

NO WAY OUT FOR CLIMATE REFUGEES’ ASYLUM APPLICATIONS IN COURT DECISIONS AND CONVENTIONS

Accepted
24. 10. 2022

Revised
6. 1. 2023

Published
26. 4. 2023

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Abstract One major consequence of climate change is the migration problem caused by internal and international displacement of people due to environmental disasters. The cross-border effects of climate-induced displacement have naturally sparked novel debates in the field of refugee law, and has created a group of people commonly called ‘climate refugees’. Climate refugees do not necessarily fall within the definition of ‘refugee’ under the 1951 Geneva Convention. While certain states and international organisations, including the UN, approach the situation of climate refugees solely from a security point of view, others see these people as victims of climate-induced disasters. No country is truly willing to share the burden caused by the climate-induced mass migration or address the full extent of this major phenomenon. Moreover, the international agreements on which they base their asylum claims fail to adequately address the circumstances surrounding their requests. Differing opinions have been expressed in academia as to the appropriate protection mechanisms and assistance that can be provided to climate refugees. In article, we explain the differences between the conventional refugees and climate refugees, discuss the reasons why the existing international conventions fail to protect climate refugees, and highlight the proposed solutions for the protection of such refugees.

Keywords

Climate refugees,
environmental refugees,
environmentally-
displaced persons,
climate induced
migration,
1951 Geneva
Convention

1 The Concept of “Climate Refugees”

Of the many reasons that cause migration, which until recently was seen primarily as the result of economic problems, natural disasters have become the leading factor, particularly in recent years (Moberg, 2009, p. 1111).¹ As a consequence of natural disasters or climate change, which also led to economic crises, people have been displaced either internally or internationally. Displacement as result of economic reasons has given rise to the concept of “economic refugees”, which is linked more to managed migration and international aid and development than to the institution of asylum (Goodwin-Gill & McAdam, 2007, p. 15). Similarly, disappearing small islands² and coastal states, water and food shortages, extreme weather events, armed conflict and political instability due to diminishing natural sources (Westra, 2009, p. 79) have created new refugee-related terms such as “climate refugees”, “environmental refugees” “environmentally-displaced persons”, “environmentally-induced migration”, “environmentally-induced displacement”, “environmental migrants”, “ecological migrants” or “ecological refugees”.³ However, neither economic reasons nor natural disasters are accounted for in the refugee definition of the 1951 “Geneva Convention Relating to the Status of Refugees”. Article 1A(2)

¹ Civil remedies against the polluters are also among the major problems arising from the climate change. For the jurisdictional obstacle in transboundary environmental lawsuit brought by foreign victims of climate change *see* Laganière, 2020, pp. 390-422.

² These islands are also called “Ex-Situ nations”. The concept of “Ex-Situ nations”, an entirely new status for governments that will lose their territory, was first used by Burkett (Koenig, 2015, pp. 519-520). For more information about Ex-Situ nations *see* Burkett, 2013, pp. 89-121.

³ Jacovella, 2015, p. 82. The concept of “environmental refugee” was first created by Brown L. of World Watch Institute (WWI) in 1970 (Brown, 1979, pp. 214 and 239), and was subsequently used by the International Institute for Environment and Development located in London in 1984 and the UN Environment Programme-UNEP in 1985 and its 1992 Agenda 21. Environmental refugees are defined by El-Hinnawi, an Egyptian professor, in his book published by UNEP in 1985, “*as those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life*” (El-Hinnawi, 1985, p. 4). He divided environmental refugees into three categories: According to him “*there are three broad categories of environmental refugees. First, there are those who have been temporarily displaced because of an environmental stress. Once the environmental disruption is over and the area rehabilitated to its original state, they return to their habitat. This is usually the situation with populations, displaced by natural hazards such as earthquakes or cyclones or an environmental accident (for example, an industrial accident that created temporary environmental disruption). The second category of environmental refugees comprises those who have to be permanently displaced and re-settled in a new area. They are displaced because of permanent changes, generally man-made, that affect their original habitat-in the case of the establishment of huge dams, for example, and the associated man-made lakes. The third category of environmental refugees consists of individuals or groups of people who migrate from their original habitat, temporarily or permanently, to a new one within their own national boundaries, or abroad, in search of a better quality of life*” (El-Hinnawi, 1985, pp. 4-5). Both Brown and El-Hinnawi’s works are generally accepted as the starting point for climate or environmental refugee-based studies (Biter, 2019, p. 434). However, since climate or environmental refugees do not meet the requirements of refugee definition of the 1951 Geneva Convention, the UNHCR, the IOM, and the Refugee Policy Group (RPG) prefer not to use the term “refugee” and suggest alternatives such as “environmental migrants”, “climate change migrants”, or “environmentally displaced persons” (Islam, 2013, pp. 217-218). For evaluations of the climate refugees in respect of case law and conventions *see* Ekşi 2016, pp. 10-58.

of the 1951 Geneva Convention provides that a refugee is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. In order to be considered as a refugee, a person must show well-founded fear of persecution for one of the reasons stated in this provision. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them⁴. The reasons for persecution may be 1) race, 2) religion, 3) nationality⁵, 4) membership of a particular social group or 5) political opinion.

According to paragraph 39 of the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and its 1967 Protocol, the concept of "persecution" excludes such persons that are victims of famine or natural disasters.⁶ A variety of actors have called for a new international treaty on climate change displacement, or a Protocol to the 1951 Geneva Convention to create a new class of refugee-like protected persons (McAdam, 2011, p. 6). However, the steady increase in the number of refugees and victims of environmental disasters moved the issue of the drafting of a new treaty for the protection of climate refugees away from the agenda of States. Other aspects of climate-induced migration constitute an unbearable burden and threat to security which prevent the States from initiating a new refugee-type convention.

⁴ Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979. <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> (access 27 July 2016).

⁵ "74. The term "nationality" in this context is not to be understood only as "citizenship". It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term "race". Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution" (Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979).

⁶ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979. UNHCR also underlines that no protection is provided in 1951 Geneva Convention for displaced people in the climate change context. "[...] *most people displaced across an international border solely by the effects of disaster or climate change will not fall within the definition of a refugee under international law. They may nevertheless still be in need of international protection, on a temporary or longer term basis. UNHCR has produced Guidelines on Temporary Protection and Stay Arrangements to inform Government responses to such humanitarian crises and disasters*", UNHCR Key Messages and Commitments on Climate Change and Disaster Displacement COP 25 Madrid, Spain 2 to 13 December 2019: <https://www.unhcr.org/5e01e3857.pdf> (access 20 April 2021).

Since the 1990s, international organizations have considered climate change as posing a threat to security, economy, politics and the environment. According to the UN Security Council⁷, ecological damage has threatened both peace and security. The statement of the UN Security Council also finds support in the academic works.⁸ Moreover, the UN Secretary-General's remarks to the Security Council on addressing climate-related security underlines the risks to international peace and security.⁹ Similarly, the EU Council has increasingly focused more attention on the impact climate change poses to security.¹⁰

Science shows that certain Island States, including Tegu, the Federated States of Micronesia, the Carteret Islands, Papua New Guinea, Bangladesh, the Marshall Islands, the Maldives, Tuvalu, and Kiribati will become uninhabitable in the near future (Stoutenburg, 2013, p. 60; Schofield & Freestone, 2013, p. 144; Rayfuse, 2013, pp. 168; Dewaele, 2019, p. 10; Wennersten & Robbins, 2017, pp. 63-70). People living in these lands have already been moving to the neighbouring countries to make asylum applications. While the numbers of "climate change refugees", "ecological refugees" or "environmental refugees" have been constantly increasing, no adequate protection is provided to them under national legislations or international treaties

⁷ UN Security Council has been emphasising "...Ecological fields have become threats to peace and security". United Nations Security Council S/23500 31 January 1992, Note by the President of the Security Council: <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/PKO%20S%2023500.pdf> (access 14 April 2021).

