Universiteit Leiden
The Netherlands

The international legal protection of environmental refugees: a human rights–based, security and state responsibility approach
Vliet, J.M.M. van der

Citation
Vliet, J. M. M. van der. (2020, May 7). *The international legal protection of environmental refugees: a human rights–based, security and state responsibility approach*. *Meijers-reeks*. Eleven International Publishing. Retrieved from https://hdl.handle.net/1887/87594

Version:	Publisher's Version
License:	Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden
Downloaded from:	https://hdl.handle.net/1887/87594

Note: To cite this publication please use the final published version (if applicable).

Cover Page

Universiteit Leiden

The handle http://hdl.handle.net/1887/87594 holds various files of this Leiden University dissertation.

Author: Vliet, J.M.M. van der
Title: The international legal protection of environmental refugees: a human rights–based, security and state responsibility approach
Issue Date: 2020-05-07

5 The security approach

The security approach traditionally focusses on the consequences of environmentally forced migration for States. Especially in the context of climate change, security analysts and academics have warned that it threatens water and food security, the allocation of resources, and coastal populations; threats which in turn could increase forced migration, raise tensions and trigger conflict.[1] The interest of developed States in the security approach is traditionally rooted in the fear of mass-influx of environmentally forced migrants. The legal focus therefore primarily lies with cross-border protection obligations and secondary with 'human security' risks (such as limited access to resources) (see § 2.3.2). To address human security issues, many branches of international law can be instrumental for stronger global or multilateral governance and management. As Saul pointed out, this can cover:

- economic law and the law of development to ensure a more rational, equitable and timely global international distribution of scarce resources.
- international environmental law.
- the principle of equitable and reasonable utilization, the obligation not to cause significant harm, the protection and preservation of ecosystems, and the 'precautionary approach' could be instrumental for transnational governance of freshwater resources such as transboundary watercourses and groundwater aquifers. Also more specific, the principle of sustainable development needs to be modified to include the long-term and global effects of climate change in judgments about the sustainability of particular development projects.
- international trade law, to regulate global agricultural trade and realize fair prices for developing countries.
- international intellectual property law, for better sharing and improved transfer of technology across a range of areas essential to human development, whether in the patenting of medicines against disease, new energy technologies, or genetically modified organisms and gene technology.
- climate change adaptation and mitigation measures could be made conditions of finance or assistance for international loans and assistance, and multilateral or bilateral foreign aid.

1 Brown, Hammill & McLeman 2007.

- in the area of international investment law, measures should be taken to prevent private investment patterns to aggravate the conflict risks associated with climate change. And,
- the international law of the sea, to determine maritime borders.[2]

It goes beyond the scope of this research to visit all these legal regimes to assess their possibility to limit the security risks of climate change and other types of environmental degradation and the prevention of forced migration due to these circumstances. Instead, this chapter focusses on the protection possibilities for those forcedly displaced.[3]

5.1 CROSS-BORDER MIGRATION

Cross-border migration takes place in broadly two patterns: (a) short-term immediate movements across a contiguous land border by individuals fleeing or directly affected by environmental degradation (most often by persons living in a part of the country from which the border is accessible); and (b) longer-term movements, often towards more distant countries (by individuals from across a country very severely affected by environmental degradation).[4] These types of cross-border migration require different responses. From an international law perspective both types of migration are only marginally regulated. International law is limited to narrow and specialised interventions in areas such as refugees or migrant workers and it is mostly the sovereign States that decide whether or not to allow access and stay to people willing to enter their territory. International law recognises a narrow category of those who are forced to migrate as being entitled to international protection. The leading convention to determine who is considered a refugee is the 1951 Refugee Convention relating to the Status of Refugees (hereafter: Refugee Convention). This Convention is supported by regional instruments, such as the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa (hereafter: OAU Convention) and the 1984 Cartagena Declaration on Refugees (hereafter: Cartagena Declaration). This paragraph first analyses protection obligations for longer-term movements based on refugee instruments and complementary forms of protection. Short term immediate movements will be discussed under § 5.2.2.

2 Saul 2009.
3 The need for these rules to be valued in the migration context is for example reflected in the Protocol on the Protection and Assistance to Internally Displaced Persons to the Pact on Security, Stability and Development in the Great Lakes Region.
4 See for an analysis in the context of natural disasters Cantor 2016, p. 2.

5.1.1 The Refugee Convention relating to the Status of Refugees

The Refugee Convention is often considered in the context of environmental refugees, as it is the main international instrument to protect people that are forced to migrate. Being qualified as a refugee under this Convention, comes with the collective commitment by States to guarantee admission on to their territory and to provide substitute protection in lieu of the country of origin. This therefore sets them apart from 'regular' migrants that move in search for better living conditions. The element of force resonates with the reality that environmental refugees are not entirely free in their choice to leave, as they are urged by the environmental degradation, but at the same time it does not reflect the reality of the multi-causality of the decision to leave. The legal definition of a 'refugee' is set out in the Refugee Convention, read in conjunction with its 1967 Protocol.[5] A 'refugee' is defined as someone who:

> 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'[6]

Therefore, for refugee status to be recognized under the Geneva Refugee Convention, the following criteria must apply:
1. a well-founded fear of persecution;
2. the persecution must be for reasons of race, religion, nationality, membership of a particular social group or political opinion;
3. the person must be outside the country of his or her nationality or, if stateless, outside the country of his or her former habitual residence;
4. the person must be unable or, owing to such fear, unwilling to avail him or herself of the protection of that country.

As the Refugee Convention was not drafted with environmental refugees in mind, this paragraph analyses whether the Refugee Convention can reasonably be interpreted to include those persons.

Well-founded fear of persecution

There is no general definition of persecution. However, the UNHCR has identified some (non- exhaustive) general categories of situations that will amount to persecution:

---

5 Convention relating to the Status of Refugees International Refugee Convention, 28 July 1951.

6 Refugee Convention, Art. 1A2, read in conjunction with Protocol relating to the Status of Refugees.

> '(a) a threat to life or liberty on account of one of the listed grounds; (b) other serious infringements of human rights on account of one of those grounds; (c) discrimination leading to consequences of a substantially prejudicial nature for the person concerned, such as serious restrictions on the right to earn his or her living, right to practice his or her religion, or access to normally available educational facilities; (d) discriminatory measures not amounting as such to persecution, but that produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his/her future existence; (e) criminal prosecution or fear of it for one of the grounds enlisted in the refugee definition or excessive punishment or fear of it for a criminal offence.'[7]

Environmental refugees do not easily fit any of these categories

In general, environmental refugees will have a hard time establishing that they are suffering from persecution, because environmental factors do not and cannot readily be construed to 'persecute' someone, as environmental degradation affects everybody indiscriminately. Even though, some authors argue that forced migration due to environmental degradation can be considered persecution based on serious infringements of human rights,[8] this opinion is not widely shared. I agree with the main stream opinion that this interpretation of persecution would stretch the meaning too much. Also, to be recognised as persecution, the lack of protection must be based on one of the grounds mentioned in the definition of refugee, which is generally not the case (see analyses on convention grounds below).

It would also be hard to qualify the home State as a 'persecutor'. Home States might have contributed little (e.g. developing States to climate change) or nothing (natural disasters not caused by humans) to the environmental degradation, and therefore cannot be considered a persecutor. Some academics point to the inaction of home States to base a claim of persecution upon. Williams refers to the examples of the desertification of the African Sahel where it is claimed the governments of the Sahel region 'could have enacted policies and programs to cut population growth, to improve agricultural techniques, or to heighten food production' and the Chernobyl disaster where the impacts of which were argued to be accentuated by the Soviet government's delayed response to the accident and apparent disregard to safety and environmental considerations in the country's quest for nuclear power.[9] I agree with Williams' conclusion that given the object and purpose of the agreement and the narrow applicability of the Refugee Convention intended by the parties, it is highly

7 Frigo 2011, p. 44. See also Art. 9 EP and Council Directive 2011/95/EU 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

8 See § 3.1.

9 Williams 2008, p. 508-510.

unlikely that this argument is to be accorded any significant credibility even if one adopts the most liberal approach to treaty interpretation.

