

**MIND THE GAP – EXPOSING THE PROTECTION GAPS IN
INTERNATIONAL LAW FOR ENVIRONMENTALLY DISPLACED CITIZENS
OF SMALL ISLAND STATES**

by

KERSTIN WALTER

LL.B. (Hons), University of Aberdeen, 2010

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

THE UNIVERSITY OF BRITISH COLUMBIA
(Vancouver)

JANUARY 2012

© Kerstin Walter, 2012

ABSTRACT

The President of the Maldives, Mr. Mohamed Nasheed, has stressed repeatedly that if current trends in sea level rise continue, the Maldives and other island countries would disappear before the end of the century. Despite the growing awareness of the nexus between climate change and migration, academic research into the legal protection, or even the legal definition, of people who may be induced or forced to leave their homeland due to the effects of climate change is scarce. Citizens of Small Island States, displaced as a result of climate change, have very specific characteristics that make them unique in international law but so far it is unclear what status and protection they will have under international law. This thesis aims to provide an overview over existing legal instruments, their capacity to protect island citizen and the ensuing duties and obligations on signatory states and the international community in the hope that it will provide a roadmap for future actions. The author first confirms the leading opinion that environmentally displaced people are not refugees before moving on to explore the protection capacity of international human rights law, the international legal principle of non-refoulement and the legal framework on statelessness.

This thesis reaches the unwelcome conclusion that current legal frameworks are not equipped to provide displaced citizen of disappearing islands with the necessary and effective protection they require and none of the discussed legal instruments can confer on them a secure and stable legal status, comparable to that of a refugee. It further concludes that - seeing how specific the needs of these geographically remote islands are and taking into account the wishes of the populations at risk - the most promising way forward for the protection of small island states citizen therefore lies in regional agreements aimed at gradual and dignified migration and the preservation of island communities and culture within the host countries.

TABLE OF CONTENTS

ABSTRACT	ii
TABLE OF CONTENTS	iii
ACKNOWLEDGEMENTS	v
DEDICATION.....	vi
CHAPTER 1: Introduction	1
CHAPTER 2: Climate Change Impact on Small Island States	6
CHAPTER 3: International Refugee Law as a Protection Mechanism.....	13
A. International Refugee Law as part of International Human Rights Law?	13
B. Environmental Refugees?	16
1. Small Island States and the Refugee Definition.....	19
C. Conclusion.....	38
CHAPTER 4: International Human Rights and Displaced Small Island Citizen	39
A. Specific Human Rights of Island Citizens Affected by Climate Change	41
1. Right to Life.....	42
2. The Right to Health.....	44
3. The Right to Water.....	45
4. The Right to Adequate Food.....	46
5. Right to Cultural Participation.....	48
6. Other Human Rights	49
B. Effectiveness and Enforceability.....	50
C. Human Rights Instruments and Initiatives Aimed at Protecting Migrants	53
D. Availability and Effectiveness of Legal Remedies	56
1. International Court of Justice.....	58
2. Treaty Monitoring Bodies.....	63
E. Conclusion.....	65
CHAPTER 5: Non-Refoulement and Complementary Protection	67
A. Evolution of Non-Refoulement.....	68
B. Non-refoulement: Rule of Customary International Law?	72

C. Complementary Protection and Non-Refoulement – an Overview	80
D. Environmentally Displaced Persons and Complementary Protection	82
1. The Meaning of ‘Inhumane or Degrading Treatment’	83
2. Extending the Scope of the Non-Refoulement Principle?	91
E. Conclusion	99
CHAPTER 6: Small Island States and the Issue of Statelessness	102
A. Small Island States and the Claim to Statehood	103
1. Defined Territory	106
2. Permanent Population	110
3. Effective Government	111
4. Capacity to Enter into Relations with other States	114
B. Small Island States and Statelessness	115
1. UN Statelessness Conventions	117
2. Effectiveness of Statelessness Conventions	126
C. Conclusion	130
CHAPTER 7: Conclusion: Where Do we Go from Here?	135
BIBLIOGRAPHY	141
Legal Instruments	141
Cases	142
Journal Articles and Research Papers	146
Books and Treaty Body Publications	153
Web-based Resources	156

ACKNOWLEDGEMENTS

I would like to first thank my supervisor Dr. Catherine Dauvergne for her support and guidance throughout my time at UBC. Without her encouragement and insight this thesis would not have been possible, and I could not have wished for a kinder supervisor.

This thesis would also not have been possible without the support of my family and I owe them my deepest gratitude. My parents have encouraged me throughout my life to follow my dreams and have always provided me with the moral and material support I needed and I am deeply grateful for their presence in my life. Sincere thanks are owed to my grandparents as well who have always believed in me and who have given me strength and inspiration. Without them I would not be where I am today.

To my grandmother

CHAPTER 1: Introduction

Atoll nations such as Kiribati and Tuvalu have become the symbol of the very real threats posed by climate change and sea level rise. The fate that awaits these islands is for many people simply unimaginable and more readily associated with myths such as the legendary sunken island of Atlantis than with reality. National leaders such as President Tong of Kiribati and President Nasheed of the Maldives work tirelessly to raise awareness for the fact that if current trends in sea level rise continue, their countries and other island nations such as Tuvalu, Nauru and the Marshall islands will disappear before the end of the century.¹ In October 2009 President Nasheed held an underwater cabinet meeting at which he and his cabinet signed a document calling for global cuts in carbon emissions.² The Maldives has also pledged to become the first country to be carbon-neutral by 2020, leading by example in the hope to inspire other countries to follow in their footsteps.³ All of these efforts however might not be enough to save the islands from eventual inundation and the citizen of these islands might ultimately have to flee their homelands in order to survive.

This scenario of disappearing states poses a number of new and unprecedented problems in international law and raises the question of how the citizens of these islands will be

¹ See: President Nasheed's speech at the opening ceremony of the UN Climate Change Summit in New York, 22 September 2009. Available at: <http://www.un.org/wcm/content/site/climatechange/lang/en/pages/2009summit/programme> (accessed 20 December 2011).

² See: BBC Online, 'Maldives Cabinet Makes a Splash', 17 October 2009. Available at: <http://news.bbc.co.uk/2/hi/8311838.stm> (accessed 20 December 2011).

³ See: Press Release of the President's Office, 'Maldives Pledges 100% Mitigation Target Under Copenhagen Accord', 31 January 2010. Available at: <http://www.presidencymaldives.gov.mv/4/?ref=1,5,3291> (accessed 20 December 2011).

protected both when they move and once they reach their destinations. Citizens of Small Island States, displaced as a result of climate change, have very specific characteristics that make them unique in international law and distinguish them from other persons displaced by climate change. The majority of environmentally displaced persons (EDPs) will be displaced internally, within their own country, while citizens of disappearing islands will have to cross an international border in order to flee their sinking homes.⁴ Furthermore, they will not be able to return to their countries and in fact are likely to lose them forever to the sea. Finally, this scenario is unique as it means displacing entire nations, an unprecedented event in history.

Despite the growing awareness of the nexus between climate change and migration, academic research into the legal protection, or even the legal definition, of people who may be induced or forced to leave their homeland due to the effects of climate change is scarce. The publicity-effective term ‘environmental refugees’ is increasingly being used to describe situations of such cases of environmental displacement and creates the impression that these displaced people will be protected under international refugee law. However, among scholars of international law there exists a widely held belief that the term ‘environmental refugee’ is in fact a misnomer and misleading as well as potentially damaging to the protection of traditional refugees under the Refugee Convention.⁵ This

⁴ J. McAdam, ‘Climate Change ‘Refugees’ and International Law’, Paper for Legal Seminar at NSW Bar Association, 24 October 2007, 4. Available at: <http://www.nswbar.asn.au/circulars/climatechange1.pdf> (accessed 20 December 2011); K. K. Moberg, ‘Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection’, 2009, 94 Iowa Law Review, 1132; D. Keane, ‘The environmental causes and consequences of migration: A search for the meaning of ‘environmental refugees’’, 2004, Georgetown International Environmental Law Review 16 (2), 213.

⁵ See S. Castles, ‘Environmental change and forced migration: making sense of the debate’, 2002, Geneva, UNHCR; G. Kibreab, ‘Environmental causes and impact of refugee movements: A critique of the current

view is shared by international organizations such as the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), who instead use the term environmentally displaced person.⁶

The possibility of a mass exodus of small island state citizens in the search for new and save homelands will confront the international community with a number of legal, practical and humanitarian questions as how to handle this new challenge. This thesis aims to provide an overview over existing legal instruments, their capacity to protect island citizen and the ensuing duties and obligations on signatory states and the international community in the hope that it will provide a roadmap for future actions.

The first chapter will give an overview over the impacts of climate change and sea level rise on small island states and the challenges it poses before looking at the different possible legal frameworks in international law that might be able to provide protection. In the name of completeness this analysis will begin by looking at international refugee law and confirm the leading opinion that the 1951 Geneva Convention Relating to the Status of Refugees⁷ does neither apply to cases of environmental displacement in general nor to the situation of small island state citizens in particular as they cannot fit themselves into

debate', 1997, *Disasters* 21 (1): 20–38; R. Black, 'Environmental refugees: myth or reality?', 2001, Geneva, UNHCR; K. Romer, 'Environmental Refugees', May 2006, FMR 25, Refugees Studies Centre, Oxford; D. Keane, 'The environmental causes and consequences of migration: A search for the meaning of 'environmental refugees'', 2004, *Georgetown International Environmental Law Review* 16 (2), 213.

⁶ D. Keane, 'The environmental causes and consequences of migration: A search for the meaning of 'environmental refugees'', 2004, *Georgetown International Environmental Law Review* 16 (2), 213.

⁷ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), (hereafter: Refugee Convention).

the definition of ‘refugee’ as outlined in Article 1 of the Refugee Convention.⁸ Chapter four will then explore the framework of international human rights law, most importantly the International Bill of Rights,⁹ and its capacity to provide protection for displaced island citizen. The chapter concludes that while a number of human rights will be compromised by such a large-scale displacement, international human rights instruments do neither impose a legal obligation on the host countries to let displaced small island citizens remain within their territory nor to afford them protection. This reveals a protection gap for those displaced persons who cross the border to another country without falling under the protection of the refugee regime. The analysis of the international human rights framework however does reveal that the principle of ‘non-refoulement’, the prohibition of the return of any person to circumstances where their life might be in danger, might provide a possible protection regime for displaced island citizens. Chapter five therefore looks at the non-refoulement principle and its scope in both international treaties and customary international law. This is an area of international law which is in constant flux and which has evolved significantly in recent decades and the chapter analyses the relevant jurisprudence and the expansion of the principle over time. However, it concludes that in its current scope and judicial interpretation this

⁸ For a detailed analysis see: K. K. Walter, ‘Environmental Refugees – Misnomer or Fact in the Case of Small Island States?’, Undergraduate Dissertation, University of Aberdeen, April 2010, unpublished work; S. Castles ‘Environmental change and forced migration: making sense of the debate’, 2002, Geneva, UNHCR; G. Kibreab, ‘Environmental causes and impact of refugee movements: A critique of the current debate’, 1997, *Disasters* 21 (1): 20–38; R. Black, ‘Environmental refugees: myth or reality?’, 2001, Geneva, UNHCR; K. Romer, ‘Environmental Refugees’, May 2006, *FMR* 25, Refugees Studies Centre, Oxford; D. Keane, ‘The environmental causes and consequences of migration: A search for the meaning of ‘environmental refugees’’, 2004, *Georgetown International Environmental Law Review* 16 (2), 213.

⁹ Universal Declaration of Human Rights (adopted December 10, 1948); International Covenant on Civil and Political Rights (adopted on December 16, 1966, entered into force on March 23, 1976); International Covenant on Economic, Social and Cultural Rights (adopted on December 16, 1966, entered into force on January 3, 1976).

international legal principle does not extend to such extreme cases of environmental degradation and displacement as Small Island States are facing. The final legal framework to be examined is the international legal regime on statelessness. Chapter six will consequently be looking at the principles and criteria of statehood and have specific emphasis on the two UN statelessness conventions. It concludes that both the 1954 Convention Relating to the Status of Stateless Persons¹⁰ and the 1961 Convention on the Reduction of Statelessness¹¹ do not provide protection for displaced island citizens seeing as the relevance and effectiveness of the conventions are limited by inherent flaws and the fact that these instruments have been so poorly ratified.

This thesis reaches the unwelcome conclusion that current legal frameworks are not equipped to provide displaced citizen of disappearing islands with the necessary and effective protection they require and none of the discussed legal instruments can confer a secure and stable legal status, comparable to that of a refugee. This thesis further concludes that - seeing how specific the needs of these geographically remote islands are and taking into account the wishes of the populations at risk - the most promising way forward for the protection of small island states citizen therefore lies in regional agreements aimed at gradual and dignified migration and the preservation of island communities and culture within the host countries.

¹⁰ Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960).

¹¹ Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975).

CHAPTER 2: Climate Change Impact on Small Island States¹²

The negative impacts of climate change on our world and the scientific evidence as to its cause are no longer contested. Rising sea levels, retreating snow cover and glaciers, longer growing seasons and shifting wildlife are indications of a warming world. The United Nations stresses on its web portal for climate change that “disruption in the climate system is manifesting itself around the world through more frequent floods, droughts and heat waves whose severity will only increase.”¹³ The continued emissions of greenhouse gases are warming our planet and changing our climate and are starting to have significant impacts on the livelihoods of people around the world. United Nations Secretary-General Ban Ki-moon has made it a cornerstone of his tenure to address climate change and he is determined to keep the issue at the top of the international agenda. He warns that “unless we fight against climate change, unless we stop this trend, we'll have devastating consequences for humanity.”¹⁴ This chapter will give a brief overview of the impacts and consequences of climate change on island states and the challenges this dangerous trend poses for small island states and their leaders.

¹² This chapter builds on previous work of the author and contains parts of chapter 2 of the author's undergraduate honours dissertation (K. K. Walter, 'Environmental Refugees – Misnomer or Fact in the Case of Small Island States?', Undergraduate Dissertation, University of Aberdeen, Scotland, April 2010, unpublished work), which have been edited and adapted for this thesis.

¹³ UN Gateway to the UN System's Work on Climate Change, 'The Science'. Available at: <http://www.un.org/wcm/content/site/climatechange/pages/gateway/the-science> (accessed 20 December 2011).

¹⁴ See: UN Gateway to the UN System's Work on Climate Change, 'Quotes – Secretary-General'. Available at: <http://www.un.org/wcm/content/site/climatechange/pages/gateway/secretary-general/quotes> (accessed 20 December 2011).

The leading scientific body in charge of researching the impacts, causes and future projections of climate change is the Intergovernmental Panel on Climate Change (IPCC), established by the United Nations Environment Program (UNEP) and the World Meteorological Organization (WMO) in 1988 to provide the world with a clear scientific view on the current state of climate change and its potential environmental and socio-economic consequences.¹⁵ According to the IPCC there is sufficient scientific evidence to prove that human activity is warming the planet and changing our climate.¹⁶ Since the mid-20th century, the average temperature of Earth's near-surface air and oceans has increased by 0.74°C.¹⁷ The main part of this temperature rise is being caused by increasing concentrations of greenhouse gases resulting from human activity such as fossil fuel burning and deforestation, according to the IPCC.¹⁸ In the twentieth century, global sea level rose 0.17 metres, averaging 1-2 millimetres per year due to melting continental ice masses and expansion of the oceans.¹⁹ In its Fourth Assessment Report in 2007, the IPCC predicted that by 2100, global warming would lead to a sea level rise of 19 to 58 cm, depending on the emission trajectory, which will be followed in the future.²⁰ It is further expected that sea levels will continue to rise for decades even after global

¹⁵ See: IPCC website at <http://www.ipcc.ch/organization/organization.htm> (accessed 20 December 2011).

¹⁶ See: IPCC website at <http://www.ipcc.ch/organization/organization.htm> (accessed 20 December 2011); Andy Pitman, 'Climate Change, Migration and Environmental Refugees', Lecture at the University of New South Wales (UNSW), May 23, 2008. Available at: http://www.youtube.com/watch?v=n5CHtYR_Sik (accessed 20 December 2011).

¹⁷ IPCC, 'Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I', 1990, First Assessment Report, New York.

¹⁸ IPCC, 'Climate Change 2007: The Physical Science Basis', 2007, Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, New York.

¹⁹ David Taylor, 'Small Island States Threatened by Sea Level Rise' in *Vital Signs*, 2003, Worldwatch Institute, 84; IPCC, 'Climate Change 2001: The Scientific Basis', 2001, Cambridge Press.

²⁰ IPCC, 'Climate Change 2007: Working Group I: The Physical Science Basis', 2007, Cambridge Press, at 10.6.1.

temperatures have been stabilized, as it takes time for the oceans to equilibrate to the level of greenhouse gases in the atmosphere.²¹

The IPCC acknowledges that “small islands are highly vulnerable to the impacts of climate change and sea level rise.”²² The main reason given for this conclusion is that these countries are comprised of small landmasses surrounded by vast expanses of ocean and are frequently located in regions prone to natural disasters.²³ In addition, these small island countries are highly isolated and often have only the most basic infrastructure and limited natural, human and economic resources and rely heavily on marine resources and agriculture for food supplies.²⁴ These characteristics make island states especially vulnerable and also limit their capacity to adapt to climate change.²⁵

The majority of low-lying and atoll islands are located in the tropics and subtropics and span the ocean regions of the Pacific, Indian and Atlantic.²⁶ The rate of increase in air temperature in the Pacific and Caribbean during the 20th century exceeded the global average and for the South Pacific, the IPCC report indicated that the surface air temperature was estimated to be at least 2.5°C higher by 2100 than in 1990.²⁷ Looking at sea level rise in this region, and at the Maldives in particular, the IPCC determined that a

²¹ Andy Pitman, ‘Climate Change, Migration and Environmental Refugees’, Lecture at the University of New South Wales (UNSW), May 23, 2008. Available at: http://www.youtube.com/watch?v=n5CHtYR_Sik (accessed 20 December 2011).

²² IPCC, ‘Climate Change 2007: Working Group II: Impacts, Adaption and Vulnerability’, 2007, Cambridge Press, at 16.2.1.

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ L. A. Nurse and others. ‘Small island states’ (2001) *Climate Change 2001: Impacts, Adaptation, and Vulnerability* 845.

²⁷ IPCC, ‘Climate Change 2007: Working Group II: Impacts, Adaption and Vulnerability’, 2007, Cambridge Press, at 16.3.1.1.

rise of approximately 50 cm during the 21st century remains the most reliable scenario.²⁸ The Maldives with an average ground level of 1.5 meters above sea level is the lowest country on the planet and any rise in sea level, let alone 50 cm, is potentially devastating to the country's survival.

Islands predicted to be most at risk of complete inundation are the Marshall Islands, the Maldives, Tuvalu and Kiribati, followed closely by the Federated States of Micronesia, Nauru and Tonga.²⁹ The impact on Fiji and the Solomon Islands is predicted to be less severe but still considerable.³⁰ Indeed, in 1999, Kiribati lost two uninhabited islets, Tebua Tarawa and Abanuea, to the sea.³¹ The Carteret Islands of Papua New Guinea have been rendered uninhabitable in 2005 and are expected to be completely submerged by 2015.³²

It is accepted that small islands are by no means a homogeneous group, as they vary by size, geography, climate, social and political character and stage of development.³³ While the threat of sea level rise may vary between islands, it is nonetheless predicted to have a devastating impact with projections of beach erosions, coastal land inundation, flooding

²⁸ *ibid.* at 16.3.1.2.

²⁹ IPCC, 'The Regional Impacts of Climate Change: An Assessment of Vulnerability', 1998, Cambridge Press, 350; David Taylor, 'Small Island States Threatened by Sea Level Rise' in Vital Signs, 2003, Worldwatch Institute, 84.

³⁰ IPCC, 'The Regional Impacts of Climate Change: An Assessment of Vulnerability', 1998, Cambridge Press, 350.

³¹ D. Taylor, 'Small Island States Threatened by Sea Level Rise' in Vital Signs, 2003, Worldwatch Institute, 84.

³² Oxfam Resources, 'Carteret Islands sunk by Climate Change', 2009. Available at: http://www.oxfam.org.uk/applications/blogs/campaigners/2009/04/carteret_islands_sunk_by_clima.html (accessed 20 December 2011).

³³ L. A. Nurse and others. 'Small island states' (2001) Climate Change 2001: Impacts, Adaptation, and Vulnerability, 847; Jon Barnett and Neil Adger, 'Climate Danger and Atoll Countries', 2003, Climatic Change 61, 321.

and salinization of ground water supplies and soil.³⁴ In addition to a threat from sea level rise, small island states face increased frequency and intensity of weather events such as cyclones, storm surges and king tides and with elevated sea levels these surges are predicted to be even more destructive.³⁵ The warming sea also threatens the marine ecosystems with corals being very sensitive to temperature changes in the ocean. Coral bleaching, the death or severe impairment of corals due to rising sea surface temperatures, is threatening the ecosystems of coral reefs, displacing fish stocks.³⁶ Storm surges are also predicted to be more devastating without the protection of coral reefs. Indeed, in June 1997, Cyclone Keli destroyed an islet of Tuvalu, Tepuka Savilivili, washing away all vegetation and rendering the island uninhabitable.³⁷

There are also serious health concerns in relation to warming climate and changing rain patterns. The IPCC warns that reduced rainfall coupled with accelerated sea level rise will increase the threat to clean water resources.³⁸ It predicts that the Tarawa Atoll of Kiribati will lose 20% of its underground freshwater by 2050 due to a 10% reduction in average rainfall.³⁹ As Jane McAdam pointed out “during the years leading up to the final evacuation of the Carteret Islands the incursion of saltwater had made it impossible to

³⁴ L. A. Nurse and others. 'Small island states' (2001) *Climate Change 2001: Impacts, Adaptation, and Vulnerability*, 847.

³⁵ J. Barnett, 'Adapting to Climate Change in Pacific Island Countries: The Problem of Uncertainty', 2001, *World Development*, Vol. 29, Number 6, 978.

³⁶ L. A. Nurse and others. 'Small island states' (2001) *Climate Change 2001: Impacts, Adaptation, and Vulnerability*, 847.

³⁷ D. Taylor, 'Small Island States Threatened by Sea Level Rise' in *Vital Signs*, 2003, Worldwatch Institute, 84; Patrick Barkham, 'Going Down', 16 February 2002, *Guardian Online*. Available at: <http://www.guardian.co.uk/environment/2002/feb/16/weekendmagazine.globalwarming> (accessed 20 December 2011).

³⁸ IPCC, 'Climate Change 2007: Working Group II: Impacts, Adaption and Vulnerability', 2007, Cambridge Press, at 16.4.

³⁹ *ibid.*

grow traditional food sources, such as bananas and sweet potato.”⁴⁰ With the islanders’ diet being limited to fish, coconut and seaweed and rice, rates of diabetes and diarrhoea began to rise among the population due to these changes in diet.⁴¹ In addition, the constant wet ground resulted in an increase in mosquitoes, followed by an outbreak of malaria.⁴²

The threats of climate change and sea level rise to small island states are serious and diverse. This overview has shown that these islands will become uninhabitable long before the sea swallows the last stone. Unless current trends in greenhouse gas emissions are reversed these islands will be forever lost and its populations permanently displaced.

Recent headlines pointed to a study of the University of Auckland suggesting that some small islands are actually growing and not sinking.⁴³ According to the report, out of 27 low-lying atoll islands 20 grew or remained stable and only 7 were reduced in size over the past 60 years.⁴⁴ Due to coral debris and sediment, the islands of Tuvalu, Kiribati and the Federated States of Micronesia are among those, which have grown and should still

⁴⁰ J. McAdam, ‘Climate Change ‘Refugees’ and International Law’, Paper for Legal Seminar at NSW Bar Association, 24 October 2007, 3. Available at: <http://www.nswbar.asn.au/circulars/climatechange1.pdf> (accessed 20 December 2011).

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ BBC Online, ‘Low-lying Pacific islands ‘growing not sinking’’, 3 June 2010. Available at: <http://www.bbc.co.uk/news/10222679> (accessed 20 December 2011); Solomon Star Online, ‘Beck criticises Pacific Island ‘growing not sinking’ report’, 8 June 2010. Available at: <http://www.solomonstarnews.com/news/national/6299-beck-criticises-pacific-island-growing-not-sinking-report-> (accessed 20 December 2011); Washington Times Online, ‘Editorial: Pacific islands not sinking from global warming’, 11 June 2010. Available at: <http://www.washingtontimes.com/news/2010/jun/11/pacific-islands-not-sinking-from-global-warming/> (accessed 20 December 2011).

⁴⁴ A. P. Webb and P. S. Kench. ‘The dynamic response of reef islands to sea-level rise: Evidence from multi-decadal analysis of island change in the Central Pacific’ (2010) 72(3) *Global Planet Change*, 12.

be there in 100 years time.⁴⁵ Associate Professor Paul Kench of Auckland University, one of the authors, said that the islands were not in immediate danger of extinction but admitted that it was not clear whether many of them would remain inhabitable.⁴⁶ Ambassador Colin Beck of Solomon Islands criticized the report severely and called it “short-sighted science”.⁴⁷ He stressed that this kind of report suggested that things would be fine in the long run, which they will not.⁴⁸ A scientist in Kiribati warned the population not to be lulled in a false sense of security as coastal erosion and sea level rise remain serious threats.⁴⁹

While there might be some doubts as to the level of coastal erosion, other threats of climate change such as higher frequency of extreme weather event and salinization of drinking water remain serious concerns for small island citizen. For the purpose of this paper, the premise will be the same as what has been repeated by the governments of small island states for years now: that these islands are in fact facing destruction and if no urgent action is taken, their populations will lose their homelands and be permanently displaced.

⁴⁵ BBC Online, ‘Low-lying Pacific islands 'growing not sinking'’, 3 June 2010. Available at: <http://www.bbc.co.uk/news/10222679> (accessed 20 December 2011).

⁴⁶ *ibid.*

⁴⁷ Solomon Star Online, ‘Beck criticises Pacific Island ‘growing not sinking’ report’’, 8 June 2010. Available at: <http://www.solomonstarnews.com/news/national/6299-beck-criticises-pacific-island-growing-not-sinking-report-> (accessed 20 December 2011).

⁴⁸ Secretariat of the Pacific Regional Environment Programme, ‘Press Release: Pacific Island ‘growing not sinking’ report criticized’’, 4 June 2010. Available at: http://www.sprep.org/article/news_detail.asp?id=780 (accessed 20 December 2011).

⁴⁹ *ibid.*

CHAPTER 3: International Refugee Law as a Protection Mechanism

The first logical step when looking at possible protection mechanisms for environmentally displaced people is to look at the international refugee law regime. The 1951 Refugee Convention was the second major human rights convention adopted by the United Nations, only being preceded by the 1948 Convention on the Prevention and Punishment of Genocide. At that time the only formulation of international human right was the 1948 Universal Declaration of Human Rights, which was an unenforceable General Assembly resolution.⁵⁰ Even though today a complex regime of binding international human rights treaties exists, the Refugee Convention remains the only instrument specifically aimed at protecting refugees and is the most frequently used international treaty in existence. This chapter will briefly contrast the international refugee law regime with the international human rights regime – pointing out differences but also points of convergence between the two regimes. It will then explore whether the Refugee Convention can provide protection for EDPs of small island states by looking at the refugee definition and its requirements.

A. International Refugee Law as part of International Human Rights Law?

International refugee law and international human rights law are very different in nature even though they both aim at addressing and preventing human rights abuses.⁵¹

⁵⁰ J. C. Hathaway, *The rights of refugees under international law*, 2005, 119.

⁵¹ D. E. Anker. 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 Harvard Human Rights Journal, 133.

The international human rights regime's function is to improve human rights standards worldwide by monitoring whether states are fulfilling their duties and obligations under existing treaties and by publicizing non-compliance in order to deter future abuses.⁵² This legal framework is a proactive regime in the sense that it is designed to prevent human rights violations by changing the behavior of states.⁵³ It is made up of the so called International Bill of Rights, consisting of the Universal Declaration of Human Rights (UDHR)⁵⁴, the International Covenant on Civil and Political Rights (ICCPR)⁵⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵⁶, as well as the more specialized instruments related to race⁵⁷, gender⁵⁸ and children⁵⁹. The regime's institutions are international monitoring bodies such as the Human Rights Committee (HRC) or the Committee on the Elimination of all Forms of Discrimination against Women (CEDAW), which hear complaints, issue guidance and comments on thematic issues and monitor compliance with the relevant treaties. In cases of non-compliance these institutions can issue recommendations in order to encourage compliance and those treaty monitoring bodies which have complaint procedures in place can hear individual complaints. However, seeing as the cooperation of signatory countries with these bodies

⁵² *ibid.*

⁵³ *ibid.* at 134.

⁵⁴ Universal Declaration of Human Rights (adopted December 10, 1948).

⁵⁵ International Covenant on Civil and Political Rights (adopted on December 16, 1966, entered into force on March 23, 1976).

⁵⁶ International Covenant on Economic, Social and Cultural Rights (adopted on December 16, 1966, entered into force on January 3, 1976).

⁵⁷ International Convention on the Elimination of All Forms of Racial Discrimination (adopted on December 21, 1965, entered into force on January 4, 1969).

⁵⁸ Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (adopted on December 19, 1979, entered into force on September 3, 1981).

⁵⁹ Convention on the Rights of the Child (adopted on November 20, 1989, entered into force on September 2, 1990).

is on a voluntary basis, the effectiveness of this enforcement mechanism is somewhat limited.⁶⁰

Refugee law on the other hand is not as generally applicable as human rights law as it only provides protection for certain groups of people or individuals with specific characteristics, outlined in Article 1 of the 1951 Convention Relating to the Status of Refugees⁶¹. The status of refugee comes with a range of legal right, such as the right of the refugee to have protection and support extended from the receiving state and to be afforded a minimum standard of treatment.⁶² Refugee law is designed to provide substitute protection where a state is unable to protect its citizens and is therefore a reactive regime, aimed at protecting people fleeing from human rights abuses rather than holding states responsible for them. As the signatory states incorporate the duties and obligation of the Refugee Convention into their domestic laws, there is variation as to how they are interpreted and applied but it also allows asylum seekers access to domestic appeal mechanisms and other legal safeguards. Even though the refugee regime applies to a much small group of people as compared to the human rights regime, it provides a much more comprehensive and enforceable protection mechanism for those who do fall within its scope.

⁶⁰ D. E. Anker. 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 Harvard Human Rights Journal, 134.

⁶¹ Convention Relating to the Status of Refugees (adopted on 28 July 1951, entered into force on 22 April 1954).

⁶² See Refugee Convention, Article 2; UNHCR Website, 'Definitions and Obligations'. Available at: <http://www.unhcr.org.au/basicoblig.shtml> (accessed 20 December 2011).

There has been some convergence between the two systems in recent decades, especially in relation to the interpretation and meaning of ‘persecution’. Moving away from a understanding of ‘persecution’ based on ideology and political opposition, the definition is evolving towards a focus on the denial of basic human rights and human dignity.⁶³ James Hathaway advocates for a definition of persecution which takes into account current international human right obligations under the UDHR, the ICCPR and also the ICESCR, using sustained or systemic denial of core human rights as the appropriate standard.⁶⁴ The scope of what type of situations fall within the refugee definition and specifically under ‘persecution’ has evolved significantly since the Refugee Convention was adopted in 1951. The definition of persecution originally included only acts of state actors and today most states argue that the agents of persecution can also be private actors, acting independently of the state, and jurisprudence is continuing to evolve on this issue.⁶⁵

B. Environmental Refugees?

The term ‘environmental refugees’ or ‘climate refugees’ has become increasingly popular in the news but at the same time has been criticized by the academic community and a number of organizations such as the IOM and UNHCR for being a misnomer. The reasoning behind this criticism is that the term ‘refugee’ has a specific legal meaning

⁶³ J. C. Hathaway, ‘*The rights of refugees under international law*’, 2005, 108.

⁶⁴ *ibid.*

⁶⁵ See *Ward v. Canada* (Minister of Employment & Immigration) [1993] 2 S.C.R. 689; *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190; G. S. Goodwin-Gill and J. McAdam, ‘*The refugee in international law*’, 2007, 100; European Council on Refugees and Exiles, ‘Non-State Agents of Persecution and the Inability of the State to Protect’, September 2000, London.

under the 1951 Refugee Convention and 1967 Protocol and that falling within the scope of the refugee definition in Article 1 of the Convention comes with certain rights and privileges. Most importantly, a refugee will fall under the protection mandate of the UNHCR, the UN refugee agency mandated by the United Nations to lead and coordinate international action for the worldwide protection of refugees and the resolution of refugee problems.⁶⁶ Once under the protection of UNHCR, the agency will attempt to either enable the return of the refugee to their country of origin once it is safe, help them to integrate locally or to resettle to a third country. The term ‘refugee’ therefore implies that the person described by it falls under this specific protection regime.