"...The biggest threat to security that modern humans have ever faced..." Sir David Attenborough in his address to the UN Security Council on 23 February 2021 (<https://www.gov.uk/government/speeches/pm-boris-johnsons-address-to-the-un-security-council-on-climate-and-security-23-february-2021>) (access 14 April 2021).

⁸ Evaluation of security aspect of climate change migration *see* Elliott 2010, pp. 175-190; Timura, 2001, p. 104; Nevitt, 2020, pp. 321-366.

⁹ "[...] *Where climate change dries up rivers, reduces harvests, destroys critical infrastructure, and displaces communities, it exacerbates the risks of instability and conflict. [...] In Afghanistan, for example, where 40 percent of the workforce is engaged in farming, reduced harvests push people into poverty and food insecurity, leaving them susceptible to recruitment by criminal gangs and armed groups. Across West Africa and the Sahel, more than 50 million people depend on rearing livestock for survival. Changes in grazing patterns have contributed to growing violence and conflict between pastoralists and farmers. In Darfur, low rainfall and recurrent droughts are increasing food insecurity and competition for resources and we are seeing the result. The consequences are particularly devastating for women and girls, who are forced to walk farther to collect water, putting them at greater risk of sexual and gender-based violence. Vulnerability to climate risks is also correlated with income inequality. [...] Unless we protect those most exposed and susceptible to climate-related impacts, we can expect them to become even more marginalized, and their grievances to be reinforced. In some small island nations in the Pacific, entire communities have been forced to relocate, with terrible implications for their livelihoods, culture and heritage. The forced movement of larger numbers of people around the world will clearly increase the potential for conflict and insecurity beyond their suffering. [...]*" 23 February 2021: <https://www.un.org/sg/en/content/sg/statement/2021-02-23/secretary-generals-remarks-the-security-council-addressing-climate-related-security-risks-international-peace-and-security-through-mitigation-and-resilience-building> (access 18 April 2021).

¹⁰ Climate Change and International Security Paper from the High Representative and the European Commission to the European Council S113/08 14 March 2008: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/reports/99387.pdf (access 18 April 2021).

due to the security-related issues as well as the unbearable economic, social and political burdens resulting from climate migration. It is also stated that developed countries are worried that even if they act, other countries' inaction will negate their work, and some countries believe that there is no reason to act because humans are unable to alter the climate (Koenig, 2015, p. 502). China, Vietnam, India, Indonesia, Bangladesh, Japan, Shanghai, Manila, Bangkok, and Jakarta as well as certain US states and cities such as Miami, Florida, California, Louisiana, New York, Norfolk, and Boston are under the threat of climate change (Wennersten & Robbins, 2017, pp. 17-19, 75, 84, 95, 190 et seq.). Ethiopia, Chad, Sudan, Liberia, Somalia, Mozambique, and Haiti are the examples of countries where not only the normal state services but also boundaries have disappeared (Wennersten & Robbins, 2017, p. 30).

Tuvalu and Kiribati are just two examples of many countries that are losing inhabitable lands (Moberg, 2009, p. 1110). Tuvaluans depend on farming and fishing as their means of survival (Moberg, 2009, p. 1110). Due to the increase in salt in their soil, increasingly severe storms and rising sea levels, the ability of the Tuvaluans to farm has been negatively impacted. Each year many Tuvaluans try to migrate, particularly to New Zealand and Australia (McAdam, 2010, pp. 109).¹¹ Knowing that the eventual submersion of its homeland is inevitable, the Tuvalu Government has unsuccessfully sought agreements with Australia and New Zealand that would allow Tuvaluans to migrate to these countries if an emergency evacuation is necessary (Moberg, 2009, p. 1109; Lopez, 2007, pp. 372-373). The governments of these sinking islands have been struggling to find solutions other than such bilateral agreements. Even the President of Kiribati has considered buying the so-called floating islands from Japan (Stoutenburg, 2013, p. 63). Moreover, Tuvalu's then Prime Minister threatened to bring a case against the United States and Australia for compensation, which plan did not materialize because of a change in Government (Stallard, 2009, p. 163). Maldives, which is a collection of over 1,000 islands, is described as an example of a tireless voice regarding climate change (Koenig, 2015, p. 516). In 2009, the President of the Maldives held a cabinet meeting underwater in an attempt to garner global support on climate change (Koenig, 2015, p. 516). Buying land is deemed to be another solution for disappearing island. Thus, Kiribati purchased property from the Church of England in Fiji in 2014 without official

¹¹ For the evaluations about the nationality of the sinking islands see McAdam, 2010, pp. 118-121, 128-129.

permission from the Fiji Government (Koenig, 2015, p. 519). Similarly, McAdam cited two interesting statements of the officials of Maldives and Indonesia. The President of the Maldives announced a plan to purchase land in India or Australia to relocate his citizens. This was followed by an announcement from the Indonesian Government that Indonesia was considering to rent out some of its 17,500 islands to climate change refugees (McAdam, 2020, p. 122).

As in the example of Nauru, some devastated islands refuse resettlement or incorporation with another country in order to protect not only their independence, identity, values, but also their strong personal and spiritual relationship with their lands (McAdam, 2020, p. 125). In 1888, Nauru was annexed by Germany. On 6 November 1914, after the outbreak of the First World War, Australian forces occupied Nauru. At the end of the war, the Australian Government expressed a desire to annex Nauru in order to gain control over the phosphate deposits in the interests of Australian agriculture. But at the Versailles Conference, it was agreed that Nauru, along with other German colonies, would be placed under the mandate system. Mandate for Nauru was allocated to the British Empire. On 26 August 1942, Nauru was occupied by Japanese forces. Nauru remained under Japanese occupation until 14 September 1945, when Australian forces retook the island. Under the Trusteeship Agreement for the Territory of Nauru of 1 November 1947, the Government of Australia, New Zealand and the United Kingdom were designated as the joint authority which would exercise the administration of the Territory. However, the actual administration was vested in the Government of Australia. Nauru became independent as a Republic on 31 January 1968.¹² Nauru was important for Australia due to phosphate mining. Phosphate mining ultimately destroyed the island's environment. Australia was responsible for the immense environmental destruction caused by phosphate mining. Nauru asked Australia to rehabilitate the environment. The rehabilitation was more expensive than the resettlement of people living on the island. This is why in the 1960s, it was proposed that the population of Nauru be resettled in Australia (McAdam, 2010, p. 124). The resettlement offer was rejected by Nauru and in 1963 Australia offered Curtis Island to Nauru but the latter again rejected the offer (McAdam, 2010, p. 124-125). On 19 May 1989, the Republic of Nauru filed in the International Court of Justice in the

¹² International Court of Justice Application Instituting Proceedings Filed in the Registry of the Court on 19 May 1989 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, pp. 4-12: <https://www.icj-cij.org/public/files/case-related/80/6653.pdf> (access 18 April 2021).

Hague an application instituting proceedings against the Commonwealth of Australia in respect of a dispute concerning the rehabilitation of certain phosphate lands mined under Australian administration before Nauruan independence.¹³ The ICJ accepted its jurisdiction (Stallard, 2009, p. 192). However, save for the preliminary order for jurisdictional objections, the two parties, by a joint notification, deposited on 9 September 1993, informed the ICJ that they had, in consequence of having reached a settlement, agreed to discontinue the proceedings. Accordingly, the *Nauru v. Australia* case¹⁴ was removed from the list of the ICJ on 13 September 1993.¹⁵ Despite the mass environmental destruction as a result of over-exploitation of resources and its obvious responsibility, Australia took responsibility for what it had done in Nauru and Nauru agreed to waive the case pending before ICJ.