In the context of climate change it has been argued that the international community and industrialized countries in particular could be qualified as persecutor for their failure to cut greenhouse gas. As McAdam rightfully pointed out, this is quite different from the traditional concept where refugees need protection against their own government. On the contrary, protection is sought in countries that have contributed to climate change.[10] It is highly unlikely that this interpretation of the Refugee Convention would be accepted in any court.

Convention grounds

The Refugee Convention also requires persecution to be on account of an individual's race, religion, nationality, political opinion, or membership of a particular social group. As environmental degradation generally affects everybody indiscriminately, this standard will be very hard to meet, even if governments to not act to protect their citizens. When only government responsibility or negligence can be established, without any reason based on the five Convention grounds, this is not considered persecution within the scope of the Refugee Convention as defined by present interpretations.[11] For persecution on account of convention grounds, some extra circumstances need to be considered. So for example, when the national government has consciously withheld or obstructed assistance in order to punish or marginalize environmental refugees on one of the five Convention grounds.[12]

Kolmannskog suggest that – even though a highly controversial interpretation[13] – the ground 'social group' offers some possibilities. He pointed out that there are two main theories regarding what constitutes a social group; one arguing that it is crucial that the group has fundamental or inherent protected characteristics, the other emphasising (external) social perception. This second interpretation could be argued to encompass environmental refugees. Kolmannskog suggests that environmental refugees may constitute 'a social group composed of persons lacking political power to protect their own environment.'[14] Some have argued that the combination of being an

10 McAdam 2011, p. 12 and 13.

11 Williams 2008, p. 508-510.

12 Kolmannskog 2009, p. 32 and UNHCR 2011, p. 3 and 4. In most cases such an element of an attitude or motivation that can be considered persecution for reasons of the Refugee Convention is absent. McAdam refers to an Australian case in which the Tribunal stated: There is simply no basis for concluding that countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases, have any element of motivation to have any impact on residents of low lying countries such as Kiribati, either for their race, religion, nationality, membership of any particular social group or political opinion. McAdam 2011, p. 14.

13 Kolmannskog 2008, p. 25 and 27.

14 See for example Art. 10 1d EP and Council Directive 2011/95/EU.

environmental refugee and a member of a vulnerable group[15] can form the basis for the acknowledgement of a social group. As vulnerable groups are considered to be affected disproportionately by environmental degradation, it is argued that this combination of environmentally forced migration and being a member of a vulnerable group, constitutes and a social group.[16] However, even if this controversial interpretation were to be accepted, it would still be hard to make the argument that they are being persecuted for reasons of belonging to this group. Only combined with discriminatory measures this could attribute to the qualification as refugee.

Outside the territory of the national State
The refugee definition only applies to people who have already crossed an international border. The growing body of empirical research shows that in most cases, movement is likely to be predominantly internal and/or gradual, so either international borders have not been crossed or the nature of the movement will not be one of 'flight'.[17] Therefore, the majority of environmental refugees clearly falls outside the scope of the refugee convention. They either migrate internally or are qualified as 'economic' migrants. This again demonstrates the extent to which the traditional approach to refugee protection is ill suited to address the contemporary challenge of environmental refugees.[18]

Unable or unwilling to avail himself of the protection of the national State
While traditional refugees could not avail themselves of the protection of their country, as States were often the source of persecution, environmental refugees can, in theory, rely on the protection of their national government.[19] In line with the principle of sovereignty, it is the national States obligation to protect those people. The governments of environmental refugees will likely not have abandoned them and indeed may be actively trying to assist them.[20] Therefore, there is no need to transfer this obligation to protect to other States, as is the basis of the Refugee Convention.

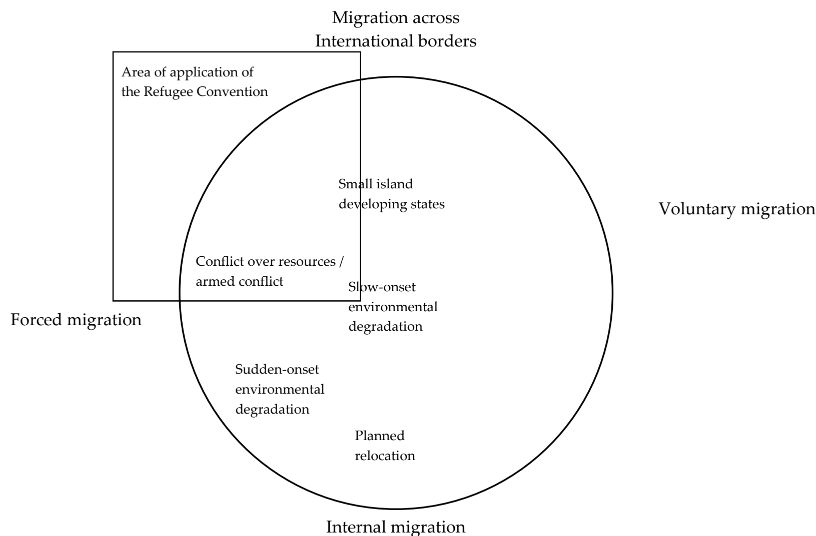
Conclusion on the refugee convention
The factual reality of environmentally forced migration does not translate easily into the protection possibilities offered by the Refugee Convention. Environmental refugees in general do not meet the requirements to be defined as refugees under the Refugee Convention. Even when environmental refugees

15 See § 3.1.4.
16 Ammer et al. 2010, p. 64.
17 McAdam 2011, p. 8.
18 Williams 2008, p. 508-510.
19 *Ibid.*, p. 508-510.
20 Wyman 2013, p. 179 and 180.

have a well-founded fear of threats to their life due to environmental degradation, and seem deserving of international sanctuary, they generally do not fall within the scope of the Refugee Convention as defined by present interpretations.[21] The Refugee Convention, was designed to answer a particular protection gap for refugees after the World War II in Europe. Not only was environmental degradation not considered by the drafters (and it therefore needs interpretation to include them), but the solutions that can be offered through the Convention are ill suited to address the contemporary challenge of environmental refugees. This is a strong argument not to base protection on the refugee framework.

Only for a very narrow group of environmental refugees the Convention offers protection. This covers those of whom the national government has consciously withheld or obstructed assistance in order to punish or marginalize them on one of the five Convention grounds and who have crossed an international border and those that flee from conflicts that are (also) caused by environmental degradation, and qualify as 'war refugees'.[22] This discrepancy between the Refugee Convention and the different types of environmental refugees was presented in a diagram by Vogel et al.

Figure 11: Climate-induced migration within the continuum of the Refugee Convention definition of refugee[23]



21 McAdam 2011, p. 13.

22 'One example would be where government policies target particular groups reliant on agriculture for survival, where climate change is already hampering their subsistence. Another example would be if a government induced famine by destroying crops or poisoning water, or contributed to environmental destruction by polluting the land and/or water.' McAdam 2011, p. 14 and 15. See more in § 6.3.

23 Figure from Vogel et al. 2009, p. 5, adapted to the terminology used in this research.

However, despite the legal arguments, in the aftermath of a 2010 earthquake, Panama and Peru recognised some Haitians as refugees based on a well-founded fear of non-State actor persecution and a lack of governmental authority in Haiti. If a State is unable to protect a person from non-State persecution in an area plagued by slow onset processes or following a sudden onset event, this can in practice serve as a basis for a refugee claim.[24]

5.1.2 Regional refugee instruments

Several regional instruments provide a definition of refugee wider than that in the Refugee Convention. However, the regions that are most likely to experience massive displacement because of the impact of climate change – Asia and the Pacific – have no regional convention or instrument on refugees and many Asian States have not ratified the global Refugee Convention.[25]

The 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa

Article 1.2 of the OAU Convention extends refugee protection 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.' The reason for the broader definition is that the OAU Convention wanted to include those displaced by wars of independence.[26] Theoretically, this broad definition, may provide protection to persons fleeing their countries as a result of at least certain forms of environmental degradation. However, as with the Refugee Convention, the OAU Convention was not designed to protect environmental refugees, and therefore needs interpretation to offer protection.

