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The Application of the Non-Refoulement Principle in Regard to Climate-Induced Migration in International and European Law

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To my parents, for all the unwavering encouragement and support
and to Johannes, for all the love, patience and motivation.

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
Art	Article
AU Refugee Convention	Organization of African Unity Convention (now African Union) Governing the Specific Aspects of Refugee Problems in Africa
CAI	Consolidated Act on Immigration
Cartagena Declaration	Cartagena Declaration on Refugees
CAT	United Nations Convention Against Torture
CEAS	Common European Asylum System
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
Dublin III Regulation	European Parliament and Council Regulation 604/2013 of 26 June 2013 on establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
EU	European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IOM	International Migration Organization
Kampala Convention	African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa
Refugee Convention	Convention Relating to the Status of Refugees
Returns Directive	European Parliament and Council Directive 2008/115/EU of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
Sendai Framework	Sendai Framework for Disaster Risk Reduction 2015-2030

Temporary Protection Directive	Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof
TFD	Task Force on Displacement
TFEU	Treaty on the Functioning of the European Union
TPS	Temporary Protected Status
UN Human Rights Committee	United Nations Human Rights Committee
UNDRR	United Nations Office for Disaster Risk Reduction
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
US	United States
Qualification Directive	European Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

A. Introduction

Storms, floods, tropical cyclones, droughts, wildfires, high tide flooding.
What do all these things have in common?
They are extreme weather events impacted by climate change and are increasing in frequency and intensity. The environment has always been interconnected with the migration movement.[1] If the environment does not provide a safe place to live, people leave their homes to protect themselves. Sometimes, the displacement is temporarily, and sometimes, a return is not possible. However, all affected people need protection.

Nowadays, almost every environmental disaster can be related to climate change.[2] Environmental degradation is a global threat to human rights. Just recently, the European Court of Human Rights (ECtHR) reiterated what is common knowledge now: 'There has […] been a recognition that environmental degradation has created, and is capable of creating, serious and potentially irreversible adverse effects on the enjoyment of human rights.'[3]
In recent years there has been a lot of movement in climate change mitigation cases in front of courts.[4] The world is focused on measures to stop, if not mitigate, climate change. However, what about the vulnerable groups who already live with the consequences every day and already know their land will be submerged in the next twenty to thirty years due to the rising of the sea level?[5] What about farmers who can no longer grow their crop due to droughts or floods? People who are affected by storms or cyclones and lost their homes in the catastrophe? These circumstances lead people to leave their homes and find a better place to live. For that reason, people are willing to cross borders to look for safer places to live. Other circumstances, which originate in the impacts of climate change and ultimately lead to cross-border movement, are rising tensions and conflicts over resources like farmland and food or access to water.[6] In order to protect themselves, people often have no other choice than to leave and find a safer home elsewhere.

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[1] See further on how environmental conditions shaped the human migration movement: Frédérik Saltré et al, 'Environmental conditions associated with the initial northern expansion of anatomically modern humans' (2024) 15 Nature Communications <https://www.nature.com/articles/s41467-024-48762-8> accessed 14 August 2024, 1.
[2] United States Geological Survey, 'How can climate change affect natural disasters?' <https://www.usgs.gov/faqs/how-can-climate-change-affect-natural-disasters> accessed 16 August 2024.
[3] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App no 53600/20 (ECtHR, 9 April 2024) para 431.
[4] See as recent examples: *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App no 53600/20 (ECtHR, 9 April 2024); *Duarte Agostinho and Others v Portugal and Others* App no 39371/20 (ECtHR, 9 April 2024).
[5] Pat Brennan, 'NASA-UN Partnership Gauges Sea Level Threat to Tuvalu' (15 August 2023) <https://sealevel.nasa.gov/news/265/nasa-un-partnership-gauges-sea-level-threat-to-tuvalu/> accessed 24 July 2024.
[6] International Migration Organization (IOM), 'A Complex Nexus' <https://www.iom.int/complex-nexus> accessed 12 August 2024.

In 2022, more than half of the reported displacements (internally or externally) were related to environmental disasters and nearly 60 per cent of the affected persons stayed in countries which are not equipped to face the consequences of climate change.[7]

Although least developed countries, that are economically unstable and countries which are geographically unfavorably located (like small islands) will be affected more by the impact of climate change, extreme weather phenomena are also likely to occur in Europe. In 2021, Germany was hit with the catastrophic flooding of the *Ahrtal* [8] which is just one of many examples. Displacement because of climate change and extreme weather is a worldwide phenomenon that will increase in the upcoming years. To estimate the movement of climate-induced migration in the upcoming years is difficult. It is agreed that it will be one of the biggest challenges of the 21st century. Estimations vary from 25 million to 1 billion people displaced related to environmental impacts by 2050.[9] These numbers alone are incredibly high and do not include migration movements due to conflicts and war.

Consequently, it is time to consider measures of protection to combat this problem. The numbers are simply too high to dismiss this topic any longer. Rather sooner than later, the problem will increase. Legal options are narrow. Under the existing legal instruments, the principle of non-refoulement could be used to help environmentally displaced persons.

The principle of non-refoulement is enshrined in various international and regional treaties. Beyond, it is recognized as customary international law[10], and some even grant it *jus cogens* nature.[11] It is therefore of high importance to the topic of climate-induced migration since it is (mostly) detached from the refugee status and can therefore be applied more broadly and generally. This thesis will examine the principle of non-refoulement regarding climate-induced migration. In detail it will deal with the question if and how the principle of non-refoulement can be applied in cases of climate-induced migration. For this purpose, judgments of different courts are primarily used with considering the current literature. This work aims to determine which criteria cases of climate-induced migration would need to fall within the scope of the principle of non-refoulement. This could lead to clues on how courts will apply the principle in

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[7] Kristy Siegfried, 'Climate change and displacement: the myths and the facts' (15 October 2023) <https://www.unhcr.org/news/stories/climate-change-and-displacement-myths-and-facts> accessed 12 August 2024.

[8] Patrick Ludwig et al, 'A multi-disciplinary analysis of the exceptional flood event of July 2021 in central Europe – Part 2: Historical context and relation to climate change' (2023) 23 Natural Hazards and Earth System Sciences 1287.

[9] International Migration Organization, 'A Complex Nexus. What are the Estimates?' <https://www.iom.int/complex-nexus> accessed 12 August 2024.

[10] See Chapter B.I.5.

[11] See Chapter B.I.6.

the future in cases of climate-induced migration. Further, this will give insight if the principle of non-refoulement is the appropriate instrument for dealing with this matter and if it can offer sufficient and adequate protection. Outside of the scope of the principle of non-refoulement, this thesis will look at various other solutions that have been suggested or tried regarding climate-induced migration. These will also be analyzed in terms of effectiveness or even feasibility on a smaller scale.

The thesis is structured in four chapters. Apart from the introduction chapter, which includes some clarification of terms that will be used throughout this work, the second one will explain the principle of non-refoulement in detail as to its criteria, scope of application, and different legal frameworks. It will show the nature of this principle and where it is enshrined in different treaties.

In the third chapter, the thesis will look more closely at the opinions of scholars and assess relevant examples of cases by the United Nations Human Rights Committee (UN Human Rights Committee), the ECtHR and the European Court of Justice (CJEU) as well as some selected national cases. The case-law will be evaluated to determine if and how the principle can be applied. Further, whether the non-refoulement principle is sufficient or whether other approaches are needed will be addressed.

The final chapter will discuss with more general solutions to climate-induced migration as one of the most pressing issues of this century. These solutions will also be scrutinized as to their effectiveness and feasibility. Finally, the thesis will close with a conclusion and outlook.

I. The term ‘climate-induced migration’

Firstly, to continue with this thesis it is essential to clarify what the term ‘climate-induced migration’ means. It is not a legal term and is not officially recognized. Until today, there has been no official term for cross-border movement due to the consequences of climate change. ‘Climate-induced migration’ is often used as well as ‘disaster displacement’. Since no legal framework can define these terms, they will be defined here as exchangeable throughout this thesis. It is difficult to distinguish between ‘catastrophes’, ‘disasters’ and ‘climate change’. Disasters and environmental catastrophes can impact the living conditions of people and therefore make assistance and protection necessary.[12] While distinction in the sense of responsibility and obligation about climate change is important, for the mere application of the non-refoulement principle it plays little to no role. Due to the complexity of climate change, it might not always be easy to determine which disaster is based on climate change and which is not. The lines can blur sometimes.

In this thesis, weather-related disasters will be equated to climate change disasters since they will increase immensely, and it is not always possible to distinguish one from another.[13] The term ‘disaster displacement’ therefore means displacement related to impacts of disaster and/or climate change.[14]

The Former Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons *Walter Kälin* pointed out different situations which could trigger ‘climate-induced migration’:

> ‘(i) *sudden-onset disasters*, such as flooding, windstorms or mudslides (…);
>
> (ii) *slow-onset environmental degradation* caused, inter alia, by rising sea levels, increased salinization of groundwater and soil (…);
>
> (iii) so called *‘sinking small island states’* present a special case of slow-onset disasters (…);
>
> (iv) governments may designate *areas as high-risk zones* too dangerous for human habitation on account of environmental dangers (…);

[12] Jane McAdam ‘Displacement in the Context of Climate Change and Disasters’ in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 833.

[13] United Nations Environment Program, ‘Disasters and Climate Change’ <https://www.unep.org/topics/fresh-water/disasters-and-climate-change> accessed 15 July 2024; cf Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 639.

[14] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 639.

(v) finally, *unrest seriously disturbing public order, violence or even armed conflict* (…)'.[15]

As shown, *Kälin* included a lot of different scenarios under the term 'climate-induced migration'. These scenarios might require different legal treatment, and the focus of the legal treatment might not be the same. However, since *Kälin* summarized all of these situations under the term 'climate-induced migration', it will be used in this thesis with a more general understanding and meaning. When needed, a distinguishment will be made between the different scenarios.