2 No Adequate and Long-Term Protection for Climate Refugees under National Laws

Save for certain countries such as Sweden, Finland, Argentina and the USA, climate refugees will not receive protection under national laws. It is stated that “complementary protection plays a significant role, because in cases of migrations caused by climate change, the *non-refoulement* principle could be activated and applied, thereby granting some form of international protection to forced climate migrants” (Sciaccaluga, 2020, p. 159 et seq.). Temporary protection is also suggested as another type of protection. Sweden, Finland, Argentina and the USA extend the protection regime also to people unable to return to their country due to an environmental disaster either under the rubric of “persons otherwise in need of protection” or “temporary protection” or “complimentary protection”. The Swedish Law on Foreigners provides protection to “persons otherwise in need of protection” in addition to refugees. The concept of “persons otherwise in need of protection” does cover environmental refugees. Chapter 4, Section 2 of the Swedish Law on Foreigners provides that a “person otherwise in need of protection” is a foreigner who is outside their home country because they (1) feel a well-founded fear of suffering the death penalty or being subjected to corporal punishment, torture or other inhumane or degrading treatment or punishment, (2) need protection because

¹³ <https://www.icj-cij.org/public/files/case-related/80/6797.pdf> (access 18 April 2021).

¹⁴ Case Concerning Certain Phosphate Lands in Nauru (*Nauru v. Australia*) (Preliminary Objections) Judgment of 26 June 1992.

¹⁵ <https://www.icj-cij.org/en/case/80> (access 18 April 2021).

of external or internal armed conflict or, because of other severe conflicts in their country of origin, feel a well-founded fear of being subjected to serious abuses, or (3) is unable to return to their country of origin because of an environmental disaster. Section 2 is mainly a reflection of the non-refoulement principle. Similarly, the immigration laws of Finland (Bryne, 2018, p. 784; Sciacaluga, 2020, p. 172) and Argentina guarantee residence to individuals unable to return home due to environmental or natural disasters (Sciacaluga, 2020, pp. 172-173). Temporary protected status in the United States can be given to aliens provided that the Attorney General finds that there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected¹⁶. However, all of these legal provisions are discretionary and not designed to provide long-term support to environmental migrants (Bryne, 2018, pp. 784).

In the EU Directive on temporary protection¹⁷, no specific reference is made to natural or environmental disasters.¹⁸ But Article 7 gives discretion to the member states to extend temporary protection to additional categories of displaced persons (“DPs”).

The current trend that provides no protection to climate refugees is followed by Turkey. In 2013, Turkey enacted a new law entitled the “Law No. 6458 on Foreigners and International Protection” (“LFIP”).¹⁹ Provisions of the LFIP regarding the administrative structure and the appointment of personnel came into force on the date of publication of the Law in the Official Gazette, namely 11 April 2013. Other provisions of the LFIP have been in force since 11 April 2014. That means that the entirety of the provisions of the LFIP have been in effect only since 11 April 2014. The LFIP redesigns the administrative structure of migration and international protection. The LFIP sets forth the procedures and principles regarding the visa, entrance and residence permits of foreigners. It also addresses

¹⁶ 8 USC 1254a: Temporary protected status. Text contains those laws in effect on May 12, 2021: [\(https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1254a%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1254a%20edition:prelim)) (access 28 January 2023).

¹⁷ 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, OJ 7.8.2011 L 212, pp. 12-23.

¹⁸ “As far as environmentally-displaced persons are concerned, however, an extensive interpretation of the directive may not reasonably include this category of displaced persons” (Lopez, 2007, p. 399).

¹⁹ Official Gazette Dated 11.4.2013 No. 28615. The unofficial English translation of the Law on Foreigners and International Protection was published by the Republic of Turkey’s Ministry of Interior Directorate General of Migration Management, Publication Number: 6, April 2014.

expulsion of foreigners as well as international protection. Additionally, the LFIP contains provisions concerning the administrative review of, and the judicial challenges to, decisions made under the LFIP concerning regular and irregular migration as well as international protection.²⁰

Significantly, the LFIP does *not* provide for the protection of *internally* displaced persons. The LFIP only provides *secondary protection* to displaced persons who have left their country due to the reasons listed in Article 63. Environmental reasons are not accounted for among the grounds for secondary protection listed in Article 63 of the LFIP. Article 63 of the LFIP does, however, provide protection to people, *regardless of their country of origin*, who are displaced and flee their country because they face: (1) the death penalty or execution; (2) torture or inhumane or degrading treatment or punishment; (3) serious threat to their person by reason of indiscriminate violence in situations of international or internal armed conflict upon return to their country of origin or country of habitual residence. Although Article 63 does not cover climate refugees, we can say that the LFIP goes far beyond protections provided under the 1951 Geneva Convention and the domestic laws of many other States because of its coverage of foreigners under threat of indiscriminate violence in situations of international or internal armed conflict.

3 International Treaties Fail to Protect Climate Refugees

3.1 No Protection under 1951 Geneva Convention for Climate Refugees

Climate refugees are not considered “refugees” within the meaning of the 1951 Geneva Convention in judgments made by various countries’ courts. Scholars generally agree that persons displaced by climate change would not be the subject of protection under the 1951 Geneva Convention and there is a legal gap in protection for those environmentally displaced across borders (Biter, 2019, pp. 434-435; Jacovella, 2015, p. 84; Skinner, 2014, p. 418; Hodgkinson et. al., 2010, p. 75; Williams, 2008, p. 508; Lopez, 2007, p. 387; Koenig, 2015, p. 505; Francis, 2021, pp. 113-114). In this respect, the so-called term of “climate refugees” is not only disfavoured but also misleading in the sense of the 1951 Geneva Convention.

²⁰ For more information about the LFIP see Eksi 2014; Eksi, 2018. For the negotiation and drafting process of the LFIP as well as the corresponding provisions of EU legislation and the impact of the ECtHR judgments on the LFIP see Eksi, 2012, pp. 5-110.

However, Alexander and Simon are of the view that 1951 Geneva Convention is applicable to submerged or uninhabitable states. “In order to legally grant asylum to the displaced inhabitants of completely submerged or uninhabitable states, we need not advocate for an expansion of refugee law to cover all climate migrants, nor need we twist the characterization of persecution so that displaced islanders somehow count as persecuted by their own submerged countries. We need only bear in mind that it is fundamental lack of basic national protection, rather than persecution that is at the heart of the 1951 Convention” (Alexander & Simon, 2014, p. 573). Marcs makes a distinction between the naturally occurring environmental disasters and artificial environmental harm. He presents the argument that while purely natural environmental disasters are not sufficient to establish conventional refugee status, an applicant who can show deliberately inflicted severe environmental harm in the absence of state protection will have a strong claim to refugee status pursuant to an evolutionary interpretation of the 1951 Geneva Convention definition (Marcs, 2008, p. 71). Cooper also claims that climate refugees represent a particular social group and therefore are covered by the definition of the 1951 Geneva Convention (Cooper, 1998, pp. 535-526). Falstrom disagrees with Cooper and argues that environmentally displaced persons do not form a particular social group and these persons do not generally fit under the traditional definition, unless they meet the criteria on some ground other than environmental (Falstrom, 2002, pp. 13 and 16). To fill the protection gap, Markovich and Annandale find it plausible to rely upon an emerging argument that the refugee definition is being extended in customary law or on a more speculative view that the existing definition already allows for claims by environmental refugees (Markovich & Annandale, 2000, pp. 151-154). In most cases, climate refugees move internally within their own countries (Internally Displaced Persons - hereinafter: IDPs). As they have not left their own country and are not in danger of persecution *per se*, they do not fall within the scope of the 1951 Geneva Convention. However, climate refugees leave their countries and seek asylum in other jurisdictions in certain cases.