It has been argued that environmentally forced migration can be qualified as events seriously disturbing the public order. While some commentators stress that the OAU Convention could apply to environmental refugees, most think not.[27] Even if this interpretation is accepted, the threshold for seriously disturbing the public order is very high and would apply only to the most severe disasters, leaving most environmental refugees without protection.[28]

Okello argues that the real value of the OAU Convention lies in the 'focus (in the definition) on the objective circumstances which compel flight and not

24 HRC UN Doc A/HRC/37/CRP.4, The Slow onset effects of climate change and human rights protection for cross-border migrants, 22 March 2018, para 70.
25 Manou et al. 2017, chapter 2.
26 Ammer et al. 2010, p. 67.
27 Kraler, Nack & Cernei 2011, p. 39 and 40.
28 See for this threshold § 4.1.2 and 4.2.2.

linking the flight to the individual asylum seeker's subjective interpretation of danger arising from events around his or her person.'[29] This focus away from the individual asylum seeker corresponds much better with the reality of environmentally forced migration that often affects groups of people. It is almost impossible to determine who is forced into migration and who can stay when the land still supports some people to remain behind. In practice it is often those most vulnerable that stay behind (and which are most in need for protection). On the other hand, Lackzo and others argue that, even though regional practice allows people fleeing natural disasters to cross international borders and temporary residence is offered, this is considered a voluntary gesture of humanitarian protection as opposed to a convention obligation.[30] Ammer et al. argue that, at best, these humanitarian gestures can point to a development of common law towards an obligation of humanitarian protection.[31] Therefore, at present, State practice shows little scope for regional instruments to offer protection against environmental forced migration.[32]

Cartagena declaration

In Latin America, the 1984 Cartagena Declaration includes in the refugee definition: 'persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.'[33] This Declaration, while not reflecting treaty obligations, has been endorsed and implemented in national legislation by many Latin American States and has been endorsed by the Organisation of American States (OAS), by UNHCR and by the Conference of the States Parties to the Geneva Refugee Convention.[34]

It has been argued that environmental refugees can be included in the category of those who fled their country because of massive violations of human rights. Rohl describes that in theory, it could be argued that violations of human rights (including economic and social rights) that can be ascribable to a failure of States to prevent or remedy such violations could amount to massive violations of human rights. She refers to Shacknove to argue that the negative consequences of weather related environmental degradation are often

29 Okello 2014.
30 Aghazarm, Laczko 2009, p. 413.
31 Ammer et al. 2010, p. 67. See more in § 5.2.2 humanitarian asylum/discretionary forms of protection.
32 Aghazarm, Laczko 2009, p. 413.
33 Cartagena Declaration, Section III3.
34 Frigo 2011, p. 69 and 70.

to a greater extent attributable to State negligence or indifference than to the weather.[35]

Other authors argue that environmental refugees can be included in the category 'other circumstances which have seriously disturbed public order'. However, a mayor argument against this extension is that the International Conference on Central American Refugees does not understand the 'other circumstances' to include natural disasters.[36] The Conference has determined that: 'circumstances seriously disturbing public order must result from human acts and not from natural disasters.'[37] Of course it could be argued that human actions have an impact on the need for protection and that environmental degradation may be caused by humans (e.g. anthropocentric climate change), but these strings of causality are very complex and difficult to prove. Also (as with the OAU Convention) the threshold for seriously disturbing the public order is very high and would apply only to the most severe disasters, leaving most environmental refugees without protection.[38] It is therefore not very likely that jurisprudence and doctrine will include environmental refugees under the protection scope of the Cartagena Declaration.

5.2 Complementary forms of protection

Complementary protection may be more promising in providing protection to (certain categories of) environmental refugees. Complementary protection is the generic name given to that protection which results from international legal obligations not to return a person to serious ill-treatment such as torture, cruel, inhuman and degrading treatment or punishment. The non-refoulement principle, and other complementary protection mechanisms can provide building blocks for new ways of affording protection, particularly regarding the concept of return.[39] Complementary protection does not supplant or compete with protection under the 1951 Convention; by its nature, it is complementary to refugee status determination done in accordance with the 1951 Convention.[40] This paragraph analyses the possibilities under non-refoulement, temporary protection for reasons of mass-influx or humanitarian reasons and subsidiary protection based on generalised violence.

---

35 'When starvation occurs not because of drought or flood but because of the hoarding of grain or the corrupt distribution of material aid, deprivation is no longer the result of natural conditions. [Rather,] the state has left unfulfilled its basic duty to protect the citizen from the actions of others.' in Rohl 2005, p. 5.

36 Kolmannskog 2009, p. 32.

37 Ammer et al. 2010, p. 67.

38 See for this threshold § 4.1.2 and 4.2.2.

39 Kolmannskog, Trebbi 2010, p. 729 and 730.

40 Zetter 2011, p. 19 and 20.

5.2.1 Non-refoulement

The principle of non-refoulement is the prohibition for States to expel or return a person to a country where he or she risks being subjected to serious human rights violations. Non-refoulement is a fundamental principle of international law and one of the strongest limitations on the right of States to control entry into their territory and to expel aliens as an expression of their sovereignty. It has its origin in international refugee law and international regulations on extradition.[41] In Article 33 of the Refugee Convention (where the obligation is codified) this obligation is limited to a prohibition to expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[42] This limitation of the protection scope to threats for reasons of the Convention grounds limits the protection possibilities based on non-refoulement in the same way as it is limited for regular Refugee Protection.[43] The non-refoulement principle of the Refugee Convention is therefore of a very limited use for environmental refugees.

Complementary protection based on human rights law

By contrast, complementary protection based on human rights law, applies without a link to a particular status (race, religion, nationality, membership of a particular social group, or political opinion), and thus broadens the protection offered by the Refugee Convention.[44] 'The legal basis of the principle of non-refoulement lies in the obligation of all States to recognise, secure and protect the human rights of all people present within their jurisdiction, and in the requirement that a human rights treaty be interpreted and applied so as to make its safeguards practical and effective.'[45] Here, consideration is given as to whether returning a national to its country of origin raises an obligation for the host State to prevent a breach of fundamental human rights.[46] While only the Convention against Torture explicitly states

41 Frigo 2011, p. 95-97.

42 Morel 2014, p. 101 and 102.

43 *Ibid.*, p. 101 and 102. See § 5.1.1.

44 Gil-Bazo 2015, p. 25.

45 'It is widely accepted that the risk of serious human rights abuses does not necessarily have to come from State agents in order to trigger the protection of non-refoulement. It can also originate from non-State actors when the State is unwilling or unable to protect the person at risk.' In Frigo 2011, p. 113 and 114.

46 The HRC held that 'the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant.' CCPR,

the principle, it is implicit in the obligation of States to protect certain rights of people within their jurisdiction which will otherwise be violated in another jurisdiction.[47] Some prohibitions of returning someone are absolute. Currently, the risk of arbitrary deprivation of life and torture, or cruel, inhuman or degrading treatment or punishment are considered absolute. The consequence is that these violations do not allow for a balancing test between the interests of the individual and the State.[48] However, the threshold for these non-refoulement obligations is high.

- *Life*

For the principle of non-refoulement to apply, the risk of arbitrary deprivation of life faced on return must be real. To demonstrate that a risk to an individual subject to transfer is *'real'*, 'the standard of proof is that substantial grounds have been shown for believing that the person risks being subject to a serious violation of his or her human rights. This must be assessed on grounds that go beyond mere theory or suspicion. More precisely, the risk need not be highly probable, but it must be personal and present.'[49] 'To establish that the risk following transfer is *'personal'* it must be shown that the applicant risks as an individual to be subject to a serious violation of his or her human rights if transferred. However, the person does not have to demonstrate that he or she is being individually targeted.' [emphasis added][50]

For States to be obliged to protect environmental refugees, the threats of the environmental degradation must be actual and immediate.[51] With Zetter,[52] I agree that persons whose house will be imminently and permanently submerged in water may be able to claim a right to protection under international law in that their right to life is at risk.[53] It is debatable however whether the same protection is owed to people displaced across international borders for other reasons of environmental degradation or in anticipation of their houses being submerged.[54] Even though the positive obligations to ensure mere 'survival' have been considered by the UN Human Right Committee as falling

General Comment No. 31 [80] 2004, para 12. See also McAdam 2011, p. 17 and 18 and UK Climate Change and Migration Coalition 2014, p. 7.