II. The term 'climate refugee'

The term 'climate refugee' is often used in the media and literature. Thus, it is necessary to introduce this term as well. According to Article 1 (A)(2) of the Refugee Convention[16] the term 'refugee'

> 'shall apply to any person who […] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. [17]

The first definition of 'climate refugee' was created by *El-Hinawi* in 1985 who described it as '[…] people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.'[18] This definition was contested since it is broad and based on the assumption that environmental disruption is the only reason for migration.[19]

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[15] Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Bloomsbury Publishing Plc 2010) 84-86; Rafael Leal-Arcas, 'Climate migrants: Legal options' (2012) 37 Procedia – Social and Behavioral Sciences 86, 88 f.
[16] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).
[17] Amended by Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol) Art 1 (2).
[18] Essam El-Hinnawi, *Environmental Refugees* (UNEP 1985), 4.
[19] Rafiqul Islam, 'Climate Refugees and International Refugee Law' in Rafiqul Islam and Jahid Hossain Bhuiyan (eds), *An Introduction to International Refugee Law* (Martinus Nijhoff Publishers 2013) 218.

Until now, there is no established legal definition for environmentally displaced persons. The International Migration Organization is still working with a broad definition from 2007 which states that

> 'Environmental migrants are persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad'.[20]

This definition shows further that voluntary and involuntary cross-border movement is implied when talking about 'climate or environmental refugee'. The International Migration Organization calls affected people 'environmental migrants'.

There needs to be more consistency in international law when it comes to those terms. *Bates* distinguishes between 'environmental refugees,' which leave involuntarily, compelled movement, which she calls 'environmental emigrant' and the voluntary movement, which she calls 'migrant'.[21]

The reason that the term 'climate refugee' is highly contested stems from the assumption that persons seek protection from the effects of climate change and not persecution.[22] The term 'climate refugee' is, therefore, legally not correct as a lot of scholars remark.[23] Furthermore, it is not even clear what kind of specific categories are intended with the term 'climate refugee'.[24] Whether a 'climate refugee' can, under specific circumstances, fall within the scope of application of the Refugee Convention is debated.[25] An application might be possible for 'climate refugees' in conflict situations which are a consequence of an environmental catastrophe.[26]

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[20] IOM, 'Discussion Note: Migration and the Environment' (1 November 2007) MC/INF/288, para 6.
[21] Diane C Bates, 'Environmental Refugees? Classifying Human Migrations Caused by Environmental Change' (2002) 23 Population and Environment 465, 468.
[22] Simon Behrman and Avidan Kent, 'Overcoming the legal impasse? Setting the scene' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 5.
[23] However, it is argued that the term 'refugee' in itself is not a legal concept. Details can be found here: Simon Behrman and Avidan Kent, 'Overcoming the legal impasse? Setting the scene' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 10-12.
[24] Diane C Bates, 'Environmental Refugees? Classifying Human Migrations Caused by Environmental Change' (2002) 23 Population and Environment 465.
[25] In detail Anja Meutsch, 'Environmental-refugees: Possibilities of protection against environmental dangers under the Refugee Convention' (Djuris thesis, University of Cologne 2016) <https://kups.ub.uni-koeln.de/6644/1/Dissertation_Anja_Meutsch.pdf> accessed 30 June 2024; Rafael Leal-Arcas, 'Climate migrants: Legal options' (2012) 37 Procedia – Social and Behavioral Sciences 86, 93; Skeptical of an application but a very narrow possibility is discussed in Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Bloomsbury Publishing Plc 2010) 88.
[26] In detail Jolanda van der Vliet, 'Climate refugees' A legal mapping exercise, in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 23; see also Claire DeWitte, 'At the

McAdam argues that the conventional refugee claim might not stem from the climate disaster itself but from the act or omission attributed to the State that ends in persecution and lack of protection.[27] This could be, '[…] if a government were to withhold humanitarian assistance from people displaced by the impacts of a disaster, sideline the recovery needs of marginalized groups, or target individuals for engaging in disaster-relief work'.[28]

Although the status of a refugee is a powerful instrument to guarantee protection and legal standing in a foreign country, the Refugee Convention is not (yet) a suitable instrument to offer international protection in the context of climate related disasters. However, regardless of the scope of protection of the Refugee Convention, the non-refoulement principle can apply to every person as part of international human rights law. Therefore, the discussion about the application of the material scope of protection of the Refugee Convention is not discussed in depth in this thesis. As most scholars agree that the term 'refugee' refers to the legal status of a refugee under the Refugee Convention, the term 'climate refugee' is misleading although often used.

This thesis will focus on cross-border movement due to climate change or disasters which stem from climate change effects. Whenever referring to individuals, the thesis will talk about 'environmentally displaced person'.[29]

III. Difference between internal and external displacement

When talking about climate-induced migration, two scenarios need to be distinguished regarding their legal consequences: There is internal displacement which means that people are moving within the borders of their own country and there is external cross-border movement, which describes the situation of crossing borders and entering another country in seek of protection.[30]

Water's Edge: Legal Protections and Funding for A New Generation of Climate Change Refugees' (2010) 16 Ocean & Coastal Law Journal 211, 220; Cornelis Wolfram Wouters, *International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia 2009) 81 f.

[27] See for various scenarios Jane McAdam 'Displacement in the Context of Climate Change and Disasters' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 836.

[28] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 643.

[29] Joanna Apap with Sami James Harju, *The concept of 'climate refugee'. Towards a possible definition* (Briefing European Parliamentary Research Service PE 698.753 October 2023) 4.

[30] Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Bloomsbury Publishing Plc 2010) 87.

Internal climate migration is already happening as a form of internal displacement due to climate change and is of great importance.[31] Regarding the legal framework of internal displacement, there exist the *Guiding Principles on Internal Displacement* which are non-binding but already have concise provisions for the protection of internally displaced persons.[32] It entails measures on how internally displaced persons should be treated, assisted and protected.[33]
Further, this thesis will only deal with external displacement but will sometimes refer to internal displacement.

B. The principle of non-refoulement and its criteria

I. In general

As seen before, applying the refugee criteria to environmentally displaced persons under the Refugee Convention is complex. The principle of non-refoulement – which is the 'cornerstone of international refugee and asylum law'[34] – might offer a solution in this regard. In general it is defined by the obligation of States 'not to return a person to his country of origin, or any other country for that matter, where he is at risk of being subjected to serious harm or serious human rights violations'.[35] As a consequence the individual is prevented from being removed to the country where the person would face serious harm or serious human rights violations.[36] The non-refoulement principle's object and purpose is to prevent human rights violations where the sending State has the responsibility to protect the individual from serious harm or risk of

[31] In detail with a focus on Sub-Saharan Africa, South Asia and Latin America in the development context: Kumari Rigaud, et al, *Groundswell: Preparing for Internal Climate Migration* (The World Bank 2018) <https://openknowledge.worldbank.org/bitstreams/0804521a-3318-565e-ad8a-5924f75c3cf2/download> accessed 12 August 2024.
[32] United Nations Commission on Human Rights, 'Guiding Principles on Internal Displacement', UN Doc E/CN.4/1998/53/Add.2. (11 February 1998); Claire DeWitte, 'At the Water's Edge: Legal Protections and Funding for A New Generation of Climate Change Refugees' (2010) 16 Ocean & Coastal Law Journal 211, 224 f.
[33] Jane McAdam, 'Displacement in the Context of Climate Change and Disasters' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 835.
[34] Cornelis Wolfram Wouters, *International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia 2009) 23.
[35] Cornelis Wolfram Wouters, *International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia 2009) 24.
[36] Cornelis Wolfram Wouters, *International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia 2009) 24.

serious harm.[37] The removing State (also called sending State) is (usually) not responsible for the human rights violations conducted in the receiving State but the non-refoulement principle expresses an own responsibility not to remove an individual to this country under certain circumstances.[38] In the following, the sending State will be the State where the environmentally displaced persons is currently staying and the receiving State is the State where the person is threatened to be send back to.

Under the Refugee Convention the principle prohibits States from sending back refugees or asylum seekers where they face persecution on criteria such as race, religion, nationality, membership of a particular social group or political opinion.[39] However, there exists a broader application of the non-refoulement principle apart from risk of persecution. It is often called 'complementary protection'.[40] It is based on the international obligation to protect people from torture or cruel, inhuman or degrading treatment or punishment.[41] This expresses the broader application apart from the Refugee Convention where protection derives from further sources of international law such as human rights treaties or humanitarian principles.[42]

This chapter will exaine the non-refoulement principle, its requirements, and legal provisions where it is enshrined, focusing on international and European law. It will also assess the principle's strengths and weaknesses.

1. Personal scope of protection

The non-refoulement principle protects persons from being returned to any country where the person is likely to be in danger of facing persecution, torture, or other serious ill-treatment.[43]

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[37] Cornelis Wolfram Wouters, *International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia 2009) 25.

[38] Cornelis Wolfram Wouters, *International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia 2009) 25.

[39] Art 33 (1) of the 1951 Refugee Convention; Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2009) 89 f.; see further Chapter B.II.

[40] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 350.

[41] Jolanda van der Vliet, ''Climate refugees' A legal mapping exercise' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 22.

[42] Jane McAdam, 'Complementary Protection' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 662 f.

[43] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 241.

The personal scope of protection depends on the legal source which is used, but in general, every individual falls within the scope of application of the non-refoulement principle.[44]

2. Material scope of protection

The usual basis for a non-refoulement claim is the fear of torture or cruel, inhuman or degrading treatment in the receiving State. However, a non-refoulement claim can also be based on other human rights violations (mostly the right to life), which are not further discussed in this thesis.[45] Even though it is widely accepted that most other human rights violations could independently carry a non-refoulement claim, the absolute nature of non-return to cruel, inhuman, or degrading treatment, its reflection in international, regional, and domestic law, and the extensive jurisprudence that has been developed in this regard make it the 'go to' complementary protection ground.