Tuvalu and Kiribati citizens are examples of climate refugees and they seek asylum status in particular in New Zealand and Australia. However, the Refugee Status Appeals Authority of New Zealand²¹ and the Australian Refugee Review Tribunal²² refused to grant refugee status to people from Tuvalu and Kiribati on the ground that they did not meet the requirements described in paragraph (2) of Article 1A of the 1951 Geneva Convention.²³ According to the Refugee Review Tribunal of Australia, “there appears no doubt that the circumstances the applicant, and others living in Kiribati, face are serious risks and deserving of significant governmental consideration and attention. They are not matters against which, however, the Refugees Convention as it applies in Australia is able to provide protection. The applicant does not hold well-founded fear of being persecuted for reasons of race, religion, nationality, membership of any particular social group or political opinion should he return to Kiribati now, or in the foreseeable future”. The summary of the case and the decision of the Refugee Review Tribunal of Australia dated 10 December 2009 are as follows:

²¹ Refugee Appeal Nos. 72189/2000, 72190/2000, 72191/2000, 72192/2000, 72193/2000, 72194/2000 and 72195/2000, Nos. 72189/2000, 72190/2000, 72191/2000, 72192/2000, 72193/2000, 72194/2000 and 72195/2000, New Zealand: Refugee Status Appeals Authority, 17 August 2000, available at: <http://www.refworld.org/docid/4d08cf7f2.html> [access 18 May 2022]. For other cases see Jacovella, 2015, pp. 88-91. For the Turkish translation of the decision dated 17 August 2000 see Eksi, 2011, pp. 219-224. In the case of *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, the New Zealand Court of Appeal (hereinafter: NZCA) ruled that “*the appellant raised an argument that the international community itself was tantamount to the ‘persecutor’ for the purposes of the Refugee Convention. This completely reverses the traditional refugee paradigm. Traditionally, a refugee is fleeing his own government or a non-state actor from whom the government is unwilling or unable to protect him. Thus, the claimant is seeking refuge within the very country that is allegedly ‘persecuting’ him. No one should read this judgment as downplaying the importance of climate change. It is a major and growing concern for the international community. The point this judgment makes is that climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention*” [New Zealand Court of Appeal, *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173 (8 May 2014)]. As the Washington Post dated 14 August 2014 rightly stated, the tribunal avoided a clear decision on whether climate change can or cannot be reason enough for refugees to be granted residency <http://www.washingtonpost.com/blogs/worldviews/wp/2014/08/07/has-the-era-of-the-climate-change-refugee-begun/> (access 2 August 2016).

²² RRT Case No. 0907346, [2009] RRTA (Refugee Review Tribunal of Australia) 1168, Australia: Refugee Review Tribunal, 10 December 2009: <http://www.refworld.org/docid/4b8fdd952.html> (access 12 August 2016). For the Turkish translation of the decision dated 10 December 2009 see Molu, 2011, pp. 225-238.

²³ However, in 2014, the New Zealand Immigration and Protection Tribunal (hereinafter: NZIPT) agreed to issue a residence permit on humanitarian grounds to the Tuvaluan family who left their country due to climate change and whose refugee application was dismissed and whose original appeals against dismissal were turned down by the court. According to the NZIPT, “*the appellants claim that if deported to Tuvalu they will be separated from the husband’s family, all of whom are living in New Zealand as either citizens or residents, and with whom they have particularly close bonds. The appellants also claim that they will be at risk of suffering the adverse impacts of climate change and socio-economic deprivation. The primary issue for determination is whether these factors, either alone or in combination, amount to exceptional circumstances of a humanitarian nature. The Tribunal is satisfied that this is the case and that it would not be contrary to the public interest to allow the appellants to remain in New Zealand. They, and their two children, are each to be granted residence visas*” [New Zealand Immigration and Protection Tribunal, AD (Tuvalu) [2014] NZIPT 501370 (4 June 2014)]. For a similar decision of NZIPT, see New Zealand Immigration and Protection Tribunal, AC (Tuvalu) [2014] NZIPT 800517 (4 June 2014).

“The applicant is a national of Kiribati. He is married and has one adopted daughter. His wife is still in Kiribati and his daughter is married and resides in the United States. The applicant has previously traveled to Australia to study and work, but his most recent entry was in March 2007 and he has not departed Australia since that date. The applicant’s claims are that he cannot return home to his country, Kiribati, which has been significantly affected by climate change and is likely to be non habitable in the foreseeable future. Kiribati is a collection of small Islands in the Pacific Ocean; it is halfway between Australia and Hawaii. Most of the country’s remaining land is less than 2 meters above sea level. The applicant resided in a village prior to coming to Australia. This has been badly affected by sea water and regular wild storms. The crops are ruined and there is no fresh drinking water. Living in the village has become extremely difficult and it is anticipated that all the people of that village will have to relocate as they will not have any food, water or shelter. Relocation within Kiribati itself is difficult, as it is all a matter of short time before people are again affected by rising sea levels and have to relocate again. There is already a serious shortage of food, fresh water, shelter and energy and this must urgently be addressed now before the Island of Kiribati is completely submerged, which some estimate could be as early as 2050, according to a IPCC report. [...] Can Australia’s existing laws accommodate climate change refugees? Under existing laws, climate people affected by climate change are not recognised as a cognisable group of people in need of protection. It is submitted however, that existing protection visa laws can, and should, be creatively interpreted to accommodate climate change refugees in the absence of specific provisions in the Migration Act. Under the Migration Act, s. 36(2) (a), persons to whom Australia has protection obligations are entitled to “a protection visa”. [...] The applicant is outside his home country of Kiribati. [...] It is submitted that climate change should be seen as a form of persecution which involves serious harm [...]. Furthermore, the Government of Kiribati is unable to protect people such as the applicant from the persecution [...]. It is submitted that the applicant is a person to whom Australia has protection obligations, as he has a well-founded fear of persecution in Kiribati for reasons of membership of a particular social group [...]. The difficulty with this application in the Tribunal’s view, is that the Tribunal does not believe the applicant fears persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion as required by the Refugees Convention. [...]. It is the view of the Tribunal that the applicant does not hold well-founded fear of being persecuted for reasons of race, religion, nationality, membership of any particular

social group or political opinion should be return to Kiribati now, or in the foreseeable future. On this basis, he is not a person owed protection obligations by Australia nor is he the member of the same family unit as such a person [...].”

The decisions made by the Refugee Review Tribunal of Australia concerning the exclusion of the climate refugees from the scope of conventional refugee definition have gained stability. In another decision made in 2012, the Refugee Review Tribunal of Australia affirmed the decision not to grant protection to a Japanese citizen (1111982 [2012] RRTA 218 (5 April 2012)). The applicant, who claims to be a citizen of Japan, arrived in Australia and applied to the Department of Immigration and Citizenship for “the protection visa”. Her visa application was refused because the applicant is not a person to whom Australia has protection obligations under the Refugees Convention. The applicant applied to the Refugee Review Tribunal. A protection visa may be granted only if the decision-maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s. 36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in Sec. 36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol or on other ‘complementary protection’ grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under Sec. 36(2), and that person holds a protection visa. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1A of the Convention. The Refugee Review Tribunal of Australia stated that there are four key elements to the Convention definition. First, an applicant must be outside his or her country. Second, an applicant must fear persecution. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition –race, religion, nationality, membership of a particular social group or political opinion. Fourth, an applicant for refugee status must be unable or unwilling to avail himself of the protection of his home country.