47 Frigo 2011, p. 98 and 99. See also Wyman 2013, p. 180 and 181.

48 The ECtHR has consistently affirmed that it cannot be balanced against the public interest or any other matter, irrespective of the applicant's criminal or personal conduct. In McAdam 2011, p. 23-29.

49 Frigo 2011, p. 114 and 115.

50 *Ibid.*, p. 115. See also § 3.1.2 the right to life.

51 McAdam 2011, p. 17 and 18.

52 Zetter 2011, p. 17.

53 *Ibid.*, p. 17. See also § 6.2.5.

54 The ECHR jurisprudence also shows that when the cause of the harm is natural, the burden placed on states is lower, as it must be reasonable, therefore a breach of human rights by the home state is harder to construct. See § 3.1.2. the right to life. It might therefore be even counter-productive to frame migration as disaster related. See § 6.2.

under the right to life which is protected by Article 2 ECHR and Article 6 ICCPR,[55] the UN HRC applied a strict test in a case on the potential use of nuclear weapons. In this case, the UN HRC held that for a person to be considered a 'victim' of a violation of the ICCPR: 'he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent , for example on the basis of existing law and/or judicial or administrative decision or practice.'[56] As McAdam has pointed out, the refusal of the Committee to find a claim on the potential use of nuclear weapons admissible – despite the very strong statement of the Committee in General Comment 14 that: 'the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today'[57] and that: 'the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity'[58] 'does not augur well for a successful claim on the basis of potential, slow onset environmental degradation climate change impacts, especially given the far less forceful comments of the Committee about the links between climate change and the right to life.'[59] For most types of environmental degradation, a threat to life only becomes imminent at the very last stage of the most serious environmental degradation. Especially slow-onset disasters force people into migration long before the situation is imminent.

Another difficulty for environmental refugees to demonstrate a risk of arbitrary deprivation of life faced on return is that the risk must be personal. As McAdam pointed out:

> 'this traditional Western approach of individualized decision-making about protection on technical legal grounds seems highly inappropriate to the situation of climate-induced displacement, in which the responsibility for displacement is highly diffuse (attributable to a large number of polluting States over many years, rather than to direct ill-treatment of a particular person by a certain government) and the numbers of those displaced may require group-based rather than individualized solutions.'[60]

---

55 The HRC has noted that 'The right to life enunciated in Art. 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation Art. 4. However, the Committee has noted that quite often the information given concerning Art. 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.' UN International Human Rights Instruments, Compilations of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 29 July 1994 at 6. See also Rohl 2005, p. 21.

56 HRC, *E.W. et al. v. The Netherlands* 1993, para 6.4. See also HRC, *Vaihere Bordes and John Temeharo v. France* 1996, para 5.5-5.7.

57 CCPR, General Comment No. 14 1984, at para 4.

58 *Ibid.*, at para 6.

59 McAdam 2011, p. 50-53.

60 McAdam 2011, p. 52.

The right to life for environmental refugees is jeopardised not so much as a result of generalised or targeted violence, but because basic subsistence needs can no longer be met due to environmental degradation, such as natural or man-made disasters or a combination of both. Therefore, to demonstrate sufficient, objective characteristics that 'justify' movement, is a very high threshold.

The jurisprudence on non-refoulement has been developed most thoroughly in Article 2 of the ECHR.[61] Recently, it has also been addressed by the HRC.[62] Existing jurisprudence relating to socio-economic-based protection and environmental claims requires some individual factor that makes the situation intolerable for the particular applicant. A considerable relaxation of this requirement would be needed if the ECHR is to protect against return to climate change-related harms[63] So far, under the European Convention on Human Rights no removal case has succeeded solely on Article 2 ECHR (right to life). Article 2 ECHR is generally raised in conjunction with Article 3 ECHR, and if a violation of the latter is found, then the analysis of Article 2 ECHR typically falls away.[64] The positive obligations imposed on a State by Article 3 must go beyond Article 2, given that Article 3 is designed to ensure the protection not just of mere survival, but of a life in dignity, as far as the State's responsibility is concerned.[65]

- *Torture and other cruel, inhuman and degrading treatment*

The non-refoulement obligation for torture and other cruel, inhuman and degrading treatment offers absolute protection against torture and inhuman treatment 'whatever the source'.[66] Article 3(1) of the CAT States that: 'no State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' Article 7 of the ICCPR prohibits torture and cruel, inhuman

61 Much of the analysis about the nature and scope of the rights applies equally to the universal and regional context. The jurisprudence of the ECtHR is the most developed in this area and provides the most extensive reasoning about the scope and content of human rights-based non-refoulement in McAdam 2011, p. 17 and 18.

62 HRC, Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, UN Doc CCPR/C/127/D/2728/2016, 7 January 2020. See also § 4.2.3.

63 McAdam 2011, p. 52.

64 *Ibid.*, p. 52.

65 Rohl 2005, p. 21.

66 'Originally, 'inhuman treatment' has been defined by the Commission as covering "such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable". With time, the Court's case-law evolved and it has now established that a state may be held responsible for a violation of Article 3 even in the absence of any deliberate treatment by the authorities. The question whether the purpose of the treatment was to humiliate or debase the victim is "a factor to be taken into account", but not essential.' For an extensive analysis of the jurisprudence on this topic, see Rohl 2005, p. 14.

or degrading treatment or punishment. On the regional level, Article 3 of the ECHR prohibits torture, and 'inhuman or degrading treatment or punishment'. As Kolmannskog rightfully points out: 'No matter how much a disaster has been induced or created by humans, it is doubtful, to say the least, if it can meet the international definition of torture as the infliction of severe pain or suffering by a public official for an enumerated purpose such as punishment or obtaining a confession.'[67] Even the severest environmental catastrophe would be unlikely to amount to torture.[68] This paragraph therefore focusses on cruel, inhuman or degrading treatment.

Scott made a meaningful classification in types of harm due to climate change,[69] which is also very useful for other types of environmental degradation in this context. His classification will be discussed below.[70]

– *Type 1 cases: Direct and intentional infliction of harm*

These are types of environmental degradation where the receiving State or non-State actors directly and intentionally inflict serious harm (exemplified by Soering v. United Kingdom). Since the case of Soering v. United Kingdom,[71] Article 2 and Article 3 of the ECHR have been recognized as precluding removal to a place where an applicant would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment (the implied principle of non-refoulement).[72] This type of environmental degradation might arise for example where State authorities removed barriers that had prevented flooding to an inhabited area. The scope of this category is heavily circumscribed and the point somewhat hypothetical.[73]

– *Type 2 cases: Purely naturally occurring harm*

The most common type of environmental degradation will be the one where the receiving State is not considered to be responsible for harm that results from 'purely' naturally occurring phenomena. Scott argues that: 'Individuals facing expulsion from a European host State to a receiving State during or in the aftermath of a 'pure' natural disaster will generally struggle to engage host State non-refoulement obligations under the ECHR.'[74]

67 Kolmannskog 2009, p. 34 and 35. See also McAdam, Saul 2008.
68 Zetter 2011, p. 20.
69 Scott 2014, p. 412-416.
70 As the jurisprudence on non-refoulement has been developed most thoroughly in Art. 3 of the ECHR, this paragraph focusses on this case law Much of the analysis about the nature and scope of the rights applies equally to the universal and regional context. in McAdam 2011, p. 17 and 18.
71 ECtHR, *Soering v. United Kingdom* 1989, para 85-91.
72 For a historical overview of the development of The principle of non-refoulement in international human rights law see Gil-Bazo 2015, p. 16-18.
73 Zetter 2011, p. 20.
74 Scott 2014, p. 404.