Critics of the term ‘environmental refugee’ fear that using the term for a group of people who are not eligible for protection under the Refugee Convention holds the danger of diluting the term for those who do qualify. Since its creation in 1951, the scenarios which are included under the definition have steadily been extended by national jurisprudence and national governments have in turn been trying to resist this trend by limiting the number of incoming refugees. In the last two decades there has been a trend in many receiving countries toward more restrictive asylum and refugee policies and opinion polls in Europe, Canada, Australia and the United States show that the majority of the public believes that their countries have done more than their part and have accepted enough refugees and asylum seekers.⁶⁷ Jennifer Hyndman points out that the “externalization of asylum” has become commonplace in the European Union and Australia, meaning that

⁶⁶ UNHCR Mission Statement. Available at: <http://www.unhcr.org/pages/49ed83046.html> (accessed 20 December 2011).

⁶⁷ R. J. Simon and J. P. Lynch. 'A comparative assessment of public opinion toward immigrants and immigration policies' (1999) 33(2) *International migration review*, 464.

asylum seekers are denied access to the territory of signatory countries to prevent them from making a claim.⁶⁸ This is achieved through offshore processing, carrier sanctions, readmission agreements with sending countries and aggressive visa regimes.⁶⁹ Refugees who arrive outside of state-sponsored resettlement programs such as boat arrivals are increasingly depicted as taking illegitimate advantage of the refugee protection mechanism and portrayed as security risks for receiving countries.⁷⁰

Seeing how reluctant receiving countries already are now to live up to their full legal obligations under the Refugee Convention the very real risk exists that the false use of the term 'refugee' will reduce its viability and utility for those currently eligible for protection. Currently, there are 15.2 million refugees worldwide eligible to apply for protection under the Refugee Convention but estimates for EDPs range from 25 million to 200 million people by 2050.⁷¹ Consequently, the wrong use of the term 'refugee' might cause signatory states to fear being overrun by unpredictable and substantially higher numbers of refugees in the near future which in turn could lead to increased protectionism.

⁶⁸ J. Hyndman and A. Mountz. 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe!' (2008) 43(2) *Government and Opposition*, 250.

⁶⁹ *ibid.* at 253.

⁷⁰ Time Online, 'Australia: Boat Arrivals of Asylum Seekers Rising', 18 September 2009. Available at: <http://www.time.com/time/world/article/0,8599,1924339,00.html> (accessed 20 December 2011); Toronto Sun, 'As many as 500 Tamils on boat headed for B.C.', 11 August 2010. Available at: <http://www.torontosun.com/news/canada/2010/08/11/14990696.html> (accessed 20 December 2011); Canadian Council for Refugees, 'Statement regarding arrival of Tamil refugee claimants by boat on West Coast', 17 August 2010. Available at: <http://ccrweb.ca/en/bulletin/10/08/18> (accessed 20 December 2011).

⁷¹ William Lacy Swing, Director General of the International Organization for Migration, in a speech at the UNU Panel Discussion 'Insure me: Climate Change, Human Migration and Risk', 24 September 2009, New York.

The following section will therefore look at the refugee definition as outlined in Article 1 of the 1951 Refugee Convention in detail to explain why displaced small island states citizens are in fact not environmental refugees.

1. Small Island States and the Refugee Definition

According to Article 1 of the Refugee Convention, refugees are persons who are (1) ‘outside their country of nationality’ and (2) due to a ‘well-founded fear’ of (3) ‘persecution’ are unwilling or unable to receive protection from their country of origin or to return to their country of origin and furthermore that persecution is based on (4) ‘reasons of race, religion, nationality, membership of a particular social group or political opinion’.⁷²

When looking at environmental displacement, the first requirement already poses difficulties as the vast majority of EDPs are internally displaced, meaning within their own country, and do therefore not cross an international border but merely flee to higher ground or the next larger city.⁷³ As it is a vital element to the refugee definition that the fleeing person crosses a border to another country, the Refugee Convention could only

⁷² Refugee Convention, Article 1:

‘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.’

⁷³ J. McAdam, ‘Climate Change ‘Refugees’ and International Law’, Paper for Legal Seminar at NSW Bar Association, 24 October 2007, 4. Available at: <http://www.nswbar.asn.au/circulars/climatechange1.pdf> (accessed 20 December 2011); K. K. Moberg, ‘Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection’, 2009, 94 Iowa Law Review, 1132; D. Keane, ‘The environmental causes and consequences of migration: A search for the meaning of ‘environmental refugees’’, 2004, Georgetown International Environmental Law Review 16 (2), 213.

apply to the minority of EDPs who do so. Citizens of small island states are however able to cross this first hurdle as they inevitably have to cross a national border to flee their countries. Also the second requirement of ‘well-founded fear’ is not problematic seeing that environmental degradation, extreme weather events and resource scarcity will seriously threaten the wellbeing and the lives of island citizens.⁷⁴ The problem lies with the third and fourth requirements of persecution on one of the enumerated convention grounds, such as nationality or membership in a particular social group. The following part will look at the requirement of ‘persecution’ and ‘nexus’ in turn in order to explain the obstacles of fitting environmental degradation and displacement of small island citizens within the refugee definition.

(a) Environmental Persecution?

The first obstacle to locating environmental displacement within the framework of international refugee law is characterizing ‘climate change’ and ‘sea level rise’ as *persecution*.⁷⁵ According to the Handbook issued by the UNHCR in 1979 to give guidance on the Refugee Convention, “there is no universally accepted definition of ‘persecution’, and various attempts to formulate such a definition have met with little success.”⁷⁶ This could be interpreted as an intentional choice to keep the term broad in

⁷⁴ K. K. Walter, 'Environmental Refugees – Misnomer or Fact in the Case of Small Island States?', Undergraduate Dissertation, University of Aberdeen, April 2010, unpublished work, 13.

⁷⁵ J. McAdam and B. Saul, 'An Insecure Climate for Human Security? Climate-induced Displacement and International Law' (2008) Sydney Centre for International Law Working Paper 4, 8.

⁷⁶ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1979, Reedited 1992, UNHCR, Geneva, 10 (hereafter: UNHCR Handbook).

order to ensure its capability to react to all kinds of scenarios. However, Hathaway argues that the Convention's drafting history allows for insight into the intended meaning of the term "persecution" and emphasises that "the intention of the drafters was not to protect persons against any and all forms of even serious harm but rather to restrict refugee recognition to situations in which there was a risk of the type of injury that would be inconsistent with the basic duty of protection owned by a state to its own population".⁷⁷ The Refugee Convention was therefore intended to afford international protection where there was a demonstrative breakdown of national protection.⁷⁸

In respect to the required degree of harm to qualify an act as persecution, no internationally accepted standard exists but case law suggests that while a sufficient degree of harm must exist, that requirement is relatively low and that furthermore the existence of physical harm is not necessary for a finding of persecution.⁷⁹ Substantive economic deprivation alone can suffice to meet the requirement of harm.⁸⁰ Michelle Foster even goes one step further and advocates for an extension of the concept 'persecution' to include the deprivation of socio-economic rights.⁸¹ She bases her argument on the fact that refugee law is evolving towards a focused and progressive human rights framework, as has been proposed by James Hathaway, and that socio-

⁷⁷ J. C. Hathaway, 'The rights of refugees under international law', 2005, 103.

⁷⁸ *ibid.* at 104.

⁷⁹ *Amayo v. Canada* (Minister of Employment & Immigration) [1982] 1 F.C. 520 (C.A.); *Oyarzo v. Canada* (Minister of Employment & Immigration) [1982] 2 F.C. 779 (C.A.); *Baballah v Ashcroft*, 367 F.3d 1067, 1074 (9th Circuit 2004) (US); *Chan v. Minister for Immigration and Ethnic Affairs* (1989), 169 C.L.R. 379 (Australia).

⁸⁰ *VG Ansbach* (19th Division) 18 March 1992, AN 19 K 91.39868. (Germany); *Ovakimoglu v. Canada* (Minister of Employment & Immigration) (1983), 52 N.R. 67 (Fed. C.A.); J. Carlier, D. Vanheule, K. Hullmann, C. Pena Galiano, 'Who is a Refugee? A Comparative Case Law Analysis', 1997, 92.

⁸¹ M. Foster, 'International refugee law and socio-economic rights: Refuge from deprivation', 2007, 154.

economic rights should have the same standing in this framework as civil and political rights.⁸²

In any case, small island state citizens would not have difficulties meeting the requirement of persecution in either form as climate change and environmental harms deplete resources, destroy infrastructure, create economic hardship and, most importantly, pose physical danger through heat waves, floods, storms, fires and droughts.⁸³

The problem in relation to EDPs lies with the fact that the persecution under the Convention has to be persecution for which state protection was either denied due to state involvement, or due to state inability to provide protection.⁸⁴ The UNHCR Handbook confirms that “persecution is normally related to action by the authorities of a country” but that “where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection”.⁸⁵ Jurisprudence on this issue has expanded the definition of persecution significantly over time and while in the past only acts of state actors would fall under the definition, today the agents of persecution can also be private actors, acting independent of the state, and

⁸² *ibid.* at 158.

⁸³ K. K. Moberg, ‘Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection’, 2009, 94 Iowa Law Review, 1121.

⁸⁴ *Ward v. Canada* (Minister of Employment & Immigration) [1993] 2 S.C.R. 689; *Rajudeen v. Canada* (Minister of Employment & Immigration) (1984), 55 N.R. 129 (Fed. C.A.); *Horvath v. Secretary of State for the Home Department* [2000] H.L.J. No. 38 (UK); *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190 (Australia); J. C. Hathaway, *The rights of refugees under international law*, 2005, 104.

⁸⁵ UNHCR Handbook, 13.

jurisprudence is continuing to evolve on this issue.⁸⁶ However, this expansion did not happen overnight but rather took decades to develop and some jurisdictions still have a more restrictive interpretation than others. Germany for example still does generally not consider non-state actors as agents of persecution and requires at least an indirect state involvement in order to grant refugee status as was held in a landmark decision of the Federal Constitutional Court on 10 July 1989 and was upheld in subsequent rulings.⁸⁷ France is also considered to be one of the more restrictive countries in its approach to ‘persecution’ and the requirement of state involvement.⁸⁸ The UK House of Lords held in *Horvath* that in the case of persecution by a third party the claimant was only a refugee if the state had not done its best to provide protection, even if that did not reduce the risk for the claimant to be persecuted upon his return.⁸⁹ This case concerned a Roma from Slovakia who had asked for asylum in the UK after being repeatedly attacked by skinheads while the police would mostly ignore those acts. New Zealand’s Refugee Status Appeal Authority however opted not to follow this decision stating that the proper approach in the case of non-state actors was to inquire whether the available state protection in fact reduced the risk of serious harm.⁹⁰ The European Court of Human Rights adopted the same approach in *Osman v. UK* stating that the focus should be on the

⁸⁶ See *Ward v. Canada* (Minister of Employment & Immigration) [1993] 2 S.C.R. 689; *Khawar v. Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190; G. S. Goodwin-Gill and J. McAdam, ‘*The refugee in international law*’ (3rd edn Oxford University Press, Oxford ; Toronto 2007) 100; J. C. Hathaway, *The rights of refugees under international law* (Cambridge Univ Pr, 2005) 100; European Council on Refugees and Exiles, ‘Non-State Agents of Persecution and the Inability of the State to Protect’, September 2000, London.

⁸⁷ BVerfGE 80, 315 (1989); BVerfG, 2 BvR 260/98, 10 August 2000; VG Minden 1 K 231 / 02 . A, 11.02.2003.

⁸⁸ C. Phuong. ‘Persecution by Non-State Agents: Comparative Judicial Interpretations of the 1951 Refugee Convention’ (2002) 4 Eur.J.Migration & L. 522.

⁸⁹ *Horvath v. Secretary of State for the Home Department*, [2000] H.L.J. No. 38 at §14; H. Lambert. ‘The Conceptualisation of ‘Persecution’ by the House of Lords: *Horvath v. Secretary of State for the Home Department*’ (2001) 13(1 and 2) International Journal of Refugee Law 29.

⁹⁰ Refugee Appeal No. 71427/99, 16 August 2000, para. 66.

real reduction of risk not the availability of state protection alone.⁹¹ This overview shows that jurisprudence on this issue is still evolving and can differ significantly between countries. In the leading Canadian case of *Ward v. Canada* the Supreme Court held that state complicity was no necessary requirement and that a claim for refugee status could be made in cases where the state was neither directly nor indirectly involved in the persecution.⁹²

Seeing as the greenhouse emission that cause climate change are being emitted by countries other than small island states, their governments cannot be said to be the agents of persecution. This is disputed by Jennifer Cooper, who maintains that EDPs fall within the refugee definition and points to sea level rise as a prime example of government's inactions causing environmental degradation.⁹³ Cooper thus claims that the connection between the emission of greenhouse gas and global warming has been known for several decades, as has the connection between global warming and sea level rise and that the continued emission of greenhouse gas and the lack of initiative by the world's governments to reduce carbon footprint, constitute a persecutory act against their own nationals by these governments.⁹⁴

However, in relation to small island states Cooper's argument does not hold up as these islands are among the least developed countries and their greenhouse emissions are negligible on the global scale. Furthermore, the governments of these disappearing

⁹¹ *Osman v. United Kingdom*, [1998] EHRR 101.

⁹² *Ward v. Canada* (Minister of Employment & Immigration) [1993] 2 S.C.R. 689, at 726.

⁹³ J. B. Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition', 1998, New York University Environmental Law Journal 6, 513.

⁹⁴ *ibid.* at 513.

countries are amongst the most vigorous advocates for the reduction of greenhouse gases in order to stop global warming. President Nasheed of the Maldives announced in 2009 at the UN Climate Summit that his country is pledging to be carbon-neutral by 2020.⁹⁵ In the past he has repeatedly made headlines with similar stories in order to draw attention to the fate of the Maldives and similar islands. Most memorable and publicity effective were his announcements to create a fund to buy land on the mainland to provide a new home for his people or the holding of an underwater cabinet meeting to sign a declaration urging the international community to act against climate change.⁹⁶ Other leaders such as President Tong of Kiribati and the Alliance of Small Island States (AOSIS) haven been busy lobbying against climate change and calling for a reduction of global greenhouse emissions by more than 85% below 1990 levels by 2050.⁹⁷ However, the geographic disadvantage of these small island states, their dependence on foreign economies and their rather limited political weight on the global stage means that these countries are close to incapable of unilaterally affecting change to the world's greenhouse emissions.

The governments of Small Island States are clearly aware of the severity of the situation and of the fact that a failure to counter the effects of climate change and global warming could mean devastation and permanent displacement for their peoples and they are

⁹⁵ See President Nasheed's speech at the opening ceremony of the UN Climate Change Summit in New York, 22 September 2009. Available at: <http://www.un.org/wcm/content/site/climatechange/lang/en/pages/2009summit/programme> (accessed 20 December 2011).

⁹⁶ See: BBC Online, 'Maldives cabinet to go underwater', 5 October 2009. Available at: <http://news.bbc.co.uk/1/hi/8291487.stm> (accessed 20 December 2011); R. Ramesh, 'Paradise almost lost: Maldives seek to buy a new homeland', 10 November 2008, Guardian Online. Available at: <http://www.guardian.co.uk/environment/2008/nov/10/maldives-climate-change> (accessed 20 December 2011).

⁹⁷ AOSIS Climate Change Declaration 2009. Available at: <http://www.sidsnet.org/aosis/summit2009.html> (accessed 20 December 2011).

fighting to stop it. These governments are not persecuting their own nationals; on the contrary, they are trying to protect them.⁹⁸

Finally, as mentioned above in cases where the persecution emanates from a third party, a state owes a basic duty of protection to its citizens and refugee protection only applies where the state fails or is unable to respond to this legitimate expectation of protection.⁹⁹

Lord Hope of Craighead in the UK House of Lords decision of *Horvath* affirms this by stating that persecution within the meaning of the Convention requires that the state has to either deny protection due to state involvement in the persecution or due to state inability to provide protection.¹⁰⁰ In *Ward* the Canadian Supreme Court held that “clear and convincing proof of the state’s inability to protect must be advanced” to trump the assumption that a state has generally the ability to protect its own citizen.¹⁰¹ There are two main scenarios in which this is relevant, one being a breakdown of state institutions through civil war or civil strife and the other where the state is unable to provide protection due to the nature of the persecuting group.¹⁰² In *Ward* the applicant feared for his life at the hands of a terrorist organization in Ireland and the Court accepted that the Irish state, while commanding a fully functioning state apparatus, was in fact unable to provide meaningful protection. Similarly, in *Miranda v. Canada*, the claimant feared persecution by the Shining Path terrorists in Peru and the Court accepted that the state had been shown to be incapable

⁹⁸ For a more detailed analysis see: K. K. Walter, 'Environmental Refugees – Misnomer or Fact in the Case of Small Island States? ', Undergraduate Dissertation, University of Aberdeen, April 2010, unpublished work.

⁹⁹ J. C. Hathaway, ‘*The rights of refugees under international law*’, 2005, 129.

¹⁰⁰ *Horvath v. Secretary of State for the Home Department*, [2000] H.L.J. No. 38 at §14.

¹⁰¹ *Ward v. Canada* (Minister of Employment & Immigration) [1993] 2 S.C.R. 689.

¹⁰² L. Waldmann, ‘*The Definition of Convention Refugee*’, 2001, 8.209.

of protecting the claimant from these specific threats.¹⁰³ Furthermore, in the House of Lords case of *Adan* the Court accepted that the claimant fearing persecution as a result to the civil war in Somalia was a Convention refugee and the same was held in the Canadian case of *Zalzali* where a Lebanese applicant fled civil war and the Court pointed out that the non-existence of a government was one clear example of a situation where the state is unable to protect its citizens.¹⁰⁴

Disappearing island will struggle to maintain their governments let alone protect their citizens from the effects of climate change and sea level rise, the failure to protect will in this case therefore also not be a result of state's denial of protection but of its inability to protect. While the governments are still functioning, they have little power to stop greenhouse gas emissions of the polluting countries and once their islands start to feel the full effects of climate change the ability of governments to protect their citizens will decline as well. They will be unable to provide the necessary protection their citizens need.

To sum up, in order to fall within the meaning of 'persecution', the environmental degradation caused by climate change would therefore likely have to be shown to be a deliberate act of a non-state actor or any third party from which small island states are unable to protect their citizens. This brings us back to the problem of characterizing 'climate change' and 'sea level rise' as *persecution*.¹⁰⁵

¹⁰³ *Miranda v. Canada* (1995), 91 F.T.R. 256.

¹⁰⁴ *Adan v. Secretary of State for the Home Department*, [1998] H.L.J. No. 15 at §39; *Zalzali v. Canada (Minister of Employment & Immigration)* [1991] 3 F.C. 614.

¹⁰⁵ J. McAdam and B. Saul. 'An Insecure Climate for Human Security? Climate-induced Displacement and International Law' (2008) Sydney Centre for International Law Working Paper 4, 8.

While the understanding of what constitutes ‘persecution’ has evolved significantly since the drafting of the Refugee Convention, this would require another large step towards broadening this principle further. As mentioned above, it took decades to evolve this far and in all this time it has always been necessary to show that the persecutory acts, whether by state actors or a third party, holds some level of targeted harassment or discrimination.¹⁰⁶ Sea level rise and other consequences of climate change, caused by greenhouse gas emissions, are not targeted at small island state citizens but rather are the result of general and non-discriminatory policies of the polluting countries. Furthermore, seeing as the detrimental effects of climate change are still somewhat disputed among countries and that no single country can be singled out as the sole cause for sea level rise, there is a problem in showing a clear causal link between the emission of greenhouse gases and the inundation of island states. This is a global problem, caused not only by governments of industrial countries but largely by multinational companies, which are almost impossible to hold accountable, especially in an area of international law where even the governments are reluctant to live up to their obligations under Refugee Convention. In order to include the threats faced by small island states through climate change within the meaning of ‘persecution’ the principle will have to evolve significantly further beyond its current interpretation and it remains uncertain whether it ever will be able to encompass untargeted environmental degradation.

¹⁰⁶ J. C. Hathaway, *The rights of refugees under international law*, 2005, 102.

(b) Persecution based on Reasons of Race, Religion, Nationality, Membership of a Particular Social Group or Political Opinion

In any case, even if it were eventually decided to extend the interpretation of persecution to include environmental persecution, the final requirement of the refugee definition would have to be met as well. The reason for persecution therefore has to fall into one of the categories mentioned in the Refugee Convention. However, as pointed out above the threats of environmental degradation or environmental disasters do not target individuals or groups based on a particular characteristic but are instead non-discriminatory. Environmental displacement is not generally the result of a concerted (government) action targeted at a specific group of people with common, immutable characteristics, such as race or religion.¹⁰⁷ Nonetheless, it has been argued that some EDPs, namely those displaced by sea level rise, could be regarded as belonging to a “particular social group” (PSG) and in addition the ground of “nationality” might be relevant for citizens of small island states. Each of these two grounds has particular problems associated with it in regards to small island states and these will be examined in turn in the following discussion.

¹⁰⁷ D. Zartner Falstrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’, 2001, Colorado Journal of International Law and Policy 12 (1), 6.

(i) *Persecution on Grounds of “Nationality”?*

The concept of nationality remains undefined by the Refugee Convention and the drafting history of the Convention does not offer a specific definition of nationality either.¹⁰⁸ Hathaway states that “early commentators assumed a narrow meaning of the term, roughly equivalent to formal citizenship” but that led to unsatisfying results as it would only apply to situations where a state were to persecute its citizens solely because of their status as citizens.¹⁰⁹ A more expansive interpretation however suggests four main situations to which this ground of persecution can apply. Firstly, this might cover persons resident outside their country of origin and without international protection, such as refugees or asylum seekers, who are persecuted for their status as “foreigners”.¹¹⁰ The second scenario includes persons who are denied full citizenship by their own governments and treated as “second-class citizens”.¹¹¹ The third scenarios covers persons who are being ascribed a different nationality and with that disenfranchised by their governments, as in the case of the black “homelands” in South Africa.¹¹² Lastly, this category can apply in cases where a state is composed of previously sovereign territory – such as the U.S.S.R. - and the persecution is directed against those who remain loyal to the predecessor state.¹¹³ The UNHCR Handbook gives little more guidance when it describes nationality as including “membership of an ethnic or linguistic group”.¹¹⁴ Case law on this particular ground of persecution is scarce as most situations overlap with

¹⁰⁸ J. C. Hathaway, *The rights of refugees under international law*, 2005, 144.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.*; See also L. Waldmann, *The Definition of Convention Refugee* (Butterworth, 2001) 8.180.

¹¹² Leslie Bank, Roger Southall, ‘Traditional Leaders in South Africa's New Democracy’, 37 & 38 *J. Legal Pluralism & Unofficial L.*, 1996, 412; J.C. Hathaway, *The Law of Refugee Status*, 1993, 144.

¹¹³ J. C. Hathaway, *The rights of refugees under international law*, 2005, 144.

¹¹⁴ UNHCR Handbook, 18.

other categories, mainly race and particular social group, and those cases that base their claim on nationality usually include ethnic conflicts, such as the persecution of Tutsis or Rwandans in the DRC.¹¹⁵

Citizens of Small Island States are threatened due to the fact that they live on island countries, would they be citizens of landlocked countries on the mainland, they would not be in this specific danger. In addition, this would not be an issue if they had dual citizenship and could simply move to another country on the mainland. There could be an argument made that the citizen of disappearing states are in fact facing dangers to their lives as a result of their nationality. Looking at the usual use of this category, however, it becomes clear that this situation is very different from past cases. For one, those have never involved the entire population of a country, not to mention several countries being displaced. This is not a situation, which only applies to a certain ethnic group or a disenfranchised part of the population but rather to every citizen on these islands. Furthermore, this opens the door for floodgate arguments, saying that national asylum systems are not equipped for such large groups and it could be argued that the protection framework outlined in the Refugee Convention provides insufficient protection for such large-scale population movements. Even though the Courts stated in the British case *Shah* and Canadian case *Ward* that the size of the recognized group does not matter, the

¹¹⁵ L. Waldmann, 'The Definition of Convention Refugee' (Butterworth, 2001) 8.180; *R (on the application of (Kalombo) v. Secretary of State for the Home Department*, [2008] EWHC 2249 (UK).

displacement of several entire nations would pose a serious problem to the refugee protection system.¹¹⁶

Hathaway furthermore states that the historical context and the comments made by the different delegations during the drafting process show that the Convention had been intended as a means of identifying and protecting refugees from known forms of harm due to their civil and political status and not as a means to identify all unforeseen future types of state abuse.¹¹⁷ The harm that citizens of small islands face was unforeseen at the time of drafting and it is not being inflicted on these people due to their civil or political status. It would stretch the definition to the Refugee Convention too far to include the entire population of a country within the grounds of ‘nationality’.

(ii) Citizen of Small Island States as members in a Particular Social Group?

This category is decisively broader than the others mentioned in the refugee definition and therefore often overlaps with one or several of them, such as race, religion or political opinion.¹¹⁸ It was a last minute addition to the Refugee Convention by the Swedish delegation and adopted without discussion.¹¹⁹ This has made it very difficult to determine what the drafters of the Refugee Convention had in mind with this addition and as a result

¹¹⁶ *Ward v. Canada* (Minister of Employment & Immigration) [1993] 2 S.C.R. 689 (Canada); Immigration Appeal Tribunal and Secretary of State for the Home Department, *Ex parte Shah* [1997] Imm.A.R. 145.

¹¹⁷ J. C. Hathaway, *The rights of refugees under international law*, 2005, 159.

¹¹⁸ UNHCR Handbook, 13.

¹¹⁹ UNHCR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-third Meeting, 26 November 1951. Available at: <http://www.unhcr.org/protect/PROTECTION/3ae68cda10.html> (accessed 20 December 2011); J. C. Hathaway, *The rights of refugees under international law*, 2005, 157.

its interpretation has changed significantly over the years. In the 1979 Handbook on the interpretation of the Refugee Convention, UNHCR stated that a “particular social group” comprises of persons with a “similar background, habits or social status” but did not give any further guidance.¹²⁰ Initially, case law and legal commentary treated membership of a PSG as helpful in clarifying the other four grounds of race, nationality, political opinion and religion but not as a separate ground in its own right.¹²¹ Among academics however many believed that this category had been added in order to fill any possible gaps left by the four more specific grounds of persecution and was intended as a safety-net or catch-all provision.¹²²

The courts eventually found a middle-ground between these two extreme views which is most comprehensively summed up in *Ward* where the court looked at the tests proposed in the prior cases of *Matter of Acosta*¹²³ and *Cheung*¹²⁴ and used those as basis for the now widely accepted definition of ‘particular social group’. *Ward* lays out three possible categories of what falls under PSG, the first one being “groups defined by innate or unchangeable characteristics” which would include individuals “fearing persecution on such basis as gender, linguistic background and sexual orientation”.¹²⁵ The second category encompasses “groups whose members voluntarily associate for reasons so

¹²⁰ UNHCR Handbook, 13.

¹²¹ *Obertz Belfond* (1975), 10 I.A.C. 208; J. Fraser, ‘Review on Caselaw on Particular Social Groups From 1999 to 2005’, 2005, Refugee Legal Project, Legal Services Agency Glasgow, 1; J. C. Hathaway, ‘*The rights of refugees under international law*’, 2005, 157.

¹²² A. Helton, ‘Persecution on Account of Membership in a Social Group as a Basis for Refugee Status’, 1983, 15 Columbia Human Rights Law Review, 39; A. Grahl-Masden, ‘*The Status of Refugees in International Law*’, 1966, Volume 1, 220; G. Goodwin-Gill, ‘*The Refugee in International Law*’, 1984, 30; P. Hyndman, ‘The 1951 Convention Definition of Refugee’, 1987, 9 Human Rights Quarterly 49, 71.

¹²³ *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985. Available at: <http://www.unhcr.org/refworld/docid/3ae6b6b910.html> (accessed 20 December 2011).

¹²⁴ *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314.

¹²⁵ *Ward v. Canada (Minister of Employment & Immigration)* [1993] 2 S.C.R. 739.

fundamental to their human dignity that they should not be forced to forsake the association”, including for example human rights activists.¹²⁶ The last group covers individuals “associated by a former voluntary status, unalterable due to its historical permanence” and was meant to clarify that the past is an immutable part of a person and can therefore be grounds of persecution in the sense of the Convention.¹²⁷ This definition and similar approaches have consequently been used in decisions by courts in the United States, United Kingdom, France and other jurisdictions around the world.¹²⁸ The key idea behind this approach, the circularity argument, was furthermore articulated skilfully by McHugh J in *Applicant A* where he stated that members of a PSG “must exist independently of, and not be defined by, the persecution they fear” as “otherwise art. 1A(2) [of the Refugee Convention] would be rendered illogical and nonsensical”.¹²⁹ This case concerned a Chinese couple fleeing China’s one-child policy and claimed they would face persecution in the form of forced sterilisation if returned to China.¹³⁰ A PSG must therefore be defined by more than an external threat of persecution.

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ Immigration Appeal Tribunal and Secretary of State for the Home Department, *Ex parte Shah* [1997] Imm.A.R. 145 (UK); Jean-Yves Carlier, Dirk Vanheule, Klaus Hullmann, Carlos Pena Galiano, ‘Who is a Refugee? A Comparative Case Law Analysis’, 1997, 100 (in respect to Belgium), 330 (Denmark), 412 (France), 712 (overview); J. C. Hathaway, ‘*The Law of Refugee Status*’, 1993, 166; Derek McGhee, ‘Homosexuality and Refugee Status in the United Kingdom’, 2001, *Sociological Research Online*, vol. 6, no. 1, paragraph 4.1. Available at: <http://www.socresonline.org.uk/6/1/mcghee.html> (accessed 20 December 2011); J. Fraser, ‘Review on Caselaw on Particular Social Groups From 1999 to 2005’, 2005, Refugee Legal Project, Legal Services Agency Glasgow, 2.

¹²⁹ *Applicant A v. Minister for Immigration and Ethnic Affairs and another* (1997) 190 CLR, 263.

¹³⁰ *ibid.*

In the past, persons who have been deemed to belong to a particular social group were for example homosexuals¹³¹, Iranian women who advocate women's rights¹³², victims of female genital mutilation¹³³ and women without male protection in Pakistan¹³⁴; deemed not to belong to a PSG were persons refusing to join the military.¹³⁵

(aa) PSG of “Persons Lacking Political Power to Protect Their Environment”?

Under the first category of PSG as defined by *Ward* small island state citizens would need to show that they share an innate character trait. Jennifer Cooper argues that people who are displaced as a result of sea level rise constitute a PSG, composed of persons who lack the political power to protect their own environment. She argues that these people become victims of environmental degradation on account of their political disempowerment, which is the immutable characteristic that makes the citizens of small island countries members of a social group in the sense of the refugee definition.¹³⁶ Several authors have challenged these assumptions.¹³⁷ Dana Zalstrom notes that “political

¹³¹ *Timothy Veysey v. Commissioner of the Correctional Service of Canada* (1989), 29 F.T.R. 74 (T.D) (Canada); BVerwG (9th Senate) 15 March 1088, 9C 178.86 (Germany); D. McGhee, ‘Homosexuality and Refugee Status in the United Kingdom’, 2001, Sociological Research Online, vol. 6, no. 1, paragraph 4.1. Available at: <http://www.socresonline.org.uk/6/1/mcghee.html> (accessed 20 December 2011); J. Carlier, D. Vanheule, K. Hullmann, C. Pena Galiano, ‘Who is a Refugee? A Comparative Case Law Analysis’, 1997, 331.

¹³² *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Circuit 1994) (US); V.B.C. (1 ch.), 23 October 1992, E040 (Belgium).

¹³³ *Matter of Kasinga*, 21 I. & N. Dec. 357 (AG, 1994) (US).

¹³⁴ Immigration Appeal Tribunal and Secretary of State for the Home Department, Ex parte *Shah* [1997] Imm.A.R. 145 (UK).

¹³⁵ *Arriga-Berrientos v U.S. I.N.S.*, 925 F.2d 1177, 1180 (9th Circuit 1991) (US).

¹³⁶ J. B. Cooper, ‘Environmental Refugees: Meeting the Requirements of the Refugee Definition’, 1998, New York University Environmental Law Journal 6, 522.