The refugee application of a person fleeing from Fukushima disaster was also rejected by Australia. The facts of the case are as follows. The applicant is from Ibarag/Ibaraki which was radiation-affected from the Fukushima disaster in Japan due to a magnitude-9 earthquake in northeastern Japan which triggered a tsunami

on 11 March 2011. At her hearing, the applicant said that she was afraid to go back to Japan because the area where she had been living, which was near Fukushima, had been flooded after the tsunami in 2011 and was also radiation-affected. She had nowhere to live. She would therefore be facing “a humanitarian challenge situation in Japan”. The applicant said that in Japan, more than 28,000 people had been confirmed dead or listed as missing since the Japanese disaster in March 2011, and that Japan has been affected by high levels of radioactive substances. The applicant said that the Japanese Government lied about the radiation count present in the water, food and air. The applicant also claimed that a growing number of commentators have employed the notion of “environmental refugees” or “climate refugees”, though the UNHCR has serious reservations about this terminology and says that such terms have no basis in international refugee law. The applicant underlined that the circumstances of her case are of such a compelling nature that it is in the public interest to grant her a Protection Visa in Australia; she said it is not feasible for her to move back to Japan. The applicant claimed that her home and everything was destroyed and she could not reach her house; she got no help from anyone; the Japanese Government did not provide assistance to people from affected areas and she strongly believed that there is danger to her life if she returns. The Tribunal considered various reports drafted by independent institutions, which indicated that radiation levels were within safe limits. The applicant was unable to explain how she had been able to live for the past five years, or to travel to Australia without being employed, beyond saying that she had been able to rely on friends in Australia. The Tribunal reached the conclusion that there is no real chance that the applicant will face 1951 Geneva Convention-based persecution if she returns to Japan in the foreseeable future.

3.2 No Protection under 1966 International Covenant on Civil and Political Rights, and International Covenant for Economic, Social and Political Rights

As the climate refugees are overwhelmingly not considered as conventional refugees, solutions are searched through other conventions to provide them with the best possible protection. It has been argued that Article 6(1) of the 1966 International

Covenant on Civil and Political Rights (hereinafter: ICCPR)²⁴ and Article 1 of the 1966 International Covenant for Economic, Social and Political Rights (hereinafter: ICESCR)²⁵ do not contain effective instruments to protect environmentally displaced people; that it is not possible to accord adequate protection under international human rights law to such people because climate change results from a multiplicity of factors; that it is impossible to identify a given factor that causes displacement; and that because the ICCPR and ICESCR and other similar treaties on human rights provide protection after a violation of a fundamental right, it is impossible to protect the environmentally displaced people before they lose their homes and living spaces (Moberg, 2009, pp. 1116-1117).

In its decision dated 24 October 2019, regarding the application of Ioane Teitiota, a Kiribati citizen, the Human Rights Committee (hereinafter: HRC), which was established by the Optional Protocol to the International Covenant on Civil and Political Rights, reached the conclusion that the applicant's deportation from New Zealand to Kiribati does not constitute a violation of his right to life under Article 6(1) of the ICCPR.²⁶ New Zealand is a party to the ICCPR. Teitiota and his wife arrived in New Zealand, their three children were born there, however none of the children are entitled to citizenship in New Zealand. The family remained in New Zealand, although their residence permits expired on 3 October 2010. New Zealand authorities decided to deport them to Kiribati. The Immigration and Protection Tribunal of New Zealand confirmed the deportation order. Teitiota applied to the HRC by claiming that by removing him to Kiribati, New Zealand violated his right to life under the ICCPR while sea level rise in Kiribati has resulted in the scarcity of habitable space, which has in turn caused violent land disputes that endanger his life, and environmental degradation, including saltwater contamination of the freshwater supply.²⁷ The factual background of the application stated in the decision of the HRC is as follows:

²⁴ For the ratification law of the ICCPR see Official Gazette Dated 21.7.2003 No. 25175. For the ratification of the Protocol for ICCPR Convention see Official Gazette Dated 5.8.2006 No. 26250.

²⁵ For the ratification law of the ICESCR see Official Gazette Dated 11.8.2003 No. 25196.

²⁶ *Ioane Teitiota v. New Zealand*, Human Rights Committee Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016, 23 September 2020. For the comments on this decision see Kayğusuz Akbay, 2021, pp. 223-248; Safi, 2020, pp. 509-540; Sciacaluga, 2020, pp. 122-124; Wennersten & Robbins, 2017, pp. 63-66.

²⁷ *Ioane Teitiota v. New Zealand*, Human Rights Committee Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016, 23 September 2020, p. 5.

- “2.1 The author claims that the effects of climate change and sea level rise forced him to migrate from the island of Tarawa in Kiribati to New Zealand. The situation in Tarawa has become increasingly unstable and precarious due to sea level rise caused by global warming. Fresh water has become scarce because of saltwater contamination and overcrowding on Tarawa. Attempts to combat sea level rise have largely been ineffective. Inhabitable land on Tarawa has eroded, resulting in a housing crisis and land disputes that have caused numerous fatalities. Kiribati has thus become an untenable and violent environment for the author and his family.
- 2.2 The author has sought asylum in New Zealand, but the Immigration and Protection Tribunal issued a negative decision concerning his claim for asylum. Nevertheless, the Tribunal did not exclude the possibility that environmental degradation could “create pathways into the Refugee Convention or protected person jurisdiction”. The Court of Appeal and the Supreme Court each denied the author’s subsequent appeals concerning the same matter.”

In its decision of 25 June 2013, the Immigration and Protection Tribunal first examined in detail the 2007 National Adaptation Programme of Action filed by Kiribati under the United Nations Framework Convention on Climate Change and next considered the expert testimony on climate change in Kiribati as well as many supporting documents submitted by the author, including several scholarly articles written by United Nations entities and experts”.²⁸ At the end, the Immigration and Protection Tribunal of New Zealand refused to provide refugee status to Teitiota. The reasoning of the decision of the Immigration and Protection Tribunal are as follows:

- “2.8 After a lengthy analysis of international human rights standards, the Tribunal determined that “while in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the Refugee Convention, no hard and fast rules or presumptions of non-applicability exist. Care must be taken to examine the particular features of the case”. After further examination, the Tribunal concluded that the author did not objectively face a real risk of being persecuted if returned to Kiribati. He had not been subjected

²⁸ *Ioane Teitiota v. New Zealand*, Human Rights Committee Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016, 23 September 2020, pp. 2-3.

to any land dispute in the past and there was no evidence that he faced a real chance of suffering serious physical harm from violence linked to housing, land or property disputes in the future. He would be able to find land to provide accommodation for himself and his family. Moreover, there was no evidence to support his contention that he was unable to grow food or obtain potable water. There was no evidence that he had no access to potable water, or that the environmental conditions that he faced or would face on return were so perilous that his life would be jeopardized. For those reasons, he was not a “refugee” as defined by the Convention relating to the Status of Refugees.

- 2.9 [...] The Tribunal accepted that the right to life involves a positive obligation on the part of the State to fulfil that right by taking pragmatic steps to provide for the basic necessities for life. However, the author could not point to any act or omission by the Government of Kiribati that might indicate a risk that he would be arbitrarily deprived of his life within the scope of article 6. The Tribunal considered that the Government of Kiribati was active on the international stage concerning the threats posed by climate change [...] There was no evidence establishing that the author’s situation in Kiribati would be so precarious that his or his family’s lives would be in danger. The Tribunal noted the testimony of the author’s wife that she feared her young children could drown in a tidal event or storm surge. However, no evidence had been provided to establish that deaths from such events were occurring with such regularity as to raise the prospect of death occurring to the author or his family members to a level rising beyond conjecture and surmise, let alone a risk that could be characterized as arbitrary deprivation of life. Accordingly, there were no substantial grounds for believing that the author or any of his family members would be in danger of a violation of their rights under Article 6 of the Covenant. The Tribunal also found that there was not a substantial risk that the author’s rights under Article 7 of the Covenant would be violated by his removal to Kiribati”.²⁹

The HRC held that Teitiota’s rights under Article 6 of the Covenant were not violated upon his deportation to Kiribati. Therefore, efforts to seek asylum within the scope of the ICCPR did not yield any results for the Kiribati citizens.

²⁹ *Ioane Teitiota v. New Zealand*, Human Rights Committee Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016, 23 September 2020, pp. 3-4.