Generally, courts have carefully circumscribed the meaning of 'inhuman or degrading treatment' so that it cannot be used as a remedy for general poverty, unemployment, or lack of resources or medical care except in the most exceptional circumstances. The standard for inhuman and degrading treatment for this type of naturally occurring harm (such as HIV) is exemplified by the cases of D v. United Kingdom[75] and N v. United Kingdom.[76] In these cases, the Court considered that in cases where the alleged future harm 'would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country,'[77] a high threshold must be maintained. This standard of 'very exceptional' and 'compelling humanitarian considerations' would likely apply for victims of natural disasters.

In the case of D v. the United Kingdom, the concept of 'inhuman treatment' has been interpreted rather progressively. In this case the ECtHR considered that returning an HIV-infected person to St. Kitts would amount to 'inhuman treatment', due to inter alia the lack of sufficient medical treatment, social network, a home or any prospect of income.[78] The European Court stressed that it was the exceptional combination of factors that made the applicant's removal incompatible with Article 3. In the latter case of N. v. United Kingdom, the Court observed that at no time since that judgment (over 10 years later) had the court found the proposed removal of an alien on the grounds of the applicant's ill health to constitute a violation of Article 3.[79] The court extrapolated several principles, in particular:

> 'Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient of itself to give rise to a breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for treatment of that illness are inferior to those available in the contacting State may give rise to a violation under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling.'[80]

75 ECtHR, *D. v. The United Kingdom* 1997.
76 ECtHR, *N. v. United Kingdom* 2008.
77 Scott 2014, p. 414.
78 ECtHR, *D. v. The United Kingdom,* para 49-54. See also McAdam 2011, p. 50-53.
79 ECtHR, *N. v. United Kingdom* 2008, para 34.
80 *N. v. United Kingdom* 2008, para 42. See also Burson 2010, p. 165. McAdam noted that 'By contrast, the dissenting judges in that case regarded the removal of a person on their death bed as being, in and of itself, inconsistent with article 3. Accordingly, they regarded the additional grounds in D.'s case – lack of medical and palliative care – as "equally relevant

This is also a political consideration, as a finding to the contrary would place too great a burden on the Contracting States.[81]

Following the case of D v. the United Kingdom the ECtHR further clarified wat should be understood under 'exceptional circumstances' in the case of Paposhvili v. Belgium.[82] The Court determines that:

> 'the "other very exceptional cases" within the meaning of the judgment in N. v. the United Kingdom (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.'[83]

Although the Court clarifies the content of 'exceptional circumstances', it maintains the high threshold for Artcile 3 violations of previous case-law. This leaves little protection possibilities for envirmental refugees, as it only covers the most exceptional cases. A key factor in determining the extent of non-refoulement under Article 3 is the existence of a *'real risk'* of ill-treatment. While certainty is not required, the ECtHR has on the other hand held that a mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Article 3.[84] A real risk of being subjected to torture or inhuman or degrading treatment or punishment must be a foreseeable consequence of the transfer, and personal, i.e. it must concern the individual person claiming the non-refoulement protection.[85] Rohl pointed out that the case-law of the ECtHR 'is

---

to the finding of a separate potential violation of Article 3 of the Convention."' in McAdam 2011, p. 23-29.

81 Scott 2014, p. 414.

82 ECtHR, *Paposhvili v. Belgium* 2016.

83 *Ibid.*, para 183.

84 ECtHR, *Vilvarajah and Others v. UK* 1991, para 111: 'The evidence before the Court concerning the background of the applicants, as well as the general situation, does not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country. Since the situation was still unsettled there existed the possibility that they might be detained and ill-treated as appears to have occurred previously in the cases of some of the applicants see paragraphs 10, 22 and 33 above. A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3.'

85 To demonstrate that a risk to an individual subject to transfer is 'real', the standard of proof is that substantial grounds have been shown for believing that the person risks being subject to a serious violation of his or her human rights. This must be assessed on grounds that go beyond mere theory or suspicion. More precisely, the risk need not be highly probable, but it must be personal and present, although international human rights bodies may, in

ambiguous as to whether an applicant has to demonstrate that the risk which he or she is running of being subjected to treatment contrary to Article 3 is significantly higher than that of other persons in similar circumstances. In some cases […] the Court has used existing patterns of ill-treatment in the country of origin as supporting evidence for a real risk to the applicant.'[86] In other cases, the Court 'has demanded that the applicant demonstrates that his or her situation upon return would be significantly worse than that of the average population. This stands in stark contrast to 'domestic' cases […], where no such 'singling out' of an applicant has been an issue.'[87] As a minimum, a 'mere possibility' of victimhood is not sufficient. An applicant certainly has to show that he or she, in particular, is at risk. Generalised violence, statistics of incidences of ill-treatment, or authoritative reports pointing to the vulnerability of certain groups of which the applicant might be a member, have been regarded as insufficient to engage Article 3 responsibility.[88] In the case of Paposhvili v. Belgium the Court considered that 'it is for the applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3'.[89] However, the Court lifts some of the burden of proof by considering that:

> 'In this connection it should be observed that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons con cerned to provide clear proof of their claim that they would be exposed to proscribed treatment […]. Where such evidence is adduced, it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it.'[90]

In conclusion, Article 3 ECHR might protect those who: 'a) successfully reach or already are on European territory; b) can demonstrate that their expected suffering upon return would be exceptionally severe according to the high threshold established in European jurisprudence, and; c) can demonstrate an

extreme circumstances, 'recognise non-refoulement protection for mere general situations of violence in the country of destination. This will occur only where there is a real risk simply by virtue of an individual being exposed to such violence on return.' Frigo 2011, p. 115 and 116.

86 Rohl 2005, p. 28.
87 *Ibid.*, p. 28.
88 See for example ECtHR, *Case of Venkadagalesarma v. The Netherlands* 2004. For cases concerning the applicants' membership in persecuted minority groups. In Rohl 2005, p. 18 and 26.
89 ECtHR, *Paposhvili v. Belgium* 2016, para 186.
90 *Ibid.*, para 186 and 187.

– equally strictly applied – high probability of the anticipated harmful treatment or suffering.'[91]

Scott considers that: 'although it is not inconceivable that a natural disaster-related non-refoulement claim could succeed even where the impacts are seen as resulting from "purely natural" phenomena, the circumstances would have to be very exceptional, involving extreme deprivation without relief.'[92]

– *Type 3 cases: Predominant cause*

The final type of environmental degradation is where actors in the receiving State are seen as being the predominant cause of a humanitarian crisis, exemplified by Sufi & Elmi v. United Kingdom.[93] In this case, the Court considered that it was reasonably likely that returnees who either had no close family connections or could not safely travel to an area where they had such connections would have to seek refuge in an Internally Displaced Persons or refugee camp. The conditions in these camps, were dire. The Court ruled on the applicable standard for determining degrading or inhumane treatment that:

> 'If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in N. v. the United Kingdom may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict.'[94]

The Court consequently considered the approach adopted in N. v. the United Kingdom not to be appropriate. It adopted the approach as taken in M.S.S. v. Belgium and Greece.[95] In this case, the Court stated that it had not excluded the possibility that the responsibility of the State under Article 3 might be engaged in respect of treatment where an applicant, who was wholly dependent on State support, found himself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity.[96] Scott pointed out, it is unclear if all these factors must be met. She concluded that in the light of expected resource conflicts due to climate change, it is likely that the interpretation of Article 3 as developed in Sufi & Elmi will be applied.[97]

91 Rohl 2005, p. 31.
92 Scott 2014, p. 414 and 415.
93 ECtHR, *Sufi and Elmi v. the United Kingdom* 2011.
94 *Ibid.*, para 282.
95 ECtHR, *M.S.S. v. Belgium and Greece* 2011, para 283.
96 *Ibid.*, para 253.
97 Scott 2014, p. 404.

