article has explored the ramifications of climate-induced displacement on people living in low-lying small island states. This group is uniquely vulnerable to the threats posed by climate change, with particular issues under current legal frameworks.

Given that people from SIDS face unique physical vulnerabilities and rights challenges, a specific human rights-based response may ultimately be necessary to keep individuals as the focus of the discussion. This article has argued that a human rights-based approach is most effective for addressing these human rights challenges. This approach can work by using “soft law” guiding principles specific to climate-induced displacement to clarify and combine the current international obligations into one authoritative document. These may help to close the legal gap in protection, aiding the development of a normative framework for applying human rights to this issue and creating long-term solutions.

It has been argued that this approach should work in parallel with other initiatives to provide more immediate “legal scaffolding” where protection deficits remain and to increase political expediency for proper coordinated solutions. Although this approach will not fix everything, it is seen as the most immediate approach, with a high chance of success for helping to set the legal framework towards creating long-term solutions in future.