The prohibition of non-refoulement concerns conducts of States or conducts attributable to States, which can, under certain conditions, apply to private persons or companies too.[46]

Regarding the material scope of application, non-rejection at the border is included.[47] The right to asylum is not to be equated with the non-refoulement principle. However, since rejection at the border is not permitted because of the assessment of the individual's risk, factual temporary admission is required.[48]

3. Strengths

The principle of non-refoulement enjoys absolute nature in relation to torture or inhuman or degrading treatment or punishment. The principle of non-refoulement as enshrined in the Refugee Convention does make an exception from the absolute nature and the personal scope of

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[44] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 350.

[45] With further remarks, specifically to case-law of the ECtHR: Jane McAdam, 'Complementary Protection' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 667 f.

[46] In detail: Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 77.

[47] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 244; Nils Coleman, 'Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 European Journal of Migration and Law 23, 40 ff.; UNHCR 'Note on International Protection' UN Doc. A/AC.96/1134 (9 July 2014) para 18; Under international refugee law the International Law Association (ILA) affirms this: Committee on International Migration and International Law, 'Interim Report: Right to Enter' Eighty-First Biennial International Law Conference (Athens 2024) <https://www.ila-hq.org/en_GB/documents/committee-migration-int-law-interim-report-athens-2024> accessed 17 July 2024, para 108.

[48] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 254.

application, which will be explained on further pages.[49] Further, it usually applies to every person with no more requirements needed and enjoys status of customary international law which stresses its importance in human rights and migration law.[50]

4. Weaknesses

The biggest weakness of the principle of non-refoulement is that its application has no legal consequence as to the status of a person seeking protection. It does not automatically guarantee any legal status of a person in the sending country.[51] It only guarantees not to be sent back to a country where one is faced with torture, inhumane or degrading treatment, nothing more and nothing less. However, the sending State needs to grant access to its territory and guarantee a fair asylum process.[52]

5. Customary international law

The principle of non-refoulement could also form part of customary international law. Customary international law can either be a process which forms norms of international law or rules that are already formed through the process.[53] A rule becomes customary law when two requirements are fulfilled. An objective requirement is the repeated behavior of States (*diuturnitas*) and the subjective requirement contains the belief that such behavior is based on a legal obligation (*opinion iuris*).[54] It is contested if the non-refoulement principle forms part of customary international law.[55] Some scholars say, at least the non-refoulement which protects against torture and inhumane and degrading treatment is considered customary international law while the protection against persecution is excluded from this effect.[56]

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[49]Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 366.
[50] See Chapter B.I.5. for the discussion on customary international law.
[51] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 307.
[52] 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) <https://www.refworld.org/policy/legalguidance/unhcr/2007/en/40854> accessed 1 July 2024 para. 8
[53] Tullio Treves, 'Customary International Law' (last updated November 2006) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008–) <www.mpepil.com> accessed 1 July 2024, para 1.
[54] Tullio Treves, 'Customary International Law' (last updated November 2006) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008–) <www.mpepil.com> accessed 1 July 2024, para 8.
[55] With further remarks Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 300; distinguishing between different regions and their custom and only partially arguing in favor of a customary rule is Nils Coleman, 'Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 European Journal of Migration and Law 23, 46 ff.
[56] Hélène Lambert, 'Customary Refugee Law' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 243; Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker

As a consequence of categorizing the non-refoulement principle as customary international law it is binding even for Non-State Parties to Conventions where the principle is enshrined.[57] This is of great importance since the Refugee Convention only has 146 State Parties[58] (and the Protocol 147 State Parties[59]) and some big migration countries which are hosting a lot of environmentally displaced persons have not ratified the Refugee Convention.[60]

6. *Jus cogens* nature

It is also discussed whether the principle of non-refoulement can be considered *jus cogens*.[61] In translation, *jus cogens* means that it is a peremptory norm. A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character, Art 53 of the Vienna Convention on the Law of Treaties.[62]

As a consequence of a rule being classified as *jus cogens*, States cannot derogate from this norm and States are bound by the rule which means that they cannot act contrary to this norm.[63] Norms with *jus cogens* nature are at the same time customary international law.[64] However, not all customary rules also have *jus cogens* value. Although the non-refoulement principle is often violated despite its supposedly peremptory character, it is not an indication of the legal standing of the *jus cogens* nature of the non-refoulement principle.[65] *Allain* is of the opinion that the *jus*

Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2009) 162.

[57] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 300.

[58] United Nations Treaty Collection, Status of Treaties <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5> accessed 1 July 2024.

[59] United Nations Treaty Collection, Status of Treaties <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5> accessed 1 July 2024.

[60] Hélène Lambert, 'Customary Refugee Law' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 240; nevertheless, the States claim to respect the non-refoulement principle, which is a strong argument in favor of a customary legal rule: Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 121 f.

[61] Hélène Lambert, 'Customary Refugee Law' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 248.

[62] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331.

[63] Dinah Shelton, *Jus Cogens* (Oxford University Press 2021) 91.

[64] Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 International Journal of Refugee Law 533, 538.

[65] Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 International Journal of Refugee Law 533, 540.

cogens character is essential to prevent United Nations Security Council resolutions which allow or require refoulement.[66]

Even if the recognition of the *jus cogens* nature in this regard would be necessary, it would raise questions about the alignment of the Refugee Convention with international law regarding the exceptions of the non-refoulement principle in Art 33 (2) of the Refugee Convention.[67]

II. Under the Refugee Convention

The principle of non-refoulement is enshrined in Art 33 of the Refugee Convention. According to Art 33 (1) '[n]o 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'.[68] The personal scope of protection applies to refugees as mentioned in Art 1 (2). Every person categorized as a refugee is automatically protected by Art 33. [69] It furthermore protects asylum seekers which stresses the meaning and purpose of the principle.[70] In addition, the principle of non-refoulement applies to persons who entered the territory of the sending State illegally as mentioned in Art 31 of the Refugee Convention as well.[71]

Consequently, the Refugee Convention does not guarantee a right to asylum. However, States are obliged to allow persons who fall into the scope of protection of the non-refoulement principle to stay within the country unless they can be returned to a safe third country.[72] Therefore, the Refugee Convention does not give rights to legal status inside the receiving country. In reality, the personal scope of protection is detached from the refugee status.[73] As mentioned

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[66] Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 International Journal of Refugee Law 533, 543.

[67] With more questions raised Aoife Duffy, 'Expulsions to Face Torture? Non-refoulement in International Law' (2008) 20 International Journal of Refugee Law 373, 389 f.

[68] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[69] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 23.

[70]Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 265; UNHCR Executive Committee, 'Non-Refoulement No 6 (XXVIII)' (12 October 1977) <https://www.refworld.org/policy/exconc/excom/1977/en/41699> accessed 1 July 2024.

[71] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 24.

[72] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 2.

[73] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 244.

above, non-rejection at the border is protected by the material scope of protection. Since this cannot be equated with the right to asylum, factual temporary access to the territory of the sending State is required.

Further relevant behavior includes expulsion, deportation, extradition or forced returns before a risk assessment was conducted or after the risk assessment was positive regarding persecution.[74] This is expressed in Art 33 (1) by the phrase 'in any manner whatsoever'.[75]

Failure of the State to guarantee fair legal proceedings and fair procedural conduct could also amount to a violation of the principle.[76]

As already assessed above, the non-refoulement principle is of absolute nature. This means that no State is allowed to return a person where he or she would face torture, inhumane or degrading treatment or the risk of being killed, without any exception.[77]

The non-refoulement principle in Art 33 (1) will not be guaranteed for individuals who are excluded from the protection of the Refugee Convention in cases of Art 1 (F).[78] For the non-refoulement principle per se, Art 33 (2) gives exceptions to the protection of the right guaranteed in Art 33 (1) namely when there are reasonable grounds for regarding the refugee as a danger to the security of the country or when a refugee has been convicted by a final judgment of a particularly serious crime and as a consequence constitutes a danger to the community of that country. The scope of application of the exception in Art 33 (2) of the Refugee Convention seems small. In reality, the individual often does not face the risk of persecution without facing the risk of torture or inhuman or degrading treatment or punishment as well.[79] The prohibition of removal because of torture or inhuman or degrading treatment is protected in various human

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[74] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 81.

[75] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) paras 97-98.

[76] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 82.

[77] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 84; Andreas Zimmermann and Philipp Wennholz, 'Article 33, para. 2' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 43.

[78] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 23.

[79] Andreas Zimmermann and Philipp Wennholz, 'Article 33, para. 2' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 107.

rights treaties which are binding as well which is discussed below. In addition, as already established above, the principle of non-refoulement has (almost) the status of *jus cogens* and in regard to the prohibition of torture or inhuman or degrading treatment enjoys absolute nature. To conclude, the exception enshrined in Art 33 (2) of the Refugee Convention rarely applies because a person who will face persecution in the receiving country most likely will also face torture or inhuman or degrading treatment and is therefore also protected by other non-refoulement principles in human rights treaties which have a broader scope of application and are considered absolute.

III. Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Art 3 (1) of the CAT[80] contains another explicit prohibition of refoulement in case of a person being subjected to torture. The term 'torture' relates to the definition in Art 1 (1) of the CAT

> 'which means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

Regarding the material scope of application, the non-refoulement principle only applies to torture, which is a narrower approach than in the Refugee Convention.[81] Application of the non-refoulement principle is also possible in receiving States where non-State actors practice torture without being prosecuted.[82]

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[80] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[81] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 56.
[82] Margit Ammer and Andrea Schuechner, 'Art. 3 Principle of Non-Refoulement' in Manfred Nowak, Moritz Birk and Giuliana Monina (eds), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (Oxford University Press 2019) para 5.