¹³⁷ A. Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’, 2007, 37 Environmental Law, 386; D. Zartner Falstrom, ‘Stemming the Flow of Environmental Displacement:

powerlessness is not an immutable characteristic that will make a person or group of persons members of a particular social group”, and the mere fact that they have been affected by the same environmental problem does not suffice to meet the requirements of a social group in the refugee definition.¹³⁸ Lopez adds that, “unless these people are also associated by other factors, such as religion or culture, they do not constitute a social group”.¹³⁹

Indeed, the members of the social group of “Persons Lacking Political Power to Protect Their Environment” are defined by nothing more than the desire to avoid a common environmental harm. There is nothing inherent in their persons, which makes them the target of persecution. These people are trying to avoid an external threat, which would affect everyone in their situation indiscriminately of their personal traits and characteristics. Political powerlessness can therefore not be construed as an immutable trait to support membership in a PSG.

(bb) Connection to their Islands as a Characteristic Fundamental to Human Dignity

According to the second category laid out in *Ward* the common characteristic does not have to be innate in the sense of unchangeable but it can also be a characteristic so

Creating a Convention to Protect Persons and Preserve the Environment’, 2001, Colorado Journal of International Law and Policy 12 (1), 13.

¹³⁸ D. Zartner Falstrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’, 2001, Colorado Journal of International Law and Policy 12 (1), 13.

¹³⁹ A. Lopez ‘The Protection of Environmentally-Displaced Persons in International Law’, 2007, 37 Environmental Law, 386.

fundamental to the identity of the individual that giving it up would mean an infringement of that person's human dignity. It could be argued that the life and unique culture of inhabitants of small islands is closely linked to their natural environment. This unique way of life and the population's dependence on their islands could be perceived as a characteristic that is crucial to their identity and which they should not be required to change. Due to the fact that this scenario would again encompass giving the entire population of a country refugee status, the above mentioned floodgate arguments are once more relevant. Courts in the US, although often more restrictive than jurisdiction in Canada, Australia or the UK, have also shown to be reluctant to accept memberships to PSG in cases such as these due to the vast number of people that it would encompass. In the US case *Pedro-Mateo v INS* the Ninth Circuit denied status of a PSG to indigenous Indians in Guatemala due to the fact that the indigenous people comprised a large percentage of the population of the disputed area.¹⁴⁰ In *Sanchez-Trujillo v INS* the court held that a social group could not be said to exist where it would create an "all-encompassing grouping" that would cover "a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings".¹⁴¹

James Hathaway rightly points out that the "notion of social group as an all-encompassing residual category is seductive from a humanitarian perspective, since it largely eliminates the need to consider the issue of linkage between fear of persecution and civil or political status".¹⁴² Yet he goes on to point out that the drafters of the

¹⁴⁰ *Pedro-Mateo v I.N.S.*, 224 F.3d 1147, 1151 (9th Circuit 2000) (US).

¹⁴¹ *Sanchez-Trujillo v I.N.S.*, 801 F.2d 1571 (9th Circuit 1986) (US).

¹⁴² J. C. Hathaway, *The Law of Refugee Status*, 1993, 159.

Convention “intended to establish a demarcation between those whose fear was attributable to civil or political status (refugees) and those whose concern to flee was prompted by other concerns (not refugees)”.¹⁴³ Island citizens are not threatened as a result of their civil or political status but are fleeing disaster, which affects their entire population. This brings us back to the original circularity argument that there has to be more than simply an external threat that unites a PSG and this cannot be established in the case of citizens of Small Island States.

C. Conclusion

This chapter has shown that citizens of Small Island States are neither persecuted for their nationality, nor do they constitute a “particular social group” and consequently do not fall under the refugee definition and not within the protection regime that comes with the refugee status. The use of the term ‘environmental refugees’ has consequently been confirmed to be a misnomer and potentially damaging to existing refugee protection mechanisms. The next chapter will therefore now explore the possible protection awarded by the international human rights regime.

¹⁴³ *ibid.*

CHAPTER 4: International Human Rights and Displaced Small Island Citizen

International human rights law has a myriad of sources, the most important ones being the above mentioned International Bill of Rights but there are numerous other conventions and declarations dealing with issues such as the prevention of genocide¹⁴⁴, the rights of people with disabilities,¹⁴⁵ the protection from forced disappearances¹⁴⁶ or the prohibition of torture.¹⁴⁷ The United Nations Treaty Collection lists 16 different instruments under the general section “human rights”, but there are many more sections that are devoted to issues very much within the realm of human rights.¹⁴⁸ For example, eleven instruments are mentioned under a separate section for “traffic in persons”, four instruments under “health” and many more under sections such as “status of women”, “educational and cultural matters” and “freedom of information”.¹⁴⁹ The scope of what falls within the framework of international human rights law is very broad and inclusive.

However, the International Bill of Rights and the other major human rights treaties were adopted at a time when the dangers of climate change and its impact on human security were not yet apparent. As a report by the Australian Human Rights and Equal Opportunity Commission notes, “the environmental dimension of these rights has

¹⁴⁴ Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948, entered into force on 12 January 1951).

¹⁴⁵ Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force on 3 May 2008).

¹⁴⁶ International Convention for the Protection of All Persons from Enforced Disappearance (adopted on 20 December 2006, entered into force on 23 December 2010).

¹⁴⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force on 26 June 1987).

¹⁴⁸ See: UN Treaty Collection. Available at: <http://treaties.un.org/Pages/ParticipationStatus.aspx> (accessed 20 December 2011).

¹⁴⁹ *ibid.*

therefore not been extensively articulated and the precise connection between climate change and the international human rights law system is as yet undeveloped".¹⁵⁰ The question whether there exists a right to a clean environment has yet to be answered satisfactorily and currently no binding international treaty is aimed at guaranteeing an environment of a particular quality.¹⁵¹ Even though in 1994 the UN Special Rapporteur on Human Rights and the Environment presented a report concluding that everyone has a right to a safe and healthy environment and even appended a Draft Declaration of Principles on Human Rights and the Environment to the report, the UN has since been dragging its feet on following up with a binding treaty.¹⁵² The non-binding Declaration sets out a series of general principles, including the human right to a secure and healthy environment, the right to safe and healthy water and the right to effective redress for environmental harm.¹⁵³ However, The Advisory Council of Jurists of the Asia-Pacific Forum on National Human Rights Institutions found that "current legal instruments and

¹⁵⁰ Human Rights and Equal Opportunity Commission (HREOC) Australia, 'Background Paper: Human Rights and Climate Change', 2008, 3; see also: Advisory Council of Jurists of the Asia Pacific Forum, 'Observations and Recommendations – Reference on the Right to Environment', 2007. Available at: http://www.asiapacificforum.net/acj/references/right-toenvironment/downloads/environment/observations_recommendations.doc (accessed 20 December 2011).

¹⁵¹ Human Rights and Equal Opportunity Commission (HREOC) Australia, 'Background Paper: Human Rights and Climate Change', 2008, 3; P. Sands, '*Principles of international environmental law*', 2003, 293.

¹⁵² UN Commission on Human Rights, 'Draft Declaration of Principles on Human Rights and the Environment', UN Doc,E/CN.4/Sub.2/1994/9, 6 July 1994. Available at: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/eeab2b6937bcca18025675c005779c3?Opendocument> (accessed 20 December 2011); Kate Davies, 'A Clean Environment Needs to be a Universal Right', 3 December 2008, The Progressive-Online. Available at: <http://www.progressive.org/mp/davies120308.html> (accessed 20 December 2011).

¹⁵³ UN Commission on Human Rights, 'Draft Declaration of Principles on Human Rights and the Environment', UN Doc,E/CN.4/Sub.2/1994/9, 6 July 1994. Available at: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/eeab2b6937bcca18025675c005779c3?Opendocument> (accessed 20 December 2011).

trends in relation to environment law are insufficient to support the existence of a clear and specific right to an environment of a particular quality in international law”.¹⁵⁴

A. Specific Human Rights of Island Citizens Affected by Climate Change

Even without a codified human right to a clean environment, there are a number of recognized human rights that will be compromised by environmental degradation, especially when looking at citizen of disappearing islands. The following section will give a brief overview over the most important human rights likely to be under threat.

Sea level rise and increased frequency of extreme weather events pose multiple threats to the human rights of the citizen of low-lying small island states and, as outlined in chapter two, island countries will face increased adversity with the continuous rising and warming of the sea. Cyclones and king tides are predicted to become even more destructive due to elevated sea levels and threaten to wash away all vegetation on low-lying islands, making it impossible to grow food.¹⁵⁵ Saline intrusion threatens freshwater supplies and adversely affects crops and vegetation.¹⁵⁶ Coastal erosion causes beaches to retreat and forces the population to move further away from the coast - a futile attempt on

¹⁵⁴ Advisory Council of Jurists of the Asia Pacific Forum, ‘Observations and Recommendations – Reference on the Right to Environment’, 2007. Available at: http://www.asiapacificforum.net/acj/references/right-toenvironment/downloads/environment/observations_recommendations.doc (accessed 20 December 2011).

¹⁵⁵ J. Barnett, ‘Adapting to Climate Change in Pacific Island Countries: The Problem of Uncertainty’, 2001, World Development, Vol. 29, Number 6, 978.

¹⁵⁶ *ibid.*

small islands. In addition, coral bleaching¹⁵⁷ threatens fish populations - a major food source on small islands - and the destruction of the coral reef leaves the islands even more vulnerable to storm surges.

Small island states will therefore eventually lose their ability to produce enough food and clean drinking water for their populations, there will be increased exposure to water-borne diseases including cholera and the populations of these islands will finally be forced to evacuate. The degradation of the environment will lead to the collapse of crucial infrastructure, the lack of imported food, clean water and medical support.

1. Right to Life

The adversities faced by disappearing islands will first and foremost be a threat to the life and physical wellbeing of island inhabitants. The right to life is enshrined in Article 3 of the UDHR and Article 6(1) ICCPR. They respectively guarantee that ‘everyone has the right to life, liberty and security of person’ and that ‘every human being has the inherent right to life’. In addition the Convention on the Right of the Child upholds the right to life of children.¹⁵⁸ As Jane McAdam points out, “the Inter-American Commission on Human Rights has recognized that realization of the right to life is necessarily linked to and

¹⁵⁷ The name of the condition when coral reefs suffer severe impairment or death due to rising ocean temperatures.

¹⁵⁸ Convention on the Right of the Child, Article 6 (ratified on 20 November 1989, entered into force on 2 September 1990); see also: Human Rights and Equal Opportunity Commission (HREOC) Australia, ‘Background Paper: Human Rights and Climate Change’, 2008, 4.

dependent on the physical environment”.¹⁵⁹ This case concerned the Yanomami Indians in Brazil who lost nearly one-fifth of their population (1500 people) to diseases and pollution brought in and created by gold-miners in the 1980s. Furthermore McAdam added that the rights enshrined in the ICESCR to an adequate standard of living, adequate supply of food, housing and the continuous improvement of living conditions can all be seen as necessary components of the right to life.¹⁶⁰ The same applies to the right to the enjoyment of the highest attainable standard of physical and mental health.¹⁶¹

The Human Rights Committee also stated in its General Comment No. 6 on the right to life that “the expression ‘inherent right to life’ cannot properly be understood in a restrictive manner” and has been “too often narrowly interpreted”.¹⁶² The adversity small island citizens’ face as a result of climate change and sea level rise will threaten this most basic human right.

¹⁵⁹ J. McAdam. 'Climate Change 'Refugees' and International Law' (2008) (Winter 2008) Bar News: The Journal of the NSW Bar Association 27, 8; Report on the Human Rights Situation in Ecuador OEA/Ser.L/V/II.96 Ch 8; Yanomami case (case 7615 of 5 March 1985), cited in annual report of the Inter-American Commission on Human Rights, 1984–85, OEA/Ser.L/V/II.66, doc 10 rev.1.

¹⁶⁰ ICESCR, Article 11; *ibid* 8.

¹⁶¹ ICESCR, Article 12.

¹⁶² Human Rights Committee, ‘General Comment No. 6 – The Right to Life’, 1982. Available at: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/84ab9690ccd81fc7c12563ed0046fae3?Opendocument> (accessed 20 December 2011).

2. The Right to Health

Climate change causes serious health concerns with diseases likely to spread more rapidly due to the warmer climate.¹⁶³ In the Pacific, changes in temperature and rainfall will make it far harder to control dengue fever and malaria, according to health experts, with a climate more hospitable to mosquitoes.¹⁶⁴ In addition, with the gradual breakdown of infrastructure, governments of small island states will struggle to provide health services and medical supplies. The expected shortage of clean drinking water and sufficient food will also threaten the well being of island citizens.

The right to health is enshrined in a number of human rights instruments, most prominently in the UDHR, Article 25, which states that states that ‘everyone has the right to a standard adequate for the health and well-being of himself and his family’. The ICESCR in Article 12 recognizes the right of everyone to ‘the enjoyment of the highest standard of physical and mental health’ and also the CRC has several provisions guaranteeing a right to health and access to medical treatment.¹⁶⁵ The Convention on the

¹⁶³ Agence France Presse, ‘Expert says climate change will spread global disease’, 11 September 2007; National Geographic News, ‘Climate Change Spurring Dengue Rise, Experts Say’, 21 September 2007. Available at: <http://news.nationalgeographic.com/news/2007/09/070921-dengue-warming.html> (accessed 20 December 2011); Human Rights and Equal Opportunity Commission (HREOC) Australia, ‘Background Paper: Human Rights and Climate Change’, 2008, 6.

¹⁶⁴ Agence France Presse, ‘Expert says climate change will spread global disease’, 11 September 2007; Human Rights and Equal Opportunity Commission (HREOC) Australia, ‘Background Paper: Human Rights and Climate Change’, 2008, 6.

¹⁶⁵ Convention on the Right of the Child, Article 24(1): ‘States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.’

Elimination of All Forms of Discrimination against Women (CEDAW) contains similar provisions with an emphasis on childbearing and family planning in Article 12.¹⁶⁶

3. The Right to Water

While there is no provision in any of the human rights treaties that explicitly guarantees a right to water, it is mentioned in the context of other basic rights. The CRC, Article 24(2)(c) on the right to health, provides to combat malnutrition and disease through ‘provision of adequate nutritious foods and **clean drinking water**’. Similarly, CEDAW in Article 14(2)(h) recognizes the right to ‘enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and **water supply**, transport and communications’.

The ICESCR only implicitly recognizes a right to water in Articles 11 and 12, which deal with adequate living standards and enjoyment of highest attainable standard of health.¹⁶⁷ However, in 2002, the Committee on Economic, Social and Cultural rights, the treaty monitoring body of the ICESCR, published a detailed definition on the right to water in the General Comment No. 15.¹⁶⁸ The Comment states “the human right to water entitles

¹⁶⁶ CEDAW, Article 12: ‘(1) States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. (2) Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.’

¹⁶⁷ Find full text of ICESCR, Articles 11 and 12 here: <http://www2.ohchr.org/english/law/cescr.htm> (accessed 20 December 2011).

¹⁶⁸ Committee on Economic, Social and Cultural Rights, ‘General Comment No. 15 – Right to Water’, E/C.12/2002/11, 2002. Available at:

everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.”¹⁶⁹ On 28 July 2010, the General Assembly formally recognized the right to water and sanitation by supporting resolution 64/292, which acknowledges that clean drinking water and sanitation are integral to the realization of all human rights.¹⁷⁰

Salt-water intrusion will threaten the drinking water supplies on disappearing islands and together with changing rainfall patterns and frequency this could lead to a severe shortage of clean water on many islands.

4. The Right to Adequate Food

This human right is enshrined most importantly in the ICESCR in Article 11(1), which declares that the ‘right to an adequate standard of living includes **food**, housing, clothing’ and furthermore Article 11(2) recognizes the ‘fundamental right of everyone to be **free**

<http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94?Opendocument> (accessed 20 December 2011).

¹⁶⁹ *ibid.* at para. 2.

¹⁷⁰ UN General Assembly, ‘Resolution on the Human Right to Water and Sanitation’, A/RES/64/292, 28 July 2010. Available at: <http://daccess-ods.un.org/TMP/9280992.html> (accessed 20 December 2011); see also: Right to Water Online Portal, ‘The General Assembly formally recognises the right to water and sanitation’, 28 July 2010. Available at: <http://www.righttowater.info/general-assembly-formally-recognises/> (accessed 20 December 2011).

from hunger'.¹⁷¹ As mentioned above in regard to the right to water, the CRC contains a similar provision in Article 24(2)(c) on children's right to health.

The Committee on Economic, Social and Cultural Rights issued a General Comment on the 'right to adequate food' in 1999, affirming "that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights".¹⁷² In 2007 the UN Special Rapporteur on the Right to Food Olivier de Schutter commissioned a report on the impact of climate change on the right to food. The report was published in 2009 and concludes that "climate change has overwhelming repercussions for international food security and the right to adequate food" as it will "affect the availability, accessibility, adequacy, and sustainability of food supplies".¹⁷³ On islands the rising sea levels will wash away fertile soil and cause fish species to migrate and the increased frequency of extreme weather events will disrupt agriculture even more.

¹⁷¹ ICESCR, Article 11, see full text here: <http://www2.ohchr.org/english/law/cescr.htm> (accessed 20 December 2011); see also: Food and Agriculture Organization of the United Nations, 'Guiding Principles – Online'. Available at: http://www.fao.org/righttofood/principles_en.htm (accessed 20 December 2011).

¹⁷² Committee on Economic, Social and Cultural Rights, 'General Comment No. 12 – Right to Adequate Food', E/C.12/1999/5, 1999, para. 4. Available at: <http://www.unhcr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9> (accessed 20 December 2011).

¹⁷³ Columbia Law School – Human Rights Institute, 'Climate Change and the Right to Food', edited by the Heinrich Böll Foundation, 2009. Available at: <http://www.boell.de/ecology/society/publications-7960.html> (accessed 20 December 2011).

5. Right to Cultural Participation

Small island state citizens have a very close connection to their islands and their environment and sea level rise threatens their unique way of life, their culture and traditions and once these people have to be resettled, their language and national identity will be under threat as well. The right to cultural participation and the right of indigenous, linguistic and ethnic minorities to enjoy their own culture and use their own language are therefore also compromised by the inundation of low-lying island states. These rights are guaranteed in the 2007 Declaration on the Rights of Indigenous People, the ICESCR and ICCPR, with all these instruments acknowledging the intrinsic connection between indigenous culture and land and recognizing the right to practice and revitalize their cultural practices, customs and institutions.¹⁷⁴ The UN Permanent Forum on Indigenous Issues acknowledged that “climate change exacerbates the difficulties already faced by indigenous communities including political and economic marginalization, loss of land and resources, human rights violations, discrimination and unemployment”.¹⁷⁵ The Inter-American Commission on Human Rights has furthermore acknowledged that “the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities”.¹⁷⁶

¹⁷⁴ Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007); ICESCR, Article 15; ICCPR, Article 27.

¹⁷⁵ See UN Permanent Forum on Indigenous Issues website, “Climate Change”. Available at: http://www.un.org/esa/socdev/unpfii/en/climate_change.html (accessed 20 December 2011).

¹⁷⁶ Maya Indigenous Communities of the Toledo District (Belize Maya) Case 12.053 Inter-American Commission on Human Rights (2004) para 120; J. McAdam. 'Climate Change 'Refugees' and International Law' (2008) (Winter 2008) Bar News: The Journal of the NSW Bar Association 27, 9.

6. Other Human Rights

In addition, a range of other rights will likely be violated by the inundation of small island states, such as the right to property,¹⁷⁷ freedom of movement,¹⁷⁸ the right to work,¹⁷⁹ and the right to education.¹⁸⁰ Due to the breakdown of infrastructure and the eventual displacement civil and political rights will be threatened such as the right of free speech¹⁸¹, right to political participation¹⁸² or due process¹⁸³. In the case that island populations will not be able to relocate as a community their right to self-determination¹⁸⁴ would also be violated.

This overview has shown that the devastating scenario small island states are facing will compromise a number of human rights under several conventions. It is therefore crucial from to establish how these rights might be enforced and who holds the obligation under the human rights framework to protect this group of displaced people. The following sections will therefore look at the effectiveness and enforceability of these rights as well as the availability and effectiveness of legal remedies.

¹⁷⁷ UDHR, Article 17.

¹⁷⁸ UDHR, Article 13; ICCPR, Article 12.

¹⁷⁹ UDHR, Article 23.

¹⁸⁰ UDHR, Article 26; ICESCR, Article 13.

¹⁸¹ UCHR, Article 19; ICCPR, Article 19.

¹⁸² UCHR, Article 21

¹⁸³ ICCPR, Article 14.

¹⁸⁴ ICESCR, Article 1.

B. Effectiveness and Enforceability

Human rights are de jure universal and inalienable - meaning they apply everywhere and cannot be denied to any human being.¹⁸⁵ It is undisputed that citizens of small island states have human rights and that these will be compromised by the rising seas and the forced resettlement of entire island populations. Rights are however only effective where someone is responsible for protecting and enforcing them, simply said where a state has a direct obligation to uphold these rights. This means that the de facto effectiveness is oftentimes very different from the de jure guarantees outlined in the human right instruments.

The main drawback of initiatives aimed at improving human rights conditions for migrants in receiving countries is that they only apply to migrants and forcibly displace people already within the territory of the host country. They do not provide protection in the country of origin or while people are on the move.

As a general rule, states only have a direct human rights obligation to people within their territory or jurisdiction.¹⁸⁶ Furthermore, even if a forcibly displaced person reaches the territory of another state, international human rights law does generally not give rise to a right to remain within that state's territory and prevent it from sending the person back.¹⁸⁷

¹⁸⁵ P. A. Taran. 'Human rights of migrants: challenges of the new decade' (2001) 38(6) Int Migr, 8.

¹⁸⁶ Human Rights Committee (HRC), "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", adopted on 29 March 2004, para. 10. Available at: <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument> (accessed 20 December 2011); J. McAdam. 'Climate Change 'Refugees' and International Law' (2008), Journal of the NSW Bar Association 27, 9.

¹⁸⁷ J. McAdam. 'Climate Change 'Refugees' and International Law' (2008), Journal of the NSW Bar Association 27, 9.

The right to decide who can and cannot enter or remain in a state's territory lies at the heart of state sovereignty. This is a fundamental right where states make concessions only very reluctantly. While people have the right to leave any country and the right to return to one's own country, there is no corollary right to enter another country.¹⁸⁸ The international human rights framework is therefore missing the most remarkable feature of the refugee protection framework: the provision that allows displaced people to enter the borders of a country to make an asylum claim without having to fear any criminal charges for breaching another country's sovereign borders. Such a feature is in itself a remarkable concession on the side of sovereign states and does not exist within international human rights law.

For citizens of small island states this means that once they make it into the territory of another state, they do not have the right to remain there based on international human rights law. Furthermore, the receiving state has merely a duty to respect their human rights while they are within its territory but is still entitled to deport these displaced people after determining that they are in fact not Convention refugees. In addition, the island state itself has an obligation to protect the human rights of its citizens, even of those outside its territory, but once the island populations are forced to move, the governments of these countries will not be able to protect their citizen effectively any longer.¹⁸⁹ Consequently, the country in which small island citizens have a right to remain and which has a duty to protect them is no longer capable of doing so and the country to

¹⁸⁸ See UDHR Article 13 and ICCPR Article 12.

¹⁸⁹ In regard to the protection duties of small island states it needs to be noted that most of these states have not signed any or all of the major human rights instruments and would therefore only be bound by those principles which have become part of international customary law.

which they then flee does have no legal obligation to let them enter and remain within its territory, even though it would be capable of doing so. As Roger Zetter, Director of the Refugees Studies Centre in Oxford pointed out, there is a significant protection gap for those environmentally displaced people who flee across borders, who cannot rely on their own government's protection but who do also not fall within the refugee regime.¹⁹⁰

There is however one exception to this scenario based on a principle rooted both in international human rights law and customary international law – the non-refoulement principle. This principle enshrines the prohibition of returning a person to circumstances where their lives might be in danger or where they might be subjected to inhumane or degrading treatment. Small island states citizen might therefore find protection by proving that the return to their sinking homelands would amount to such circumstances covered by this principle. This could create an alternative asylum system for environmentally displaced people and the chapter five will therefore explore this possibility in much greater detail.

Finally, before turning to the effectiveness and availability of legal remedies it is also necessary to look at those human rights instruments aimed specifically at migrants to explore how effective and relevant these might be to displaced island citizens.

¹⁹⁰ R. Zetter, 'Protecting environmentally displaced people: Developing the Capacity of Normative and Legal Frameworks', Refugee Studies Centre Research Report (2011), Refugees Studies Centre, 24.

C. Human Rights Instruments and Initiatives Aimed at Protecting Migrants

As the IOM noted on several occasions, migrants and displaced people are a particularly vulnerable group who face a continued struggle to have their human rights recognized.¹⁹¹

A number of specific instruments and initiatives have been aimed at guaranteeing migrant's rights and the human rights of displaced people in the last two decades. Most significantly, in 1990 the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was adopted by the General Assembly in an attempt to protect this vulnerable and exposed group of migrants, especially given the added problems encountered from clandestine movements and trafficking in workers.¹⁹² The underlying goal of this Convention is to provide an instrument that protects those migrant workers and members of their families who are in an undocumented or irregular situation.¹⁹³

¹⁹¹ IOM, 'Conference on Effective Respect for the Human Rights of Migrants: A Shared Responsibility - Background Paper', 25-26 March 2009, Geneva. Available at: <http://www.iom.int/jahia/Jahia/policy-research/international-dialogue-migration/intersessional-workshops/effective-respect-human-rights-migrants-shared-responsibility/cache/offonce;jsessionid=0448D1118FE9230598014D7504BE41B6.worker02> (accessed 20 December 2011); see IOM Website, 'Human Rights Instruments'. Available at: <http://www.iom.ch/jahia/Jahia/about-migration/migration-management-foundations/rights-obligations-migrants/human-rights-instruments/cache/offonce/lang/en;jsessionid=1623037042C823538D2C4948CAC84094.worker02> (accessed 20 December 2011).

¹⁹² International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted on 18 December 1990, entered into force 1 July 2003) (hereafter: Migrant Worker Convention).

¹⁹³ IOM Website, 'Human Rights Instruments'. Available at: <http://www.iom.ch/jahia/Jahia/about-migration/migration-management-foundations/rights-obligations-migrants/human-rights-instruments/cache/offonce/lang/en;jsessionid=1623037042C823538D2C4948CAC84094.worker02> (accessed 20 December 2011).

This convention is the most comprehensive binding international agreement in relation to migrants, apart from the Refugee Convention, and the only such instrument dealing specifically with undocumented migrants.¹⁹⁴ The success of the convention was however very limited and by the year 2000 only 16 states had ratified or acceded - all of them sending countries - and the convention did not acquire the necessary 20 ratifications to enter into force until 2003.¹⁹⁵ Even though the instrument has 44 parties today it does not carry much weight with receiving countries, as almost all of the member states are developing and source countries. Not a single country of the European Union has acceded to the convention and neither have the US, Australia, New Zealand, Canada, India or China.¹⁹⁶ Patrick Taran points out that the disinterest in this instrument symbolizes “a broader general resistance to recognition of application of human rights standards to migrants”.¹⁹⁷

Even though this convention is a crucial and important international instrument for migrants, it is specifically aimed at migrant workers and therefore of very limited application to the situation of displaced small island citizen. The entire population of these island states will have to relocate, not just the working force; also the majority of island citizen, especially from countries such as Tuvalu and Vanuatu with economies based on farming and fishing, will not possess the necessary skills to find gainful employment in other countries. President Tong of Kiribati who is very much aware of

¹⁹⁴ P. A. Taran. 'Human rights of migrants: challenges of the new decade' (2001) 38(6) Int Migr, 17.

¹⁹⁵ *ibid.* at 18.

¹⁹⁶ See UN Treaty Collection. Available at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (accessed 20 December 2011).

¹⁹⁷ P. A. Taran. 'Human rights of migrants: challenges of the new decade' (2001) 38(6) Int Migr, 18.

this situation has created job-training programs and opportunities for labour migration to Australia and New Zealand so that those who want to move have an early opportunity to do so, and can gradually build up i-Kiribati communities abroad.¹⁹⁸ Kiribati is so far however the only island states with such a labour initiative and for the majority of disappearing islands, the Migrant Worker Convention will not provide the necessary protection needed for the displacement of entire island populations, even if it were to be widely ratified in the near future. It is however a very strong example of just how much resistance exists among receiving countries to award enforceable rights to migrants and displaced people.

In 1999 the UN Special Rapporteur on Human Rights of Migrants was appointed, symbolizing the UN's recognition of the plight of migrants and the need for further action to promote the human rights of this group.¹⁹⁹ In June 2011 the Human Rights Council again renewed the mandate for another three years and Francois Crépeau was appointed to the role.²⁰⁰ Other initiatives also have continuously drawn attention to the issue of human rights of migrants and in 1999 the General Assembly officially proclaimed the 18th December as International Migrants Day.²⁰¹ Organizations such as the IOM and the UNHCR work tirelessly against the marginalization of migrants and displaced people and to create a global forum for their issues. As a result of their struggles the Global Commission on International Migration (GCIM) was established in 2003 on the initiative

¹⁹⁸ M. Loughry and J. McAdam, 'Kiribati – Relocation and Adaptation', *Forced Migration Review*, 31, October 2008, 51.

¹⁹⁹ See website of UN Special Rapporteur on the Human Rights of Migrants. Available at: <http://www2.ohchr.org/english/issues/migration/rapporteur/> (accessed 20 December 2011).

²⁰⁰ *ibid.*

²⁰¹ See UN website on the International Migrants Day. Available at: <http://www.un.org/en/events/migrantsday/> (accessed 20 December 2011).

of the then UN Secretary-General, Mr. Kofi Annan, and presented its report and recommendations to UN Members States and the international community in late 2005.²⁰² In 2006 the Global Migration Group (GMG) was established in response to a recommendation of the GCIM for the establishment of a high-level inter-institutional group of agencies involved in migration-related activities.²⁰³ The GMG is at present comprised of 14 entities, including IOM, UNHCR, UNICEF, UNDP and UN Population Fund (UNFPA) and works to improve the global situation of migrants.²⁰⁴

This brief overview of international and institutional initiatives shows that awareness for the marginalization of migrants does exist at the global level but so far national responses to these efforts have been sparse.

D. Availability and Effectiveness of Legal Remedies

Looking at the broader picture it is worth exploring what judicial possibilities small island states have to force greenhouse-emitting countries to either resettle their populations or reduce their output of greenhouse gases in order to prevent or at least mitigate the violation of human rights resulting from climate change and sea level rise. Seeing as their political influence is very limited, small islands might be more successful taking their grievances to the courts. Already in 1997 Judge Weeramantry of the International Court of Justice (ICJ) said that “the protection of the environment is a vital

²⁰² See website of the Global Commission on International Migration for final report. Available at: <http://www.gcim.org/en/finalreport.html#> (accessed 20 December 2011).

²⁰³ See website of the Global Migration Group. Available at: http://www.globalmigrationgroup.org/what_is_gmg.htm (accessed 20 December 2011).

²⁰⁴ *ibid.*

part of contemporary human rights doctrine, for it is [an indispensable requirement] (...) for numerous human rights such as the right to health and the right to life itself".²⁰⁵ The case in question had centered around an agreement between Hungary and Slovakia to build a dam on the Danube river in a joint development but Hungary ceased work on the project due to concerns of the harmful environmental impact.²⁰⁶

It is a basic principle of customary international law that every state has an obligation not to knowingly allow its territory to be used for acts that are contrary to the rights of other states, known as the 'no-harm' rule.²⁰⁷ This principle was invoked in the 'Inuit Claim' still pending before the Inter-American Commission on Human Rights where it was argued that greenhouse emissions in one state cause harm in other states and should therefore be stopped.²⁰⁸ Small island states might consequently be able to protect their human rights in court with a similar claim.

²⁰⁵ Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia) 1997 ICJ 92 (Separate Opinion of Judge Weeramantry), at para A(b); J. McAdam. 'Climate Change 'Refugees' and International Law' (2008), Journal of the NSW Bar Association 27, 10.

²⁰⁶ Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia) 1997 ICJ 92.

²⁰⁷ Corfu Channel case (UK v Albania) 1949 ICJ 4, 22; J. McAdam. 'Climate Change 'Refugees' and International Law' (2008), Journal of the NSW Bar Association 27, 10.