3.3 No Protection under the 1984 Convention against Torture

In addition to the 1951 Geneva Convention, ICCPR, and ICESCR, the citizens of sinking islands claim protection under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In its recent decision dated 4 June 2014³⁰, the Immigration and Protection Tribunal of New Zealand (“the NZIPT”) dismissed an appeal which was based collectively on the 1951 Geneva Convention, ICCPR, and the 1984 Convention. The appellants claimed that there were substantial grounds for believing that they would be in danger of being arbitrarily deprived of their lives or in danger of being subjected to cruel treatment if returned to Tuvalu because of the effects of climate change in Tuvalu. The NZIPT ruled that the central issue to be determined by the Tribunal was whether the Government of Tuvalu could be said to be failing to take steps within its power to protect the appellants’ lives from the effects of climate change such that their lives could be said to be in danger and whether or not the harm they feared amounted to “cruel treatment” as that term is defined under the Act. The NZIPT determined that appellants’ claims derived to a significant extent from the geophysical characteristics in Tuvalu. The NZIPT reached the conclusion that the appellants were not refugees within the meaning of the 1951 Geneva Convention. The NZIPT also found that they were not “protected persons” within the meaning of the 1984 Convention against Torture or the 1966 ICCPR.³¹

3.4 No Protection under the United Nations Framework Convention on Climate Change and Kyoto Protocol

Although there are two main international instruments concerning “climate change”, neither provides protection to the people displaced from their homes because of environment-related reasons. The United Nations Framework Convention on Climate Change (hereinafter: UNFCCC), to which 193 States are parties, was accepted on 9 May 1992, and has been in force since 21 March 1994.³² The UNFCCC encourages cooperation among the States relating to climate change and draws a framework for the future. The Kyoto Protocol to the UNFCCC commits

³⁰ Immigration and Protection Tribunal New Zealand [2014] NZIPT 800517-520.

³¹ Falstrom argues that 1984 Convention against Torture can be a model to a new convention on the protection of environmentally displaced persons (Falstrom, 2002, pp. 18-23).

³² UN Framework Convention on Climate Change, 1771 UNTS 107.

the State Parties to reduce their collective emissions of greenhouse gases. However, neither of these instruments deals with the aspect of international protection related to climate refugees.

3.5 Implications of Climate Change for the Enjoyment of Human Rights under the ECHR

3.5.1 Challenges Under the ECHR before National Courts Regarding Climate Change

As of 13 May 2021, around 1,367 climate change cases had been filed before U.S. courts and over 425 cases in other countries.³³ In this section, we will provide brief explanations on a few of the successful and unsuccessful cases, without going into details.

The Urgenda case is one of the most popular among the cases cited.³⁴ *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda* case³⁵ is known as one of the first successful challenges to climate change policy based on a human rights treaty³⁶ and as “a landmark case within climate change litigation since it was the first case where a government was ordered by the court to further limit its greenhouse gas emissions” (Niska, 2020, p. 335). Urgenda asked the Dutch Government to commit itself to reduce greenhouse emissions. Following the refusal of this request, Urgenda, a foundation established under Dutch law, filed a case before the Hague District Court acting on its own behalf and as a representative of 886 individual citizens³⁷ to secure a judgment which would instruct the State to

³³ <http://climatecasechart.com/climate-change-litigation/> (access 13 May 2021). For more information see also The Status of Climate Change Litigation, 2017.

³⁴ Leghari is the other mostly cited case. Leghari case [Lahore High Court, *Leghari v. Federation of Pakistan* No. 25501/2015, Judgment 25 January 2018], which was lodged by Ashgar Leghari, a Pakistani farmer, who had sued the national and regional governments for failure to carry out the National Climate Change Policy, Lahore High Court ruled that the delay and lethargy of the State in implementing the Framework offend the fundamental rights of the citizens,” as codified in Articles 9, 14, 19A, and 23 of the Pakistani constitution relating to right to life, human dignity, information, property (The Status of Climate Change Litigation, 2017, p. 16; Dewaele, 2019, pp. 52-55).

³⁵ For the English translation see *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, Supreme Court of the Netherlands Civil Division Number 19/00135, Date 20 December 2019; Spier, 2020, pp. 343-389.

³⁶ Meguro, 2020, p. 729. For cases against Pakistan and Germany see Byrne, 2018, pp. 785-786. Some US States based on tort law claims also filed cases against oil and gas companies alleging that the defendants' conduct exacerbated climate change and amounted to a public nuisance. See Star, 2021, pp. 195-218.

³⁷ For more information see Meguro, 2020, pp. 729-735; Muyunda, 2017, pp. 362-363; *State of Netherlands v. Urgenda Foundation*, 2019, pp. 2091; Dewaele, 2019, pp. 38-52; The Status of Climate Change Litigation, 2017, p. 15.

reduce the emission of greenhouse gases. They based their claims on Article 2 of the ECHR, which protects the right to life, and Article 8, which protects the right to private and family life. The Hague District Court accepted Urgenda's claim and ruled on 24 June 2015, that the Netherlands Government must cut its greenhouse gas emissions by at least 25 percent by the end of 2020. The judgment of the Hague District Court was appealed. The Court of Appeals upheld the judgment. Then the Netherlands applied to the Supreme Court. The Supreme Court recognized Urgenda's claim under Article 2 and Article 8 of the ECHR. The Netherlands' courts also made references to the Dutch Constitution, the Dutch Civil Code, the Articles on Responsibility of States for Internationally Wrongful Acts which was prepared by the International Law Commission as well as the United Nations Framework Convention on Climate Change (hereinafter: UNFCCC) which was ratified by the Netherlands in 1992.³⁸ However, the Supreme Court rejected the responsibility of the Netherlands derived from Article 21 of the Dutch Constitution, the no harm principle, or the UN Climate Change Conventions (Muyunda, 2017, p. 369). One commentator has stated that "this case raises concerns over the creation of a snowball effect which may bring about a string of actions in other jurisdictions" (Muyunda, 2017, p. 374).

However, considering the case Verein KlimaSeniorinnen Schweiz Association, lodged with the Swiss Federal Tribunal, it is not certain that each case would be as successful as the Urgenda case. Based on Articles 2, 6, 8 and 13 of the ECHR, KlimaSeniorinnen claimed that they were part of an especially vulnerable group, since the older population was more adversely affected by climate change. However, based on different grounds, their application was dismissed by the Swiss Federal Administrative Court and the Swiss Federal Tribunal respectively (Niska, 2020, pp. 337-338; Dewaele, 2019, pp. 56-58; The Status of Climate Change Litigation, 2017, p. 17). KlimaSeniorinnen has lodged an application with the ECtHR.

Another unsuccessful attempt was the *Armando Carvalho and Others v European Parliament and Council of the European Union* case. The appellants operated in the agricultural sector, including reindeer husbandry, and the tourism sector. They were 36 individuals belonging to families from various Member States of the European

³⁸ For comments about the case of Urgenda see Lin, 2015, pp. 65-81; Muyunda, 2017, pp. 362-375; Spier, 2020, pp. 319-342; *State of Netherlands v. Urgenda Foundation*, 2019, pp. 2090-2097.

Union, namely Germany, France, Italy, Portugal and Romania, as well as from the rest of the world, namely Kenya and Fiji, and an association governed by Swedish law, which represented young indigenous Samis. Through their appeal, Mr. Armando Carvalho and 36 other appellants, sought to set aside an order of the General Court of the European Union of 8 May 2019, *Carvalho and Others v Parliament and Council* (T-330/18), in which the General Court had dismissed as inadmissible their action seeking, first, the partial annulment of directives and decisions of the EU related to enhancing cost-effective emission reductions, low-carbon investments, annual greenhouse gas emission reductions; second, compensation in the form of an injunction for the damage which the appellants claimed to have suffered. The ECJ dismissed the appeal on the ground that the appellants did not have standing to bring a case to request partial annulment of the legislative package and their claim for compensation.³⁹

3.5.2 Challenges Under the ECHR before ECtHR Regarding Climate Change

Another question that must be addressed is whether there is a direct correlation between climate change and the full enjoyment of human rights. Articles 2 and 3 of the ECHR preclude countries from returning people to a risk of arbitrary deprivation of life, the death penalty, torture, or cruel, inhuman or degrading treatment or punishment. Both articles may be employed to help climate refugees from being deported to their countries which face natural disasters.