Compared to the non-refoulement principle under the Refugee Convention, Art 3 (1) of the CAT firstly guarantees a broader application as the personal scope as it is not reduced to refugees and asylum seekers, and secondly, it does not contain an exception like Art 33 (2). The non-refoulement principle in the CAT is detached from the legal status of individuals.[83]
The principle of non-refoulement protecting a person against torture is considered absolute.[84] It even applies when Art 1 (F) of the Refugee Convention is invoked.[85] The non-refoulement principle enshrined in the CAT is less likely to be claimed regarding climate-induced migration. The scope of application would need to be 'substantially developed before climate impacts' could amount to inhuman treatment.[86]

IV. Under the International Covenant on Civil and Political Rights (ICCPR)

The ICCPR[87], as another universal human rights treaty, does not explicitly contain the principle of non-refoulement. However, States Parties have the 'obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant (…)'.[88] So, the principle of non-refoulement can be derived from either Art 6 or Art 7 ICCPR, the former protecting the right to life and the latter enshrining the prohibition of torture or cruel, inhuman or degrading treatment or punishment. In the light of Art 7 a mere threat of deprivation of liberty is not sufficient but must exceed a particular level and must entail other elements to amount to a certain level where punishment can be regarded as degrading.[89] The UN Human Rights Committee ruled that States have an obligation to refrain from returning persons to a country where they would face torture or cruel, inhuman or degrading treatment.[90]

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[83] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 258.
[84] Margit Ammer and Andrea Schuechner, 'Art. 3 Principle of Non-Refoulement' in Manfred Nowak, Moritz Birk and Giuliana Monina (eds) *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (Oxford University Press 2019) para 3.
[85] Margit Ammer and Andrea Schuechner, 'Art. 3 Principle of Non-Refoulement' in Manfred Nowak, Moritz Birk and Giuliana Monina (eds) *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (Oxford University Press 2019) para 78.
[86] Simon Behrman and Avidan Kent, 'Overcoming the legal impasse? Setting the scene' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 23.
[87] International Covenant on Civil and Political Rights (adopted 16 December 2966, entered into force 23 March 1976) 999 UNTS 171.
[88] Human Rights Committee, 'General Comment No 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant'(29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 12.
[89] *Vuolanne v Finland*, UN Doc CCPR/C/35/D/265/1987 (7 April 1989) para 9.2; Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 143.
[90] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 48; Human Rights Committee 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN

The non-refoulement principle in the light of the ICCPR is considered an absolute right and exceptions are not allowed.[91] It has a broader scope of application than Art 3 CAT because it also prohibits refoulement in cases of inhuman or degrading treatment.[92] Compared to the Refugee Convention, all individuals fall within the scope of protection not just refugees and asylum seekers. To conclude, the principle of non-refoulement of the ICCPR has the broadest scope of application, personal and material.

V. Under the European Convention on Human Rights (ECHR)

The ECHR[93], like the CAT and the ICCPR as well, does not explicitly entail a rule on non-refoulement, it is only implied in the right to life, Art 2 ECHR and the prohibition of torture, cruel, inhuman and degrading treatment, Art 3 ECHR.[94] The European Court of Human Rights can therefore only assess the conformity of expulsion in the light of the articles of the Convention.[95] Usually, the ECtHR decides cases of non-refoulement regarding Art 2 and Art 3 under Art 3 together.[96]

Art 3 ECHR reads as follows: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

In the *Soering case* and the *Chahal case*, the ECtHR ruled that a person cannot be extradited or expulsed if he or she faces torture or inhuman or degrading treatment in the country after return regardless of the applicant's conduct.[97] Although these cases referred to extradition and expulsion and the *Soering case* specifically to the risk of death penalty, the ECtHR case-law applies to asylum seekers and their expulsion as well without exceptions regarding the conduct of the individual applicant.[98]

Doc A/47/40 1994, pp 193-195 para 9; *Mohammed Alzery v Sweden*, UN Doc CCPR/C/88/D/1416/2005 (25 October 2006) para 11.5.

[91] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 52.

[92] Roberta Mungianu, *Frontex and Non-Refoulement* (Cambridge University Press 2016) 97.

[93] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (European Convention on Human Rights).

[94] Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts' *Non-Refoulement* before the United Nations Treaty Bodies' (2020) 21 German Law Journal 355, 356; William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 165.

[95] Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 137.

[96] Janneke Gerards, 'Chapter 6 Right to Life' in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) 375.

[97] *Soering v the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) para 91, which deals with extradition in a 'death row' case; *Chahal v the United Kingdom* App no 22414/93 (ECtHR, 15 November 1996) paras 74 and 80, which deals with the expulsion of an alien.

[98] Ben Vermeulen and Hemme Battjes, 'Chapter 7 Prohibition of Torture and other Inhuman or Degrading Treatment or Punishment' in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) 417; *Cruz Varas and Others v Sweden*

This guarantees broader protection than the Refugee Convention, which provides under Art 33 (2) exceptions to the non-refoulement principle.[99] Further, the personal scope of application is not limited to refugees and asylum seekers which provides more comprehensive protection than the Refugee Convention.[100]

The ECtHR recognizes the absolute nature of the non-refoulement principle.[101] Moreover, the ECtHR provides effective protection as issued judgments are binding and implementation of decisions do not depend on voluntary State compliance.[102] Decisions of the ECtHR although binding, do not declare a legal status of the applicant once the non-refoulement principle applies.[103] Further, the ECHR does not guarantee a right to political asylum or residence.[104]

VI. Under European Law

The European Union (EU) has two significant instruments regarding human rights and migration, which are of great importance to the principle of non-refoulement. Firstly, the Charter of Fundamental Rights of the European Union[105] which entails not only political and civil but also economic and social rights[106] and secondly, the EU Qualification Directive[107] which is a legal migration document. Furthermore, in the Treaty on the Functioning of the European Union[108], the principle of non-refoulement and compliance with the Refugee Convention is enshrined in Art 78 (1) TFEU. When interpreting or deciding on asylum legislation, the European Court of Justice affirms the importance of compliance with the Refugee Convention as part of EU primary law.[109] The legislation of the EU in the area of migration and asylum is based on the

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App no 15576/89 (ECtHR, 20 March 1991) para 70; Jens Vedsted-Hansen, 'European Non-Refoulement Revisited' (2010) 55 Scandinavian Studies in Law 269, 272.

[99] Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 137.

[100] Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (6th edn, Sweet & Maxwell and Thomson Reuters 2019) Chapter 63, para 8.

[101] Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 138.

[102] Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 139.

[103] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 365.

[104] Christoph Grabenwarter, *European Convention on Human Rights: Commentary* (C.H. Beck, Hart Publishing, Nomos and Helbing Lichtenhahn 2014) Art 3 para 13.

[105] Charter of Fundamental Rights of the European Union (entered into force 1 December 2009) (Charter of Fundamental Rights).

[106] Roberta Mungianu, *Frontex and Non-Refoulement* (Cambridge University Press 2016) 117.

[107] European Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9 (EU Qualification Directive).

[108] Treaty on the Functioning of the European Union (entered into force 1 December 2009) (TFEU).

[109] Roberta Mungianu, *Frontex and Non-Refoulement* (Cambridge University Press 2016) 106 f.

Common European Asylum System (CEAS) which establishes common standards and cooperation between the Member States and guarantees fair and equal asylum procedures.[110] The EU Qualification Directive is part of this system as is the EU Returns Directive[111] and the Dublin III Regulation[112] which also mention the non-refoulement principle.

1. Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union is part of EU primary law. It entails a 'written catalogue of fundamental rights'.[113] The rights of the Charter are inspired by the ECHR making Art 4 and Art 19 (2) of the Charter important for the principle of non-refoulement. As Art 52 (3) of the Charter states that the ECHR must be the minimum standard of protection for the Fundamental Rights Charter, Art 4 mirrors the same understanding and scope of Art 3 ECHR as it reads: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[114] However, Art 19 (2) states that 'no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.' This raises the question on which provision of the Charter the principle of non-refoulement is based. Art 19 (2) is not viewed as *lex specialis* as the European Court of Justice applies the scope of Art 4 of the Charter in cases of removals from a Member State.[115] However, its existence guarantees clarity and confirms the prohibition of refoulement enshrined in the Charter.[116] Art 19 (2) does not

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[110] 'Common European Asylum System' <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en> accessed 12 August 2024. The EU recently, in May 2024, passed 'The Pact on Migration and Asylum', which entails reforms and deals with the shortcomings of the CEAS. This thesis will still refer to the current system. The implementation of the Member States will take place until 2026. 'Pact on Migration and Asylum. A common EU system to manage migration' (21 May 2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en> accessed 12 August 2024. The principle of non-refoulement will be respected and guaranteed in this reform: Commission, 'Communication from the Commission on a New Pact on Migration and Asylum' COM (2020) 609 final, 2.1.

[111] European Parliament and Council Directive 2008/115/EU of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ 2008 L348/98 (EU Returns Directive).

[112] European Parliament and Council Regulation 604/2013 of 26 June 2013 on establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ 2013 L180/31 (Dublin III Regulation).

[113] Christian Calliess, '§ 20 The Charter of Fundamental Rights of the European Union' in Dirk Ehlers (ed), *European Fundamental Rights and Freedoms* (De Gruyter 2007) 518.

[114] Maria Teresa Gil-Bazo, 'Article 4' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn Hart Publishing 2021) 59.

[115] Elspeth Guild, 'Article 19' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart Publishing 2021) para 19.05.

[116] Elspeth Guild, 'Article 19' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart Publishing 2021) para 19.05.

mirror a provision in the ECHR since it was developed from the case law of the ECtHR regarding expulsion and extradition of third country citizens.[117] Therefore, both provisions embody the principle of non-refoulement.

In comparison to the Refugee Convention and the CAT, the Charter, strictly as Art 3 ECHR protects individuals, not only refugees or asylum seekers, from serious risk of torture, inhuman or degrading treatment or punishment upon returning them to the receiving country.[118] Art 4 and Art 19 (2) of the Charter, which stresses the importance of Art 4, are both considered absolute rights.[119] Art 18 of the Charter protects the right to asylum. It complements the Refugee Convention and therefore also protects the non-refoulement principle in the scope of the Refugee Convention.[120] But it also goes further than the principle of non-refoulement as it embodies the right to access to an asylum procedure, which makes Art 18 of the Charter a procedural right.[121]

2. EU Qualification Directive

The Directive 2011/95/EU (Qualification Directive) is part of EU secondary legislation and not a human rights instrument but part of EU migration law. Initially, it was created in the European Union to establish a common EU asylum law where the non-refoulement principle is highly respected as guaranteed in the Refugee Convention, which was the basis for this legislation.[122] It combines the scope of protection of the Refugee Convention and guarantees further subsidiary protection for persons that do not fall under the refugee definition.[123]

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[117] Elspeth Guild, 'Article 19' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart Publishing 2021) para 19.07.