²⁰⁸ See summary of the hearing at: Earthjustice, 'Global Warming and Human Rights: Testimony of Martin Wagner before the Inter-American Commission on Human Rights' (1 March 2007) 3. Available at <http://earthjustice.org/news/press/2007/global-warming-human-rights-gets-hearing-on-the-world-stage> (accessed 20 December 2011).

1. International Court of Justice

Tuvalu made headlines in 2002 by threatening to sue the US and Australia for their excessive carbon dioxide emissions and their refusal to sign the Kyoto Protocol.²⁰⁹ The government of the island nation had criticized the failure of these countries to take responsibility for their greenhouse emissions repeatedly without success and felt a stronger measure was necessary.²¹⁰ Although this threat was never acted on and no other island nations has so far brought such a case to the ICJ, a recent study released by the Foundation for International Environmental Law and Development (FIELD), based in the United Kingdom, says that threatened island countries have the right and likely the procedural means to take their case to the ICJ.²¹¹ The study concludes that “current literature suggests that, in relation to climate change, a credible case for a legal wrong can be made. Affected countries may have a substantive right to demand the cessation of a certain amount of CO₂ emissions in order to limit further harm”.²¹² As concerns the substantive basis for the claim, the study suggests that the ‘no-harm’ rule is most commonly suggested in current literature as the best possible legal basis.²¹³ The precedent quoted to support this, the Canadian Smelter case, awarded damages to the United States for pollution caused by the sulphur dioxide emissions of the Canadian smelter, which had harmed land across the border to the US.²¹⁴ While the Canadian Smelter case was in fact

²⁰⁹ See an overview of press reports on Tuvalu and Climate Change on the official website of Tuvalu. Available at: <http://www.tuvaluislands.com/warming.htm> (accessed 20 December 2011).

²¹⁰ *ibid.*

²¹¹ FIELD, ‘International Climate Change Litigation and Negotiation Process’, October 2010, London. Available at: <http://www.field.org.uk/library/library> (accessed 20 December 2011).

²¹² FIELD, ‘Summary – International Climate Change Litigation and Negotiation Process’, October 2010, London, 4. Available at: <http://www.field.org.uk/library/library> (accessed 20 December 2011).

²¹³ *ibid.* at 2.

²¹⁴ Trail Smelter Arbitration: United States v Canada (1931-1941) 3 UNRIAA, vol. III, 1941.

arbitrated by an ad-hoc tribunal specifically created for this dispute and not the ICJ, it still is a leading case in regard to transboundary environmental harm. The no-harm rule has subsequently to this 1941 case been reaffirmed in a number of decisions of the ICJ, most recently in the 2010 Pulp Mills Case.²¹⁵ The study further points out that it is in fact not necessary to show the actual occurrence of harm but that it is sufficient to show that a state's conduct will cause significant damage in the future.²¹⁶ It goes on to state that "by approving activities that result in greenhouse gas emissions, or by failing to put restrictions into place that prevent harm to other countries, governments are responsible for the resulting transboundary pollution and non-compliance with the no-harm rule".²¹⁷ Even though this seems to make a convincing case, the question of causation and the identity of the main perpetrator is highly difficult to establish in the case of climate change and sea level rise. Greenhouse gases are produced by all industrial countries today and even though some countries, such as the US or China, produce significantly more than others the responsibility for climate change does not lie with a single country but with the entire international community.

As to the procedural side of such a claim, all member states of the United Nations are entitled to appear in front of the ICJ, which includes of course all small island nations. However, the jurisdiction of the ICJ is based on express consent of the state parties involved and only a limited number of countries have declared that they recognize the

²¹⁵ Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), 2010, at par. 101; International Court of Justice (ICJ), Corfu Channel case (*United Kingdom v. Albania*), 1949; Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996; Case concerning the Gabcikovo-Nagymaros Dam (*Hungary v. Slovakia*), 1997.

²¹⁶ FIELD, 'Summary – International Climate Change Litigation and Negotiation Process', October 2010, London, 2. Available at: <http://www.field.org.uk/library/library> (accessed 20 December 2011).

²¹⁷ *ibid.*

compulsory jurisdiction of the Court.²¹⁸ Famously, the United States has made no such declarations and repeatedly refused to be a defendant in ICJ proceedings and the same applies to China - excluding the two main producers of greenhouse emissions from any possible lawsuit.²¹⁹ Even though those countries willing to submit to the international court still include a number of emission producing states - such as Australia, the UK and all members of the European Union – the US refusal further limits the impact of any claim brought by small island states.

Finally, looking at past decisions of the ICJ, the main remedy in cases of environmental harm has been to order an environmental assessment to gauge the impact of the actions in questions.²²⁰ While it is possible for the Court to impose an injunction on harmful activity, it has so far never happened.²²¹ In the Gabcikovo-Nagymaros Dam case the ICJ decided that the joint development agreement between Hungary and Slovakia regarding the building of the dam was not equitable. The Court ordered the agreement to be renegotiated and regimented the completion of an environmental assessment before resuming the construction of the dam.²²² In the Pulp Mills case the Court held that there was no sufficient evidence of environmental harm to close the pulp mill and allowed it to

²¹⁸ See official website of the ICJ for a complete list. Available at: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (accessed 20 December 2011).

²¹⁹ See a full list of cases where the US refused to accept the jurisdiction of the ICJ on the ICJ website section on 'Jurisdiction', under footnote 1. Available at: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2#1> (accessed 20 December 2011).

²²⁰ Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), 2010; Case concerning the Gabcikovo-Nagymaros Dam (Hungary v. Slovakia), 1997.

²²¹ In the Pulp Mill Case an injunction was sought by Argentina but denied by the Court, see: Summary of Judgment 'Pulp Mills on the River Uruguay (*Argentina v. Uruguay*)'. Available at: <http://www.icj-cij.org/docket/index.php?sum=661&code=au&p1=3&p2=3&case=135&k=88&p3=5> (accessed 20 December 2011).

²²² Case concerning the Gabcikovo-Nagymaros Dam (Hungary v. Slovakia), 1997.

remain operative.²²³ According to Phillip Sands, the reluctance of the ICJ to impose monetary damages is “consistent with the limited international practice concerning reparations for environmental damage at inter-state level”.²²⁴ On the other hand, monetary awards are common in relation to ad-hoc tribunal decisions such as the Canadian Smelter case.²²⁵ These are however quite rare as the disputes are usually resolved on a diplomatic level before they reach the arbitration stage. Additionally, in order for an ad-hoc tribunal to be established both countries involved have to agree on a format of the hearing and to be bound by the decision. Seeing as this is a voluntary arbitration, it is highly unlikely that emission-producing countries would submit to such a tribunal.

Compliance with rulings of the ICJ has been mixed as a study by Colter Paulson has shown.²²⁶ In the time from 1987 to 2004 fourteen cases resulted in final judgments by the ICJ, in five of which the state had been only partially compliant and in one case there was a complete refusal.²²⁷ That specific case involved a death-penalty dispute between Germany and the US where the US executed a German national in violation of the ICJ

²²³ Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), 2010.

²²⁴ P. Sands, ‘*Principles of international environmental law*’, 2003, 889.

²²⁵ Trail Smelter Arbitration: United States v Canada (1931-1941) 3 UNRIAA, vol. III, 1941.

²²⁶ C. Paulson. ‘Compliance with Final Judgments of the International Court of Justice Since 1987’ (2004) 98(3) *The American Journal of International Law*, 436.

²²⁷ The cases are: *Eletronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 ICJR EP.1 5 (July 20); *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, 1991 ICJR EP.5 3 (Nov. 12); *Land, Island and Maritime Frontier Disput (El Sal./Hond.: Nicar. Intervening)*, 1992 ICJR EP.3 51 (Sept. 11); *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.)*, 1993 ICJ REP. 38; *Territorial Dispute (Libya/Chad)*, 1994 ICJ REP.6 (Feb. 13); *Gabcikovo-Nagymaros Dam (Hungary v. Slovakia)*, 1997; *Kasikili/Sedudu Island (Bots./Namib.)*, 1999 ICJR EP. 1045 (Dec. 13); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.)*, Merits (Mar. 16,2001), 40 ILM 847 (2001); *La Grand (Ger. v. U.S.)* (June 27,2001), 40 ILM 1069 (2001); *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 ICJ REP. 3 (Feb. 14); *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.)* (2002); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.)* (2002); *Oil Platforms (Iran v. U.S.)*, Merits (2003); *Avena and Other Mexican Nationals (Mex. v. U.S.)* (2004), 43 ILM 581.

ruling.²²⁸ Paulson points out that “legal obligations are often unclear and the conduct of states intentionally ambiguous. Concepts such as ‘undue delay’, ‘good faith negotiation’, and a state's duty in a changing political situation cannot be precisely measured.”²²⁹

Judging from past decision of the ICJ, the best-case scenario ICJ ruling in a claim brought by sinking islands would ask the countries in questions to either reduce their greenhouse emissions or urge them to meet their obligation under the Kyoto Protocol. While this is of course useful for small island states and would go a long way in stopping or mitigating the effects of climate change, it would not solve the overall problem of lack of protection under international law. While there is no closed list of available remedies in the Statute of the ICJ, looking at prior decisions, it seems highly unlikely that the court would order the US or Australia to resettle the citizens of the sinking islands within their territory as this would be a major encroachment on those states’ sovereignty and would also open floodgates for claims of environmentally displaced people worldwide. As to a possible monetary award, should small island states be able to bring their claim in an ad-hoc tribunal and receive a monetary award, it might give them the possibility to buy land somewhere to resettle their populations. The President of the Maldives has already announced that he is starting a fund to buy new homeland for his people and depending on the amount, such a monetary award might make a big difference to this endeavor.²³⁰

²²⁸ La Grand (Ger. v. U.S.) (June 27, 2001), 40 ILM 1069 (2001).

²²⁹ C. Paulson. 'Compliance with Final Judgments of the International Court of Justice Since 1987' (2004) 98(3) The American Journal of International Law, 436.

²³⁰ Guardian Online, 'Paradise almost lost: Maldives seek to buy a new homeland', 10 November 2008. Available at: <http://www.guardian.co.uk/environment/2008/nov/10/maldives-climate-change> (accessed 20 December 2011); BBC News Online, 'Plan for new Maldives Homeland', 1 November 2008. Available at: http://news.bbc.co.uk/2/hi/south_asia/7719501.stm (accessed 20 December 2011).

While a claim to the ICJ and its likelihood of success are an issues which deserves much more detailed research, in regard to the questions at hand - namely whether the international human rights framework can provide protection for displaced island citizen - a claim to the ICJ does not provide a solution.

2. Treaty Monitoring Bodies

Another forum for small island states to make their complaints heard would be the quasi-judicial treaty monitoring bodies of the individual human rights treaties. The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties.²³¹ Nine such bodies exist and four of the committees, namely the Human Rights Committee (HRC) of the ICCPR, the Committee on the Elimination of Racial Discrimination (CERD), the Committee Against Torture (CAT) and the Committee on the Elimination of Discrimination Against Women (CEDAW) can, under certain conditions, receive petitions from individuals who claim that their rights under the treaties have been violated. The committee which is addressed most frequently and which would also be most relevant for small island state citizen is be the HRC. However, a complaint can be brought against a state only if it is a party to the ICCPR and the Optional Protocol recognizing the competence of the HRC.²³² Although

²³¹ See UN website on 'Human Rights Treaty Bodies'. Available at: <http://www2.ohchr.org/english/bodies/treaty/index.htm> (accessed 20 December 2011).

²³² UN Human Rights Treaty Bodies, 'Procedure for complaints by individuals under the human rights treaties'. Available at: <http://www2.ohchr.org/english/bodies/petitions/individual.htm#who> (accessed 20 December 2011).

the US has ratified the ICCPR, it is not a party to the Optional Protocol and neither is China, again excluding those countries from possible complaints.

Small island state citizens would have to show how they are personally the victims of the alleged violations and how the accused state is directly responsible for the violation, which again brings up questions of causation and responsibility for climate change and sea level rise.²³³ It also should not be forgotten that this committee is staffed with experts appointed by the parties to the ICCPR and therefore more a diplomatic than a judicial body and the available remedies reflect this role. Once the HRC finds a violation it submits a report to the state party at fault and invites it to supply information within three months on the steps it has taken to give effect to the committee's findings and then follows up on the state's compliance periodically.²³⁴ This individualized complaint procedure would furthermore not be able to provide protection for large groups of displaced people as each complaint is decided on a case-to-case basis, on the merits of each individual case.

So far no cases relating to climate change have been brought before the HRC, or any other human rights treaty body, but a number of cases dealing with non-removal claims under Article 6 and 7 have been successful in front of the HRC.²³⁵ Article 7, which prohibits torture and inhumane or degrading treatment, has been linked with the prohibition of the death penalty enshrined in Article 6, subsection 2 and has been

²³³ *ibid.*

²³⁴ *ibid.*

²³⁵ *Selcuk v Turkey*, Application No. 23184/94 (24 April 1994); *Hajrizi Dzemajl v. Yugoslavia*, Comm. No. 161/2000, 21 Nov. 2002; *C v. Australia* (2002) Comm. No. 900/1999; *Judge v. Canada*, Comm. No. 829/1998, 5 August 2003.

interpreted by the HRC to contain an implied prohibition to return a person to situations where they might face such treatment.²³⁶ This prohibition to return a person to harm, known as the aforementioned non-refoulement principle, might therefore be a possible basis for protection for small island citizens seeing as returning a person to a sinking homeland could be interpreted to be inhumane or degrading treatment. As mentioned above, the next chapter will explore this possibility in detail and look at existing case law both of the HRC and other international and regional tribunals in relation to non-refoulement and environmental degradation.

E. Conclusion

This chapter has explored the international human rights framework in regard to its capacity to provide protection for displaced citizen of sinking island states. Even though a number of human rights will be compromised by the displacement of entire island populations there exists a major protection gap for those crossing international border outside of the refugee protection regime. None of the human rights instruments can give displaced citizen of sinking islands the right to cross into the territory of another country or remain there once they are inside. While there are positive obligations on the host country to respect the human rights of this special group of EDPs, there is no obligation to let these people remain within its territory. While a recourse to the judicial sphere or treaty monitoring bodies might potentially prove successful, it would not provide the type

²³⁶ Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994.

of immediate protection required in this situation and not solve the question of protection under international human rights law.

The non-refoulement principle might prove to be an exception from this protection gap and might be able to provide legal protection to displaced citizens of small island states who have fled to another country and this possibility will be explored in greater detail in the next chapter.

CHAPTER 5: Non-Refoulement and Complementary Protection

This chapter will look at sources of protection outside the Refugee Convention framework, known as ‘complementary protection’, with specific emphasis on the international legal principle of non-refoulement. In broad terms, this principle stipulates that no refugee should be returned to a country where he or she is likely to face persecution, ill-treatment, or torture. The distinction between ‘complementary protection’ and ‘non-refoulement’ is not an obvious one nor is one used consistently in current literature. It has been best explained by Goodwin-Gill who describes complementary protection as “a shorthand term for the widened scope of non-refoulement under international law”.²³⁷ This extended principle of non-refoulement, based in international human rights law, is therefore different from the principle of non-refoulement codified in article 33 of the Refugee Convention and which applies to convention refugees only and which is limited to ‘persecution’. The interconnectedness between these two principles will be looked at in more detail in the following discussion.

The chapter will start by outlining the evolution and sources of the non-refoulement principle and will then go on to look at the scope of the principle in customary international law. It then defines the meaning and scope of both ‘complementary protection’ and ‘non-refoulement’ and explains how both these doctrines interact. After examining the existing jurisprudence on the non-refoulement principle of both international and regional tribunals in order to explore whether the principle can be

²³⁷ G. S. Goodwin-Gill and J. McAdam, *The refugee in international law*, 2007, 285.

employed for the protection needs of citizens of sinking islands the final part will then explore the possibility to broaden the current scope of non-refoulement and complementary protection in order to encompass the situation of this special group.

A. Evolution of Non-Refoulement

The idea that there is an obligation on a state not to return a person to a country where they might face harm is a comparatively recent development in history.²³⁸ The power to decide who can remain within the borders of a certain country has always been with the sovereign of that country. The principle of non-refoulement and its consequences therefore go to the core of state sovereignty by suggesting that there might exist an obligation on a sovereign country to relinquish that power out of moral and humanitarian reasons. It was during the early- to mid-nineteenth century that this idea first started to form, in a time of political upheaval in Europe and South America as well as a time of mass movements of people due to increasing persecution of Jewish and Christian minorities in Russia and the Ottoman Empire.²³⁹ The idea to protect those fleeing oppressive and tyrannical governments grew into a popular sentiment and after World War 1, into international practice.²⁴⁰ It was however only following the Second World War that the era of modern refugee protection began with the establishment of the International Refugee Organization in 1946, the forerunner organization to the United Nations High Commissioner for Refugees, to take on the protection mandate for the

²³⁸ G. S. Goodwin-Gill and J. McAdam, *The refugee in international law*, 2007, 201.

²³⁹ *ibid.* at 202.

²⁴⁰ *ibid.*

millions of displaced people. With the adoption of the Refugee Convention in 1951 the principle of non-refoulement was codified in an internationally recognised treaty for the first time in history. But even then states were still concerned with creating a dangerous precedent by giving up their sovereignty and the 1951 Conference of Plenipotentiaries, the body drafting the Refugee Convention, included certain exceptions from the rule to ensure the safety of the receiving countries and their populations.²⁴¹ States have therefore still the right under the convention to “refouler” a refugee that would pose a security risk or put the country and its population in danger.²⁴²

In addition to the Refugee Convention, as amended by the 1967 Protocol,²⁴³ the non-refoulement principle has been codified in other international instruments. Article 3 of the 1984 UN Convention against Torture (CAT) forbids the return or extradition of a person to another state where there is a substantial chance that this person would be in danger of being subjected to torture.²⁴⁴ Furthermore, Article 7 of the 1966 International Convention on Civil and Political Rights (ICCPR), which contains the prohibition of torture, has been

²⁴¹ See: Committee on Refugees and Stateless People, *Travaux Préparatoires of the 1951 Conference of Plenipotentiaries*, July 1951. Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/search%5C?page=&comid=3c07a8642&cid=49aea9390&scid=49aea9398> (accessed 14 December 2010).

²⁴² Article 33 of the Refugee Convention:

“1. No Contracting State shall 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.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

²⁴³ Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967).

²⁴⁴ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987).

interpreted as containing an implied prohibition on refoulement.²⁴⁵ A version of the principle also found its way into international humanitarian law, namely the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.²⁴⁶ Article 45 of this convention prohibits transferring a protected person to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

Going beyond international instruments, the non-refoulement principle has also been embodied in a number of regional instruments. The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa declares in Article II (3) that no person shall be turned away at the border or returned to a country where his life, physical integrity or liberty would be threatened.²⁴⁷ The Cartagena Declaration on Refugees reiterates in section III(5) the „importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the border) as a corner-stone of the international protection of refugees“.²⁴⁸ While not legally binding, the provisions of the Cartagena Declaration have been incorporated into the legislation of numerous States in Latin America.²⁴⁹ In addition, the 1969 American Convention on

²⁴⁵ International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force from 23 March 1976); Human Rights Committee, General Comment No 20, 1992, para 9. Available at: <http://www.unhcr.org/refworld/docid/453883fb0.html> (accessed 14 December 2010).

²⁴⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, commonly referred to as the Fourth Geneva Convention (adopted in August 1949).

²⁴⁷ Organization of African Union, Convention Governing the Specific Aspects of Refugee Problems in Africa, (adopted 10 September 1969).

²⁴⁸ Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1.

²⁴⁹ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, Geneva, page 6.

Human Rights and the 1981 African Charter of Human and Peoples' Rights reiterate the non-refoulement principle.²⁵⁰

Finally, Article 3 of the 1951 European Convention on Human Rights (ECHR), which prohibits torture, or cruel, inhuman or degrading treatment or punishment, has been interpreted by the European Court of Human Rights to also prohibit extradition or expulsion of a person to a country where he might face such threats.²⁵¹ In contrast to Article 33 of the Refugee Convention, Article 3 of the ECHR is absolute, preventing removal of the individual no matter how undesirable or dangerous the person is.²⁵² The European Union furthermore adopted the Qualification Directive in 2004 in the process of developing a comprehensive European asylum system. The directive covers refugee status and complementary protection status, aiming at ensuring a minimum standard of protection in all EU member states to prevent asylum shopping in the European Union.²⁵³ Article 2(e) of the directive contains the non-refoulement principle when outlining the protection available to persons not qualifying for refugee status but still in need of protection.²⁵⁴

²⁵⁰ See: Article 22 (8), American Convention on Human Rights (adopted 1969, entered into force 18 July 1978); Article 12(3), African Charter of Human and Peoples' Rights (adopted 1981, entered into force 21 October 1986).

²⁵¹ *Soering v. United Kingdom* (1989) 11 EHRR 439, para 91; *Chahal v. United Kingdom* (1996) 23 EHRR 413.

²⁵² *Soering v. United Kingdom* (1989) 11 EHRR 439, para 91; *Chahal v. United Kingdom* (1996) 23 EHRR 413; G. S. Goodwin-Gill and J. McAdam, 'The refugee in international law', 2007, 211.

²⁵³ N. De Moor and A. Cliquet, 'Environmental Displacement: A New Security Risk for Europe?' International Conference on 'Security Insecurity and Migration in Europe', 2009, 13.

²⁵⁴ Council of the European Union, 'Council 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', 2004/83/EC, 29 April 2004. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML> (accessed 20 December 2011).

B. Non-refoulement: Rule of Customary International Law?

The non-refoulement principle has undergone substantial development since its emergence as a vague morality-based rule and is continuously evolving. As a fundamental component of the prohibition of torture, cruel, inhumane and degrading treatment and as a fundamental part of international human rights law, the principle of non-refoulement is now widely considered to be part of customary international law, meaning that this principle also binds countries which are not party to any of the above-mentioned international and regional instruments.²⁵⁵ The following part will take a brief look at this assumption before going on to examine the scope of this principle.

Customary international law is recognized as an official source of international law in Article 38(1) of the 1946 Statute of the International Court of Justice, which describes “international custom, as evidence of a general practice accepted as law”.²⁵⁶ The ICJ held in the *North Sea Continental Shelf* cases that customary international law requires the existence of consistent conduct of states acting out of the belief that the law required them to act that way – state practice and *opinio juris*.²⁵⁷ The ICJ further ruled that the fact that a rule exists in treaty form as part of an international convention does not prevent this rule to also exist as a customary norm. In the *North Sea Continental Shelf* cases it accepted that largely identical rules of customary law and treaty law on the delimitation

²⁵⁵ N. De Moor and A. Cliquet, 'Environmental Displacement: A New Challenge for European Migration Policy' (2009) Proceedings Protecting People in Conflict and Crisis: Responding to the Challenges of a Changing World, 6; E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion' in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR Global Consultations on International Protection* (Cambridge University Press, 2003) 140.

²⁵⁶ Statute of the International Court of Justice, Article 38 (1)(b).

²⁵⁷ *North Sea Continental Shelf*, ICJ Reports, (1969), 3, para. 42; S. Rosenne, 'Practice and methods of international law', 1984, 55.

of the continental shelf could exist side-by-side and in the *Nicaragua* case the Court specifically decided that a principle of customary law did not cease to exist only because it was embodied in a multilateral convention, even as regards States that were parties to the convention.²⁵⁸

Seeing that the non-refoulement principle has been codified in a number of international conventions, starting as early as 1951, the question presents itself whether state practice derived from such treaties can lead to a custom. Indeed, the ICJ acknowledged the special standing of international conventions in relation to the creation of customary norms in the *North Sea Continental Shelf* cases where it held that treaty rules can be regarded “as reflecting, or as crystallising, received or at least emergent rules of customary international law”.²⁵⁹ The Court laid out three requirements for such a crystallization process to be deemed successful and the scholars Lauterpacht and Bethlehem, writing a position paper on the scope of non-refoulement for the UNHCR, have addressed these three elements in detail.²⁶⁰ Firstly, the norm in question has to be of “fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law”.²⁶¹ Secondly, such a norm can even come into existence within a short time period providing there exists widespread and representative participation in the convention,

²⁵⁸ *North Sea Continental Shelf*, ICJ Reports, (1969), 3, para. 42; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports (1984), p. 392, at para. 73.

²⁵⁹ *North Sea Continental Shelf*, ICJ Reports, (1969), 3, para. 63.

²⁶⁰ E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion' in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR Global Consultations on International Protection*, 2003, 143.

²⁶¹ *North Sea Continental Shelf*, ICJ Reports, (1969), 3, para. 72.

especially that of states “whose interests were specially affected”.²⁶² Finally, there needs to be consistent practice and general recognition of the rule, again especially of those states who are specifically affected by the convention.²⁶³

As for the first requirement, Lauterpacht and Bethlehem point to the 1951 Convention, the CAT and the many regional instruments codifying the non-refoulement principle as having “norm creating character, as opposed to the mere expression of contractual obligations”.²⁶⁴ The Executive Committee of the High Commissioner's Programme (ExCom), UNHCR's governing body, issued several Conclusions over the years reiterating the normative character of the non-refoulement principle.²⁶⁵ Most notably, in Conclusion No. 17 of 1980, the ExCom stresses “the fundamental character of the generally recognized principle of non-refoulement”.²⁶⁶

The normative value of the non-refoulement principle is also mentioned in a number of non-binding texts and declarations such as the Declaration on Territorial Asylum which was unanimously adopted by the General Assembly on 14 December 1967.²⁶⁷ The Council of Europe also declared that “the principle of *non-refoulement* has been

²⁶² *ibid.* at para. 73.

²⁶³ *ibid.* at para. 74.

²⁶⁴ E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion' in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR Global Consultations on International Protection*, 2003, 143.

²⁶⁵ Executive Committee, Conclusion No. 6 (XXVIII) 1977; Conclusion No. 17 (XXXI) 1980; Conclusion No. 25 (XXXIII) 1982; Conclusion No. 79 (XLVII) 1996, at para. (j); Conclusion No. 81 (XLVIII) 1997.

²⁶⁶ Executive Committee, General Conclusion on Problems of Extradition Affecting Refugees No. 17 (XXXI) 1980.

²⁶⁷ United Nations General Assembly, 'Declaration on Territorial Asylum', A/RES/2312(XXII), 14 December 1967. Available at: <http://www.unhcr.org/refworld/docid/3b00f05a2c.html> (accessed 20 December 2011).

recognised as a general principle applicable to all persons”.²⁶⁸ The fact that Article 3 of the ECHR and Article 7 of the ICCPR have been interpreted by the European Court for Human Rights and the HRC respectively, to contain an *implied* prohibition of refoulement is furthermore a strong indicator of the normative quality of the principle.²⁶⁹

The second element requires widespread and representative participation in the conventions, including those states whose interests are specially affected. There are 193 recognized sovereign states in existence, all but one (Vatican City) are members of the United Nations. The 1951 Convention has 144 member states, the CAT a total of 147 and the ICCPR has 166 parties and Lauterpacht and Bethlehem point out that including the regional agreements, 90% of all UN members are party to at least one instrument, which enshrines the non-refoulement principle.²⁷⁰ Only nine states are not party to any such agreement, namely Bhutan, Brunei Darussalam, Kiribati, the Federated States of Micronesia, Oman, Palau, Saint Lucia, the United Arab Emirates and Vanuatu and none of those states have spoken out against the non-refoulement principle or shown explicit opposition.²⁷¹ There is no question that these conventions enjoy widespread and representative support and participation.

²⁶⁸ Council of Europe, ‘Recommendation No. R (84) on the ‘Protection of Persons Satisfying the Criteria in the Geneva Convention Who are Not Formally Recognised as Refugees’’, 25 Jan. 1984. Available at: <http://www.unhcr.org/refworld/publisher,COE,,,3ae6b3816c,0.html> (accessed 20 December 2011).

²⁶⁹ *Soering v. United Kingdom*, 98 ILR 270, at para. 88; Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994; E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-refoulement: Opinion’ in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR Global Consultations on International Protection*, 2003, 144.

²⁷⁰ United Nations Treaty Collection. Available at: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (accessed 20 December 2011); *ibid* 147.

²⁷¹ E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-refoulement: Opinion’ in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR Global Consultations on International Protection*, 2003, 147.

Finally, the last requirement for a treaty provision to be considered of having crystallized into customary international law is the consistent practice and general recognition of the rule. The widespread participation in the relevant conventions is again a good indicator as to the general recognition of the non-refoulement principle. Beyond that an overwhelming number of at least 80 states have, according to Lauterpacht and Bethlehem, “either enacted specific legislation on *non-refoulement* or have expressly incorporated the 1951 Convention or 1967 Protocol into their internal law”.²⁷² When taking into account municipal legislation this number goes up to 125 states that have incorporated the refoulement prohibition into their domestic legal systems.²⁷³ The Executive Committee is also worth mentioning in this respect as it is composed of currently fifty-seven representatives of those states most affected by problems surrounding refugees and who hold a vested interest resolving those problems. The above mentioned opinions of this body on non-refoulement and its nature as a general rule of international law are therefore another indicator of the practice especially of those states whose interests are specifically affected.²⁷⁴

It has to be admitted though that there are instances where states shown reluctance to live up to their non-refoulement obligations under the Refugee Convention and other treaties often due to either concerns for international relations or within the realm of ethnic uprisings or conflicts. The conflict in former Yugoslavia in the early 1990s would be a good example of state refusal to take in refugees fleeing from life-threatening

²⁷² *ibid.*, at 148.

²⁷³ *ibid.*

²⁷⁴ *ibid.*

circumstances. In 1992, Croatia closed its border to refugees from Bosnia-Herzegovina and sent back a number of refugees from within their territory.²⁷⁵ Other such examples include the rejection of Kurdish refugees at the Turkish border during the Gulf War and the rejection of Afghan refugees at the Pakistan border during the Taliban regime.²⁷⁶ These examples show the challenges posed in a time of war and conflict not only to this specific international obligation but to all human rights obligations. While these examples of states' refusal to adhere to the non-refoulement principle are troubling they remain the exception, mostly occurring in times of general unrest and cannot outweigh the general support and positive state practice. The principle of non-refoulement has therefore been shown to be part of international customary law and therefore binding on all states, not only those party to one of the relevant international conventions.

Looking briefly at the *jus cogens* nature of the non-refoulement principle, the evidence is less than convincing. While the Executive Committee suggested as early as 1982 that the principle of non-refoulement was in fact *jus cogens* and therefore not subject to derogation and the Cartagena Declaration declared in 1984 that the principle of non-refoulement “should be acknowledged and observed as a rule of *jus cogens*” this does not seem to be supported by the reality of the legal principle.²⁷⁷ The nature of *jus cogens* is according to Article 53 of the Vienna Convention on the Law of Treaties a “peremptory

²⁷⁵ N. Coleman. 'Non-Refoulement Revised-Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 Eur.J.Migration & L. 23 24.

²⁷⁶ *ibid.*

²⁷⁷ Executive Committee, General Conclusion on International Protection No. 25 (XXXIII) 1982. Available at: <http://www.unhcr.org/3ae68c434c.html> (accessed 14 December 2010); 1984 Cartagena Declaration on Refugees, Section III, para.5.

norm from which no derogation is permitted”.²⁷⁸ The Refugee Convention does however allow the denial of protection for those deemed unsuitable or a danger to the host country through Article 1(F).²⁷⁹ The 1967 UN Declaration on Territorial Asylum also outlines several exceptions to *non-refoulement* and national legislation often allows for the balancing of national security interests with the likelihood of persecution.²⁸⁰ Aoife Duffy points out that the political landscape has changed significantly since 11 September 2001 and that individual rights are continuing to be compromised in favor of national security concerns. In this climate, the possibility that such a sovereignty-infringing principle as *non-refoulement* might rise to the status of *jus cogens* seems remote.

Despite the overwhelming support for the conclusion that *non-refoulement* is part of customary international law, some prominent scholars disagree with this assessment. James Hathaway does not believe that the *non-refoulement* principle in any form has developed into international customary law and insists that it only exists within the Refugee Convention.²⁸¹ However, this extreme position is put into perspective by the fact that Hathaway has a very restrictive understanding of customary international law in general and believes that only *one* human rights norm has in fact reached customary

²⁷⁸ Vienna Convention on the Law of Treaties (adopted on 22 May 1969, entered into force on 27 January 1980).

²⁷⁹ 1951 Refugee Convention, Article 1(F):

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.”

²⁸⁰ A. Duffy. 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20(3) International Journal of Refugee Law 373 389.