Importantly, for the present context, inhuman treatment for type 2 and 3 cases does not need to be deliberate. Also a lack of intent to humiliate will not conclusively rule out a violation of Article 3.[98] This means that in principle the non-refoulement principle based on torture and other cruel, inhuman or degrading treatment or punishment could apply in the context of environmentally forced migration, where the environmental degradation is often not deliberate and is often not intended to humiliate anyone. In the context of climate change, McAdam claims that: 'In principle there is no reason why a person suffering from the impacts of climate change could not seek to argue that those impacts – collectively or separately – violate article 3, however it is doubtful that an applicant could presently substantiate a claim according to the level of severity of harm mandated by the European Court of Human Rights.'[99] She extrapolates the case law on protection based on general situations of violence to the climate change context and convincingly concludes that:

> 'Even though the impacts of climate change may ultimately render basic survival in a particular location impossible, Article 3 (and, by extension, Article 7 of the ICCPR) would only assist a person once conditions were already very extreme. This mechanism does not allow for pre-emptive movement where conditions are anticipated to become dire, and thus would not assist people trying to move before the situation becomes intolerable.'[100]

On top of that, often internal flight alternatives are available, which would exclude protection obligations of host States.

- *Other human rights and the obligation of non-refoulement*

Environmental degradation also effects other human rights than torture and certain ill-treatment such as the right to food, the right to water, the right to health and the right to adequate housing.[101] Ever since the case of Soering v. United Kingdom,[102] the court has accepted that 'the same obligation [of

98 McAdam 2011, p. 23-29.

99 *Ibid.*, p. 23-29.

100 *Ibid.*, p. 25.

101 McAdam has pointed out that the UN HRC, the UN Committee on the Rights of the Child, the ECtHR, the UN Committee on the Elimination of Racial Discrimination 'have all recognized that the principle of non-refoulement may extend beyond protection of the right to life Art. 6 ICCPR, Art. 2 ECHR and the right to be free from torture or cruel, inhuman or degrading treatment or punishment Art. 7 ICCPR, Art. 3 ECHR, Art. 37 CRC. The Committee on the Rights of the Child has made clear that the non-refoulement obligation applies in any case where there are substantial grounds for believing that there is a real risk of "irreparable harm" if the person is removed. The language of "irreparable harm" has been used by the HRC to describe harm that is comparable to that contemplated by Art. 6 and 7 ICCPR. However, so far, no other provision has independently given rise to a non-removal claim.' *Ibid.*, p. 32-35.

102 ECtHR, *Soering v. United Kingdom* 1989, in particular para 88-92.

implicit non-refoulement] may be implicit in other ECHR rights'.[103] However, even though, in theory, any human rights violation may give rise to a non-refoulement obligation, the non-absolute rights permit a balancing test between the interests of the individual and the State.[104] In most cases it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach of a human right. So far, no other human rights provision has independently given rise to a non-removal claim.

Adverse social and economic conditions may in principle constitute valid grounds for claims of an Article 3 violation. In fact, it would be difficult to visualise a case in which a sufficiently flagrant violation of other human rights would not also involve treatment in violation of Article 3.[105] This is why analysis typically begins with Article 3, and only if a violation is not made out, other Articles are even considered.[106] If a violation of a socio-economic rights can be re-characterized as a form of inhuman treatment, this would give rise to an absolute international protection obligation.[107]

In her analysis of the cases of Ullah v. United Kingdom[108] and Razgar v. United Kingdom,[109] McAdam considered that the court held that, as a matter of principle, any provision of the ECHR could found a non-removal claim, but that the threshold in such cases would be very high. The applicant would need '*to establish at least a real risk of a flagrant violation of the very essence of the right*.' A '*flagrant denial' of a right is effectively a complete denial or nullification of the right* (the exceptionality test).[110] The ECtHR has suggested that the applicant must demonstrate 'an added 'measure of persecution, prosecution, deprivation of liberty or ill treatment' beyond a 'mere' violation of the

103 McAdam 2011, p. 33.

104 Kolmannskog, Skretteberg 2009, p. 19. 'The reasons for a tendency to regard implicit non-refoulement as only applying to violations of 'fundamental rights' must be found in the tension between human rights treaties and the sovereign right of states to control their territory. While human rights treaties are designed to limit the power of states to a significant extent, states' rights under international law such as the right to border control in turn limit human rights to some extent. In fact, what might be called the 'mutual restriction principle' often informs the interpretation of human rights treaties, in the attempt to strike a "fair balance […] between the general interests of the community and the interests of the individual"' in Rohl 2005, p. 8 and 9.

105 For example, in ECtHR, *Z. and T. v. United Kingdom* 2006 the ECtHR stated that 'it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of Article 3 of the Convention.' in McAdam 2011, p. 33.

106 *Ibid*., p. 32 and 33.

107 McAdam 2010. For an extensive analysis of case law on Art. 3 and socio-economic conditions see Rohl 2005, p. 23 and 24.

108 *Ullah v. Special Adjudicator; Do v. Immigration Appeal Tribunal* 2004.

109 *Regina v. Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent)* 2004.

110 McAdam 2011, p. 33 and Burson 2010, p. 166.

right.[111] 'Again, the justification for this appears to be a policy one: the ECtHR does not make Contracting States the "indirect guarantors of freedom of worship for the rest of the world", and thus a higher threshold of harm (beyond the absolute, non-derogable rights of Articles 2 and 3) must be met.'[112]

Environmental refugees would therefore have to meet the exceptionality test in order to be protected under the non-refoulement obligation for non-absolute human rights. In exceptional circumstances of environmental degradation it may be demonstrated a right is violated if the very essence of the right is destroyed or nullified. By requiring in extremis impacts, this approach to protection from non-refoulement would tend to favour those whose migration is a clear result of force. This limits protection to all but the most severe cases, as many effects will take years to manifest at a sufficiently harmful level to engage Article 3 protection. 'Furthermore, those with the foresight and means to migrate before such threshold of harm is reached, that is, those who migrate voluntarily to avoid the worst, would not be protected.'[113]

To what extent it needs to remain 'exceptional' to qualify is unclear. McAdam pointed out 'a distinguishing feature that makes the lack of such services particularly deleterious on the applicant – would appear to be necessary.'[114] If 'exceptional circumstances' are required, this bodes not well for environmental degradation that is likely to affect groups of people at the same time. At the same time, the internal flight alternative applies. Only when environmental refugees cannot return to any part of the country, the principle of non-refoulement will apply. Apart from the low-lying SIDS[115] it will be unlikely that entire countries become uninhabitable for a longer period of time. Only in the period directly following the most severe natural disasters, whole countries may be unsuitable for return. Under this scenario the effects would only be temporary, therefore they do not render return unlawful.[116]

Conclusion on non-refoulement

In theory any human rights violation could give rise to a non-refoulement obligation. However, for now, human rights violations caused by environmental degradation are as such highly unlikely to give rise to a non-refoulement obligation. Up till now, the principle of non-refoulement has not been accepted by any Court in cases of environmental displacement.[117]

111 ECtHR, *Z. and T. v. United Kingdom* 2006.
112 McAdam 2011, p. 32-35.
113 Burson 2010, p. 167.
114 McAdam 2011, p. 27.
115 See § 6.2.5.
116 McAdam 2011, p. 23-29.
117 There has been a lot of media coverage about the June 4, 2014 decision of the New Zealand Immigration and Protection Tribunal AD Tuvalu. This case was claimed to be the first successful claim for asylum based on environmental degradation due to climate change.

The protection possibilities under the principle of non-refoulement are limited by the facts that: (1) most environmental refugees will have an internal flight alternative, which would exclude non-refoulement obligations; (2) to take advantage of the non-refoulement principle, a claimant already must be outside of his or her home country (where environmentally forced migration is mostly internal); and (3) even if a non-refoulement obligation is accepted, the principle of non-refoulement does not provide the applicants with a legal residence status. 'The principle of non-refoulement does not clarify whether persons which cannot be returned, are entitled to legal residency, leaving these individuals often in an illegal residence status.'[118]

5.2.2 Other forms of complementary protection

Apart from the non-refoulement principle, protection possibilities can also arise from subsidiary protection. However, very few universally accepted sources of subsidiary protection exist to address the needs of people fleeing for reasons other than political persecution and if they have emerged, it is largely on an ad hoc and unpredictable basis that varies between countries and regions.[119] In some regions, temporary protection is offered for reasons of mass-influx, or humanitarian reasons. In other regions, protection is based on generalised violence. This paragraph analyses the protection possibilities of subsidiary protection frameworks for environmental refugees.