[118] Elspeth Guild, 'Article 19' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart Publishing 2021) para 19.34; Tobias Lock, 'Article 19 CFR' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) Art 19 para 6.

[119] Tobias Lock, 'Article 19 CFR' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) Art 19 para 1.

[120] Tobias Lock, 'Article 18 CFR' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) Art 18 para 3.

[121] Roberta Mungianu, *Frontex and Non-Refoulement* (Cambridge University Press 2016) 118. See p 124 f. for the discussion if Art 18 of the Charter constitutes an individual right.

[122] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 41; Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law (Text and Commentary) Volume 3: EU Asylum law* (2nd rev edn, Brill 2015) 161; Tampere European Council, 'Presidency Conclusions' (15 and 16 October 1999) <https://www.europarl.europa.eu/summits/tam_en.htm> accessed 22 July 2024 para 13.

[123] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 41.

The material scope of application for subsidiary protection demands the person seeking protection to face a real risk of suffering serious harm in the receiving country.[124] This can either be the death penalty or execution, Art 15 (a); torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, Art 15 (b); or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict, Art 15 (c) of the Directive. The CJEU has ruled that '(…) Article 15(b) of the Directive (…) corresponds, in essence, to Article 3 of the ECHR'.[125] The two provisions also have similar wording with the exception of the phrase 'in the country of origin' that was added in Art 15 (b).[126] The purpose of the phrase is to prevent cases on health claims which are a combination of withdrawal of medical care in the sending State and the medical situation in the receiving State.[127] The cases will be discussed further below in detail.[128] The CJEU decided as well on the relationship between Art 3 ECHR and Art 15 (b): Just because an individual cannot be removed because his circumstances fall within the scope of Art 3 ECHR, the Member State is not obliged to grant subsidiary protection.[129] This shows that the scope of protection is narrower for Art 15 (b) than for Art 3 ECHR. Expulsion cases are discussed and decided concerning Art 15 (b) of the Qualification Directive and Art 3 ECHR.

Explicitly, the principle of non-refoulement is enshrined in Art 21 (1) of the Directive and refers to the obligations of the Member States under international law. It only has a declaratory effect. Art 21 (2) expresses exceptions to the prohibition of refoulement, precisely as the Refugee Convention in Art 33 (2), since it only refers to the status of a refugee and not applicants or beneficiaries of subsidiary protection.[130]

Not yet decided is if the provision of Art 21 of the Directive is directed at the extension of the scope of protection of Art 33 of the Refugee Convention, which would include persons who are

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[124] Jens Vedsted-Hansen, 'European Non-Refoulement Revisited' (2010) 55 Scandinavian Studies in Law 269, 280.

[125] Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* (CJEU, 17 February 2009) para 28.

[126] Hugo Storey, 'Asylum Qualification Directive 2011/95/EU: Article 15 Serious harm' in Daniel Thym and Kay Hailbronner (eds), *EU Immigration and Asylum Law* (3rd edn, C.H. Beck, Hart Publishing and Nomos 2022) para 3.

[127] Hugo Storey, 'Asylum Qualification Directive 2011/95/EU: Article 15 Serious harm' in Daniel Thym and Kay Hailbronner (eds), *EU Immigration and Asylum Law* (3rd edn, C.H. Beck, Hart Publishing and Nomos 2022) para 3.

[128] See Chapter C.II.3.

[129] Case C-542/13 *Mohamed M'Bodj v État belge* (CJEU, 18 December 2014) paras 39 f; Case C-535/16 *MP v Secretary of State for the Home Department* (CJEU, 24 April 2018) para 52.

[130] Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law (Text and Commentary) Volume 3: EU Asylum law* (2nd rev edn, Brill 2015) 162; Hemme Battjes, 'Asylum Qualification Directive 2011/95/EU: Article 21 Protection from refoulement' in Daniel Thym and Kay Hailbronner (eds), *EU Immigration and Asylum Law* (3rd edn, C.H. Beck, Hart Publishing and Nomos 2022) para 1.

eligible for subsidiary protection.[131] As Art 21 of the Directive only affirms existing international obligations under international human rights law and the Refugee Convention, persons with subsidiary protection can at least invoke the articles of these instruments. However, Art 20 (2) of the Directive clearly states that the chapter applies to both refugees and persons with subsidiary protection.

3. EU Returns Directive

The Directive 2008/115/EU[132] sets out measures that Member States have to comply with when returning illegally staying third-country nationals.[133] The non-refoulement principle has to be respected by the Member States, Art 4 (b) and Art 5 and removals have to be postponed when a return would violate the principle of non-refoulement, Art 9 (1)(a) of the Directive. The non-refoulement principle in this Directive is just a criterion for the return and does not entail its own scope of protection.[134]

4. Dublin III Regulation

The Dublin III Regulation is an EU instrument that determines which Member State is responsible for assessing an asylum request inside the borders of the EU. It is based on the assumption that all EU Member States offer equal protection and abide by human rights law, which makes them all 'safe countries'.[135] Persons who seek international protection in an, EU Member State therefore, cannot choose freely in which State they apply for protection but are referred to the first State through which they entered the EU, Art 3 (1) Dublin III Regulation. As the procedure under the Dublin III Regulation deals with many transfers of persons the principle of non-refoulement must be respected. Art 3 (2) of the Regulation refers to Art 4 of the Charter of Fundamental Rights, which prohibits torture or inhuman or degrading treatment or punishment and mirrors Art 3 ECHR. At all times, the Member States must be aware of the situation of the

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[131] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 43.
[132] European Parliament and Council Directive 2008/115/EU of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ 2008 L348/98.
[133] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 44.
[134] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 44.
[135] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 454.

receiving Member State and whether the transfer of the applicant complies with the non-refoulement principle. The ECtHR has ruled in the case of *MSS v Belgium and Greece*[136] that the transfer of an asylum applicant due to the Dublin III Regulation back to Greece violated Art 3 ECHR in the light of the non-refoulement principle.

VII. Conclusion

The non-refoulement principle is enshrined in many human rights treaties and sources of international law and regional refugee law. Furthermore, it has the status of customary law and is on the verge of becoming *jus cogens*. The personal and material scope of every codified non-refoulement principle is slightly different. However, the level of protection in European countries is considered very strong since all Member States of the European Union are parties to the Refugee Convention as well as the ECHR and a lot of them are bound by the Charter of Fundamental Rights as well.[137] If this, in theory very strong protection, could apply to climate-induced migration and under which conditions will be discussed in the following.

[136] *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).
[137] European Parliamentary Research Service, 'The EU and the UN refugee agency (UNHRC)' (May 2015) <https://www.europarl.europa.eu/EPRS/EPRS-AaG-557004-EU-and-UNHCR-FINAL.pdf> accessed 17 July 2024, which states that all EU Member States are Parties to the Refugee Convention; Council of Europe, 'European Union accession to the European Convention on Human Rights – Questions and Answers' <https://www.coe.int/en/web/portal/eu-accession-echr-questions-and-answers> accessed 17 July 2024, which states that all EU Member States are Contracting Parties to the ECHR.

C. Environmental conditions as criteria for the application of the non-refoulement principle – current status

I. Literature

There is consensus among legal scholars tthat a protection gap for climate-induced migration in the context of cross-border movement exists.[138] As discussed above, international legally binding instruments do not deal with this issue. However, some scholars argue that the already established instruments of human rights law and international refugee law can offer some protection, they are just not applied to their fullest capacity and effectivity.[139]

The principle of non-refoulement as enshrined in the Refugee Convention in Art 33 (1) regarding climate-induced migration is not helpful since it is only applicable to people granted refugee status.[140] The 'persecution' requirement as already discussed above, will rarely be met.[141]

The scholarly literature mainly focuses on the case of *Teitiota v New Zealand*[142], which will be explained in detail later. It was the first case to acknowledge the possible application of the non-refoulement principle to environmentally displaced persons. The literature quotes this case to argue in favor of the application of the non-refoulement principle.[143]

Most scholars pursue the principle of non-refoulement but remain sceptical about its effectiveness because it does not grant a right to permanent residency.[144] To successfully claim the non-refoulement principle, the circumstances of climate-induced displacement need to fall within the scope of torture or inhuman or degrading treatment or punishment. This is a high threshold which many cases might not fulfil.[145] Situations where 'the area is disaster-prone, there are extreme water shortages, crops cannot grow, and the risk of illness is heightened' could fall within the scope of protection of inhuman or degrading treatment if people were to send back

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[138] Rafael Leal-Arcas, 'Climate migrants: Legal options' (2012) 37 Procedia – Social and Behavioral Sciences 86, 94.

[139] Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law, 322, 323.

[140] Rafiqul Islam, 'Climate Refugees and International Refugee Law' in Rafiqul Islam and Jahid Hossain Bhuiyan (eds), *An Introduction to International Refugee Law* (Martinus Nijhoff Publishers 2013) 226.

[141] See Chapter A.II.

[142] *Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019).

[143] Jane McAdam 'Displacement in the Context of Climate Change and Disasters' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 838.

[144] Rafael Leal-Arcas, 'Climate migrants: Legal options' (2012) 37 Procedia – Social and Behavioral Sciences 86, 94.

[145] Jane Mc Adam and Ben Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' [2008] Sydney Law School Legal Studies Research Paper No 08/131, 12. See further Chapter C.II.

there.[146] The voices of the literature tend to stay vague and do not deal in depth with the criteria since there is little case-law. However, as seen below, the case-law gives insight into the criteria. Further, the development and interconnection of climate change create problems regarding the non-refoulement principle with its application and purpose.