²⁸¹ J. C. Hathaway, 'The rights of refugees under international law', 2005, 363.

status in international law, namely ‘freedom from systemic racial discrimination’.²⁸² Another prominent scholar in this field, Kay Hailbronner, has been often quoted for calling a customary non-refoulement norm “wishful legal thinking”.²⁸³ Looking at his argument however it becomes clear that he in fact talks about an extension of non-refoulement to ‘humanitarian’ refugees, those fleeing generalized violence or similar grounds not covered by the refugee definition.²⁸⁴ Hailbronner does accept that non-refoulement as it exists in the Refugee Convention and the Torture Convention can be argued to be part of customary international law.²⁸⁵

As to the scope of the customary norm, Lauterpacht and Bethlehem declare that the principle today in its customary form is based on torture as well as “cruel, inhuman or degrading treatment or punishment” and the prohibition to return a person to “persecution or threat to life, physical integrity, or liberty”.²⁸⁶ Goodwin-Gill agreed with this interpretation, adding that this view was supported by the fact that “over 150 states are party to at least one binding international instrument proscribing torture *and* cruel, inhumane or degrading treatment or punishment” and that it is therefore conceived as a single prohibition.²⁸⁷ The principle has been mentioned and incorporated in this form in most international and regional treaties and declarations and the UNHCR, the UN

²⁸² *ibid.*

²⁸³ K. Hailbronner, 'Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking' (1985) 26 *Virginia J Int Law* 857.

²⁸⁴ *ibid.* at 858.

²⁸⁵ *ibid.*

²⁸⁶ E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion' in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR Global Consultations on International Protection*, 2003, para. 253.

²⁸⁷ G. S. Goodwin-Gill and J. McAdam, *The refugee in international law*, 2007, 348.

General Assembly and the Human Rights Committee have endorsed the customary character of the non-refoulement principle on many occasions.²⁸⁸

C. Complementary Protection and Non-Refoulement – an Overview

As Jane McAdam points out: “the concept of complementary protection is plagued by imprecision”.²⁸⁹ The term first emerged in the 1990s and has since then caused considerable confusion. On the one hand, it can be used as a mere generic description of protection that falls outside the Refugee Convention, comprising all situations in which states have ever accorded protection to persons not covered by the ‘refugee’ definition. That would however include a wide range of scenarios from ‘temporary protection’ and ‘victims of environmental disasters’ to protection of ‘internally displaced people’ and many other forms of protection. In legal terms on the other hand ‘complementary protection’ has a very specific meaning. It covers protection granted to persons on the basis of a legal obligation other than the Refugee Convention either derived from an international treaty or customary international law.²⁹⁰ Furthermore, as Jane McAdam makes clear, it originates from legal obligations prohibiting the return to serious harm

²⁸⁸ ExCom Conclusion No 56 (XL) ‘Durable Solutions and Refuge Protection’ (1989); ExCom Conclusion No 74 (XLV) ‘General Conclusion on International Protection’ (1994); ExCom Conclusion No 103 (LVI) ‘The Provision of International Protection including through Complementary Protection’ (2005); HRC ‘General Comment No. 24: General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant’ (52) (1994), CCPR/C/21/Rev.1/Add.6; HRC ‘General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, UN Doc CCPR/C/21/Rev.1/Add.13 (2004); UNHCR, *Note on International Protection*, 12 July 2006, A/AC.96/1024; UNGA Res. 36/148 on International Cooperation to Avert Flows of Refugees (1981).

²⁸⁹ J. McAdam, ‘*Complementary Protection in International Refugee Law*’, 2001, 1.

²⁹⁰ *ibid.* at 2.

rather than from compassionate reasons or practical obstacles to removal.²⁹¹ Complementary protection is therefore not a temporary or provisional source of protection but rather an international legal obligation of states to individuals, prohibiting them from returning them to harm by virtue of the extended principle of non-refoulement.²⁹²

Many countries have complemented their immigration and refugee legislation with provisions that go further than the obligations under the 1951 Refugee Convention. Canada has the ‘protected person’ status under s.97 of the Immigration and Refugee Protection Act 2001, the European Union adopted the Qualification Directive mentioned above and the US has complemented its asylum legislation with instruments such as Temporary Protected Status, ‘deferral of removal’ and ‘withholding of removal’.²⁹³

To sum up, complementary protection describes protection extended by a state to someone not covered by the Refugee Convention but still in need of protection, on the basis of the state’s extended non-refoulement obligations under customary and treaty-based human rights law. Goodwin-Gill describes complementary protection as “a shorthand term for the widened scope of non-refoulement under international law”.²⁹⁴

²⁹¹ *ibid.* at 3; see also R. Mandal. 'Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)' (2002) UNHCR Department of International Protection, Legal and Protection Policy Research Series, PPLA/2005/02, June xi.

²⁹² J. McAdam, ‘*Complementary Protection in International Refugee Law*’, 3; R. Mandal. 'Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)' (2002) UNHCR Department of International Protection, Legal and Protection Policy Research Series, PPLA/2005/02, June xi.

²⁹³ For an in-depth analysis of these examples and different country approaches to complementary protection see: J. McAdam. 'Complementary Protection and Beyond: How States Deal with Human Rights Protection', August 2005, Sydney Law School Research Paper No. 06/18; *New Issues in Refugee Research Working Paper No. 118*.

²⁹⁴ G. S. Goodwin-Gill and J. McAdam, ‘*The refugee in international law*’, 2007, 285.

This extended principle of non-refoulement, based in international human rights law, is therefore different from the principle of non-refoulement codified in article 33 of the Refugee Convention and which applies to convention refugees only and which is limited to 'persecution'. As environmentally displaced people do not fall within the refugee definition, they can only rely on the extended non-refoulement principle for protection. However, the exact scope of the obligations under this complementary protection is unclear and has been the discussed by many legal commentators. The next section will therefore explore both the sources and scope of this principle in order to determine whether citizens of disappearing islands fall within its protective framework.

D. Environmentally Displaced Persons and Complementary Protection

As explained above, the extended non-refoulement principle has its basis in human right treaties, the main ones being the CAT, the ICCPR and the ECHR, the scope of which has been determined by the relevant tribunals and which binds only the parties to the relevant treaties. Additionally, the principle is part of customary international law and its scope in that respect will be generally determined by state practice. In order to determine whether these principles can afford protection to the citizens of small island states, both will be explored in the following section.

As has been shown in this overview, the general consensus is that the customary legal principle of non-refoulement extends both to persecution and torture or cruel, inhumane or degrading treatment or punishment. This interpretation therefore mirrors the wording

of the treaty provisions of Article 3 CAT, Article 3 ECHR and Article 7 ICCPR, which are the main international sources for the treaty-based non-refoulement principle.²⁹⁵ In order to fall under the protection of the non-refoulement principle as defined above, the citizens of small island states would consequently need to make the case that a return to their sinking homelands would amount to cruel, inhumane or degrading treatment. The next part will therefore look at the definition and interpretation given to these terms in international and regional jurisprudence.

1. The Meaning of ‘Inhumane or Degrading Treatment’

The main body of relevant jurisprudence on this question is produced by the European Court of Human Rights (ECtHR) and the Human Rights Committee (HRC). The Committee against Torture has issued a number of General Comments but these focus more on the definition of ‘torture’ and are therefore only of limited help in this situation.²⁹⁶

²⁹⁵ Article 3 CAT:

“1. 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.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

Article 3 ECHR:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 7 ICCPR:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

²⁹⁶ Article 16 of the CAT refers to a prohibition on cruel, inhuman and degrading treatment, in the context of non-refoulement while Article 3 is limited to acts of torture. The Committee against Torture in its General Comment No 2 allows for the possibility of exploring the possibility that the Committee Against Torture will deal with complaints from persons at risk ‘of being subjected to cruel, inhuman or degrading treatment or punishment in the event of *refoulement*’; See: C. Ingelse, *The UN Committee Against Torture: An Assessment* (The Hague/London/Boston 2001),

The Human Rights Committee stated in its General Comment in 1992 that ‘the aim of the provisions in Article 7 of the ICCPR is to protect the dignity and the physical and mental integrity of the individual’.²⁹⁷ The HRC added that this Article applies no matter whether the harm is ‘inflicted by people acting in their official capacity, outside their official capacity or in a private capacity’.²⁹⁸ However, in relation to the meaning of the different categories of harm, the HRC refuses to establish “sharp distinctions between the different kinds of punishment or treatment” and maintains that “the distinctions depend on the nature, purpose and severity of the treatment applied” and as a result generally refers to ‘ill-treatment’ in its decisions.²⁹⁹ There is limited HRC jurisprudence on Article 7 in general as the majority of claims brought under Article 7 have failed on the evidence or for inadmissibility reasons such as non-exhaustion of domestic remedies.³⁰⁰

The jurisprudence of the ECtHR on the other hand is more extensive, especially in regard to the meaning of the terms of ‘inhumane or degrading treatment or punishment’. In the *Greek* case, the European Commission held that ill-treatment that is not torture, in that it does not have sufficient intensity or purpose, will be classed as inhuman or degrading.³⁰¹

The Commission went on to say that the notion of ‘inhuman treatment’ covers “at least such treatment as deliberately causes severe suffering, mental or physical, which in the

307; additionally, protection under CAT is significantly limited, as the potential danger must emanate from state actors, see: A. Duffy. 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20(3) *International Journal of Refugee Law*, 381.

²⁹⁷ HRC ‘General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)’ (1992), HRI/HEN/1/Rev.1, para. 2.

²⁹⁸ *ibid.*

²⁹⁹ G. S. Goodwin-Gill and J. McAdam, ‘*The refugee in international law*’, 2007, 306; HRC ‘General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)’ (1992), HRI/HEN/1/Rev.1, para.4.

³⁰⁰ G. S. Goodwin-Gill and J. McAdam, ‘*The refugee in international law*’, 2007, 308.

³⁰¹ *Greek* case, 5 November 1969, 12 Yearbook 1, page 186.

particular situation is unjustifiable”.³⁰² Degrading treatment, according to the ECtHR, is that which is said to arouse in its victims “feelings of fear, anguish and inferiority, capable of humiliating and debasing them”.³⁰³ This has also been described as involving treatment that would lead to breaking down the physical or moral resistance of the victim.³⁰⁴ The vast majority of decisions on this issue relate to the conditions of detention of persons deprived of their liberty or to persons fearing bodily injury and violence should they return to their countries of origin.³⁰⁵

There is furthermore a requirement for the ill-treatment to reach a minimum level of severity and to be more than a likely possibility upon return.³⁰⁶

In the scenario at question, where citizens of sinking islands seek refuge in another country, they would not be subjected to torture or ill-treatment in the form of physical violence should they be returned to their homelands but to threats of a different nature. Currently, the inhabitants of these sinking islands do not want to leave the only way of life they know and the places where they have lived for generations. When they finally will start to flee to the mainland, for the majority of people it will be due to the fact that they cannot ensure their survival on the islands any longer and see no other choice but to leave. Within the next 50 years these small islands’ capability to support their citizens

³⁰² *ibid.*

³⁰³ *Ireland v. United Kingdom* (1979) 2 EHRR 25, para. 167; *Pretty v. United Kingdom* (2002) 35 EHRR 1, para.52; *East African Asians* (1973) 3 EHRR 76, paras. 189, 195.

³⁰⁴ *Ireland v. UK* (1979) 2 EHRR 25, para. 167.

³⁰⁵ A. Reidy, ‘The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights’, Human Rights Handbook No. 6, Council of Europe, 2002, 11.

³⁰⁶ *Ireland v. United Kingdom* (1979) 2 EHRR 25, para. 162; *Greek case*, 5 November 1969, 12 Yearbook 1, page 180; see also: J. McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007), 143.

will diminish and the provision of basic services such as freshwater, food, shelter and access to health will become increasingly difficult for the governments of these islands. So even though the citizens fleeing their islands will not be under the threat of physical violence should they return, their governments will not be able to ensure their survival. The meaning of inhumane or degrading treatment would therefore have to encompass such situations in order for these people to fall under the protection of the extended non-refoulement principle.

Neither the ICCPR nor the ECHR however contain a guarantee to these rights and the ECtHR has taken a very strict approach when assessing such claims brought under Article 3 and there is very little authority supporting a right to remain on socio-economic grounds, such as severe scarcity of resources or lack of medical care.³⁰⁷

In order for violations of socio-economic rights to fall within the meaning of ‘inhumane’ and ‘degrading’ treatment, the applicant must prove ‘exceptional circumstances’ beyond for example the simple lack of housing or medical care.³⁰⁸ Goodwin-Gill points out that an analysis of existing case law on this issue suggests that it is unlikely that “resource-related Article 3 claims will develop into a meaningful protection alternative”.³⁰⁹ In *Salkic*, the Court held that Article 3 will not be breached simply because the level of

³⁰⁷ *D v. UK* (1997) 24 EHRR 423; *N v. Secretary of State for the Home Department* [2005] UKHL 31; *Hajrizi Dzemailj v. Yugoslavia*, Comm. No. 161/2000, 21 Nov. 2002; See: J. McAdam, ‘*Complementary Protection in International Refugee Law*’, 2007, 165; G. S. Goodwin-Gill and J. McAdam, ‘*The refugee in international law*’, 2007, 314, 315; A. Cassese, ‘Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?’ (1991) 2(1) *European Journal of International Law* 141.

³⁰⁸ G. S. Goodwin-Gill and J. McAdam, ‘*The refugee in international law*’, 2007, 315.

³⁰⁹ *ibid.* at 316.

medical care in the country of origin is not as high as in the country of refuge.³¹⁰ There would have to exist ‘exceptional circumstances’ which would make a return contrary to humanitarian principles, such as in *D v UK*, where the applicant, a citizen of St. Kitts, was HIV positive, terminally ill and unable to receive treatment in his home country, which would shorten his life expectancy upon return.³¹¹ In the case of *Selcuk v Turkey*, government forces burned down houses of people suspected to have contact with the PKK, while the families were still inside the houses.³¹² Both the Commission and Court found that the destruction of the homes constituted an act of violence and deliberate destruction in utter disregard of the safety and welfare of the applicants who were left without shelter and in circumstances which caused anguish and suffering.³¹³

The Court explained in *Z and T v United Kingdom* that “on a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country where the conditions are in full and effective accord with each of the safeguards of the rights and freedoms set out in the Convention” for the fear of opening floodgates to everyone currently living in poverty and without access to basic services.³¹⁴ In this case two Pakistani Christians claimed that should they be returned to Pakistan, they and their families would not be able to openly practice their religion. The Court denied the claim on the basis that there was no clear evidence of any threat to the claimants’ physical well-

³¹⁰ *Salkic v. Sweden*, Application No. 7702/04 (29 June 2004); see also: *Bensaid v. United Kingdom* (2001) 33 EHRR 205, para. 38.

³¹¹ *D v. UK* (1997) 24 EHRR 423.

³¹² *Selcuk v Turkey*, Application No. 23184/94 (24 April 1994), para. 78.

³¹³ *Selcuk v Turkey*, Application No. 23184/94 (24 April 1994), para. 78; See: A. Reidy, ‘The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights’, Human Rights Handbook No. 6, Council of Europe, 2002, 16.

³¹⁴ *Z and T v United Kingdom* Application No 27034/05, 28 February 2006), 6.

being but only a general climate of discrimination against Christians in Pakistan.³¹⁵ Claims are consequently being carefully examined, on a case-to-case basis, as to the particular risk facing the individual applicant, taking into account “all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim”.³¹⁶ Only exceptional cases, reaching a level of hardship “where the humanitarian grounds against removal are compelling”, will reach the threshold created by the ECtHR.³¹⁷ The HRC has created an equally high threshold as was affirmed in *C v. Australia*.³¹⁸ Here a citizen of Iran was detained and faced removal and claimed protection under Article 7 as his psychological illness could not be treated in Iran. This was however not enough to meet the threshold and the exceptional circumstance in this case was, that the applicant’s illness had been *caused* by the prolonged detention in Australia, which resulted in a protection obligation under Article 7.

In the above-mentioned seminal case of *D v. UK*, the ECtHR acknowledged that St. Kitts struggled with a number of environmental issues such as “coastal degradation, fish depletion and contaminated drinking water due to inadequate disposal of solid and liquid waste – especially untreated sewage - into coastal lands and waters”.³¹⁹ These generally poor living conditions caused by environmental degradation were however not enough to

³¹⁵ *ibid.* at 7.

³¹⁶ *Ireland v. the United Kingdom*, (1979) 2 EHRR 25, 65; and see more recently *Tekin v. Turkey*, ECHR 1998-IV, para. 52; *Keenan v. the United Kingdom*, judgment of 3 April 2001, para. 20; *Valašinas v. Lithuania*, judgment of 24 July 2001, para. 120.

³¹⁷ *N v. United Kingdom* (2008) 47 EHRR 42; see also: Guy S. Goodwin-Gill and Jane McAdam, *The refugee in international law* (3rd edn Oxford University Press, Oxford ; Toronto 2007) 315; *D v. UK* (1997) 24 EHRR 423; *Hajrizi Dzemajl v. Yugoslavia*, Comm. No. 161/2000, 21 Nov. 2002; *Bensaid v. United Kingdom* (2001) 33 EHRR 205, para. 38.

³¹⁸ *C v. Australia* (2002) Comm. No. 900/1999.

³¹⁹ *D v. United Kingdom* (1997) 24 EHRR 423, para. 32.

reach the threshold required by the Court under Article 3 and the case was only successful due to the fact that the applicant was terminally ill with a disease that could not be treated in St. Kitts.³²⁰

On a positive note, the Court further stated in this case that Article 3 is not restricted to intentional harmful acts by the state or non-state actors against individuals in situations where the state cannot offer protection, as had been the jurisprudence of the ECtHR before this case.³²¹ This case made it possible to apply Article 3 protection to situations where the state is neither intentionally nor unintentionally responsible for the ill-treatment or harm but is simply unable to protect its citizens' rights due to circumstances beyond its reach.³²² This case opens up the possibility for cases brought under Article 3 based on environmental harm caused by climate change and sea level rise.

So far, there have been no cases brought either before the ECtHR or the HRC, which deal with the kind of environmental degradation as citizens of sinking islands are facing. The jurisprudence on the possibility of extending Article 3 beyond physical and mental harm linked to civil and political reasons is already scarce and most cases that do exist in this area focus on the lack of medical care. The situation in which the citizens of small island states will be finding themselves has not yet been subject to any decisions made in relation to non-refoulement. However, seeing how restrictive the terms 'inhumane and degrading treatment or punishment' are being construed under current case law, and

³²⁰ *ibid.*

³²¹ *ibid.*

³²² *D v. United Kingdom* (1997) 24 EHRR 423, para. 49; Guy S. Goodwin-Gill and Jane McAdam, *The refugee in international law*, 2007, 315.

drawing parallels to cases such as *D v. UK*, it is highly unlikely that such claims would be successful unless the situation on the islands was so precarious that a return would amount to a violation of human dignity and humanitarian principles, the core values of Article 3.³²³ Additionally, even if there were a scenario which could fall within the realm of Article 3 as interpreted by the Court, that would not automatically mean that all island citizens from the same island or the same region would also be successful as the Court strictly evaluates each case based on the particular circumstances of the individual applicant, taking into account age, health and other factors.³²⁴

In conclusion, this section has looked at the customary scope of non-refoulement and at the same time given an overview over the scope of non-refoulement as it is implied into both Article 7 ICCPR and Article 3 ECHR. The interpretation of ‘inhumane and degrading treatment’ as found in current international case law³²⁵ does not envisage scenarios as will be faced by citizens of disappearing islands over the coming decades. The fear of opening floodgates by widening the interpretation further hampers the prospect of this changing anytime soon. However, Cassese insists that the possible scope of Article 3 is very broad as it is based on the concept of human dignity and the prohibition of any treatment or punishment contrary to humanitarian principles, which does not limit its application to physical or psychological mistreatment in the area civil rights but could in time be extended to cover socio-economic rights, even if the current

³²³ A. Cassese. 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?' (1991) 2(1) *European Journal of International Law*, 143.

³²⁴ G. S. Goodwin-Gill and J. McAdam, *The refugee in international law*, 2007, 315.

³²⁵ For an analysis of regional case law on this issue see: J. Lantrip. 'Torture and Cruel, Inhumane and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights' (1998) 5 *ILSA Journal of International and Comparative Law* 551.

threshold created by international jurisdiction is very high.³²⁶ The ECtHR and the House of Lords have already suggested that the standard required in the protection of human rights is increasingly rising and that acts once considered inhumane and degrading treatment might today be regarded as torture.³²⁷

2. Extending the Scope of the Non-Refoulement Principle?

The previous section has looked at the customary scope of non-refoulement as well as given an overview over the scope of treaty-based non-refoulement based on both Article 7 ICCPR and Article 3 ECHR. Both those provisions do not contain an explicit non-refoulement provision, the obligation has rather been implied by the HRC and the ECtHR from the primary provisions. What is therefore to stop the relevant tribunals from reading a non-refoulement obligation into other provisions of the ECHR and the ICCPR? This section will explore this possibility.

The most commonly quoted case in this context is in fact a House of Lords decision, namely *Ullah v Secretary of State for the Home Department* from 2004.³²⁸ Here the House of Lords comprehensively reviewed the jurisprudence of the ECtHR relating to non-refoulement to answer the question whether rights other than Article 3 “could be engaged in relation to a removal of an individual from the United Kingdom where there anticipatory treatment in the receiving state will be in breach of the requirements of the

³²⁶ A. Cassese, 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?' (1991) 2(1) European Journal of International Law 141, 143.

³²⁷ *Selmouni v France* (1999) 29 EHRR 403, para. 101; *A v. Secretary of State for the Home Department* [2005] 2 AC 68, [2004] UKHL 56, para. 53.

³²⁸ *R v. Special Adjudicator, ex p Ullah* [2004] UKHL 26 [1].

convention, but does not meet the minimum requirements of Article 3 of the Convention”.³²⁹ It concluded that in the right factual circumstances *any* EDHR provision could give rise to a non-refoulement obligation.³³⁰

This appears to be a surprisingly broad interpretation of the non-refoulement principle and this decision is frequently being cited by supporters of such an extended principle. Jane McAdam however warns that this is not as good as it seems.³³¹ Subsequent case law of the House of Lords has put this case into perspective, showing that these removal cases are subject to “the most stringent legal thresholds, which place protection from refoulement out of reach in all but the most exceptional circumstances”.³³²

The Human Rights Committee also allows for the possibility of bringing non-removal claims under other provisions than just Article 7 and a majority of such claims have actually been brought under Article 6 and 7 together, linking the right to life and the prohibition of the death penalty to the prohibition of inhumane or degrading treatment or punishment.³³³ In *Judge v. Canada*, the HRC found that it would violate both Articles 6 and 7 ICCPR to deport an individual to a state where he or she would face the death penalty without seeking reassurance that that penalty would not be imposed.³³⁴ In *ARJ v. Australia* non-removal claims brought under Articles 6, 7 and 14 ICCPR were entertained by the HRC but even though none were successful, the Committee held that a state party

³²⁹ *R v. Special Adjudicator, ex p Ullah* [2004] UKHL 26 [1]; see also: Guy S. Goodwin-Gill and Jane McAdam, *The refugee in international law*, 2007, 316.

³³⁰ *R v. Special Adjudicator, ex p Ullah* [2004] UKHL 26 [1].

³³¹ J. McAdam, ‘*Complementary Protection in International Refugee Law*’, 2007, 144.

³³² *ibid.* at 145.

³³³ G. S. Goodwin-Gill and J. McAdam, ‘*The refugee in international law*’, 2007, 308.

³³⁴ *Judge v. Canada* Comm. No. 829/1998, 5 August 2003.

who deports a person to “circumstances where there is a real risk that his or her rights under the Convention will be violated, that state party itself may be in violation of the Covenant”.³³⁵ The jurisprudence of the HRC therefore clearly allows for the possibility of non-refoulement based on other rights alone but so far this possibility has not manifested itself. In its General Comment No. 31, the HRC further stated that any such protection outside Article 7 would only apply in situations where there was a “real risk of an irreparable harm” but so far no coherent case law on the exact meaning of this phrase has emerged.³³⁶

The ECtHR has also recognized the potential of other ECHR rights to prevent removal and stated that such a protection obligation could arise under Article 2 and in exceptional cases also under Articles 5 or 6.³³⁷ In *Soering* the Court further alluded to the possibility that other rights of the ECHR could also be the basis for a prohibition of refoulement but it has so far avoided giving a concrete ruling on the question.³³⁸ This can be explained by a number of reasons, first of all the fact that not all of the ECHR rights are absolute and non-derogable, but some of them, namely Articles 8 to 11, are qualified rights and allow for the balancing of the interest of the individual applicant with the interest of the state.³³⁹ In non-removal cases, immigration control is the main medium through which this state interest is promoted and the Court has consistently held that immigration control upholds

³³⁵ *ARJ v. Australia* Comm. No. 692/1996 (11 August 1997), para. 6.9.

³³⁶ HRC ‘General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para. 12.

³³⁷ Article 2 ECHR: Right to Life; Article 5 ECHR: right to liberty and security of the person; Article 6: Right to a Fair Trial; see: *Soering v. United Kingdom* (1989) 11 EHRR 439, para.91; *Cruz Varas v Sweden* (1991) 14 EHRR 1, paras. 60-70; *Vilvarajah v. UK* (1991) 14 EHRR 248, para. 103.

³³⁸ *Soering v. United Kingdom* (1989) 11 EHRR 439, para.91; see: M. Foster. ‘Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’ (2009) (2) *New Zealand Law Review*, 274.

³³⁹ G. S. Goodwin-Gill and J. McAdam, ‘*The refugee in international law*’, 2007, 317.

legitimate aims set out in paragraph 2 of articles 8 to 11, such as to protect public safety, public health and prevent disorder and crime.³⁴⁰ Commentators on the ECHR suggest that it is “virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach” but the Court will still rigorously analyse the measures taken by the state in order to establish their necessity and proportionality.³⁴¹ Non-removal claims based on qualified rights therefore oftentimes either fail at the balancing test or these rights are invoked along with Article 3, an unqualified right, to evade the rigorous analysis and those claims are then decided on Article 3 instead. The Court will consider the Article 3 claim first and not address the other grounds should that claim be successful and if it is not successful there is again little likelihood that facts will win the proportionality test against the interest of the state.³⁴²

In the case of unqualified rights, namely Articles 2, 3, 4(1), 7 ECHR and Article 4 of Protocol 7³⁴³, it should therefore be easier to establish that a breach of such rights would give rise to a prohibition of refoulement. However, so far no removal claim has been successful on these grounds alone.³⁴⁴ This can again be explained partly by the fact that these rights are typically invoked along with Article 3 and are then decided under Article

³⁴⁰ *Abdulaziz v. United Kingdom* (1985) 7 EHRR 471; *Vilvarajah v. United Kingdom* (1991) 14 EHRR 248, para. 102; *Chahal v. United Kingdom* (1996) 23 EHRR 413; *Bensaid v. United Kingdom* (2001) 33 EHRR 205, para. 32.

³⁴¹ G. S. Goodwin-Gill and J. McAdam, *The refugee in international law*, 2007, 318; J. McAdam, *Complementary Protection in International Refugee Law*, 2007, 145; C. Ovey and R. C. A. White, *Jacobs and White, The European Convention on Human Rights*, 2002, 204.

³⁴² J. McAdam, *Complementary Protection in International Refugee Law*, 2007, 145.

³⁴³ Protocol 7 of the ECHR covers ‘Crime and Family’ and Article 4 prohibits the re-trial of anyone who has already been finally acquitted or convicted of a particular offence.

³⁴⁴ G. S. Goodwin-Gill and J. McAdam, *The refugee in international law*, 2007, 318.

3 alone or fail on the facts.³⁴⁵ The Court has adopted a very high standard when it comes to the alleged breach and the applicant has to be able to establish at least a “real risk” of a “flagrant or extreme violation” of the right in question.³⁴⁶ The question deciding the case is therefore the nature or degree of the potential violation. Such a high standard is designed to ensure that state responsibility is not engaged with every violation of Convention rights - again the floodgate argument frequently brought by states in circumstance such as these. In *Z and T v. United Kingdom*, a case based on freedom of religion, the Court explained that to impose an obligation on a Contracting State not to expel a person whose rights to worship under the Convention might be violated on return, would impose “an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of the world”.³⁴⁷ This statement clearly shows how policy considerations are part of the deliberations of these tribunals.

This analysis explains why there have not been any successful non-refoulement claims under provisions other than Article 7 ICCPR and 3 ECHR but is also shows that the problem is not a legal one but based on judicial restraint or reluctance. From a legal perspective it is possible, which has been acknowledged both by the HRC and the ECtHR, to impose a non-refoulement obligation on states based on all rights in both the ECHR and the ICCPR. Courts are however reluctant to follow that logic to the end and

³⁴⁵ *Tatete v Switzerland*, Application No. 41874/98 (6 July 2000) (settlement reached); *D v. United Kingdom* (1997) 24 EHRR 423 (decided on Art. 3); *Osman v. UK* (1998) 29 EHRR 245.

³⁴⁶ *Z and T v. United Kingdom*, Application No. 27034/05, 28 February 2006 (this requirement has been developed by the House of Lords in *Devaseelan* and has been reaffirmed in a number of cases: *Devaseelan v. Secretary of State for the Home Department* [2003] Imm. AR. 1, para. 107; *R v. Special Adjudicator, ex p Ullah* [2004] UKHL 26 [1]; *EM (Lebanon) v. Secretary of State for the Home Department* [2009] 1 All ER 559 (HL); see also: *ibid* 144; G. S. Goodwin-Gill and J. McAdam, ‘*The refugee in international law*’, 2007, 316.

³⁴⁷ *Z and T v. United Kingdom*, Application No. 27034/05, 28 February 2006, 7.

have instead created arbitrary barriers, which in reality ensure that the non-refoulement principle is not extended beyond its current scope which comprises of persecution, torture, cruel, degrading or inhumane treatment or punishment. By doing so, the ECtHR and HRC are however setting a dangerous precedent, questioning the very universality of human rights for the sake of political convenience. The ECtHR has essentially stated that the standards set out in the ECHR, many of which are part of international customary law and even jus cogens, only protect citizens of the countries of Europe and citizen of other countries cannot expect the same level of protection when applying for protection in an European country.³⁴⁸ This issue goes to the core of the ‘universalism versus cultural relativism’ debate, which would seem timely at this point but is simply beyond the scope of this paper.

In respect to the protection of citizens of small island states, this analysis has sadly not added any additional protection possibilities, at least not at this moment in time. Legal commentary is however moving towards a broader interpretation of the non-refoulement principle and with time jurisprudence might follow.³⁴⁹ Existing case law has already paved a way towards a wider application of this principle, creating a possible basis for state practice encompassing a broader understanding of non-refoulement. So far there is however not enough evidence of an expansion of the *opinio juris* or state practice that would indicate a trend towards a broadening of the scope of non-refoulement.

³⁴⁸ *ibid.* at 7, 8. See also M. Foster. 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) (2) *New Zealand Law Review*, 276.

³⁴⁹ M. Foster. 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) (2) *New Zealand Law Review* 257; J. Allain. 'The Jus Cogens Nature of Non-Refoulement' (2001) 13(4) *International Journal of Refugee Law*, 533.

Michelle Foster argues that a close reading of the developing jurisprudence of the relevant tribunals such as the HRC, the ECtHR and the Inter-American Commission on Human Rights in respect to what these tribunals conceive to be the foundation or source of the non-refoulement principle in fact shows that their reasoning supports a much wider application of the principle.³⁵⁰ A close analysis of the jurisprudence allows us to identify three different approaches mainly used in the reasoning of non-refoulement cases, some of which could be extended to support a wider application. The first is explored in *Soering* and states that the non-refoulement obligation arises in order to ensure the effectiveness of the human rights conventions.³⁵¹ The rights enshrined in these conventions would be entirely undermined if a state could disregard these obligations in sending a person back to place where they would suffer a violation of these rights.³⁵² The second is a more direct approach, based on the duty to protect as held in *ARJ v. Australia*, meaning that a state that sends a person into a situation where their rights under the Covenant could be violated, might itself be in violation of the Covenant.³⁵³ And finally, the last theory finds a violation of human rights in the act of expulsion itself, seeing it as a crucial link in the causal chain leading to the violation of the rights of the returned person.³⁵⁴ The first two theories, based on effectiveness and duty to protect, can both arguably support a non-refoulement obligation for all rights protected by the ECHR and

³⁵⁰ M. Foster. 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) (2) *New Zealand Law Review*, 269.

³⁵¹ *Soering v. United Kingdom* (1989) 11 EHRR 439, para. 87.

³⁵² M. Foster. 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) (2) *New Zealand Law Review*, 269.