Temporary protection

In general, temporary protection is either granted when return to the country of origin is impossible due to the conditions in that country (humanitarian asylum/discretionary forms of protection) or when the host State is unable to process all those coming in through a Refugee Status Determination Procedure and therefore allows temporary protection to all of them (mass-influx).

Mass-influx

Temporary protection constitutes 'a specific provisional protection response to situations of mass influx providing immediate emergency protection from refoulement',[120] both under international refugee law and international human

---

However, the decision was based on purely humanitarian and discretionary grounds – not on any domestic or international legal obligation. For an analysis of the case see McAdam 2014a.

118 Moor de, Cliquet 2010, p. 59-66.

119 Betts, Kaytaz 2009, p. 5.

120 UNGA UN Doc A/AC.96/1021 2005, p. 13, para l.

rights law, without formally according refugee status.[121] 'It is a kind of "interim protection" for people who may prima facie qualify as refugees, but whose conditions of arrival mean that they cannot proceed immediately through an ordinary RSDP [Refugee Status Determination Procedure].'[122] The basis for protection lies in a practical consideration: 'In situations of mass influx, the additional protection is necessary, not because of a 'deficiency' of refugee protection, but due to factual circumstances, which may prevent the State from providing immediate access to the ordinary procedure for asylum.'[123] It is assumed that prima facie refugees are refugees in the spirit of the Refugee Convention until the time when it has been proven that the recognition was made in error or there is a ground for exclusion.[124]

Protection of environmental refugees based on 'mass-influx' is a sub-optimal decision. First, most environmental refugees will migrate internally, and therefore are not covered under the regimes of cross-border migration. Second, most environmental refugees will not qualify as a refugee, and it would be undesirable that they require a status due to the overburdening of the system (taking into consideration that they will be excluded when it becomes clear they are not refugees). Third, an individual may be in need of protection even though he or she does not arrive as part of a 'mass influx'. This is particularly problematic for slow-onset disasters where migration takes place over a longer period of time. Where temporary protection can be a sufficient protection for those temporarily displaced, protection needs are often extended over longer periods of time. Either because the environmental degradation still takes place (e.g. desertification) or because the response of the home State to temporary environmental degradation is inadequate (e.g. insufficient support for rebuilding a society after a typhoon). Temporary protection therefore does not meet the needs of people who may need to stay longer or permanently.[125]

- *EU Temporary Protection Directive*

On the regional level the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (hereafter: EU Temporary Protection Directive) is an exceptional measure to provide displaced persons from non-EU countries and unable to return to their country of origin, with immediate and temporary protection. 'It applies in particular when there is a risk that the standard asylum system

121 However, some states have argued that this does not derive from any obligation, but is purely a matter of states' discretion and therefore a discretionary form of protection. Rohl 2005, p. 5 and 6.
122 Frigo 2011, p. 77.
123 *Ibid.*, p. 76.
124 Ammer et al. 2010, para 2.1.5.1.5.
125 Kolmannskog, Trebbi 2010, p. 727 and 728.

is struggling to cope with demand stemming from a mass influx that risks having a negative impact on the processing of claims.'[126]

Kolmannskog and Trebi note that: 'Arguably, temporary protection can be applicable to some cases of environmentally forced displacement. Article 2(c) of the Temporary Protection Directive specifies those persons who 'in particular' qualify for temporary protection, though it does not provide an exhaustive list.'[127] It includes persons who have fled areas of armed conflict or endemic violence or persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights. In some occasions environmentally forced degradation will coincide with conflict or 'generalized violations' of human rights can occur, and in such cases the displaced fall within an explicitly recognized category.[128] However, even if environmentally forced migration is included in the category of persons who have fled areas of armed conflict or endemic violence or persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights, the practical use will be limited. For the Temporary Protection Directive to apply, a qualified majority of the EU needs to decide that it applies. Mobilizing the political consent and will to do so would, however, be challenging. So far, the Temporary Protection Directive mechanism has never been used.[129] It remains uncertain whether the EU would ever be faced by a 'mass influx' due to environmentally forced migration sufficient to overwhelm the regular asylum processing procedures and warrant the exceptional grant of temporary protection on a prima facie basis.

Humanitarian asylum/discretionary forms of protection

There are situations where neither international human rights law nor the Refugee Convention requires protection, but where the State has devised systems of protection for 'humanitarian' or 'compassionate' reasons, for example in response to the existence of crises such as famine, or natural disasters. According to UNHCR, 'it has become common practice or custom to offer temporary protection to persons who cross an international border to escape the effects of natural disasters.'[130] These forms of protection, although sometimes inspired by international human rights law, are in general

126 European Commission on Migration and Home Affairs, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en.

127 Kolmannskog, Trebbi 2010, p. 727.

128 The Finnish delegation explicitly promoted the inclusion of an express reference to persons displaced by natural disasters in the negotiations on the Temporary Protection Directive, but this was not supported by other Member States, with Belgium and Spain noting that 'such situations were not mentioned in any international legal document on refugees' in McAdam 2011, p. 39.

129 See also Kraler, Noack & Cernei 2011, p. 54 and 55.

130 UNHCR 2011, p. 4.

not mandated by it and remain at the sovereign discretion of the State.[131] The 'Representative of the Secretary-General on human rights of internally displaced persons has suggested that a person who cannot be reasonably expected to return (e.g. if assistance and protection provided by the country of origin is far below international standards) should be considered a victim of forced displacement and be granted at least a temporary stay.'[132]

Humanitarian assistance is mostly a national matter. So far, the right to humanitarian assistance as a human right still remains controversial.[133] 'For various reasons, States may prefer ad hoc humanitarian responses that permit them to determine on a situation-by-situation basis whether they wish to provide 'protection', for what duration and in what form. Typically, though, this is emergency protection after a particular event, rather than pre-emptive protection for projected longer term impacts.'[134] The UNHCR stresses that there is a trend at the national level to 'provide various forms of "humanitarian" or other statuses to persons who, at the time of a natural disaster, were already within their jurisdiction but cannot be returned to their countries of origin owing to the destruction caused by the natural disaster.' And that 'This shows a trend at the national level to accept such persons on an individual basis."[135] In 2009 Kolmannskog already referred to this practice and suggested that this practice can be built upon to address the normative protection gap.[136] However, States often limit protection to those already in their country to avoid the 'pull factor' of humanitarian regulations.[137]

Although discretionary protection offers some protection for environmental refugees, Rohl pointed out that a problem of this approach is that discretionary frameworks are 'intransparent and vague about the coverage of persons supposed to benefit from this form of complementary protection. It entails a disconcerting insecurity'[138] for those protected with regard to the duration of the protection. These protection frameworks are very vulnerable for political pressure and public opinion. Also the level of protection is discretionary. As Rohl illustrates:

131 Frigo 2011, p. 65-69.
132 McAdam, Limon 2015, p. 19 and Humphreys 2008, p. 18-22.
133 For example Kuit argues that 'Looking solely to the international and regional treaties', the human right to humanitarian assistance 'has quite clearly not been independently incorporated on a large scale. The UDHR, ICESCR and ICCPR do not explicitly mention the notion of humanitarian assistance at all.' Determining the existence of a customary right to humanitarian assistance 'requires the establishment of both opinio juris and state practice on this matter. In recent years, no developments have taken place at the interstate level that can immediately or directly be related to evidence of such an emerging right in customary international law.' Kuijt 2015, p. 174-178. See also § 10.3.2.
134 McAdam 2011, p. 41 and 42.
135 UNHCR 2011, p. 4.
136 Kolmannskog 2009, p. 36.
137 See for example Kraler, Noack & Cernei 2011, p. 46 and 47.
138 Rohl 2005, p. 5.