II. Case-law

1. UN Human Rights Committee – *Teitiota v New Zealand*

The view of the UN Human Rights Committee on the case of *Teitiota v New Zealand* was the first case to directly connect the non-refoulement principle to the effects of climate change.[147]

Facts of the case

The applicant, Teitiota, was an asylum seeker whose application for refugee status in New Zealand was denied by the authorities. He was subsequently returned to his country of origin, the Republic of Kiribati. After exhausting all local remedies, he lodged an individual communication with the UN Human Rights Committee claiming that New Zealand violated his right to life under Art 6 ICCPR due to the removal.[148] The living conditions in the Republic of Kiribati were 'unstable and precarious due to sea level rise caused by global warming'.[149]

Committee's assessment

The Committee reiterated that State parties have a general obligation under Art 6 and Art 7 ICCPR 'not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm'.[150] This principle of non-refoulement even has a broader scope of application than in international refugee law which was already assessed above. Although the Committee did not find a violation of Art 6 or Art 7 in the act of removal of the authorities of New Zealand, it did take into consideration the climate change-induced harm in the Republic of Kiribati.[151] In the context of seeking protection from climate change-induced harm, it could be possible that individuals are

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[146] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 648.
[147] *Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019); for a detailed analysis see here: Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of *Non-Refoulement*' (2020) 114 American Journal of International Law 708. The UN Human Rights Committee has further dealt with a case of the impacts of climate change in *Daniel Billy et al v Australia*, UN Doc CCPR/C/135/D/3624/2019 (21 July 2022).
[148] *Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) paras 1.1-1.2.
[149] *Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) para 2.1.
[150] *Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) para 9.3.
[151] *Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) para 9.11.

exposed 'to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states'.[152]

Evaluation

Although the decision is non-binding, the ICCPR is binding for Party States to the Covenant. It is therefore highly likely that other international and European courts will adapt the interpretation and decision of the Committee.[153] The groundbreaking judgment still leaves room for interpretation as to when the non-refoulement principle could be applied precisely. Since the Committee decided that there would still be time for Kiribati to adopt some measures to mitigate the effects of climate change, the question remains under which circumstances the non-refoulement principle will be triggered since it is almost certain that Kiribati will cease to exist in the following years due to sea level rise.[154] The UN Human Rights Committee also decided that living conditions could worsen and therefore endangering the right to life with dignity even before the entire country would become submerged under water.[155] However, the circumstances have to be assessed individually and general living conditions are not sufficient to claim a violation of Art 6 or Art 7 ICCPR.

The UN Human Rights Committee granted the Republic of Kiribati, under their obligation, some time to 'take affirmative measures to protect and, where necessary, relocate its population'.[156] The applicant was therefore put off in order to turn to his State for protection. This was also challenged by Committee member *Duncan Laki Muhumuza*, who published an individual dissenting opinion.[157] Furthermore, the threshold for an individual to prove that the individual faces a particular risk to life is extremely high.[158] The risk one is facing needs to be urgent and the risk of harm needs to be very severe.[159] The UN Human Rights Committee did not examine

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[152] *Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) para 9.11.

[153] Eugénie Delval, 'From the UN Human Rights Committee for the European Courts: Which protection for climate-induced displaced persons under European Law?' (*EU Migration Law Blog*, 8 April 2020) <https://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/> accessed 11 July 2024. Referring to a new precedence is Najla Nur Fauziyah, 'The Legal Status and Legal Protection Towards Climate Refugees under international law: a Study of Ioane Teitiota Case' (2022) 8 Belli Ac Pacis 71, 73 f.

[154] Eugénie Delval, 'From the UN Human Rights Committee for the European Courts: Which protection for climate-induced displaced persons under European Law?' (*EU Migration Law Blog*, 8 April 2020) <https://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/> accessed 11 July 2024.

[155] *Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) para 9.11.

[156] *Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) para 9.12.

[157] *Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) Annex 2.

[158] Jesús Verdú Baeza, 'Climate Refugees, Human Rights and the Principle of Non-Refoulement' (2023) 11 Paix et Securite Internationales 1, 18.

[159] Matthew Scott, 'Refuge from Climate Change-Related Harm: Evaluating the Scope of International Protection within the Common European Asylum System' in Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union* (Brill 2015) 207.

a violation under Art 7 ICCPR. This would have opened questions about Kiribati's capacity to mitigate the consequences of sea level rise and it could have been possible that the Committee could have adopted the European case-law focusing more on the sending State's responsibility whether the removal itself could have violated Art 7 ICCPR.[160]

2. European Court of Human Rights

The ECtHR has not yet received an application regarding the removal to living conditions impacted by climate change. However, the ECtHR has issued judgments regarding the non-refoulement principle in cases of serious illness and living conditions of asylum seekers upon removal. Further, there have been cases where living conditions in general were contested and the Court at least considered extreme weather events. These cases could serve as a reference to the ECtHR should it decide a case on refoulement related to climate-induced migration one day. Further, the ECtHR has always emphasized that the European Convention on Human Rights is a living instrument which 'must be interpreted in the light of present-day conditions'.[161]
As explained above[162], the ECtHR usually scrutinizes all claims of refoulement under Art 3, even if they include a claim of a violation of Art 2. There are three categories of case-law regarding the application of non-refoulement within Art 3 ECHR: 'direct and intentional infliction of harm cases'; 'purely naturally occurring harm cases', which will be discussed under a. and 'predominant cause cases', which will be discussed under b.[163]

a. Refoulement of serious ill persons

The 'purely naturally occurring harm cases' deal with removing persons suffering from serious illnesses. There have been four judgments by the ECtHR where the Court has clarified the criteria for non-refoulement in these cases. These cases can be evaluated and scrutinized to determine whether and how the case-law can be transferred to climate-induced migration.

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[160] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 656.
[161] *Tyrer v the United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) para 31; *Kress v France* App no 39594/98 (ECtHR 7 June 2001) para 70; William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 48.
[162] See Chapter B.V.
[163] cf Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 International Journal of Refugee Law 404, 412.

(1) D v the United Kingdom

The case of *D v the United Kingdom*[164] marked the first judgment of the ECtHR on the application of Art 3 ECHR related to the removal of aliens with serious illness.

Facts of the case

The applicant was originally from St Kitts and tried to enter the United Kingdom where he was detained upon entry for the possession of cocaine. He was prosecuted and served a prison sentence where he was diagnosed as HIV-positive and suffering from AIDS.[165] The authorities wanted to remove him to St Kitts. It was stated that he had no family support system in St Kitts[166], and after his release in the United Kingdom, his health situation deteriorated rapidly which could have worsened after his removal to St Kitts.[167] The applicant complained of a violation of Art 2, 3 and 8 ECHR related to his pending removal to St Kitts with the Commission on Human Rights.[168]

ECtHR's assessment

The ECtHR reiterated in the judgment that refoulement is usually assessed in regard to treatments which stem from public authorities of the country of origin or non-State actors where the State is not offering appropriate protection.[169] However, the purpose of Art 3 ECHR does not limit the ECtHR's scrutiny but gives room to assess whether a removal would be a violation of Art 3 ECHR due to medical conditions without the risk of harm inflicted human conducts.[170] Since it was not contested by the authorities that the removal would lead to the applicant's death more quickly, this would be viewed as 'exceptional circumstances' which would fulfil the high threshold of requirements of Art 3 ECHR.[171] However, the violation of Art 3 ECHR in this case was not (only) the dire medical conditions in St Kitts but the withdrawal of the medical care the applicant received in the United Kingdom.[172] To conclude, the ECtHR, decided for the first time, that when death is imminent upon removal of the applicant, the 'humanitarian considerations' prevail and the person cannot be removed.

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[164] *D v the United Kingdom* App no 30240/96 (ECtHR, 2 May 1997).
[165] *D v the United Kingdom* App no 30240/96 (ECtHR, 2 May 1997) paras 6-8.
[166] *D v the United Kingdom* App no 30240/96 (ECtHR, 2 May 1997) para 18.
[167] *D v the United Kingdom* App no 30240/96 (ECtHR, 2 May 1997) paras 19-21.
[168] *D v the United Kingdom* App no 30240/96 (ECtHR, 2 May 1997) para 37.
[169] *D v the United Kingdom* App no 30240/96 (ECtHR, 2 May 1997) para 49.
[170] *D v the United Kingdom* App no 30240/96 (ECtHR, 2 May 1997) paras 49-50.
[171] *D v the United Kingdom* App no 30240/96 (ECtHR, 2 May 1997) para 53.
[172] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 652.

(2) N v the United Kingdom

In the case, *N v the United Kingdom*[173], the ECtHR again had to rule on a case of an HIV-positive person who claimed that their planned removal would constitute a violation of Art 3 ECHR.

Facts of the case

The applicant was a Ugandan citizen who entered the United Kingdom to apply for asylum where she was diagnosed as HIV-positive.[174] Her asylum claim was rejected, as was her claim of Art 3 ECHR.[175] She then lodged an application with the ECtHR regarding Art 3 and Art 8 of the ECHR.

ECtHR's assessment

The ECtHR listed a lot of case-law where the high threshold of Art 3 ECHR was not fulfilled. It summarized that Art 3 ECHR does not apply in every case of serious illness of an alien where the life expectancy would decrease significantly after the removal from the Contracting State.[176] There need to be 'very exceptional circumstances' which in *D v the United Kingdom* were the critically status of the applicant, the high risk of imminent death, no nursing or medical care and no family support system in the receiving State.[177] In the present case the ECtHR decided that the health status of the applicant was not as critical at present as in the *D v the United Kingdom* case and further it was not yet clear how rapidly her health would deteriorate.[178] The threshold of 'very exceptional circumstances' was not fulfilled and therefore no violation of Art 3 ECHR was found.[179]

(3) Paposhvili v Belgium

The case of *Paposhvili v Belgium*[180] is used as a landmark ruling regarding the expulsion of aliens with serious illnesses where the ECtHR's requirement of a 'very exceptional case' was applied for the first time without the risk of imminent death.