³⁵³ *ARJ v. Australia* (1996) Communications No. 692/1996, para. 6.9; see also: *Ahani v. Canada* (2004) Comm. No. 1051/2002.

³⁵⁴ *Kindler v. Canada* (1993) Comm. No. 470/1991, para. 10.6; *D v. United Kingdom* (1997) 24 EHRR 423; see also decision by the Inter-American Commission on Human Rights: *The Haitian Centre for Human Rights v. United States* (1997) Report No 51/96, IACHR 550, para. 167-168.

the ICCPR. The effectiveness of *all* rights would be undermined if they could be ignored by the deporting state and equally, there does not seem a self-evident ground on which to distinguish between rights towards which a state has a duty to protect and rights where the state has *no* such duty.³⁵⁵ As to the last theory, it again seems that this approach could be adapted to apply to all rights in the relevant conventions - the causal link would exist independent of the nature of the violated right. In *D v. United Kingdom* however, the act of deportation itself was regarded as the inhumane treatment under Article 3 ECHR, and this interpretation would consequently restrict this theory to this specific provision.³⁵⁶

To sum up, the theoretical potential already exists in the relevant jurisprudence and further research on the wider application of these theories could eventually lead to a change towards a broader interpretation of the non-refoulement principle. Michelle Foster goes as far as suggesting that these theories could be employed to extend non-refoulement to the rights enshrined in the ICESCR.³⁵⁷ However, this has already been termed an “extension of an extension” by the House of Lords and has so far not been further considered in the jurisprudence of the HRC or the ECtHR or by legal commentators.³⁵⁸ One obvious problem with her theory, which springs to mind right away, is the fact that most rights of the ICESCR do not impose immediate obligations but rather obligations of progressive implementation and a breach of such an obligation

³⁵⁵ M. Foster. 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) (2) *New Zealand Law Review*, 272.

³⁵⁶ *ibid.*

³⁵⁷ *ibid.* at 259.

³⁵⁸ International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, in force 3 January 1976); M. Foster. 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) (2) *New Zealand Law Review*, 266; *AJ (Liberia) v. Secretary of State for the Home Department* [2006] EWCA Civ 1736, para. 12.

would be difficult to evaluate from the outside by a sending state.³⁵⁹ But again, further research into the possibility of extending the non-refoulement principle to encompass socio-economic rights might pave the way towards such a development in the future.

E. Conclusion

This analysis has shown that the current scope of complementary protection, in form of the extended non-refoulement principle, cannot provide satisfying protection for citizens of small island states displaced by sea level rise. The relevant jurisprudence makes it highly unlikely that claims brought by this specific group of environmentally displaced people under non-refoulement provisions would be successful unless the situation on their islands was abysmal.

This issue of finding a suitable source protection for these people has not only a legal dimension but a political and practical dimension as well. This chapter has explored a small section of the legal dimension and from a legal viewpoint there is clear potential that complementary protection could develop into a protection framework, which could eventually encompass the special circumstances of island citizens forced to flee their homelands.

However, receiving countries are already becoming increasingly restrictive when it comes to immigration and asylum policies. The economic crisis has further hampered

³⁵⁹ For a more detailed analysis see: M. Foster. 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) (2) New Zealand Law Review, 257.

countries' willingness to take in growing number of refugees and in many countries public opinion is increasingly convinced that a high influx of refugees and immigrants will take away employment opportunities for nationals as well threaten national identity. The floodgate argument and the fear to set dangerous precedents is a common theme among receiving countries and can even be found in judicial reasoning. Lord Sedley most eloquently expressed this view when saying that the "internal logic of the ECtHR has to give way to the external logic of events when these events are capable of bringing about the collapse of the ECHR system (...) and just as the system has grown through its jurisprudence to meet new assaults on human rights, it is also having to retrench in places to avoid being overwhelmed by its own logic".³⁶⁰

It has to be pointed out however, that the floodgate argument is not supported by the reality of refugee movements, at least as they impact developed countries.³⁶¹ The fear of the phenomena of "health tourism" is a good example, and entails patients traveling as refugees from developing countries to receive treatment in developed countries. A study conducted on this issue clearly shows that no evidence exists to support such a trend and exposes this as an unfounded fear.³⁶²

Finally, this issue of protection for island state citizens also has a practical dimension. Under current jurisprudence the protection under the non-refoulement principle would only be available to them once the situation on the islands would be close to life-

³⁶⁰ *ZT v. Secretary of State for the Home Department* [2005] 2 AC 296 (HL).

³⁶¹ M. Foster. 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) (2) *New Zealand Law Review*, 309.

³⁶² House of Lords/House of Commons Joint Committee in Human Rights. *The Treatment of Asylum Seekers*, Tenth Report of Session 2006/07, HL Paper 81-2 (30 March 2007), para. 164.

threatening and a return would therefore go against humanitarian principles. People leaving in anticipation of what will happen to their islands will therefore be unable to claim protection under this framework, which would result in people having to wait until the very last minute before fleeing their islands and that would furthermore result in a mass-movement of refugee all to be processed at the same time. Asylum systems are challenged by high numbers of refugees arriving simultaneously and this often results in undue delays and detentions of refugees. In addition, in scenarios of mass-influx, countries often address them with a range of discretionary and temporal measures instead of the using the usual asylum and immigration provisions in order to speed up the process. Mass movements of refugees from sinking island nations should therefore be avoided at all costs and the protection afforded by the extended non-refoulement principle in its current form is, for the reasons outlined above, not a suitable and satisfactory source of protection.

CHAPTER 6: Small Island States and the Issue of Statelessness

The threat of losing one's homeland to the rising sea is very unique to citizen of small island states. While some coastal territory on the mainland might be lost to the sea, no other environmentally displaced persons are facing the possibility of becoming stateless as a result of the effects of climate change. Apart from the legendary island of Atlantis, which according to Plato sank into the sea in single day and night of misfortune, history has never before seen a country simply disappear. The fate of disappearing islands is therefore a new and unexplored scenario in international law, especially is regard to the laws surrounding statehood and sovereignty.

This chapter will look at the principles of nationality and statehood as well as the international legal framework on statelessness to assess whether those can provide protection for small island citizens. The first part will look at these island states' claim at statehood and consider the indicia of statehood in relation to the situation of sinking island states. This chapter will then go on to explore the two UN statelessness conventions and look especially at the definition of 'statelessness' and the effectiveness of these legal instruments in order to determine their protective capacity for small island state citizen.

A. Small Island States and the Claim to Statehood

Due to the unpredictable nature of this scenario it is so far unclear at what precise point these states might lose their legal identity. International law has no mechanism for the dissolution of a state in such a scenario, as the only known cases are those of ‘absorption’ by another state, ‘merger’ with another state and ‘dissolution’ with the emergence of a successor state.³⁶³ The situation of small island states is unprecedented in international law as there will be no successor state - the territory will simply cease to exist. The first step towards understanding the predicament of the citizen of these states is therefore to understand when their countries will cease to exist and in order to do that it is necessary to look at all the essential criteria of statehood as they relate to the scenario of disappearing islands.

The first hurdle when looking at the issue of statehood is the lack of a formal definition of ‘state’. While there have been many attempts by legal scholars to define what constitutes a state none of the resulting theories have found general and wide acceptance.³⁶⁴ Scholars such as Franz von Liszt in Germany and Pasquale Fiore in Italy wrote around the turn of the century that independence and political supremacy over territory were necessary attributes of a state.³⁶⁵ Several decades later, Hans Kelsen on the other hand defined

³⁶³ J. McAdam. ‘Disappearing States’, *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series, 2.

³⁶⁴ T. D. Grant. ‘Defining statehood: The Montevideo Convention and its discontents’ (1998) 37 *Colum.J.Transnat’l L.* 411.

³⁶⁵ F. von Liszt, *Das Völkerrecht: Systematisch Dargestellt*, 1904, 65-66, 70-72; P. Fiore, *International Law Codified and its Legal Sanction or the Legal Organization of the Society of States* (5th edn 1918), 51, 109; T. D. Grant. ‘Defining statehood: The Montevideo Convention and its discontents’ (1998) 37 *Colum.J.Transnat’l L.* 409.

statehood in terms of a legal order and put less emphasize on territorial supremacy.³⁶⁶ This definition did however not find wide acceptance after World War II when issues of population and effective control over territory became the dominant requirements in statehood theories.³⁶⁷ With the increasing influence of the United Nations, scholars began to realize that states were no longer the only legal persons on the international playing field and governmental ability to enter into international treaties and to have diplomatic relations with other states was seen more and more as a necessary prerequisite of a functioning state.³⁶⁸ Definitions from the 1970s onwards would therefore widely cite governmental capacity, population, territory and independence as the criteria of statehood.³⁶⁹ Seeing as large numbers of scholars have engaged in discussion statehood, there is no lack of academic sources; the problem is rather to find the one to follow. The International Court of Justice has so far also been reluctant to make a clear statement as to which theory is to be given preference and in the recent Advisory Opinion on the declaration of independence of Kosovo the Court deliberately did not engage in the question of the statehood of the Republic of Kosovo.³⁷⁰ There is however some indication that the Court deems certain criteria to be necessary as Judge Cançado Trindade in his

³⁶⁶ H. Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941-42) 55 Harv. L. Rev. 44, 64.

³⁶⁷ See: T. D. Grant. 'Defining statehood: The Montevideo Convention and its discontents' (1998) 37 Colum.J.Transnat'l L. 411, for a comprehensive overview over the historical development of the definition of statehood.

³⁶⁸ *ibid.* at 412.

³⁶⁹ *ibid.* at 412. Grant gives examples of legal scholars from different countries: Hugh M. Kindred et al (eds), *International Law Chiefly as Interpreted and Applied in Canada* (4th edn Butterworth Toronto, 1987) 13; G. Dahm, J. Delbrück and R. Wolfrum. 'Völkerrecht, Bd. I/1, 2' (1989) Auflage, Berlin ua 126; Barry Carter and Phillip Trimble, *International Law* (1991), 413-418; Nguyen Quoc Dinh, *Droit International Public* (3rd edn, LGDJ; Paris 1994), 398.

³⁷⁰ International Court of Justice, 'Advisory opinion on the accordance with international law of the unilateral declaration of independence in respect of Kosovo', 22 July 2010. Available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=5> (accessed 20 December 2011).

opinion called population “the most precious constitutive element of statehood”.³⁷¹ The International Law Commission has so far also refrained from tackling the issue of statehood, which leaves this domain to the academic writers.

Out of the myriad of definitions, the most commonly cited and best-known formulation of the basic criteria of statehood is that contained in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.³⁷² It lists the necessary indicia of statehood as (1) a defined territory, (2) a permanent population, (3) an effective government, and (4) the capacity to enter into relations with other states. This regional instrument was adopted at the Seventh International Conference of American States and since then the four criteria of statehood have been cited worldwide, especially in contemporary discussions of statehood and will therefore be relied upon in this chapter as well.

Jane McAdam states that while all four criteria need to be present for a state to come into existence, the absence of all four “may however not mean the end of the state”.³⁷³ James Crawford stresses that there is a strong presumption against the extinction of states once they are firmly established.³⁷⁴ He bases this on the fact that since the establishment of the UN in 1945, there have been very few cases of extinction of states, and in fact no cases of *involuntary* extinction and Jane McAdam points to the fact that ‘failed states’ were

³⁷¹ *ibid.* at 16.

³⁷² Article 1, Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934); See also: J. McAdam. ‘Disappearing States’, *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series, 6.

³⁷³ J. McAdam. ‘Disappearing States’, *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series, 6.

³⁷⁴ J. Crawford, *The creation of states in international law*, 2006, 715.

continued to be recognised even during times when these states were objectively failing.³⁷⁵ These are strong signs of just how reluctant the international community is to disregard the existence of a state once it has been soundly established in accordance to international law.

The next section will now look at the different indicia of statehood in turn with regard to the scenario of disappearing states to get a better understanding of what challenges to legitimate statehood these states are facing.

1. Defined Territory

The link between statehood and territory is crucial and Crawford makes this point very vividly by writing: “evidently, states are territorial entities”.³⁷⁶ In the instance of its creation, the right to be a state is dependent upon the exercise of full governmental powers with respect to some area of territory.³⁷⁷ As to the question of the size of the territory there does not seem to be a minimum requirement.³⁷⁸ Vatican City has a territory of 0.4 sq km and Monaco is only slightly larger with 1.5 sq km, both of which are recognised and functioning states. Furthermore, according to the ICJ, it is not necessary

³⁷⁵ J. McAdam. ‘Disappearing States’, *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series, 6; James Crawford, *The creation of states in international law*, 2006, 715, 720; T. D. Grant. ‘Defining statehood: The Montevideo Convention and its discontents’ (1998) 37 *Colum.J.Transnat’l L.* 403, 413. For more examples see: Grant, page 413, and footnote 45.

³⁷⁶ J. Crawford, *The creation of states in international law* (2nd edn Clarendon Press; Oxford University Press, Oxford; New York 2006), 46.

³⁷⁷ *ibid.*

³⁷⁸ J. McAdam. ‘Disappearing States’, *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series, 7; J. Crawford, ‘*The creation of states in international law*’, 2006, 47.

for the territory to have exact boundaries.³⁷⁹ Crawford, quoting Ambassador Jessup arguing for the admittance of Israel to the UN writes, “both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory”.³⁸⁰

Small island states have a number of territorial peculiarities and six of the ten smallest countries in the world are made up by island states, including for example Nauru, Tuvalu and the Marshall Islands.³⁸¹ In the case of the Pacific island states, 95% of their territory is maritime in nature and these countries’ territories are made up of large numbers of individual islands and islets.³⁸² Kiribati for example is composed of 32 atolls and one raised coral island, dispersed over 3.5 million square kilometres and Vanuatu is an island archipelago consisting of approximately 82 relatively small, geologically newer islands of volcanic origin (65 of them inhabited), with about 1,300 km north to south distance between the outermost islands.³⁸³ The atolls of the Maldives in the Indian Ocean encompass a territory spread over roughly 90,000 sq km, making it one of the most dispersed countries in the world in geographic terms. It features 1,192 islets, of which

³⁷⁹ Monastery of Saint Naoum, Advisor): Opinion, 1924, P.C.I.J., Series B, No. 9, at p. 10; North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969, para. 46.

³⁸⁰ See: J. Crawford, ‘*The creation of states in international law*’, 2006, 47 - Crawford quotes Ambassador Jessup arguing for the admittance of Israel to the United Nations on 2 December 1948: UN *SCOR* 383rd session, 2 Dec. 1948, 11.

³⁸¹ J. Crawford, ‘*The creation of states in international law*’, 2006, 47.

³⁸² A. Maas and A. Carius. 'Territorial Integrity and Sovereignty: Climate Change and Security in the Pacific and Beyond', presented at the *Climate Change and Security Conference* 21-24 June 2010, Trondheim, 6. Available at: http://climsec.prio.no/papers/Paper_Trondheim_PSIDS_CCIS_Maas_Carius_final_revised.pdf (accessed 20 December 2011).

³⁸³ See: Official Website of Tourism Vanuatu. Available at: <http://www.tourismvanuatu.com/vanuatu-travel.html> (accessed 20 December 2011).

two hundred are inhabited.³⁸⁴ Currently, the combined exclusive economic zones (EEZ)³⁸⁵ of the Pacific islands states are several times larger than the entire European Union and with the potential of deep sea fishing and mining the EEZ are important economic assets for small island states.³⁸⁶

The effects of climate change have therefore a unique impact on the territory of these countries, many of which have an average ground level of only a couple of meters with the Maldives being the country with the world's lowest highest point at 2.3 meters. Rise in sea levels and increased flooding and severe weather events are continuing to erode the coastline of the islands and causing them to retreat. The inundation of small islets, as has already happened to two islets of Kiribati, will not only reduce the overall size of the country but also lead to a dramatic reduction in maritime territory.³⁸⁷ In order to avoid disputes surrounding the economic value of the EEZ of small island states it has been proposed to freeze current limits of maritime zones.³⁸⁸ There is however no mechanism set out for such a dramatic step in the UN Convention on the Law of the Sea and so far this idea has not found much traction in the legal community. A detailed analysis of the merits of this proposal go beyond the scope of the paper. However, it is true that without

³⁸⁴ See: Official Website of the Maldives Tourism Promotion Board. Available at:

<http://www.visitmaldives.com/en/the-maldives/location-and-geography> (accessed 20 December 2011).

³⁸⁵ The exclusive economic zone (EEZ) is a sea zone under the Law of the Sea, over which a state has special rights over the exploration and use of marine resources. It stretches from the seaward edge of the state's territorial sea out to 200 nautical miles from its coast.

³⁸⁶ A. Maas and A. Carius. 'Territorial Integrity and Sovereignty: Climate Change and Security in the Pacific and Beyond', presented at the *Climate Change and Security Conference* 21-24 June 2010, Trondheim, 6. Available at:

http://climsec.prio.no/papers/Paper_Trondheim_PSIDS_CCIS_Maas_Carius_final_revised.pdf (accessed 20 December 2011).

³⁸⁷ D. Taylor, 'Small Island States Threatened by Sea Level Rise' in *Vital Signs*, 2003, Worldwatch Institute, 84.

³⁸⁸ R. Rayfuse. 'W(h)ither Tuvalu? International Law and Disappearing States' (2009) 9 *University of New South Wales Faculty of Law Research Series*, 6.

any special measures to protect the sovereignty over their resources, once small island states cease to exist their maritime zones will revert to the High Seas as only states are entitled to maritime zones.³⁸⁹

The fact that there is no minimum requirement of territory for a state to continue existing as an independent legal entity bodes well for small island states as does the fact that it is not necessary to have precisely defined borders as the coastlines of the islands are continuously changing. Even the fact that the territory of these states is not contiguous but rather highly fragmented does not prevent the existence of a state.³⁹⁰ Unless small island states lose all of their land to the sea, the requirement of territory will therefore still be met. Crawford concludes that the core requirement is that the territory, whatever its size or shape, must be effectively governed and suggests that this requirement of territory is therefore rather a constituent of government and independence than a distinct criterion of its own.³⁹¹ No matter how small the territory of disappearing islands will become, as long as the governments of these states maintain effective control over their territory these countries will continue to exist under international law. Different possibilities exist of preserving the control over islands and their resources, even once they have become unable to sustain their populations, such as government in exile, some form of self-governance or associated statehood.

³⁸⁹ D. D. Caron. 'When law makes climate change worse: Rethinking the law of baselines in light of a rising sea level' (1990) 17(4) *Ecol Law Q*, 650; R. Rayfuse. 'W(h)ither Tuvalu? International Law and Disappearing States' (2009) 9 *University of New South Wales Faculty of Law Research Series*, 7.

³⁹⁰ J. McAdam. 'Disappearing States', *Statelessness and the Boundaries of International Law* (2010) 2 *University of New South Wales Faculty of Law Research Series*, 7; J. Crawford, '*The creation of states in international law*', 2006, 47; Crawford points to examples such as the Federated States of Micronesia or the separation of East Prussia from Germany between 1919 and 1945, which did not cast doubt on the statehood of these countries.

³⁹¹ J. Crawford, '*The creation of states in international law*', 2006, 52.

2. Permanent Population

The most commonly cited scenario is an Atlantis-style apocalypse where the entire territory of the small island states will be lost to the sea. However, as mentioned above, the populations of these countries will have to start moving away well before the islands will be completely submerged. As a permanent population is required for the creation of a state, this requirement might prove to be problematic long before the issue of territory. There is however no minimum requirement of how large the population has to be to qualify for the definition of statehood.³⁹² Scholar Thomas Franck aptly wrote “infinitesimal smallness has never been seen as a reason to deny self-determination to a population”.³⁹³ The Vatican City is, again, the smallest state by population with 826 citizens, followed by Tuvalu with 12,373 and Nauru with 14,019 citizens.³⁹⁴ Seeing as small population numbers alone are not a problem, the main question in regard to island states is then whether the population requirement is still fulfilled when large proportions, or even all, of the populations leave the islands.

In this context it has to be noted that there are already a number of Pacific island countries with large proportions of their populations living outside their territory. Jane McAdam points out that 56.9 per cent of Samoans and 46 per cent of Tongans live in other countries and that this has never affected the recognition of these countries as states

³⁹² J. McAdam. 'Disappearing States', *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series, 8; see also: T. M. Franck and P. Hoffman. 'The Right to Self-Determination in Very Small Places' (1975) 8 NYUJ Int'l L. & Pol. 331, 383; J. Duursma, *Fragmentation and the international relations of micro-states: self-determination and statehood*, 1996, 411–12.

³⁹³ T. M. Franck and P. Hoffman. 'The Right to Self-Determination in Very Small Places' (1975) 8 NYUJ Int'l L. & Pol. 331, 383.

³⁹⁴ J. Crawford, *The creation of states in international law*, 2006, 52.

under international law.³⁹⁵ So even if large numbers of island state citizen were to move away, their homelands would not cease to exist due to that reason alone. But what will happen when the islands are no longer capable of sustaining their people. When the entire population has to leave, would it suffice for the requirements of statehood to have a small government outpost on the islands while the population lives somewhere else, as Kiribati is planning to do, or could a government in exile remotely administer the abandoned territory of the islands?³⁹⁶ So far this question has not been answered satisfactorily. Any of these possibilities are however clearly premised on a continued existence of a functioning and effective government - the next statehood indicia to be looked at in more detail.

3. Effective Government

Statehood is not simply a factual situation but rather a legal claim to exercise control over a certain territory and the people within it.³⁹⁷ The acts of a state are generally defined by the acts of its government bodies and institutions and a functioning and effective government is the basis for the state's relations with other states. The criterion of an effective government is therefore central to a state's claim to statehood.³⁹⁸

³⁹⁵ J. McAdam. 'Disappearing States', *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series, 8.

³⁹⁶ AlterNet, 'Kiribati officials plan for 'practical and rational' exodus from atolls', 9 December 2009. Available at: <http://www.trust.org/alertnet/news/kiribati-officials-plan-for-practical-and-rational-exodus-from-atolls> (accessed 20 December 2011).

³⁹⁷ J. Crawford, *The creation of states in international law*, 2006, 56.

³⁹⁸ J. McAdam. 'Disappearing States', *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series.

As to the meaning of ‘effective’ and at what point a government would be ‘ineffective’ enough to warrant the state’s extinction under international law - this question is not easy to answer. There are many borderline cases of states with highly corrupt, instable, ineffective or even puppet governments, which are nonetheless recognised as states.³⁹⁹ Countries such as Somalia, the Republic of the Congo (DRC) or Afghanistan make constant headlines about their inability to maintain effective control over their territory and govern their country effectively but are still recognised as states by the international community.

Crawford looks for the answer to this conundrum in the way that these states have come into existence. He argues that not only the actual exercise of authority matters but also the right or title to exercise that authority.⁴⁰⁰ In the case of the DRC the former sovereign of that territory, Belgium, had granted the Congo independence and the international community and the UN accepted the new state’s right to govern its territory. The right and title were not disputed by another country, which for Crawford is the key to the fact that the DRC was recognised as a state from the moment of independence in 1960 even though its government was barely functioning.⁴⁰¹ The same reasoning can be applied to the events surrounding the independence of Rwanda and Burundi.⁴⁰² In situations, however, where one country secedes from another by way of an adverse claim on the territory or where one country is conquered by another by force, there are competing

³⁹⁹ See: Official Website of Vision of Humanity, ‘Global Peace Index 2010’ (ranking countries in respect of their level of democracy, transparency, government efficiency etc.). Available at: <http://www.visionofhumanity.org/gpi-data/#/2010/scor> (accessed 20 December 2011).

⁴⁰⁰ J. Crawford, ‘*The creation of states in international law*’, 2006, 57.

⁴⁰¹ *ibid.*

⁴⁰² *ibid.* at 59.

claims as to who holds the legitimate authority over the territory. In those instances statehood can in general “only be obtained by effective and stable exercise of governmental powers” such as in the cases of Bangladesh, Guinea-Bissau or Indonesia.⁴⁰³ A number of attempts at statehood have failed or are still contested due to lack of effective governmental control and a consequent denial of recognition of the new states by the international community such as in the cases of Biafra or Somaliland.⁴⁰⁴

This brief overview shows that only in cases where there are no competing claims to the territory in question, is the requirement for an effective government applied less stringent. Where a former sovereign grants independence and therefore forfeits its right to govern that territory, there even seems to exist a presumption of statehood from the moment of independence. In the case of small island states, the situation is not like any scenario ever foreseen by international law, but there is in any case no competing claim to the territory. From all the different ways of gaining statehood, the situation of small island states seems therefore closest to the scenario of the DRC and the presumption of continuity should apply until the international community decides to no longer recognize the governments of the island countries.⁴⁰⁵

As long as the governments of disappearing islands are capable of governing their territory and their people, in whatever way possible, there would be no reason to doubt

⁴⁰³ *ibid.* at 58.

⁴⁰⁴ A. Maas and A. Carius. ‘Territorial Integrity and Sovereignty: Climate Change and Security in the Pacific and Beyond’, presented at the *Climate Change and Security Conference* 21-24 June 2010, Trondheim, 9. Available at: http://climsec.prio.no/papers/Paper_Trondheim_PSIDS_CCIS_Maas_Carius_final_revised.pdf (accessed 20 December 2011). J. Crawford, ‘*The creation of states in international law*’, 2006, 375.

⁴⁰⁵ J. McAdam. ‘Refusing ‘Refuge’ in the Pacific:(De) Constructing Climate-Induced Displacement in International Law’ (2010) 27 University of New South Wales Faculty of Law Research Series, 9.

their legitimacy and statehood. This does not necessarily mean that these governments must continue to operate from the islands, as there are many different types of governments recognised by the international community, such as ‘government in exile’, ‘self-governance’ in free association with another state, an ‘enclave’ within another state and others.⁴⁰⁶ Crawford notes that “sovereignty comes in all shapes and sizes”.⁴⁰⁷

4. Capacity to Enter into Relations with other States

This capacity is nowadays conceived as a consequence of statehood more than a criterion and the prerogative to enter into relations with states at the international level lies no longer with states alone.⁴⁰⁸ International and supra-national organizations have the same capability although the majority of international agreements still exist between sovereign states. This indicia is therefore a useful tool to determine whether a state is recognised by another but is generally considered to be part of the requirement of ‘effective government’ rather than a requirement in its own right.⁴⁰⁹

This analysis of the different indicia of statehood in relation to the situation of disappearing islands has revealed that even though there is no precedent to deal with this scenario, state practice suggests a presumption that an independent and recognised state will continue to exist even when the facts no longer support this conclusion.⁴¹⁰ In

⁴⁰⁶ J. McAdam. ‘Disappearing States’, *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series, 10.

⁴⁰⁷ J. Crawford, *The creation of states in international law*, 2006, 47.

⁴⁰⁸ *ibid.* at 61.

⁴⁰⁹ *ibid.*

⁴¹⁰ *ibid.*

addition, it is highly unlikely that small island states would give up their claim to statehood lightly, seeing how recently many of these countries have gained independence.⁴¹¹ The status of disappearing island states will therefore not primarily depend on the continued existence of the four criteria for statehood but rather on the withdrawal of recognition of statehood by other states - a very gradual and unpredictable process.

B. Small Island States and Statelessness

The possibility however does exist that at some point in the future disappearing island states will no longer be considered to be states by the international community and with that lose the ability to confer nationality upon their citizens. This following part will therefore now look at the protection available to former citizens of small island states under international law on statelessness.

The academic community agrees that a positive duty to grant nationality to stateless persons does not exist under international law.⁴¹² Article 15 of the Universal Declaration of Human Rights (UDHR) does lay the groundwork by declaring, “everyone has a right

⁴¹¹ J. McAdam, ‘Disappearing States’, *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series, 21. The author came to these conclusions as a result of personal interviews with government officials in Kiribati.

⁴¹² J. Crawford, *The creation of states in international law*, 2006, 53; J. McAdam, ‘Refusing ‘Refuge’ in the Pacific: (De) Constructing Climate-Induced Displacement in International Law’ (2010) 27 University of New South Wales Faculty of Law Research Series, 13; C. A. Batchelor, ‘Stateless persons: some gaps in international protection’ (1995) 7(2) *International Journal of Refugee Law*, 238; *Questions concerning the Acquisition of Polish Nationality* (Advisory Opinion) PCIJ Series B No 7 (1923) 15.

to nationality” but fails to specify upon whom the obligation falls to grant nationality.⁴¹³ This same specificity is absent from the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, which both outline a right for every child to acquire a nationality.⁴¹⁴ There exists therefore no positive duty on states to confer nationality onto stateless persons within their territory, unless they are children. However, Article 15 UDHR goes on to say that “no one shall be arbitrarily deprived of his nationality” and together with the duties arising under the statelessness treaties it can be argued that a *negative* duty exists for states not to create statelessness.⁴¹⁵ McAdam points out that even though such a negative duty exists, most prominently in the 1961 Convention on the Reduction of Statelessness, there has so far been no universal state practice developed to satisfactorily resolve the issue of nationality when one State ceased to exist.⁴¹⁶

The international community has responded to the problem of statelessness with two conventions, which provide protection, rights and duties for stateless persons and aim to reduce future statelessness. These treaties could provide protection and possibly a remedy for former small island citizens whose countries have ceased to exist and the next part will therefore look at these treaties in more detail.

⁴¹³ C. A. Batchelor. ‘Stateless persons: some gaps in international protection’ (1995) 7(2) *International Journal of Refugee Law*, 237.

⁴¹⁴ International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force from 23 March 1976; Convention on the Right of the Child (adopted 20 November 1989, entered into force 2 September 1990).

⁴¹⁵ C. A. Batchelor. ‘Stateless persons: some gaps in international protection’ (1995) 7(2) *International Journal of Refugee Law*, 238; J. McAdam. ‘“Disappearing States”, Statelessness and the Boundaries of International Law’ (2010) 2 *University of New South Wales Faculty of Law Research Series*, 13.

⁴¹⁶ Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975); J. McAdam. ‘“Disappearing States”, Statelessness and the Boundaries of International Law’ (2010) 2 *University of New South Wales Faculty of Law Research Series*, 13.

1. UN Statelessness Conventions

There are two UN conventions dealing with the issue of statelessness, the 1954 Convention Relating to the Status of Stateless Persons and the above-mentioned 1961 Convention on the Reduction of Statelessness.⁴¹⁷ The earlier convention gives a definition of stateless persons and deals with the status of stateless persons within the countries they find themselves to ensure that they are not treated less favourably than other aliens and are not discriminated against based on their former nationality or their status as a stateless person.⁴¹⁸ It furthermore offers a catalogue of rights and benefits for those individuals who qualify under the definition and was deemed to significantly improve the situation and legal status of stateless persons.⁴¹⁹ The ultimate goal however remained “the avoidance of statelessness and the (re)instatement of nationality” and to this end the 1961 Convention was adopted.⁴²⁰ This convention focuses on the most common causes of statelessness and how to prevent it from arising by prohibiting states from withdrawing nationality if that would leave a person stateless or take any other steps that would render a person stateless.⁴²¹ Furthermore, it imposes a duty on states to grant nationality in certain circumstances, such as to children born in the territory of the contracting party if they would otherwise be rendered stateless or allowing a stateless person to adopt the nationality of one of his/her parents.⁴²² As mentioned above, the

⁴¹⁷ Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960).

⁴¹⁸ See especially: Articles 7, 8, 13-20 of the 1954 Convention Relating to the Status of Stateless Persons.

⁴¹⁹ L. van Waas, ‘*Nationality Matters: Statelessness under International Law*’, 2008, 16.

⁴²⁰ *ibid.*

⁴²¹ See: Articles 5, 8 and 10 of the 1961 Convention on the Reduction of Statelessness.

⁴²² See: Articles 1 and 2 of the 1961 Convention on the Reduction of Statelessness.

convention does however not impose a general positive duty on states to confer nationality upon any stateless person within their territory.

In order to determine whether former small island state citizens can claim protection under the two conventions, the definition of statelessness has to be looked at in more detail.

(a) Definition of Statelessness

Article 1 of the 1954 Convention defines a stateless person as “a person who is not considered as a national by any State under the operation of its law” and the same definition is presumed in the 1961 Convention.⁴²³ This definition has caused continuous controversy among scholars and practitioners due to the fact that it is kept very narrow and only applies to *de jure* and not *de facto* statelessness.⁴²⁴ This means that it is purely decided on a point of law who falls within the definition. On first glance this seems a logical approach, as ‘nationality’ is itself a legal connection between a person and a state.⁴²⁵ However, the definition excludes people who find themselves in the same need of protection as *de jure* stateless persons but still retain a formal bond of nationality to a country, which is unable or unwilling to protect them. These *de facto* stateless people do not benefit from the usual attributes of nationality, namely rights and responsibilities but

⁴²³ C. A. Batchelor, ‘Stateless persons: some gaps in international protection’ (1995) 7(2) International Journal of Refugee Law, 232.