'beneficiaries are mostly granted less rights than Convention refugees. In some States, a stay of expulsion on humanitarian grounds is not complemented with any residence rights, the right to family reunion, or to obtain work permits. Immigrants are thus left in a legal limbo and vulnerable to economic exploitation, often with dramatic consequences.'[139]

These kinds of responses are not sustainable long term.[140] Also, as mentioned before, many environmental refugees do not arrive as part of a 'mass influx', which seriously hampers their recognition as environmental refugees and limits their chances of humanitarian protection.

Subsidiary protection based on generalised violence

Some environmental refugees will be exposed to generalised violence, for example when conflicts arise over scarce resources. Regional instruments like the OAU Convention and the Cartagena Declaration include as refugees persons fleeing from 'generalised violence'. Within the European Union, the EC Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2011/95/EU (herafter: EU Qualification Directive) extends subsidiary protection if there is 'a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict' (Article 2 e, cf. 15 c).[141] But, apart from those that have adopted the OAU Convention or the EU directives, many countries do not yet recognize people fleeing generalised violence as refugees or persons qualifying for complementary protection.[142] Also many environmental refugees will not face generalised violence.

- *EU Qualification Directive*

On the regional level, the EU Qualification Directive is the first legal instrument of a supranational nature containing a separate status for individuals protected under international human rights law that is to be complementary to the Refugee Convention, rather than to the adoption of a single status for all persons granted asylum, whether on Refugee Convention grounds or on international human rights law grounds.[143] Protection is granted to those

139 *Ibid.*, p. 5 and 6.
140 McAdam 2011, p. 41 and 42.
141 Kolmannskog 2009, p. 38.
142 Kolmannskog, Skretteberg 2009, p. 10.
143 Gil-Bazo 2015, p. 25. This regional approach seems to have later been endorsed globally by UNHCR, which considered complementary protection in its 2000 Global Consultations. The Executive Committee 'encourages the use of complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol.' UNGA UN Doc A/AC.96/1021 2005, p. 13, para i.

who face a real risk of suffering serious harm. Serious harm is limited to: (a) 'death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15). From this exhaustive list, only paragraph 'b' might be applicable.[144] Many authors argue against the inclusion of environmental refugees under this category. For example, De Moor and Cliquet pointed out that during the drafting process, the inclusion of a 'violation of a human right, sufficiently severe to engage the Member State's international obligations' that may be interpreted to include environmental refugees was not supported by the Member States.[145] Even if environmental refugees are to be included in the scope, still an 'internal flight alternative' will usually be available which would exclude those environmental refugees from protection.[146]

5.2.3 Conclusion on cross-border migration

The current legal and normative distinction between refugees and voluntary, economic migrants fails to recognize the diversity of reasons why people may be forced to cross borders. For environmental refugees that flee cross-border the refugee framework often does not apply, while in reality they are in need of substitute protection by another State if their own State is unable or unwilling to protect them against marked environmental disruptions (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life. Therefore, there is a role to play for the international community. Unlike economic migrants that look for better opportunities elsewhere, environmental refugees move away from a situation that jeopardized their existence and/or seriously affected the quality of their life. They move because they have to and (may) require assistance from third States to offer them protection.

For environmental refugees that crossed a border and cannot return home due to the circumstances in their home country, complementary protection based on the principle of *non-refoulement* might offer protection. However, no court has currently granted protection against return for reasons of environmental degradation. And even if it were granted, it would only protect against the most extreme situations of environmental degradation, where return would threat the right to life, would put the environmental refugee in danger of being subjected to torture and/or other human rights violations that are sufficiently

144 Kraler, Noack & Cernei 2011, p. 51-54.
145 Moor de, Cliquet 2010, p. 61-66.
146 Article 8. See also Kraler, Noack & Cernei 2011, p. 51-55.

flagrant to give rise to a non-refoulement obligation. This system would need to be developed before it would encompass environmental refugees.

In some situations, States have offered *temporary protection*. These instruments are however of limited use, as they only apply at the exceptional and most extreme circumstances of mass-migration. The system also only offers temporary protection and does not respond to permanent protection needs.

Humanitarian or discretionary protection are in general not mandated by international human rights law and remain at the sovereign discretion of the State. Although it offers some protection for environmental refugees, discretionary frameworks are (often) ad hoc, intransparent and vague about the coverage of persons supposed to benefit from this form of complementary protection and the beneficiaries are mostly granted less rights than Convention refugees. This type of protection therefore is not sustainable for the long term.

Some countries protect people fleeing *generalised violence* as refugees or persons qualifying for complementary protection. It is doubtful whether this protection would be extended to environmental refugees, and if it does, only a very small group of environmental refugees would face generalised violence in their home country.

In general, cross-border protection instruments are unable to address the underlying causes of environmental displacement. The instruments focus on the output: forced migration. However, many cases of forced migration due to environmental degradation may be prevented when the underlying cause (environmental degradation) is addressed. The instruments only respond to migration that is evidently forced. This element of force is often not easy to demonstrate and at the same time it rules out migration as adaptation strategy in the form of pre-emptive movement.[147] Finally, in most occasions of environmental refuge, internal flight alternatives will be available, therefore excluding the applicability of these instruments. At this point from a legal perspective, the security approach offers little protection for cross-border environmental migrants.

5.3 Internal migration

Traditionally, internal displacement is perceived primarily as a humanitarian and human rights issue. Lately, internal migration is beginning to be acknowledged as a security challenge, both as a traditional security issue and as a human security issue, where human security focuses both on the interest of States to minimise threats and on ethical duties of States.[148] Academic

147 Protection is premised on having already been compelled to leave because of an actual threat. The OAU Convention and Cartagena Declaration seem to require evidence of an actual threat. McAdam 2012, p. 15.

148 See more on this issue Commission on Human Security 2003.

research supports that mass displacement carries the risks of internal conflicts, including due to political sensitivities about migration control, the inflammation of ethno-centric political agendas, and increasing isolationism. Host communities can be heavily burdened by the environmental refugees and the environmental refugees can be frustrated by the lack of possibilities and integration in the host community. Conflicts can arise over scarce resourced or over resource abundance, such as for example claims for mineral or energy extraction in the Arctic region that become accessible due to reclining ice.[149] As has been mentioned in the introduction, many branches of international law can be instrumental for stronger global or multilateral governance and management in order to prevent conflicts. These instruments can also be helpful in preventing forced migration due to environmental degradation, when general living conditions are better and individuals are better capable to adapt or mitigate to environmental degradation. However, the main responsibility will lie with the home State and will be subjected to the sovereignty of that State. From a political perspective, however the security approach may spark the interest of States in global peace and security and the importance of minimum standards of living for all people to achieve human security (this will be further discussed in part IV).

From a legal perspective, internal migration is broadly covered by the internally displaced persons framework as discussed under § 3.2. The Guiding Principles on Internally Displaced Persons and IDP Framework (sometimes supported by regional regimes) provide a roadmap of State obligations towards internally displaced persons. The legal obligations for the home States are quite clear. The problems arise when large numbers of people are displaced within developing countries that are unable to carry that burden and to provide the protection required under the internally displaced persons framework. As Mayer rightfully pointed out, assistance and protection measures generate expenses and divert resources, possibly straining public services and environmental resources, especially within poor countries or communities. In extreme cases, mass arrivals may affect the availability of basic commodities and threaten public order or political institutions. Despite some international humanitarian assistance, most of the economic and non-economic costs of hosting large populations of migrants – refugees, in particular – has generally been sustained by host communities themselves.[150] As mentioned before, developing countries will be hit the hardest by climate change. Therefore, situations where the need for protection will supersede the ability of the State to protect will rise. Other States than the home State may be obliged to support these affected States. This obligation may be based on positive extraterritorial

149 See for example Schubert et al. 2008, p. 133.
150 Mayer 2017, p. 249.

State obligations.[151] Support may also be based on considerations of peace and stability in vulnerable regions.[152]

151 See § 10.3.
152 See § 13.3.