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[173] *N v the United Kingdom* App no 26565/05 (ECtHR, 27 May 2008).
[174] *N v the United Kingdom* App no 26565/05 (ECtHR, 27 May 2008) para 8-10.
[175] *N v the United Kingdom* App no 26565/05 (ECtHR, 27 May 2008) para 13.
[176] *N v the United Kingdom* App no 26565/05 (ECtHR, 27 May 2008) para 42.
[177] *N v the United Kingdom* App no 26565/05 (ECtHR, 27 May 2008) para 42.
[178] *N v the United Kingdom* App no 26565/05 (ECtHR, 27 May 2008) para 50.
[179] *N v the United Kingdom* App no 26565/05 (ECtHR, 27 May 2008) para 51.
[180] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016).

Facts of the case

The applicant was a Georgian national who applied for asylum in Belgium and lived there with his wife, her child, and later two other children of his own.[181] He suffered from tuberculosis, hepatitis C and chronic lymphocytic leukaemia (CLL).[182] The Belgian authorities issued an order to remove him from Belgium. After successfully applying for an interim measure at the ECtHR, the order was extended. The applicant died in June 2016, but the ECtHR allowed legal proceedings to be pursued due to the critical issues at stake in this case.[183] The applicant raised complaints of Art 2 and Art 3 of the ECHR due to the authorities' plan to remove him to Georgia.

ECtHR's assessment

The case is important so far as the ECtHR only ruled in the *D v the United Kingdom* case, where death upon removal would have been imminent, that the minimum level of severity was fulfilled. The State was obliged to respect the non-refoulement principle. In the other case of an alien against the United Kingdom, namely *N v the United Kingdom*, the ECtHR denied protection under Art 3 of the ECHR since 'exceptional circumstances' were not evident due to the applicant's condition. For that reason, the ECtHR took the chance in this present case to develop the case-law on the scope of the 'very exceptional cases' further.[184]

The ECtHR clarified that 'other very exceptional cases' should involve circumstances where

> 'the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy'.[185]

These requirements could fulfil the high threshold of applying Art 3 of the ECHR. Since the applicant had already died, the ECtHR decided hypothetically if there would have been a violation of Art 3 ECHR in case of removal. The authorities in Belgium did not look at the evidence submitted to clarify the health situation of the applicant in Georgia after his refoulement, nor

[181] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016) paras 10-11.
[182] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016) paras 34-53.
[183] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016) para 132.
[184] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016) para 181.
[185] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016) para 183.

did they assess the risk the applicant would face. The ECtHR, therefore, decided that a refoulement of the applicant would have constituted a violation of Art 3 ECHR.[186]

(4) Savran v Denmark

The most recent judgment regarding the removal of an alien with a serious illness was published in the *Savran v Denmark*[187] case.

Facts of the case

The applicant was born in Turkey and complained of a violation of Art 3 ECHR against Denmark which wanted to remove him to Turkey.[188] He was diagnosed with paranoid schizophrenia which he claimed would not have been treated appropriately in Turkey.[189]

ECtHR's assessment

The Grand Chamber of the Court reiterated that 'treatment' in the light of Art 3 ECHR 'has to attain a minimum level of severity'.[190] Moreover, it confirmed that the ECtHR has the competence to assess Art 3 ECHR even though the treatment might not stem 'from factors' which cannot engage either directly or indirectly the responsibility of the public authorities'.[191] The threshold test which was first created in *Paposhvili v Belgium* gave essential circumstances which could amount to a 'very exceptional case' of applying Art 3 ECHR in other cases than imminent death.[192] The ECtHR confirmed the standard and principles in this judgement.[193] It furthermore stressed that a mental disease is equal to a physical disease and both can be serious illnesses.[194] Importantly, the applicant first needed to submit evidence to pass the threshold test and then other questions regarding the treatment became relevant.[195] In the present case the ECtHR decided that the evidence presented for passing the threshold and therefore the *Paposhvili* test was lacking of proof and substance which could not amount to a violation of Art 3 ECHR.[196]

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[186] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016) paras 205-207.
[187] *Savran v Denmark* App no 57467/15 (ECtHR, 7 December 2021).
[188] *Savran v Denmark* App no 57467/15 (ECtHR, 7 December 2021) paras 1, 3.
[189] *Savran v Denmark* App no 57467/15 (ECtHR, 7 December 2021) para 3.
[190] *Savran v Denmark* App no 57467/15 (ECtHR, 7 December 2021) para 122.
[191] *Savran v Denmark* App no 57467/15 (ECtHR, 7 December 2021) para 123.
[192] *Savran v Denmark* App no 57467/15 (ECtHR, 7 December 2021) para 129.
[193] *Savran v Denmark* App no 57467/15 (ECtHR, 7 December 2021) para 133.
[194] *Savran v Denmark* App no 57467/15 (ECtHR, 7 December 2021) para 137.
[195] *Savran v Denmark* App no 57467/15 (ECtHR, 7 December 2021) para 140.
[196] *Savran v Denmark* App no 57467/15 (ECtHR, 7 December 2021) para 146.

(5) Evaluation

The ECtHR, for the first time, applied Art 3 ECHR in the context of serious illness and imminent death without external human intervention in its landmark judgment of *D v the United Kingdom*.[197] It created a high threshold for cases of 'purely naturally occurring harm'. In *N v the United Kingdom*, the ECtHR reiterated the high requirements for a removal case of serious illness to fall within the scope of Art 3 ECHR. *N* was excluded from the scope of protection of Art 3 ECHR because her illness was not yet that far progressed that she would have been exposed to the same harm of significantly reduced life expectancy as *D*. Further, in *Paposhvili v Belgium*, the ECtHR gave indications of how cases not dealing with imminent death upon removal could also fall within the obligation related to Art 3 ECHR. In *Savran v Denmark*, this case-law was confirmed. The ECtHR, however, always emphasized that only 'very exceptional cases' could fall within the scope of protection of Art 3 ECHR when dealing with serious illnesses. This shows that the Court is legally and politically aware of the meaning of its case-law. The Court is trying to strike a counterbalance between humanitarian, legal, and political considerations. Applying the non-refoulement principle should not become the gateway for people to seek medical treatment in other countries on a general basis.

The application of this case-law regarding environmentally displaced persons is complex. Firstly, it could be thought of a direct application. Some serious illnesses deteriorate due to environmental conditions (for example asthma) and some serious illnesses will even increase due to climate change.[198] It cannot be ruled out that cases with serious illnesses due to unbearable conditions and lack of resources in receiving countries will be tried before the ECtHR. A State would then need to refrain from removing this person if it would fall within the scope of 'very exceptional cases'. However, if the illness is based on climate change consequences, it is questionable if it is 'purely natural occurring'. The ECtHR might need to carefully assess how the disease was developed in the first place and which factors played a role. If the disease was developed due to climate change and human conduct could be established, then the application of the case-law should be rejected. It might then evaluate if the case would be assessed due to the standards created in the *Sufi and Elmi* case[199], which is analyzed further below.

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[197] Ben Vermeulen and Hemme Battjes, 'Chapter 7 Prohibition of Torture and other Inhuman or Degrading Treatment or Punishment' in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) 422.

[198] For example, there will be 'increases in zoonoses and food-, water- and vector-borne diseases, and mental health issues': World Health Organization, 'Climate change' <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> accessed 10 July 2024.

[199] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011).

Regarding applicants who do not have a serious illness but have fled from environmental deterioration in the receiving State, a direct application is excluded. The case-law could nevertheless be transferred. For that, it is essential to look exactly at the criteria for a 'real risk' that the ECtHR created in the *Paposhvili* case. The Court concedes that applicants can only admit evidence that shows substantial grounds for a 'real risk' and that there is a certain degree of speculation inherent when trying to prevent a violation of Art 3 ECHR.[200] The 'real risk' in *D v the United Kingdom* entailed imminent death which was overturned in the *Paposhvili* case. Now, the ECtHR interprets the 'real risk' as intense suffering or significant reduction of life expectancy, which coincides with the interpretation of 'treatment' in Art 3 ECHR. This has to be based on the absence of appropriate treatment or lack of access to such treatment, which results in a serious, rapid and irreversible decline of health status. It follows that it is the sending State's obligation to assess the state of health and the existence of appropriate treatment in the receiving State.[201] The criterion of the rapid deterioration of the health status changed in the *Paposhvili* case since the condition can evolve after removal and does not have to be imminent at the time of removal.[202] However, the Court requires a 'rapid' health deterioration. What exactly this means is not clear. N's predictive prognosis was that she would have passed away two years after her removal.[203] Clearly, this risk was not enough to fulfil the threshold of a 'real risk' of serious and rapid health deterioration. The ECtHR did not have to interpret the 'real risk' in the *Paposhvili* case since the Belgian authorities did not carry out a risk assessment at all, and therefore, Belgium already violated its obligation under Art 3 ECHR.

An environmentally displaced person would have to bring forward substantial claims that due to the environmental conditions in the receiving country and lack of access to basic needs without prospects of improvement, their health situation would deteriorate rapidly, seriously and irreversibly which would then lead to intense suffering or significant reduction in life expectancy. This then could fall under a 'real risk'. *Ammer* and *Mayrhofer* argue that medical cases, in contrast to disaster and disaster displacement cases, cannot be compared and that the case-law cannot be transferred: [204] Firstly, they stress that in disaster displacement cases the person

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[200] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016) para 186.
[201] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016) para 205.
[202] Adrienne Anderson, 'Comment on Paposhvili v Belgium and the Temporal Scope of Risk Assessment' (*EJIL: Talk!*, 21 February 2017) <https://www.ejiltalk.org/comment-on-paposhvili-v-belgium-and-the-temporal-scope-of-risk-assessment/> accessed 13 August 2024.
[203] Adrienne Anderson, 'Comment on Paposhvili v Belgium and the Temporal Scope of Risk Assessment' (*EJIL: Talk!*, 21 February 2017) <https://www.ejiltalk.org/comment-on-paposhvili-v-belgium-and-the-temporal-scope-of-risk-assessment/> accessed 13 August 2024.
[204] Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law 322, 329 ff.

is not dependent on medical treatment in the sending State which would be withdrawn in case of removal. Secondly, an environmental disaster is, in their eyes, not 'naturally occurring' as they combine political failure to intervene, exposure of human beings and lack of adaptation capacity. This could go in the same direction as serious illnesses developed due to changing living conditions.