⁴²⁴ L. van Waas, ‘Nationality matters : statelessness under international law’, 2008, 20.

⁴²⁵ *ibid.*

also lack the effective protection of their country.⁴²⁶ Carol Batchelor, Legal Advisor on *Statelessness* and Related Nationality Issues to the UNHCR, is of the opinion that the definition outlined in the 1954 Convention is not one of quality but one of fact and therefore does not consider how effective the nationality in questions really is.⁴²⁷

This raises the questions whether citizens of disappearing islands will be *de jure* or *de facto* stateless. Looking at the definition in the 1954 Convention there seems to be no obvious or easy answer and there is no precedent in history to rely on. While most commentators on this subject seem to assume that citizens of sinking islands will not be able to fall within the *de jure* definition but rather be *de facto* stateless, the case could also be made for the opposite conclusion. Once the islands will be submerged and lose their statehood, there will be no state legally able to confer citizenship upon the former citizens, which would seem to satisfy the 1954 definition of statelessness. Looking at the plain wording of the definition this interpretation is worth considering.

Indeed, UNHCR held an ‘Expert Meeting on The Concept of Stateless Persons under International Law’ in late May 2010 aimed at drafting guidelines on the statelessness definition of the 1954 Convention and the distinction between *de jure* and *de facto* statelessness.⁴²⁸ The summary states in the section on *de jure* statelessness that “the position of so-called “sinking island States” raises questions under Article 1(1), as the

⁴²⁶ C. A. Batchelor. ‘Stateless persons: some gaps in international protection’ (1995) 7(2) *International Journal of Refugee Law*, 233.

⁴²⁷ *ibid.*

⁴²⁸ UNHCR, “Summary of Conclusions: Expert Meeting on the Concept of Stateless Persons under International Law”, 27-29 May 2010, 5. Available at: www.unhcr.org/refworld/docid/4ca1ae02.html (accessed 20 December 2011).

permanent disappearance of habitable physical territory, in all likelihood preceded by loss of population and government, may mean the “State” will no longer exist for the purposes of this provision.”⁴²⁹ According to the UNHCR, the definition therefore requires the existence of a state able of denying or withdrawing citizenship but it is still acknowledged that “the situation is unprecedented and may necessitate progressive development of international law”.⁴³⁰

In a UNHCR submission on ‘Climate Change and Statelessness’ in 2009, supported by the IOM and the Norwegian Refugee Council, the agency also declared that even in cases where islands would disappear entirely, “the international community could agree that the affected states would continue to exist nonetheless” for the benefit of the exiled population.⁴³¹ In that case UNHCR states that the citizens would find themselves with an ineffective nationality and “could thus be considered *de facto* stateless.” A similar opinion has been advanced by Roberta Cohen and Megan Bradley who conclude that “small island states may continue to exist as legal entities even after being submerged if other countries do not officially withdraw recognition of their Statehood. This would leave the former inhabitants of completely inundated countries *de facto* stateless, as they would be unable to exercise their rights as citizens.”⁴³² Jane McAdam adds that in her opinion the only possibility to render small island citizens *de jure* stateless would be for

⁴²⁹ *ibid.*

⁴³⁰ *ibid.*

⁴³¹ UNHCR, “Submission: Climate Change and Statelessness: An Overview”, to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action under the UN Framework Convention on Climate Change, 1 to 12 June 2009, Bonn, Germany, 2.

⁴³² M. Bradley and R. Cohen, ‘Disasters and Displacement: Gaps in Protection’ (2010) 1, *Journal of International Humanitarian Legal Studies*, 10.

the states to formally withdraw nationality while they are still capable of doing so.⁴³³ This solution is however not practicable, as McAdam agrees, and would do more harm than good and should only be considered to enable the people of disappearing islands to acquire a new nationality should this opportunity arise.⁴³⁴

While there is room to argue for both *de jure* and *de facto* statelessness in the case of small island states it seems that the current, however quite limited, literature tends towards the latter. The next section will look in more detail at the reason for not including *de facto* statelessness in the 1954 Convention and its drafting history. This analysis has shown that the protection of stateless people reveals a clear gap in regard to *de facto* stateless persons, which was however not intended by the drafters of the convention and there might therefore be room to argue that the definition should be extended to some situation of *de facto* statelessness.⁴³⁵ The next section will therefore look at this more closely.

(b) De jure versus de facto statelessness

The decision to only include *de jure* statelessness was heavily influenced by the drafting history of the 1954 Convention. The development of this Convention is closely linked to the drafting of the 1951 Refugee Convention and initially the intention had been to adopt

⁴³³ J. McAdam. ‘Disappearing States’, *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series, 14.

⁴³⁴ *ibid.*, at 13.

⁴³⁵ C. A. Batchelor. ‘Stateless persons: some gaps in international protection’ (1995) 7(2) *International Journal of Refugee Law*, 241.

the 1954 Convention as a Protocol to the Refugee Convention and not an independent legal instrument.⁴³⁶

Stateless persons and refugees have not always been treated differently but were rather perceived as being similarly situated as they both suffer from a lack of national protection.⁴³⁷ Their paths began to diverge after the Second World War when the newly created UN commissioned a study on protection issues regarding persons who had become disconnected from their countries and were in need of international protection.⁴³⁸ This 'Study on Statelessness', which was completed in 1949, included two groups, namely 'refugees' and 'stateless persons', although these terms were still undefined at this point in time.⁴³⁹ In response to the study it was decided that it was necessary to address the problems of these 'unprotected persons' and the Economic and Social Council of the United Nations (ECOSOC) consequently appointed the Ad Hoc Committee on Statelessness and Related Problems in 1949, consisting of representatives of thirteen governments.⁴⁴⁰ The Ad Hoc Committee drew up a draft Convention Relating to the Status of Refugees and a draft Protocol Relating to the Status of Stateless Persons, which were submitted to the General Assembly in 1950.⁴⁴¹ The Ad hoc Committee however felt under time pressure as a consequence of the impending liquidation of the

⁴³⁶ N. Robinson. 'Convention Relating to the Status of Stateless Persons: Its History and Interpretation' (Institute of Jewish Affairs, World Jewish Congress, 1955), 2.

⁴³⁷ C. A. Batchelor. 'Stateless persons: some gaps in international protection' (1995) 7(2) *International Journal of Refugee Law*, 239.

⁴³⁸ United Nations Department of Social Affairs, 'Study of Statelessness', E/1112, August 1949, New York; see also: L. van Waas, *Nationality matters: statelessness under international law*, 2008, 16.

⁴³⁹ United Nations Department of Social Affairs, 'Study of Statelessness', E/1112, August 1949, New York.

⁴⁴⁰ N. Robinson. 'Convention Relating to the Status of Stateless Persons: Its History and Interpretation' (Institute of Jewish Affairs, World Jewish Congress, 1955), 2.

⁴⁴¹ P. Weis. 'The Convention Relating to the Status of Stateless Persons' (1961) 10(02) *International and Comparative Law Quarterly*, 256.

International Refugee Organization (IRO) and the need to create a new organization to specifically deal with the problems of refugees.⁴⁴² It therefore announced that “in view of the urgency of the refugee problem and the responsibility of the United Nations in this field, the Committee decided to address itself first to the problem of refugees, *whether stateless or not* (emphasis added), and leave to later stages of its deliberations the problems of stateless persons who are not refugees”.⁴⁴³

Thus, when the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened in Geneva from 2 to 25 July 1951, the refugee convention was the clear priority and the issues surrounding the stateless were considered to be a separate and less urgent matter.⁴⁴⁴ The Conference therefore adopted only the 1951 Refugee Convention and deferred the Statelessness Protocol, stating that the subject still required more detailed study.⁴⁴⁵ In 1954, ECOSOC convened a special Conference of Plenipotentiaries in New York to consider the Protocol and after careful consideration the Conference discarded the Protocol and adopted the Convention Relating to the Status of Stateless Persons, which is closely modeled on the Refugee Convention.⁴⁴⁶ It was felt that now that the Protocol could no longer be adopted at the same time as the Refugee

⁴⁴² C. A. Batchelor. ‘Stateless persons: some gaps in international protection’ (1995) 7(2) International Journal of Refugee Law, 243.

⁴⁴³ Report of the Ad hoc Committee on Statelessness and Related Problems, UN Doc. E/1618 and Corr. 1, 17 February 1950, 120.

⁴⁴⁴ C. A. Batchelor. ‘Stateless persons: some gaps in international protection’ (1995) 7(2) International Journal of Refugee Law, 243.

⁴⁴⁵ *ibid.* at 245.

⁴⁴⁶ P. Weis. ‘The Convention Relating to the Status of Stateless Persons’ (1961) 10(02) International and Comparative Law Quarterly, 256.

Convention it needed to be reworked to be able to stand on its own and that the issue of statelessness warranted a convention in its own right.⁴⁴⁷

The fact that the 1954 Convention started out as a protocol to the Refugee Convention had a particular impact on the definition of statelessness. The intention behind the draft Refugee Convention and draft Protocol had been to offer protection to both groups of ‘unprotected persons’, one aimed at *de jure* and one at *de facto* circumstances. The Refugee Convention was meant to establish a protection regime for those lacking *de facto* protection, which is supported by the fact that the refugee definition relies on a question of fact rather than law.⁴⁴⁸ Even though the Refugee Convention does not extend to all *de facto* unprotected persons but rather only to those who could fit themselves into the narrow refugee definition of Article 1, there was a tendency among the members of the Conference to consider this issue as closed and to only address *de jure* unprotected persons in the Statelessness Convention. It was felt that these two instruments would complement each other and provide comprehensive protection for both *de facto* and *de jure* ‘unprotected persons’.⁴⁴⁹

This might give room to argue that the drafters of the 1954 Convention never intended to create the existing protection gap and that *de facto* statelessness should be included in the definition in cases where the person cannot claim protection under the Refugee Convention.

⁴⁴⁷ N. Robinson. ‘Convention Relating to the Status of Stateless Persons: Its History and Interpretation’ (Institute of Jewish Affairs, World Jewish Congress, 1955), 3.

⁴⁴⁸ L. van Waas, ‘*Nationality matters: statelessness under international law*’, 2008, 21.

⁴⁴⁹ N. Robinson. ‘Convention Relating to the Status of Stateless Persons: Its History and Interpretation’ (Institute of Jewish Affairs, World Jewish Congress, 1955), 8

However, these concerns were in fact raised and discussed by the drafters at the 1954 Conference. At the first reading of the Convention the definition even included an option to extend it to *de facto* statelessness at the discretion of the state, an expansion, which had been lobbied for by the Belgium delegation.⁴⁵⁰ However, after long discussions and at request of several delegations, this option was removed and instead transferred to the non-binding Final Act of the Statelessness Convention.⁴⁵¹ The British delegation made clear that the Refugee Convention defined the extent to which the Contracting Parties were willing to accord protection to *de facto* unprotected persons and it was further thought more likely that the 1954 Convention would attract a higher number of signatures if it was kept separate from the Refugee Convention by only applying to *de jure* statelessness.⁴⁵² Under this definition there would be less room for abuse and inconsistencies due to the fact that a legal requirement can be proven much more easily than factual requirements. UNHCR even tried again, two years later, at the 1961 Conference to include *de facto* statelessness in the definition but was again unsuccessful and the 1954 definition is therefore also implied into the 1961 Convention.⁴⁵³

⁴⁵⁰ *ibid.*

⁴⁵¹ Article 1 of the Final Act of the Convention Relating to the Status of Stateless Persons, UN, 1954; The deliberations of the full Conference appear in Summary Records (SR) 1-15, UN Doc. E/CONF.17/SR.3, 2; N. Robinson. 'Convention Relating to the Status of Stateless Persons: Its History and Interpretation' (Institute of Jewish Affairs, World Jewish Congress, 1955), 9.

⁴⁵² UN Doc. E/CONF.17/SR.10, 10; C. A. Batchelor. 'Stateless persons: some gaps in international protection' (1995) 7(2) International Journal of Refugee Law, 248; N. Robinson. 'Convention Relating to the Status of Stateless Persons: Its History and Interpretation' (Institute of Jewish Affairs, World Jewish Congress, 1955), 8.

⁴⁵³ The deliberations of the full Conference can be found in UN Doc. A/CONF.9/11, 4; C. A. Batchelor. 'Stateless persons: some gaps in international protection' (1995) 7(2) International Journal of Refugee Law, 251.

This brief overview has shown that the drafters of the 1954 Convention were aware of the possibility of a protection gap and decided against the possibility to extend the definition to close the gap. Even though the precarious situation of small island states could not possibly have been foreseen in 1954, the drafters clearly showed that at that time they were not willing to extend protection to every person in need of international protection but intended to limit it to the *de jure* stateless and refugees. However, looking at the plain wording of the statelessness definition and the situation of small island citizens, the possibility exists, as explained above, to read it in a way that would include this group of displaced persons.

Before going into the discussion whether the two statelessness conventions should be amended or re-opened, it is sensible to first take a look at their effectiveness as protection frameworks and at the rights and benefits these instruments confer upon those who qualify as stateless persons.

2. Effectiveness of Statelessness Conventions

First of all, both instruments did not attract very high number of ratifications and so while the Refugee Convention had 76 state parties by 1980, the 1954 and the 1961 Conventions had just 31 and 9 respectively.⁴⁵⁴ Still today the 1954 Convention has only 65 parties and the 1961 Convention only 37, limiting their geographical scope and overall

⁴⁵⁴ L. van Waas, '*Nationality matters: statelessness under international law*', 2008, 17.

effectiveness.⁴⁵⁵ Even though this Convention has succeeded in attracting more signatories than its 1961 counterpart, is it still far below the level of acceptance of the 1951 Refugee Convention with 144 accessions – a striking fact given the shared history of these instruments.⁴⁵⁶ In addition, half of the state parties have exercised their right to submit either a declaration or reservation upon their accession to the 1954 Convention.⁴⁵⁷

Laura van Waas, who has conducted a detailed study on the statelessness conventions, noted that even though the 1954 Convention was mirrored on the Refugee Convention, modifications were made to the rights and guarantees offered, which had a strong detrimental impact on its effectiveness.⁴⁵⁸ A number of rights had even been deleted completely, such as the provision on non-punishment for unlawful entry. She also noted that a number of rights had been qualified for the protection of ‘public order’ and ‘national security’ and that the majority of rights did not apply to all stateless persons under the convention but only to a subset, such as only those lawfully present or lawfully resident.⁴⁵⁹ Only a handful of provisions contain absolute rights and guarantees, such as the right of access to courts and the articles dealing with stateless with ‘special needs’.⁴⁶⁰

In relation to the enforcement of the 1954 Convention, it is important to note that no enforcement or supervisory mechanism exists, as opposed to the Refugee Convention, which charged UNHCR with the role of overseeing the convention’s implementation and

⁴⁵⁵ See: Official Website of the UN Treaty Collection. Available at: <http://treaties.un.org/pages/Treaties.aspx?id=5&subid=A&lang=en> (accessed 20 December 2011).

⁴⁵⁶ L. van Waas, ‘*Nationality matters: statelessness under international law*’, 2008, 232.

⁴⁵⁷ *ibid.*

⁴⁵⁸ *ibid.* at 390.

⁴⁵⁹ *ibid.* at 391.

⁴⁶⁰ See: Article 16(1) and 27 of the 1954 Convention relating to the Status of Stateless Persons; L. van Waas, ‘*Nationality matters: statelessness under international law*’, 2008, 391.

puts a duty on state parties to cooperate fully with the UNHCR.⁴⁶¹ Furthermore, even though both conventions allow for disputes to be brought to the ICJ for settlement, this option has never been utilised under either convention.⁴⁶² Finally, Van Waas remarks that “since its adoption in 1954, the Convention has been largely outmanoeuvred by the developments in the human rights field” and is little more today than a “reaffirmation that the stateless enjoy various rights that are elaborated elsewhere and to which states have therefore already committed”.⁴⁶³

In respect to the 1961 Convention it has to first be pointed out that the convention failed to provide a positive duty to bestow nationality where statelessness threatens. It focuses specifically on the *technical* causes of statelessness and as Van Waas points out, “gives careful instructions on how to deal with every situation where statelessness threatens from a conflict of laws or similar technicality, both at birth and later in life”.⁴⁶⁴ The particularity of the instrument lies in the fact that it does not only determine what must be done but also instructs on how exactly this can be achieved and is therefore unusually detailed compared to the usually more vaguely phrased international treaties.⁴⁶⁵

Van Waas however notes that the large number of qualifications and exceptions again dampen the effectiveness of some of the provisions and that therefore the convention “lives up to its name” as it “will only ever achieve a *reduction* of statelessness” but not

⁴⁶¹ *ibid.* at 233; See: 1951 Refugee Convention, Article 35.

⁴⁶² *ibid.* at 232.

⁴⁶³ *ibid.* at 394.

⁴⁶⁴ *ibid.* at 194.

⁴⁶⁵ *ibid.*

more.⁴⁶⁶ In addition, since the adoption of the 1961 Convention new causes of statelessness have been indentified, which the convention has not foreseen and does not cover, such as issues surrounding irregular migrants and victims of human trafficking. Overall Van Waas feels that the weaknesses of the convention outweigh its strengths but that nevertheless, the 1961 Convention is the “only *universal* instrument on offer that provides clear and detailed obligations with the view to reducing the incidence of statelessness in the future”.⁴⁶⁷

This analysis of the two statelessness treaties has shown that even though they succeeded in putting ‘statelessness’ on the map of international law, their relevance and effectiveness is limited by inherent flaws within the conventions and the fact that these instruments have been so poorly ratified. The rights and guarantees outlined in the 1954 Convention are long part of other international human rights instruments⁴⁶⁸, all of them with larger numbers of signatories, and do not add significantly to the existing protection frameworks under international law. The 1961 Convention is not equipped to deal with unforeseen causes of statelessness due to its highly technical and specific character and is therefore unable to provide a remedy in the case of statelessness due to disappearing islands. Consequently, the two UN statelessness treaties would not add any significant protection for citizens of sinking islands. The questions whether the disappearance of

⁴⁶⁶ *ibid.* at 195.

⁴⁶⁷ *ibid.* This view is echoed by Weis in: P. Weis. ‘The United Nations Convention on the Reduction of Statelessness, 1961’ (1962) 11(04) *International and Comparative Law Quarterly*, 1089.

⁴⁶⁸ Such as: ICCPR (covers many rights granted by the 1954 Convention in Chapters I (general provisions), II (juridical status), V(administrative measures), ICESCR (covers many rights in Chapters III (employment) and IV(welfare)), Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (covers rights in regard to employment of irregular migrants), CEDAW (in regard to non-discrimination rights).

island states will therefore lead to *de jure* or *de fact* statelessness is no longer relevant when looking at the flaws of the statelessness Conventions. On the contrary, the status of ‘statelessness’ would not bring any protection benefits or solutions for citizens of small island states and should therefore be avoided.

C. Conclusion

It has been often quoted that the substance of a nationality is “the right to have rights”.⁴⁶⁹ The stateless person is an anomaly from the point of view of international law and has even been termed a *res nullius*, a thing, which in the eyes of international law is without legal existence.⁴⁷⁰ Even though these quotes stem from a time when the significance of the nation state was far more pronounced than today, it still reflects the importance attached to ‘citizenship’ and ‘nationality’ when it comes to the enjoyment of various rights.⁴⁷¹ Even with the development of human rights norms and progressive advancement of the concept of ‘humanity’ over ‘nationality’, it still is the case that the main link between individuals and their rights, duties and benefits of both national and international law is their nationality.⁴⁷² Establishing and preserving an individual’s right to nationality is therefore a necessary prerequisite for the expansion and enforcement of all other human rights.⁴⁷³ Without nationality no country will feel responsible for

⁴⁶⁹ H. Arendt, ‘*The Origins of Totalitarianism*’, 1967, 296.

⁴⁷⁰ P. Weis. ‘The United Nations Convention on the Reduction of Statelessness, 1961’ (1962) 11(04) *International and Comparative Law Quarterly*, 1073.

⁴⁷¹ L. van Waas, ‘*Nationality matters: statelessness under international law*’, 2008, 389.

⁴⁷² S. Oliver. ‘A New Challenge to International Law: The Disappearance of the Entire Territory of a State’ (2009) 16(2) *International Journal on Minority and Group Rights*, 216.

⁴⁷³ B. Frelick and M. Lynch. ‘Statelessness: a forgotten human rights crisis’ (2005) 24 *Forced Migration Review*, 65.

protecting the rights of a person when they are under threat and in practice stateless people are often discriminated against, especially in relation to labour rights, property rights and freedom of movement.⁴⁷⁴ The UN Special Rapporteur on the Rights of Non-citizens David Weissbrodt stated in his final report in 2003 that there is a “large gap between the rights that international human rights laws guarantee to non-citizens and the realities they must face”.⁴⁷⁵ He added that the situation is in fact worsening with the increased fears of terrorism in the world and that several countries have started detaining non-citizen or have in other ways discriminated against them under the label of fighting terrorism.⁴⁷⁶ The mandate of the Special Rapporteur was not renewed when it expired in April 2004 instead of creating a more active and monitoring role, which is another sign of how little attention the international community pays to the situation of non-citizen and stateless people.⁴⁷⁷

In relation to *de facto* unprotected persons who lack the protection of their home state the international attention is focused on refugees and the protection framework outlined in the 1951 Refugee Convention. The status that comes with being a ‘convention refugee’ brings significantly more protection benefits than the status of a ‘stateless person’ and provides an effective remedy for persons in need of international protection, as long as they fit within the refugee definition outlined in the Refugee Convention. The state parties to the convention have overwhelmingly adopted the Refugee Convention into their domestic asylum laws and created administrative procedures and institutions to

⁴⁷⁴ *ibid.*

⁴⁷⁵ D. Weissbrodt, ‘Final report on the rights of non-citizens’, UN Doc. E/CN.4/Sub.2/2003/23 (2003).

⁴⁷⁶ *ibid.*

⁴⁷⁷ B. Frelick and M. Lynch. ‘Statelessness: a forgotten human rights crisis’ (2005) 24 Forced Migration Review, 66.

implement their duties under the Convention. This has not happened in respect to the statelessness conventions and the effectiveness of the protection offered under those conventions is miles away from the protection framework of the Refugee Convention.

In simple terms, effective protection is therefore either linked to the status of ‘convention refugee’ or to nationality and as small island citizen cannot fall within the refugee protection framework, it is imperative to prevent them from finding themselves without effective nationality. Scientific predictions confirm that the islands will disappear before the end of the century and in order to protect these people ways must be found to either preserve their nationality or enable them to acquire a new nationality.

There are a number of possible ways to prevent the loss of nationality, which will have to be researched further. One possibility would be the relocation of the island populations and their governments to another state. According to McAdam, “nothing in international law would prevent the reconstitution of a state such as Kiribati or Tuvalu within an existing state, such as Australia” although she notes that the political likelihood of this seems remote.⁴⁷⁸ The idea of ‘government in exile’ is also worth exploring in order to enable small island states to maintain capable of effectively govern their people after they have to leave their islands. The uninhabitable islands and their maritime resources would remain under the control of the original governments and would provide economic viability for these states. Depending on the arrangements with the host countries, the island nations could remain fully autonomous or integrate with their new communities on

⁴⁷⁸ J. McAdam. ‘Disappearing States’, *Statelessness and the Boundaries of International Law* (2010) 2 University of New South Wales Faculty of Law Research Series, 16.

some level. Under this scenario other countries would be likely to continue recognizing the island states as full member of international community. One possibility of such integration would be a kind of self-governance in free association with another state, which is already a well-established model in the Pacific, as the relationship between the Cook Islands and Niue with New Zealand shows.⁴⁷⁹ The rationale behind this model is to enable states that are too small to stand on their own, both economically and politically, to be able to govern their territory according to their customs and traditions without interference, while external functions such as ‘defence’ are carried out by the other state.⁴⁸⁰

Should island states not find a host country willing to resettle them as a community and willing to support their efforts to maintain a remote government, island citizen would have to resettle under a refugee-like scheme, being distributed to countries willing to take in certain quota of displaced persons. Under this less ideal scenario it would be very difficult for a government to effectively govern and protect its scattered people, especially once those resettled start to acquire the nationality of their host country. In this scenario, the island states would one by one cease to exist and their unique cultures and heritage would be lost.

Finally, the possibility might exist for disappeared islands to remain sovereign entities but to lose their statehood.⁴⁸¹ According to Maas and Carius, there is a precedent for a sovereign entity without territory, namely the Sovereign Order of the Military Hospitaller

⁴⁷⁹ *ibid.* at 20.

⁴⁸⁰ *ibid.*

⁴⁸¹ *ibid.* at 10.

Order of St John of Jerusalem, of Rhodes and of Malta (SMOM), known as the Sovereign Order of Malta. While the SMOM lost its territory in Malta in 1798 it still maintains bilateral relations with 104 countries and continues to issue passports.⁴⁸² As a sovereign subject of international law, the SMOM has a standing invitation to the UN General Assembly although it is not considered a to be a member state, nor a non-member, such as the Holy Sea, nor an international organization, such as the IOM.⁴⁸³

This chapter has shown that ‘statelessness’ has to be avoided by small island state citizens at all costs. As this is a slow-onset crisis there is however enough time to find solutions for the sinking islands, if the necessary political will exists. A number of possible ways forward were mentioned in the last paragraph; however, all of those require the cooperation of other states and the willingness to share territory and resources with this group of environmentally displaced people. Furthermore, those only address the issue of loss of nationality but do not provide solutions for the overarching problem – the environmental displacement of entire nations without an effective protection framework in place. While it will be important for small island states to ensure that their citizens do not fall into statelessness, the solutions discussed in this chapter only address a symptom and not the underlying cause.

⁴⁸² *ibid.* at 9.

⁴⁸³ *ibid.*

CHAPTER 7: Conclusion: Where Do we Go from Here?

It is both shocking and surprising to realize that the conclusion of this analysis is such a disheartening one. None of the international legal frameworks considered here can provide the necessary protection for sinking small island states and their citizens, at least in their current form.

The question is therefore now: where do we go from here, what is the next step? Should the attention of the international community focus on reforming existing legal frameworks such as the Refugee Convention or the non-refoulement principle to include displaced small island citizen? Or should there be a joint effort to draft a new international convention for the protection of environmentally displaced persons?

Looking at the possibility of amending the refugee definition in order to include EDPs, it is politically highly unlikely that the state parties would agree to a broader definition and open their borders to unpredictable numbers of refugees. In a climate of increasing protectionism and a world still recovering from the worst financial crisis since the Great Depression states are reluctant to share their finite resources. UNHCR is currently looking after 16 million refugees and 26 million IDPs⁴⁸⁴ and estimates of EDPs rank

⁴⁸⁴ UNHCR has traditionally argued that it does not have a general competence for IDPs but in cases where there is a specific request by the UN Secretary General and with the consent of the State concerned it has been willing to respond by assisting IDPs. In 2005, UNHCR signed an agreement with other humanitarian agencies, regarding the Cluster Approach. Under this agreement, UNHCR will assume the lead responsibility for protection, emergency shelter and camp management for internally displaced people in cooperation with the IOM. In 2008, the number of IDPs supported by UNHCR was 14.4 million, compared to 10.5 million refugees; See: Erika Feller, 'UNHCR's role in IDP protection: opportunities and challenges', December 2006, FMR Special Issue: 'Putting IDPs on the map: achievements & challenges', 11. Available at: <http://www.fmreview.org/brookings.htm> (accessed 20 December 2011).

between 25 million to 200 million people by 2050.⁴⁸⁵

Human rights treaties were created long before the threats of climate change were common knowledge but there is a trend towards more environmental awareness and it spills over into the realm of human rights. While the right to a clean environment is not yet codified in an international treaty, there is significant movement towards such recognition in the near future. Renewable energies and bio fuels are drawing attention of governments and researchers alike and momentum is building to tackle greenhouse emissions and stop climate change. While this is a promising trend, small island states need action right this moment and they need the world to cut their greenhouse emissions significantly by 2015 in order to halt and reverse the negative effects on their islands.⁴⁸⁶ Any development within the realm of human rights or environmental law will take more time than these island states have.

While the principle of non-refoulement is a potent safeguard against returning people into situations of harm, it is also a measure of last resort invoked by people feeling immediate threats to their lives emanating from their home countries. Seeing as this is a slow moving crisis, the emphasis should be on a planned movement instead of a desperate flight. The international community has to act before the situation on these islands becomes life threatening and a recourse to expanding the non-refoulement principle therefore seems not the ideal option.

⁴⁸⁵ William Lacy Swing, Director General of the International Organization for Migration, in a speech at the UNU Panel Discussion 'Insure me: Climate Change, Human Migration and Risk', 24 September 2009, New York.

⁴⁸⁶ AOSIS Climate Change Declaration 2009. Available at: <http://www.sidsnet.org/aosis/summit2009.html> (accessed 20 December 2011).

Finally the issue of statelessness has been explored in detail and the last chapter has explained why it has to be avoided at any costs that small island citizen end up without citizenship. Beyond that, this international legal precedent might however prove to be an opportunity to revisit our current understanding of citizenship and the nature of the nation state. Globalization has moved countries close together, allowed for the movement of goods, people and capital and has blurred the lines between countries. The understanding of states as territorial entities is furthermore an idea, which is challenged by the increasing interconnectedness of countries, taking for example the Schengen Agreement in Europe. While this is an intriguing area for further research, it will not help sinking island states within the foreseeable future.

The proposal for a convention for climate change ‘refugees’ or some other form of refugee-like protection status for EDPs has been floated by a variety of actors. Biermann and Boas suggested an UNFCCC Protocol on the Recognition, Protection, and Resettlement of Climate Refugees.⁴⁸⁷ A group of legal scholars from the University of Limoges published a Draft Convention on the International Status of Environmentally-Displaced Persons.⁴⁸⁸ Docherty and Giannini proposed an ‘independent’ or ‘stand-alone’ convention defining ‘climate change refugee’ and containing ‘guarantees of assistance, shared responsibility, and administration’.⁴⁸⁹ There is variation among these proposals as

⁴⁸⁷ F. Biermann and I. Boas, ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees’, Global Governance Working Paper No. 33 (Nov. 2007), subsequently published as (2010) 10 *Global Environmental Politics* 60.

⁴⁸⁸ Draft Convention on the International Status of Environmentally-Displaced Persons (CRIDEAU and CRDP, Faculty of Law and Economic Science, University of Limoges) (2008) 4 *Revue Européenne de Droit de l’Environnement* 375.

⁴⁸⁹ B. Docherty and T. Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ (2009) 33 *Harvard Environmental Law Review* 349, 350, 373.

to how the displaced are defined, whether they would be subject to individual status determination (like Convention refugees),⁴⁹⁰ or whether protection would be extended *prima facie* on account of the objective country of origin conditions from which people flee.⁴⁹¹

However, the creation of such a treaty would require a significant amount of resources, political capital and determination on the side of the international community. Before launching into this endeavor the question should be asked whether this is the best way forward for the protection of EDPs in general and specifically small island state citizens.

Jane McAdam points out that her field work conducted on small island states such as Kiribati and Tuvalu in particular highlights that a *universal* treaty may be inappropriate in addressing the concerns of these particular communities.⁴⁹² The specific response to the threats of climate change differ from country to country because of their particular geographical, demographic, cultural and political circumstances, and it may be that localized or regional responses are better able to respond to their needs.⁴⁹³ The best way forward therefore seems to be to actually ask the governments and citizen of small island states what they want and what solutions prove would be most welcome.

⁴⁹⁰ Draft Convention on the International Status of Environmentally-Displaced Persons (CRIDEAU and CRDP, Faculty of Law and Economic Science, University of Limoges) (2008) 4 *Revue Européenne de Droit de l'Environnement* 375.

⁴⁹¹ F. Biermann and I. Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees', *Global Governance Working Paper No. 33* (Nov. 2007), subsequently published as (2010) 10 *Global Environmental Politics* 60; Docherty and T. Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *Harvard Environmental Law Review* 349.

⁴⁹² J. McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' (2011) 23(1) *International Journal of Refugee Law* 2, 4.