Although the ECHR does not enshrine any right to a healthy environment, attempts have already been made for the search for a solution with the ECtHR. To date, the ECtHR has handed down more than 300 decisions in cases raising environment-related issues (Eicke, 2021). These cases are not related to climate change-induced asylum issues. However, the first climate change case was filed by six Portuguese children and young adults before the ECtHR against 33 States.⁴⁰ The case of *Cláudia*

³⁹ Judgment of the Court (Sixth Chamber) of 25 March 2021, Armando Carvalho and Others v European Parliament and Council of the European Union, Case C-565/19 P, retrieved from <https://curia.europa.eu/juris/document/document.jsf?text=&docid=204870&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=397496> (13 May 2021).

⁴⁰ Respondent States are 1. Austria 2. Belgium 3. Bulgaria 4. Switzerland 5. Cyprus 6. Czech Republic 7. Germany 8. Denmark 9. Spain 10. Estonia 11. Finland 12. France 13. United Kingdom 14. Greece 15. Croatia 16. Hungary 17. Ireland 18. Italy 19. Lithuania 20. Luxembourg 21. Latvia 22. Malta 23. Netherlands 24. Norway 25. Poland 26. Portugal 27. Romania 28. Russian Federation 29. Slovakia 30. Slovenia 31. Sweden 32. Turkey 33. Ukraine:

Duarte Agostinho and others v. Portugal and 32 other states was taken directly to the Court without exhausting domestic instances in the respondent jurisdictions (Eicke, 2021; Heri, 2020).

*“The applicants are Portuguese nationals aged 8, 12, 15, 17 and 20 years old respectively. [...] The case concerns greenhouse gas emissions from 33 Contracting States which are said to be contributing to global warming and manifested, among other things, by heat peaks which would impact the living conditions and health of the applicants. The applicants complain about the non-compliance by these 33 States with their positive obligations under Articles 2 and 8 of the Convention, read in the light of the commitments made under the 2015 Paris Climate Agreement (COP21). They refer more specifically to the commitment referred to in Article 2 of the Agreement, namely to contain the rise in the average temperature of the planet to significantly below 2 °C compared to pre-industrial levels and continue the action taken to limit the rise in temperature to 1.5 °C compared to pre-industrial levels, with the understanding that this would significantly reduce the risks and effects of climate change. The applicants also allege a violation of Article 14 taken in conjunction with Articles 2 and/or 8 of the Convention, arguing that global warming affects their generation more particularly and that, given their age, the interference with their rights is more severe, pronounced than those in the rights of previous generations, in view of the deterioration of climatic conditions which will continue over time. In view of the fact that four applicants are children, they argue that the aforementioned provisions of the Convention must be read in the light of Article 3(1) of the United Nations Convention on the Rights of the Child which requires that any decision affecting them be based on the overriding consideration of the best interests of the child. They are also based on the principle of intergenerational equity contained in several international instruments, including the Rio Declaration of 1992 on Environment and Development, the Preamble to the Paris Agreement and the United Nations Framework Convention on climate change”.*⁴¹

https://www.nhri.no/wp-content/uploads/2020/11/DUARTE-AGOSTINHO-and-others-vs-PORTUGAL-and-32-others-unofficial-translation-fr.en_.pdf (access 19 April 2021).

⁴¹ ECtHR Fourth Section Request no 39371/20 *Cláudia Duarte Agostinho and others v. Portugal and 32 other states* introduced on September 7, 2020: <https://www.nhri.no/wp-content/uploads/2020/11/DUARTE-AGOSTINHO-and-others-vs-PORTUGAL-and-32-others-unofficial-translation-fr.en.pdf> (access 19 April 2021).

The second case before the ECtHR was *Verein KlimaSeniorinnen Schweiz Association v. Switzerland* (Eicke, 2021). The application was made to the ECtHR in November 2020. Greenpeace Switzerland supported and guaranteed the costs of the proceedings.⁴² Considering that the special relationship between climate change and human rights obligations has increasingly been recognised over the last decade (Savaresi & Hartmann, 2018, p. 76), the potential judgment of the ECtHR will encourage or discourage attempts to seek solutions before the ECHR.

3.6 No Concrete Result from the UN New York Declaration for Refugees and Migrants and the UN Compact on Migration

With the participation of all 193 Member States, the United Nations General Assembly hosted a high-level Summit on 19 September 2016, for refugees and migrants. Its aim was to improve the way in which the international community responds to large movements of refugees and migrants. At the summit, the United Nations unanimously adopted the New York Declaration for Refugees and Migrants.⁴³ The paragraphs of the New York Declaration regarding climate change are as follows:

- “1. Since earliest times, humanity has been on the move. Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors. Many move, indeed, for a combination of these reasons.

50. We will assist, impartially and on the basis of needs, migrants in countries that are experiencing conflicts or natural disasters, working, as applicable, in coordination with the relevant national authorities. While recognizing that not all States are participating in them, we note in this regard the Migrants in Countries in Crisis initiative and the Agenda for the Protection of Cross-Border

⁴² For the stages of the case see <https://klimaseniorinnen.ch/english/> (access 24 April 2021).

⁴³ United Nations General Assembly Seventy-first Session Agenda items 13 and 117, Resolution adopted by the General Assembly on 19 September 2016, 71/1. New York Declaration for Refugees and Migrants, 3 October 2016.

Displaced Persons in the Context of Disasters and Climate Change resulting from the Nansen Initiative”.⁴⁴

Another instrument which indicates that States do not want to take sincere steps to protect the climate-induced people is the Global Compact for Safe, Orderly and Regular Migration adopted on 30 July 2018, as an outcome of the UN Intergovernmental Conference in Marrakech. The Heads of State and Government and High Representatives of the UN met in Morocco on 10 and 11 December 2018, to make an important contribution to enhanced cooperation on international migration in all its dimensions. The relevant parts of the UN Compact on Migration are as follows:

“Natural disasters, the adverse effects of climate change, and environmental degradation

- (h) Strengthen joint analysis and sharing of information to better map, understand, predict and address migration movements, such as those that may result from sudden-onset and slow-onset natural disasters, the adverse effects of climate change, environmental degradation, as well as other precarious situations, while ensuring effective respect for and protection and fulfilment of the human rights of all migrants;
- (i) Develop adaptation and resilience strategies to sudden-onset and slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise, taking into account the potential implications for migration, while recognizing that adaptation in the country of origin is a priority;
- (j) Integrate displacement considerations into disaster preparedness strategies and promote cooperation with neighbouring and other relevant countries to prepare for early warning, contingency planning, stockpiling, coordination mechanisms, evacuation planning, reception and assistance arrangements, and public information;
- (k) Harmonize and develop approaches and mechanisms at the subregional and regional levels to address the vulnerabilities of persons affected by sudden-onset and slow-onset natural disasters, by ensuring that they have access to

⁴⁴ New York Declaration for Refugees and Migrants, pp. 1 and 10.

humanitarian assistance that meets their essential needs with full respect for their rights wherever they are, and by promoting sustainable outcomes that increase resilience and self-reliance, taking into account the capacities of all countries involved;

- (l) Develop coherent approaches to address the challenges of migration movements in the context of sudden-onset and slow-onset natural disasters, including by taking into consideration relevant recommendations from State-led consultative processes, such as the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, and the Platform on Disaster Displacement”.⁴⁵

As non-binding texts, both “the UN Compact on Migration” and “New York Declaration for Refugees and Migrants”, which promise nothing more than wishes and desires, are clear indications that states are far from providing protection to climate refugees. Instead of wasting time with non-binding instruments, States should act now, roll up their sleeves for an effective solution, and make an international convention that includes equal burden sharing on this issue.