⁴⁹³ *ibid.*

Interviews conducted by Jane McAdam with government officials of Kiribati suggest that the preferred solution is that of staggered migration or the promise of a place to migrate to should it become necessary.⁴⁹⁴ Tessie Lambourne, Kiribati's foreign secretary, said in a newspaper interview: “We are proud people. We would like to relocate on merit and with dignity” and she added that islanders were already taking advantage of assistance programs in Australia and New Zealand to train young people as nurses and other in-demand professions to allow the creation of Kiribati communities abroad.⁴⁹⁵

Jane McAdam has the valid concern that “if a treaty becomes the *main* focus of international policy development, attention may shift from the more immediate, alternative and additional responses that may enable people to remain in their homes for as long as possible (which is the predominant wish among affected communities), or to move safely within their own countries, or to migrate in a planned manner over time.”⁴⁹⁶ States might end up reducing their efforts to halt climate change and curb their greenhouse gas emissions, thinking that addressing the symptom makes it unnecessary to address the cause as well.

In addition, any such treaty would have to cover all EDPs in order to gain the necessary support and momentum and as pointed out above, the needs and responses of small island states are very different from other countries such as Bangladesh due to their

⁴⁹⁴ *ibid.*

⁴⁹⁵ AlterNet, ‘Kiribati officials plan for ‘practical and rational’ exodus from atolls’, 9 December 2009. Available at: (<http://www.trust.org/alertnet/news/kiribati-officials-plan-for-practical-and-rational-exodus-from-atolls>) (accessed 20 December 2011).

⁴⁹⁶ J. McAdam. ‘Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer’ (2011) 23(1) *International Journal of Refugee Law* 2, 5.

geographical particularities. Regional agreements and initiatives might prove much more effective in protecting citizens of sinking islands and would be flexible enough to take the individual needs of the different island nations into account.

This thesis therefore proposes that the way forward for the protection of small island states citizens lies in regional agreements aimed at gradual and dignified migration and the preservation of island communities and culture within the host countries. This will require a dialogue between potential host countries and island nations and a general willingness on both sides to cooperate and find the best solution for everyone involved. Human migration has throughout our history been a normal part of adapting to change and escaping danger and will continue to be just that. However, advanced planning and cooperation is crucial in order to prevent unnecessary hardship and uncertainty for island citizens and this process will need to start within the very near future.

BIBLIOGRAPHY

Legal Instruments

1969 American Convention on Human Rights.

1984 Cartagena Declaration on Refugees.

1979 Convention on the Elimination of all Forms of Discrimination against Women.

1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

1948 Convention on the Prevention and Punishment of the Crime of Genocide.

1989 Convention on the Right of the Child.

2006 Convention on the Rights of Persons with Disabilities.

1954 Convention Relating to the Status of Stateless Persons.

1961 Convention on the Reduction of Statelessness.

1951 Geneva Convention Relating to the Status of Refugees.

1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

1966 International Covenant on Civil and Political Rights.

1966 International Covenant on Economic, Social and Cultural Rights.

2006 International Convention for the Protection of All Persons from Enforced Disappearance.

1933 Montevideo Convention on the Rights and Duties of States.

1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.

1967 Protocol on the Status of Refugees.

1948 Universal Declaration of Human Rights.

Cases

A v. Secretary of State for the Home Department [2005] 2 AC 68, [2004] UKHL 56.

Abdulaziz v. United Kingdom (1985) 7 EHRR 471.

Adan v. Secretary of State for the Home Department, [1998] H.L.J. No. 15.

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

Amayo v. Canada (Minister of Employment & Immigration) [1982] 1 F.C. 520 (C.A.).

Applicant A v. Minister for Immigration and Ethnic Affairs and another (1997) 190 CLR, 263.

Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 ICJR EP.5 3.

ARJ v. Australia Comm. No. 692/1996 (11 August 1997).

Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3.

Arriga-Berrientos v U.S. I.N.S., 925 F.2d 1177, 1180 (9th Circuit 1991) (US).

Avena and Other Mexican Nationals (Mex. v. U.S.) (2004), 43 ILM 581.

Baballah v Ashcroft, 367 F.3d 1067, 1074 (9th Circuit 2004) (US).

Bensaid v. United Kingdom (2001) 33 EHRR 205.

BVerfG E8 80, 315 (1989).

BverfG, 2 BvR 260/98, 10 August 2000.

BVerwG (9th Senate) 15 March 1088, 9C 178.86.

C v. Australia (2002) Comm. No. 900/1999.

Chahal v. United Kingdom (1996) 23 EHRR 413.

Chan v. Minister for Immigration and Ethnic Affairs (1989), 169 C.L.R. 379 (Australia).

Cheung v. Canada (Minister of Employment and Immigration), [1993] 2 F.C. 314.

Corfu Channel case (UK v Albania) 1949 ICJ 4, 22.

D v. United Kingdom (1997) 24 EHRR 423.

Devaseelan v. Secretary of State for the Home Department [2003] Imm. AR. 1

East African Asians (1973) 3 EHRR 76.

EM (Lebanon) v. Secretary of State for the Home Department [2009] 1 All ER 559 (HL).

Eletronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 ICJR EP.1 5.

Gabcikovo-Nagymaros Project (Hungary v Slovakia) 1997 ICJ 92.

Greek case, 5 November 1969, 12 Yearbook.

The Haitian Centre for Human Rights v. United States (1997) Report No 51/96, IACHR 550

Hajrizi Dzemajl v. Yugoslavia, Comm. No. 161/2000, 21 Nov. 2002.

Horvath v. Secretary of State for the Home Department [2000] H.L.J. No. 38 (UK).

Immigration Appeal Tribunal and Secretary of State for the Home Department, Ex parte Shah [1997] Imm.A.R. 145 (UK).

Ireland v. United Kingdom (1979) 2 EHRR 2.

Judge v. Canada Comm. No. 829/1998, 5 August 2003.

Kasikili/Sedudu Island (Bots./Namib.), 1999 ICJR EP. 1045.

Keenan v. the United Kingdom (2001) 33 EHRR 38.

Khawar v Minister for Immigration and Multicultural Affairs (1999) 168 ALR 190

Kindler v. Canada (1993) Comm. No. 470/1991.

Land, Island and Maritime Frontier Disput (El Sal./Hond.: Nicar. Intervening), 1992
ICJR EP.3 51.

Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.) ICJ
(2002).

La Grand (Ger. v. U.S.), 40 ILM 1069 (2001).

Matter of Acosta, A-24159781, United States Board of Immigration Appeals, 1 March
1985.

Matter of Kasinga, 21 I. & N. Dec. 357 (AG, 1994) (US).

Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.),
1993 ICJ REP. 38.

Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v.
Bahr.), Merits, 40 ILM 847 (2001).

Maya Indigenous Communities of the Toledo District (Belize Maya) Case 12.053 Inter
American Commission on Human Rights (2004).

Miranda v. Canada (1995), 91 F.T.R. 256.

N v. United Kingdom (2008) 47 EHRR 42.

N v. Secretary of State for the Home Department [2005] UKHL 31.

North Sea Continental Shelf (1969) ICJ Rep., 3.

Obertz Belfond (1975), 10 I.A.C. 208.

Osman v. United Kingdom, [1998] EHRR 101.

Ovakimoglu v. Canada (Minister of Employment & Immigration) (1983), 52 N.R. 67
(Fed. C.A.)

Oyarzo v. Canada (Minister of Employment & Immigration) [1982] 2 F.C. 779 (C.A.).

Pretty v. United Kingdom (2002) 35 EHRR 1.

Pedro-Mateo v I.N.S., 224 F.3d 1147, 1151 (9th Circuit 2000) (US).

Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ, 2010.

Questions concerning the Acquisition of Polish Nationality (Advisory Opinion) PCIJ Series B No 7 (1923).

R (on the application of (Kalombo) v. Secretary of State for the Home Department, [2008] EWHC 2249 (UK).

R v. Special Adjudicator, ex p Ullah [2004] UKHL 26 [1].

Refugee Appeal No. 71427/99, 16 August 2000 (NZ).

Sanchez-Trujillo v I.N.S., 801 F.2d 1571 (9th Circuit 1986) (US).

Salkic v. Sweden, Application No. 7702/04 (29 June 2004).

Selcuk v Turkey, Application No. 23184/94 (24 April 1994).

Selmouni v France (1999) 29 EHRR 403.

Soering v. United Kingdom (1989) 11 EHRR 439.

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.) IRC (2002).

Tatete v Switzerland, Application No. 41874/98 (6 July 2000).

Tekin v. Turkey, ECHR 1998-IV.

Territorial Dispute (Libya/Chad), 1994 ICJ REP.6.

Timothy Veysey v. Commissioner of the Correctional Service of Canada (1989), 29 F.T.R. 74 (T.D).

Trail Smelter Arbitration: United States v Canada (1931-1941) 3 UNRIAA, vol. III, 1941.

Trop v. Dulles, Sectreatry of State et. al., 356 US 86, 1958.

Valašinas v. Lithuania 44558/98, 24.7.2001, ECHR 2001-VIII.

VG Ansbach (19th Division) 18 March 1992, AN 19 K 91.39868. (Germany).

VG Minden I K 231 / 02 . A, 11.02.2003.

Ward v. Canada (Minister of Employment & Immigration) [1993] 2 S.C.R. 689.

Yanomami case, 1984–85, OEA/Ser.L/V/II.66, doc 10 rev.1.

Z and T v. United Kingdom Application No 27034/05, 28 February 2006.

Zalzali v. Canada (Minister of Employment & Immigration) [1991] 3 F.C. 614.

ZT v. Secretary of State for the Home Department [2005] 2 AC 296 (HL).

Journal Articles and Research Papers

Allain, J., 'The Jus Cogens Nature of Non-Refoulement' (2001) 13(4) International
Journal of Refugee Law, 533.

Anker, D. E., 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 Harvard
Human Rights Journal 133.

Bank, L., and Southall, R., 'Traditional Leaders in South Africa's New Democracy', 37 &
38 J. Legal Pluralism & Unofficial L., 1996, 412.

Barnett, J., 'Adapting to Climate Change in Pacific Island Countries: The Problem of
Uncertainty', 2001, World Development, Vol. 29, Number 6, 978.

Batchelor, C. A., 'Stateless persons: some gaps in international protection' (1995) 7(2)
International Journal of Refugee Law 232.

Biermann, F. and Boas, I., 'Preparing for a Warmer World: Towards a Global
Governance System to Protect Climate Refugees', Global Governance Working

Paper No. 33 (Nov. 2007), subsequently published as (2010) 10 *Global Environmental Politics* 60.

Black, R., 'Environmental refugees: myth or reality?', 2001, Geneva, UNHCR.

M. Bradley and R. Cohen, 'Disasters and Displacement: Gaps in Protection' (2010) 1, *Journal of International Humanitarian Legal Studies*, 10.

Caron, D. D., 'When law makes climate change worse: Rethinking the law of baselines in light of a rising sea level' (1990) 17(4) *Ecol Law Q* 621.

Castles, S., 'Environmental change and forced migration: making sense of the debate', 2002, Geneva, UNHCR.

Cassese, A., 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?' (1991) 2(1) *European Journal of International Law*, 141.

Cohen, R. and Bradley, M., 'Disasters and Displacement: Gaps in Protection' (2010) 1, *Journal of International Humanitarian Legal Studies*, 1.

Coleman, N., 'Non-Refoulement Revised-Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 *Eur.J.Migration & L.* 23.

Cooper, J., 'Environmental Refugees: Meeting the Requirements of the Refugee Definition', 1998, *New York University Environmental Law Journal* 6, 522.

CRIDEAU and CRDP, Faculty of Law and Economic Science, University of Limoges, 'Draft Convention on the International Status of Environmentally-Displaced Persons' (2008) 4 *Revue Européenne de Droit de l'Environnement*.

- De Moor, N. and Cliquet, A., 'Environmental Displacement: A New Challenge for European Migration Policy' (2009) Proceedings Protecting People in Conflict and Crisis: Responding to the Challenges of a Changing World.
- De Moor, N. and Cliquet, A., 'Environmental Displacement: A New Security Risk for Europe?' International Conference on 'Security Insecurity and Migration in Europe', 2009, 13.
- De Wet, E., 'The Prohibition of Torture as an International Norm of jus cogens and its Implications for National and Customary Law' (2004) 15(1) European Journal of International Law, 97.
- Docherty, B. and Giannini, T., 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 Harvard Environmental Law Review 349.
- Duffy, A., 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20(3) International Journal of Refugee Law, 373.
- Feller, E., 'UNHCR's role in IDP protection: opportunities and challenges', December 2006, FMR Special Issue: 'Putting IDPs on the map: achievements & challenges'.
- Foster, M., 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009)(2) New Zealand Law Review, 257.
- Franck, T. M. and Hoffman, P. 'The Right to Self-Determination in Very Small Places' (1975) 8 NYUJ Int'l L. & Pol. 331.
- Fraser, J., 'Review on Caselaw on Particular Social Groups From 1999 to 2005', 2005, Refugee Legal Project, Legal Services Agency Glasgow.

- Frelick, B. and M. Lynch, 'Statelessness: a forgotten human rights crisis' (2005) 24
Forced Migration Review 65–66.
- Goodwin-Gill, Guy S., 'The Language of Protection' (1989) 1 International Journal of
Refugee Law, 6.
- Grant, T. D., 'Defining statehood: The Montevideo Convention and its discontents'
(1998) 37 Columbia Journal of Transnational Law, 411.
- Hailbronner, K., 'Non-Refoulement and Humanitarian Refugees: Customary
International Law or Wishful Legal Thinking' (1985) 26 Virginia J Int Law, 857.
- Helton, A. C. and E. Jacobs, 'What is Forced Migration' (1998) 13 Georgetown
Immigration Law Journal 521.
- Helton, A. C., 'Persecution on Account of Membership in a Social Group as a Basis for
Refugee Status', 1983, 15 Columbia Human Rights Law Review, 39.
- Hyndman, J. and A. Mountz, 'Another Brick in the Wall? Neo-Refoulement and the
Externalization of Asylum by Australia and Europe¹' (2008) 43(2) Government and
Opposition 249.
- Hyndman, P., 'The 1951 Convention Definition of Refugee', 1987, 9 Human Rights
Quarterly 49.
- Keane, D., 'The environmental causes and consequences of migration: A search for the
meaning of 'environmental refugees'', 2004, Georgetown International
Environmental Law Review 16 (2), 213.
- Kelsen, H., 'The Pure Theory of Law and Analytical Jurisprudence' (1941-42) 55
Harvard Law Review 44.

- Kibreab, G., 'Environmental causes and impact of refugee movements: A critique of the current debate', 1997, *Disasters* 21 (1): 20–38.
- Lambert, H., 'The Conceptualisation of 'Persecution' by the House of Lords: *Horvath v. Secretary of State for the Home Department*' (2001) 13(1 and 2) *International Journal of Refugee Law*, 16.
- Lantrip, J., 'Torture and Cruel, Inhumane and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights' (1998) 5 *ILSA Journal of International and Comparative Law*, 551.
- Lopez, A., 'The Protection of Environmentally-Displaced Persons in International Law', 2007, 37 *Environmental Law*, 386.
- Loughry, M. and McAdam, J., 'Kiribati – Relocation and Adaptation', *Forced Migration Review*, 31, October 2008, 51.
- Maas, A. and A. Carius, 'Territorial Integrity and Sovereignty: Climate Change and Security in the Pacific and Beyond' .
- Mandal, R., 'Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")' (2002) UNHCR Department of International Protection, Legal and Protection Policy Research Series, PPLA/2005/02.
- McAdam, J., 'Complementary Protection and Beyond: How States Deal with Human Rights Protection', August 2005, Sydney Law School Research Paper No. 06/18; New Issues in Refugee Research Working Paper No. 118.
- McAdam, J., 'Climate Change 'Refugees' and International Law' (2008) *Journal of the NSW Bar Association* 27.

- McAdam, J., ‘“Disappearing States’, Statelessness and the Boundaries of International Law’ (2010) 2 University of New South Wales Faculty of Law Research Series, 16.
- McAdam, J., ‘Refusing ‘Refuge’ in the Pacific: (De) Constructing Climate-Induced Displacement in International Law’ (2010b) 27 University of New South Wales Faculty of Law Research Series.
- McAdam, J. ‘Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer’ (2011) 23(1) International Journal of Refugee Law 2.
- McAdam, J. and B. Saul, ‘An Insecure Climate for Human Security? Climate-induced Displacement and International Law’ (2008) Sydney Centre for International Law Working Paper 4.
- Moberg, K. K., ‘Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection’, 2009, 94 Iowa Law Review, 1132.
- Nurse, L. A. and others, ‘Small island states’ (2001) Climate Change 2001: Impacts, Adaptation, and Vulnerability 842.
- Oliver, S., ‘A New Challenge to International Law: The Disappearance of the Entire Territory of a State’ (2009) 16(2) International Journal on Minority and Group Rights 209.
- Paulson, C., ‘Compliance with Final Judgments of the International Court of Justice Since 1987’ (2004) 98(3), The American Journal of International Law, 436.
- Phuong, C., ‘Persecution by Non-State Agents: Comparative Judicial Interpretations of the 1951 Refugee Convention’ (2002) 4 Eur.J.Migration & L. 521.
- Rayfuse, R., ‘W (h)ither Tuvalu? International Law and Disappearing States’ (2009) 9 University of New South Wales Faculty of Law Research Series.

- Robinson, N., 'Convention Relating to the Status of Stateless Persons: Its History and Interpretation' (Institute of Jewish Affairs, World Jewish Congress, 1955).
- Romer, K., 'Environmental Refugees', May 2006, FMR 25, Refugees Studies Centre, Oxford.
- Simon, R. J. and J. P. Lynch, 'A comparative assessment of public opinion toward immigrants and immigration policies' (1999) 33(2) *International Migration Review* 455.
- Taran, P. A., 'Human rights of migrants: challenges of the new decade' (2001a) 38(6) *Int Migr* 7.
- Taylor, D., 'Small Island States Threatened by Sea Level Rise' in *Vital Signs*, 2003, Worldwatch Institute, 84.
- Walter, K. K., 'Environmental Refugees – Misnomer or Fact in the Case of Small Island States?', Undergraduate Dissertation, University of Aberdeen, April 2010, unpublished work.
- Webb, A. P. and P. S. Kench, 'The dynamic response of reef islands to sea-level rise: Evidence from multi-decadal analysis of island change in the Central Pacific' (2010) 72(3) *Global Planet Change* 234.
- Weis, P., 'The Convention Relating to the Status of Stateless Persons' (1961) 10(02) *International and Comparative Law Quarterly*, 255.
- Weis, P., 'The United Nations Convention on the Reduction of Statelessness, 1961' (1962) 11(04) *International and Comparative Law Quarterly*, 1073.

Zartner Falstrom, D., 'Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment', 2001, Colorado Journal of International Law and Policy 12 (1), 13.

Zetter, R., 'Protecting environmentally displaced people: Developing the Capacity of Normative and Legal Frameworks', Refugee Studies Centre Research Report (2011), Refugees Studies Centre.

Books and Treaty Body Publications

Arendt, H., *'The Origins of Totalitarianism'* (San Diego: Harcourt, Brace 1967).

Crawford, J., *'The creation of states in international law'* (2nd edn Clarendon Press; Oxford University Press, Oxford; New York 2006).

Committee on Economic, Social and Cultural Rights, 'General Comment No. 15 – Right to Water', E/C.12/2002/11, 2002.

Dahm, G., Delbrück, J. and Wolfrum, R., *Völkerrecht, Bd. I/1, 2* (1989) Auflage, Berlin.

Executive Committee (UNHCR) Conclusion No 56 (XL) 'Durable Solutions and Refugee Protection' (1989).

Executive Committee (UNHCR) Conclusion No 74 (XLV) 'General Conclusion on International Protection' (1994).

Executive Committee (UNHCR) Conclusion No 103 (LVI) 'The Provision of International Protection including through Complementary Protection' (2005).

M. Foster, *'International refugee law and socio-economic rights: Refuge from deprivation'*, (First edn Cambridge University Press, New York, 2007).

Goodwin-Gill, Guy S. and Jane McAdam, *The refugee in international law* (3rd edn Oxford University Press, Oxford ; Toronto 2007).

Grahl-Masden, A., ‘*The Status of Refugees in International Law*’, (Leyden, A. W. Sijthoff, 1966), Volume 1.

Hathaway, J. C., ‘*The rights of refugees under international law*’ (Cambridge Univ Pr, 2005).

Human Rights and Equal Opportunity Commission (HREOC) Australia, ‘Background Paper: Human Rights and Climate Change’, 2008.

Human Rights Committee, ‘General Comment No. 6 – The Right to Life’, 30 April 1982.

Human Rights Committee, ‘General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)’ (1992), HRI/HEN/1/Rev.1.

Human Rights Committee, ‘General Comment No. 24: General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant’ (52) (1994), CCPR/C/21/Rev.1/Add.6.

Human Rights Committee, ‘General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

House of Lords/House of Commons Joint Committee in Human Rights. *The Treatment of Asylum Seekers*, Tenth Report of Session 2006/07, HL Paper 81-2 (30 March 2007).

IPCC, “Climate Change 2001: The Scientific Basis”, 2001, Cambridge Press.

- IPCC, 'Climate Change 2007: The Physical Science Basis', 2007, Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, New York.
- IPCC, 'The Regional Impacts of Climate Change: An Assessment of Vulnerability', 1998, Cambridge Press.
- Lauterpacht, E. and D. Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion' in Feller, E., V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR Global Consultations on International Protection* (Cambridge University Press, 2003).
- Loescher, G., *Beyond charity: International cooperation and the global refugee crisis* (Oxford University Press, USA, 1996).
- McAdam, J., *Complementary Protection in International Refugee Law* (Oxford University Press, 2007).
- Ovey, C. and R. C. A. White, *Jacobs and White, The European Convention on Human Rights* (Oxford university press, 2002).
- Quoc Dinh, N., *Droit International Public* (3rd edn, LGDJ; Paris 1994).
- Report of the Ad hoc Committee on Statelessness and Related Problems, UN Doc. E/1618 and Corr. 1, 17 February 1950.
- Reidy, A., 'The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights', Human Rights Handbook No. 6, Council of Europe, 2002.
- Rosenne, S., *Practice and methods of international law* (Oceana Publications, 1984).

Sands, P., *Principles of international environmental law* (Cambridge University Press, 2003).

UNHCR, 'Submission: Climate Change and Statelessness: An Overview', to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action under the UN Framework Convention on Climate Change, 1 to 12 June 2009, Bonn, Germany.

UNHCR, *Note on International Protection*, 12 July 2006, A/AC.96/1024; UNGA Res. 36/148 on International Cooperation to Avert Flows of Refugees (1981).

UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, Geneva.

United Nations Department of Social Affairs, 'Study of Statelessness', E/1112, August 1949, New York.

Van Waas, L., *Nationality matters : statelessness under international law* (School of Human Rights Research series, Intersentia, Antwerp ; Portland 2008).

Waldmann, L., *The Definition of Convention Refugee* (Buttersworth: Markham, Ontario, 2001)

Weissbrodt, D., 'Final report on the rights of non-citizens', UN Doc. E/CN.4/Sub.2/2003/23 (2003).

Web-based Resources

Advisory Council of Jurists of the Asia Pacific Forum, 'Observations and Recommendations – Reference on the Right to Environment', 2007. Available at:

http://www.asiapacificforum.net/acj/references/right-toenvironment/downloads/environment/observations_recommendations.doc
(accessed 20 December 2011).

AlterNet, 'Kiribati officials plan for 'practical and rational' exodus from atolls', 9 December 2009. Available at: (<http://www.trust.org/alertnet/news/kiribati-officials-plan-for-practical-and-rational-exodus-from-atolls>) (accessed 20 December 2011).

AOSIS Climate Change Declaration 2009. Available at:
<http://www.sidsnet.org/aosis/summit2009.html> (accessed 20 December 2011).

Barkham, P., "Going Down", 16 February 2002, Guardian Online. Available at:
<http://www.guardian.co.uk/environment/2002/feb/16/weekendmagazine.globalwarming> (accessed 20 December 2011).

Columbia Law School – Human Rights Institute, 'Climate Change and the Right to Food', edited by the Heinrich Böll Foundation, 2009. Available at:
<http://www.boell.de/ecology/society/publications-7960.html> (accessed 20 December 2011).

BBC Online, "Maldives Cabinet Makes a Splash", 17 October 2009. Available at:
<http://news.bbc.co.uk/2/hi/8311838.stm> (accessed 20 December 2011).

BBC Online, 'Low-lying Pacific islands 'growing not sinking'', 3 June 2010. Available at: <http://www.bbc.co.uk/news/10222679> (accessed 20 December 2011).

BBC News Online, 'Plan for new Maldives Homeland', 1 November 2008. Available at:
http://news.bbc.co.uk/2/hi/south_asia/7719501.stm (accessed 20 December 2011).

Canadian Council for Refugees, 'Statement regarding arrival of Tamil refugee claimants by boat on West Coast', 17 August 2010. Available at:

<http://ccrweb.ca/en/bulletin/10/08/18> (accessed 20 December 2011).

Committee on Refugees and Stateless People, *Travaux Préparatoires of the 1951*

Conference of Plenipotentiaries, July 1951. Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/search%5C?page=&comid=3c07a8642&cid=49aea9390&scid=49aea9398> (accessed 20 December 2011).

Council of the European Union, 'Council 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', 2004/83/EC, 29 April 2004. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML> (accessed 20 December 2011).

Davies, K., 'A Clean Environment Needs to be a Universal Right', 3 December 2008,

The Progressive-Online. Available at:

<http://www.progressive.org/mp/davies120308.html> (accessed 20 December 2011).

Earthjustice, 'Global Warming and Human Rights: Testimony of Martin Wagner before the Inter-American Commission on Human Rights' (1 March 2007) 3. Available at <http://earthjustice.org/news/press/2007/global-warming-human-rights-gets-hearing-on-the-world-stage> (accessed 20 December 2011).

Executive Committee, General Conclusion on International Protection No. 25 (XXXIII), 20 October 1982. Available at: <http://www.unhcr.org/3ae68c434c.html> (accessed 20 December 2011).

FIELD, 'International Climate Change Litigation and Negotiation Process', October 2010, London. Available at: <http://www.field.org.uk/library/library> (accessed 20 December 2011).

FIELD, 'Summary – International Climate Change Litigation and Negotiation Process', October 2010, London, 4. Available at: <http://www.field.org.uk/library/library> (accessed 20 December 2011).

Guardian Online, 'Paradise almost lost: Maldives seek to buy a new homeland', 10 November 2008. Available at: <http://www.guardian.co.uk/environment/2008/nov/10/maldives-climate-change> (accessed 20 December 2011).

International Court of Justice, 'Advisory opinion on the accordane with international law of the unilateral declaration of independence in respect of Kosovo', 22 July 2010. Available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=5> (accessed 20 December 2011).

IOM, 'Conference on Effective Respect for the Human Rights of Migrants: A Shared Responsibility - Background Paper', 25-26 March 2009, Geneva. Available at: <http://www.iom.int/jahia/Jahia/policy-research/international-dialogue-migration/intersessional-workshops/effective-respect-human-rights-migrants-shared->

responsibility/cache/offonce;jsessionid=0448D1118FE9230598014D7504BE41B6.worker02 (accessed 20 December 2011).

IOM Website, 'Human Rights Instruments'. Available at:

<http://www.iom.ch/jahia/Jahia/about-migration/migration-management-foundations/rights-obligations-migrants/human-rights-instruments/cache/offonce/lang/en;jsessionid=1623037042C823538D2C4948CAC84094.worker02> (accessed 20 December 2011).

McGhee, D., 'Homosexuality and Refugee Status in the United Kingdom', 2001,

Sociological Research Online, vol. 6, no. 1, paragraph 4.1. Available at:

<http://www.socresonline.org.uk/6/1/mcghee.html> (accessed 20 December 2011).

National Geographic News, 'Climate Change Spurring Dengue Rise, Experts Say', 21

September 2007. Available at:

<http://news.nationalgeographic.com/news/2007/09/070921-dengue-warming.html> (accessed 20 December 2011).

Official Kiribati Climate Change Website. Available at:

http://www.climate.gov.ki/tarawa_climate_change_conference.html (accessed 20 December 2011).

Official Website of the Maldives Tourism Promotion Board. Available at:

<http://www.visitmaldives.com/en/the-maldives/location-and-geography> (accessed 20 December 2011).

Official Website of Tourism Vanuatu. Available at:

<http://www.tourismvanuatu.com/vanuatu-travel.html> (accessed 20 December 2011).

Official Website of Tuvalu. Available at: <http://www.tuvaluislands.com/warming.htm>
(accessed 20 December 2011).

Official Website of Vision of Humanity, 'Global Peace Index 2010' (ranking countries in respect of their level of democracy, transparency, government efficiency etc.).
Available at: <http://www.visionofhumanity.org/gpi-data/#/2010/scor> (accessed 20 December 2011).

Official Website of the UN Treaty Collection. Available at:
<http://treaties.un.org/pages/Treaties.aspx?id=5&subid=A&lang=en> (accessed 20 December 2011).

Press Release of the President's Office, "Maldives Pledges 100% Mitigation Target Under Copenhagen Accord", 31 January 2010. Available at:
<http://www.presidencymaldives.gov.mv/4/?ref=1,5,3291> (accessed 20 December 2011).

Pitman, A., 'Climate Change, Migration and Environmental Refugees', Lecture at the University of New South Wales (UNSW), May 23, 2008. Available at:
http://www.youtube.com/watch?v=n5CHtYR_Sik (accessed 20 December 2011).

President Nasheed's speech at the opening ceremony of the UN Climate Change Summit in New York, 22 September 2009. Available at:
<http://www.un.org/wcm/content/site/climatechange/lang/en/pages/2009summit/programme> (accessed 20 December 2011).

Ramesh, R., 'Paradise almost lost: Maldives seek to buy a new homeland', 10 November 2008, Guardian Online. Available at:

<http://www.guardian.co.uk/environment/2008/nov/10/maldives-climate-change>
(accessed 20 December 2011).

Secretariat of the Pacific Regional Environment Programme, 'Press Release: Pacific Island 'growing not sinking' report criticized', 4 June 2010. Available at:

http://www.sprep.org/article/news_detail.asp?id=780 (accessed 20 December 2011).

Solomon Star Online, 'Beck criticises Pacific Island 'growing not sinking' report', 8 June 2010. Available at: <http://www.solomonstarnews.com/news/national/6299-beck-criticises-pacific-island-growing-not-sinking-report-> (accessed 20 December 2011).

Time Online, 'Australia: Boat Arrivals of Asylum Seekers Rising', 18 September 2009. Available at: <http://www.time.com/time/world/article/0,8599,1924339,00.html>
(accessed 20 December 2011).

Toronto Sun, 'As many as 500 Tamils on boat headed for B.C.', 11 August 2010.

Available at: <http://www.torontosun.com/news/canada/2010/08/11/14990696.html>
(accessed 20 December 2011).

UN Commission on Human Rights, 'Draft Declaration of Principles on Human Rights and the Environment', UN Doc,E/CN.4/Sub.2/1994/9, 6 July 1994. Available at:

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/eeab2b6937bcca18025675c005779c3?Opendocument> (accessed 20 December 2011).

UN General Assembly, 'Resolution on the Human Right to Water and Sanitation',

A/RES/64/292, 28 July 2010. Available at: <http://daccess-ods.un.org/TMP/9280992.html> (accessed 20 December 2011).

UN Gateway to the UN System's Work on Climate Change, 'Quotes – Secretary-General'. Available at:

<http://www.un.org/wcm/content/site/climatechange/pages/gateway/secretary-general/quotes> (accessed 20 December 2011).

UN Permanent Forum on Indigenous Issues website, “Climate Change”. Available at:

http://www.un.org/esa/socdev/unpfii/en/climate_change.html (accessed 20 December 2011).

UN Special Rapporteur on the Human Rights of Migrants Website. Available at:

<http://www2.ohchr.org/english/issues/migration/rapporteur/> (accessed 20 December 2011).

UN website on the International Migrants Day. Available at:

<http://www.un.org/en/events/migrantsday/> (accessed 20 December 2011).

UNHCR, “Summary of Conclusions: Expert Meeting on the Concept of Stateless Persons under International Law”, 27-29 May 2010, 5. Available at:

www.unhcr.org/refworld/docid/4ca1ae02.html (accessed 20 December 2011).

Washington Times Online, ‘Editorial: Pacific islands not sinking from global warming’,

11 June 2010. Available at:

<http://www.washingtontimes.com/news/2010/jun/11/pacific-islands-not-sinking-from-global-warming/> (accessed 20 December 2011).

Website of the Global Migration Group. Available at:

http://www.globalmigrationgroup.org/what_is_gmg.htm (accessed 20 December 2011).