4 Proposed Solutions for Protection of Climate Refugees

So far, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa is the only success that has normatively been achieved at a regional level and covers internal displacement in Africa (Abebe, 2010, pp. 28-29). Additionally, voices have been increasing and different views are being put forward for the normative and administrative protection of environmentally displaced-persons.

A person fleeing his/her country due to environmental reasons does not satisfy the conditions necessary to be considered a refugee under the definition in paragraph (2) of Article 1A of the 1951 Geneva Convention because it would be impossible for a person to establish a well-founded fear of persecution based on any of the grounds enumerated in the Convention (Atapattu, 2013, p. 617). Some commentators have proposed the preparation of a new convention that will deal

⁴⁵ United Nations General Assembly Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, Marrakech, Morocco, 10 and 11 December 2018, Item 10 of the provisional agenda, Outcome of the Conference, A/CONF.231/3, 30 July 2018, pp. 9.

exclusively with the treatment of climate refugees.⁴⁶ However, potential destination countries agree not to sign a convention similar to the 1951 Geneva Convention which provides protection for a new category of climate migrants (Hugo, 2010, p. 31). Moreover, despite many attempts, no specific convention or protocol annex to the 1951 Geneva Convention or the ECHR has been concluded to protect the people affected from climate change.

Commentators have also noted that the current international legal instruments dealing with human rights fail to protect climate refugees. This means that the protection of climate refugees is left to domestic laws, which do not contain effective provisions on this matter (Moberg, 2009, p. 1117). It must be underlined that although the 1951 Geneva Convention does not cover climate refugees, there is nothing that prevents State Parties to the Convention from broadly interpreting the concept of “refugee” and extending protection to climate refugees. However, States tend to narrowly interpret the definition of refugee to limit the number of foreigners receiving protection within their territories. It is rightly stated that amending the Convention to expand the refugee definition to climate change refugees is not possible because of the present lack of international consensus (Koenig, 2015, p. 505). Moreover, even if consensus existed having regard to the anti-asylum attitude of many States, there is a risk that opening the 1951 Geneva for amendments allows for the possibility of proposals that could actually weaken the Convention (Koenig, 2015, p. 505-506).

Fortunately, there have been calls from various circles for the preparation of a treaty, or an additional protocol to the 1951 Geneva Convention, which would provide people who left their places because of environmental or climate-related reasons with a status similar to that of refugees.

Some commentators have proposed the preparation of the Protocol on the Recognition, Protection, and Resettlement of Climate Refugees as an addendum to the UNFCCC (Biermann & Boas, 2010, p. 60). A group of academics from the University of Limoges have prepared the Draft Convention on the International Status of Environmentally-Displaced Persons (McAdam, 2011, p. 7; see also Prieur, 2010, pp. 247-257; Birriel, 2019). The Council of Europe Parliamentary Assembly’s

⁴⁶ For more information see Koenig, 2015, p. 506; Docherty, 2009, pp. 349 et seq.

Committee on Migration, Refugees and Population has recommended the adoption of a protocol, to be added to the ECHR, to address the right to a safe and healthy environment and to provide protection to climate refugees.⁴⁷

The UNHCR data show that currently there are around 26.3 million refugees and 80 million forcefully displaced people in the world.⁴⁸ To justify the adoption of a new treaty and the assumption of new responsibilities by the States to address the rights of climate refugees, even though the problems of these refugees and forcefully displaced have not yet been resolved at national level, McAdam points to the conversion of the individual burden into international burden sharing (McAdam, 2010, pp. 16-17).

Already some small island States such as Carteret Islands, Tokelau, and Vanuatu have begun to permanently resettle people (Atapattu, 2013, p. 633). Certain countries which are strongly affected by climate change have been struggling to find an appropriate solution. For example, "Tuvalu threatened to file legal action against the United States and Australia for their contribution to global warming which, in turn, is causing the sea levels to rise. Tuvalu also discussed the issue of immigration policies with New Zealand and Australia. Currently, New Zealand accepts 75 citizens between the age of 18-45 years annually from Tuvalu under its labor migration program. Thus, it is apparent that New Zealand has not opened its doors to climate refugees. Furthermore, Australia has no current plans to admit climate immigrants into its borders" (Atapattu, 2013, p. 633).

5 Conclusion

As can be inferred from the previous explanations and jurisprudence, no burden arises under international law as well as national laws for the countries to provide protection to climate change refugees. Providing protection to climate-induced migrants is left to the sole discretion of the States. Whether the ECHR will provide protection to climate-induced migrants will be shown by future ECtHR judgments, in particular in the case of *Cláudia Duarte Agostinho and others v. Portugal and Others*.

⁴⁷ See McAdam, 2011, p. 7 and The Council of Europe Parliamentary Assembly, Committee on Migration, Refugees and Population, 'Environmentally Induced Migration and Displacement: A 21st Century Challenge' Doc. 11785, 23 Dec. 2008.

⁴⁸ <https://www.unhcr.org/refugee-statistics/> (access 16 June 2021).

Being victims of environmental disasters is not only the result of natural events but also acts of human beings. Consequently, it is high time for all the countries to change their policy towards climate refugees. Taking into account their contribution to the occurrence of environmental disasters, industrialized countries should play a particularly leading role for taking necessary measures for the protection of climate refugees. This is particularly true for the States that benefited from the natural resources of small island States as colonists or mandates in the past. They should take all necessary steps to save the States whose lands will soon be under sea waters. Instead of leaving the climate refugees alone with their destiny, efforts should be made to conclude an international treaty which provides refugee-type protection and commitment of sharing the burden of environmental disasters.

Currently, considering the risks of increased migration caused by climate change, some States are collaborating with certain international organizations to identify countries to which climate-induced migration may be directed. In our view, including Turkey in that list of potential host countries would be unfair and would create serious risks not only for Turkey but also for Europe. The reason for this should by now be obvious to all. Turkey has been hosting an extremely high number of refugees since 2011, particularly from Syria, and it is clear that the burden created by this mass influx of refugees has brought the country to the edge of a collapse, both financially and socially. Destabilization of Turkey due to massive migration would direct illegal immigration towards Europe. The surprising fact, however, is that, despite the enormous burden under which it finds itself because of massive immigration, Turkey is also giving residence permits to climate migrants, particularly from African countries. This aspect is prone to be analyzed by historians in the future, not by lawyers today.

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Povzetek v slovenskem jeziku

Ena od glavnih posledic podnebnih sprememb je problem migracij, ki jih povzročajo notranje in mednarodne selitve ljudi zaradi okoljskih nesreč. Čezmejni učinki razseljevanja zaradi podnebnih sprememb so seveda sprožili nove razprave na področju begunskega prava in ustvarili skupino ljudi, ki se običajno imenujejo "podnebni begunci". Podnebni begunci niso nujno zajeti v opredelitev pojma "begunec" iz Ženevske konvencije iz leta 1951. Nekatere države in mednarodne organizacije, vključno z ZN, obravnavajo položaj podnebnih beguncev izključno z varnostnega vidika, medtem ko druge te ljudi obravnavajo kot žrtve nesreč, ki so jih povzročile podnebne spremembe. Nobena država ni zares pripravljena deliti bremena, ki ga povzročajo množične migracije zaradi podnebnih sprememb, ali obravnavati celotnega obsega tega velikega pojava. Poleg tega mednarodni sporazumi, na katerih temeljijo njihove prošnje za azil, ne obravnavajo ustrezno okoliščin v zvezi z njihovimi prošnjami. V akademskih krogih so bila izražena različna mnenja o ustreznih mehanizmih zaščite in pomoči, ki jih je mogoče zagotoviti podnebnim beguncem. V članku razpravljamo o razlogih, zakaj obstoječe mednarodne konvencije ne ščitijo podnebnih beguncev, pojasnjujemo razlike med običajnimi begunci in podnebnimi begunci, in izpostavljam rešitve za zaščito teh beguncev.