The *Paposhvili* test created a high threshold for the 'real risk factor' which is too high in cases where protection is sought due to environmental conditions. Submitting evidence that the situation of environmental conditions will not improve and that their own health status will deteriorate rapidly is extremely difficult since it will most likely have improved since their flight.

It is more likely that the ECtHR will not assess cases of climate-induced migration under the scope of 'purely naturally occurring' case-law. Environmental conditions are not 'purely naturally', and it further is simply too difficult for applicants to comply with the high threshold.

b. Living conditions after refoulement

As already seen, the 'purely naturally occurring harm cases' seem to have weaknesses when transferring the case-law to climate-induced migration. The 'predominant cause cases' might offer a better perspective. There have been only a few cases of the ECtHR on socio-economic factors and non-refoulement. However, the cases of *MSS v Belgium and Greece*[205] and *Sufi and Elmi v the United Kingdom*[206] could also indicate on how the ECtHR might rule in the future on the prohibition of refoulement and climate-induced migration.

(1) MSS v Belgium and Greece

Facts of the case

The applicant was an Afghan national who applied for asylum in Belgium after entering the EU through Greece and was subsequently removed to Greece to apply for asylum there. He claimed that the decision to remove him and the treatment he was subjected to in Greece amounted to a violation of Art 3 ECHR.[207] He was detained in Greece and lived on the streets although the Greek authorities knew of his status as an asylum seeker.

The ECtHR's assessment

Among other things, the ECtHR focused on the living conditions of the applicant on the street in Greece and how this could potentially amount to a violation of Art 3 ECHR. The case was

[205] *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).
[206] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011).
[207] *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) paras 1, 3, 9.

against Greece and Belgium. In the case of Belgium, the Court looked at the obligation of Belgium not to remove the applicant due to inhuman or degrading treatment or punishment. It concluded that the Belgian authorities knew about the dire living conditions in Greece, and it was, therefore, the obligation of Belgium to respect the principle of non-refoulement. The applicant did not have the 'most basic needs: food, hygiene and a place to live'.[208] In combination with the uncertainty of his asylum procedure and 'the total lack of any prospects of his situation improving', the ECtHR found a violation of Art 3 ECHR *inter alia* against Belgium. Since the living conditions amounted to degrading treatment, the Government of Belgium exposed him to these conditions knowingly.[209]

(2) Sufi and Elmi v the United Kingdom

Facts of the case

The first applicant was a Somali national who applied for asylum and was rejected and subsequently served with a deportation order.[210] The second applicant was also a Somali national who was granted indefinite leave to remain in the United Kingdom.[211] After being convicted for several offences a deportation order was issued.[212] Both applicants lodged an application before the ECtHR alleging a violation of Art 3 ECHR (and in one case Art 2 ECHR as well).

The ECtHR's assessment

The ECtHR reiterated its case-law of *N v the United Kingdom*, where it decided that humanitarian conditions could amount to a violation of Art 3 ECHR in 'very exceptional cases'.[213] If the dire humanitarian conditions in Somalia had been a result of poverty or the State's lack of resources to deal with naturally occurring phenomena such as droughts, it would not have fallen within the scope of application of Art 3 ECHR. The ECtHR would have applied the threshold as ruled in *N v the United Kingdom* because the case would have been dealing with 'naturally occurring harm'.[214]

However, the Court conceded that the severe humanitarian crisis developed due to direct and indirect acts of the parties to the conflict and, therefore, they were mostly responsible for the situation. For that reason, the ECtHR decided to rule according to *MSS v Belgium and Greece* which stressed the importance of accessible most basic needs, emphasizing the vulnerability to

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[208] *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) para 254.
[209] *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) paras 367 f.
[210] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) paras 11-16.
[211] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) paras 18, 20.
[212] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) paras 21-26.
[213] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) para 278.
[214] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) para 282.

ill-treatment and the existence of possible improvement of the living circumstances.[215] Relating to the situation of internally displaced persons in Somalia in refugee camps, the Court decided that dire humanitarian conditions can fulfil the obligation under Art 3 ECHR not to remove a person.[216]

(3) Evaluation

The ECtHR decided in two cases that dire humanitarian conditions which cannot guarantee a life in human dignity with access to most basic needs and a life in constant need of fear with no prospect of improvement can fall within the scope of inhuman or degrading treatment.[217] However, these circumstances must be the responsibility of an actor. Then the requirements for inhuman or degrading treatment are clear.

In *Sufi and Elmi v the United Kingdom*, the ECtHR took into consideration the dire humanitarian conditions exacerbated by droughts in Somalia. Had the droughts been the only trigger of the humanitarian crisis then the ECtHR would have applied the case-law of *N v the United Kingdom*, where Art 3 ECHR only applies in 'very exceptional cases'.[218]

This means that the threshold is significantly higher for 'natural causes only' than in cases where the responsibility of a human actor can be established.

As already mentioned above, the circumstances of medical cases are barely comparable to cases of non-refoulement because of climate displacement. Since it is established that climate change is partly human made and human actors are responsible for the humanitarian crisis, the focus of the requirements to fulfil inhuman or degrading treatment in the receiving State in cases of climate-induced migration should lie on access to most basic needs, possibilities of improvement of livelihood and subject to vulnerability. This could be transferred to climate-induced migration once it is established that human responsibility plays a direct role in the dire circumstances. [219] Still, for the application of this case-law, the ECtHR would have to establish the human responsibility in climate change as a 'predominant cause'.[220]

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[215] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) para 283.
[216] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) para 296.
[217] Jane McAdam 'Displacement in the Context of Climate Change and Disasters' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 839.
[218] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) para 282.
[219] Matthew Scott, 'Refuge from Climate Change-Related Harm: Evaluating the Scope of International Protection within the Common European Asylum System' in Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union* (Brill 2015) 216 ff.
[220] Matthew Scott, 'Refuge from Climate Change-Related Harm: Evaluating the Scope of International Protection within the Common European Asylum System' in Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union* (Brill 2015) 216.

Since it was already mentioned that climate change consequences do have a human impact, it is still questionable how people will claim responsibility in front of authorities and which actor specifically will be held responsible for it.[221] Furthermore, it will be extremely difficult to prove how States are responsible for specific events.[222] However, this could be an indicator for climate change case-law in the future where living conditions due to droughts or floods could reach the high threshold of Art 3 ECHR, triggering the principle of non-refoulement.

c. *Sui generis* case

Should the ECtHR dive deep into the purpose of the non-refoulement principle and examine the cases of climate displacement in detail, it would conclude that the cases deal with different problems that are not comparable to the already mentioned categories of cases. This could lead to the adoption to categorize climate displacement as a *sui generis* claim under Art 3 ECHR.[223] The establishment of human responsibility in climate change is possible but only to a certain degree. Therefore, it is unlikely that the ECtHR will claim it as a 'predominant cause'. However, it cannot ignore the fact that human conduct exists.

Another unique feature of climate-induced migration cases is that the sending State is inflicting harm on people outside of its jurisdiction, therefore affected people cannot directly claim that the sending State is committing torture or inhuman or degrading treatment but have to refer to its obligation under Art 3 ECHR to respect the non-refoulement principle.[224] Furthermore, not only one State is responsible for the consequences of climate change.[225] As the circumstances of disaster and climate change displacement are highly complicated and do not fit in any of the

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[221] cf Joel Herrault, 'Refuge from Climate Change? The Principle of Non-Refoulement under the ICCPR and the ECHR in the Context of Climate Change' (Uppsala University 2021) <https://www.diva-portal.org/smash/get/diva2:1539877/FULLTEXT01.pdf> accessed 23 July 2024, 50 f.
[222] Ideas on how to prove responsibility can be found here: Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 International Journal of Refugee Law 404, 422 ff.
[223] Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 International Journal of Refugee Law 404, 421.
[224] Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 International Journal of Refugee Law 404, 421.
[225] Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 International Journal of Refugee Law 404, 421.

expressed categories above, the proposal that the ECtHR will create a new category and examine cases under a *sui generis* claim fits best for the presented problem.[226]

d. The individual approach of the ECtHR

The risk assessment, as expressed in *D v the United Kingdom* judgment, is always based on individual considerations and not on general living conditions.[227] It has therefore been suggested that in climate-induced migration cases, a group-based solution should be applied as circumstances usually affect more than one person.[228] By assessing the existing case-law of the ECtHR it stands out that general circumstances are never enough since the Court is assessing the individual circumstances. This is an indication that living conditions alone cannot reach the threshold of Art 3 ECHR, but in addition, individual risk factors like being part of a vulnerable group are necessary to fulfil the requirements.

In the cases of *MSS v Belgium and Greece* and *Sufi and Elmi v the United Kingdom*, the ECtHR focused on the humanitarian conditions which the applicants had been or would have been subjected to: Conditions that amounted to inhuman or degrading treatment are 'extreme poverty, unable to cater for […] basic needs: food, hygiene and a place to live' and 'the extreme fear of being attacked and robbed without any prospect of improvement of this living situation'.[229] Further, in *Sufi and Elmi v the United Kingdom* the conditions deteriorated due to droughts. The Court focused more on a 'fact-specific assessment of the harm' than on 'exceptionality', which was stressed in *N v the United Kingdom*.[230] This approach would be more feasible in cases of climate-induced migration. Still, applicants will have to show that on top of dire environmental conditions in the receiving State they are especially vulnerable to inhuman or degrading treatment there.

e. Conclusion

At first sight, the case-law of the ECtHR seems to offer little jurisprudence on climate-induced migration and the non-refoulement principle. However, the ECtHR is developing its case-law

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[226] Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 International Journal of Refugee Law 404, 421 f.
[227] *D v the United Kingdom* App no 30240/96 (ECtHR, 2 May 1997) para 50.
[228] Jane Mc Adam and Ben Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' [2008] Sydney Law School Legal Studies Research Paper No 08/131, 12.
[229] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) para 279.
[230] Matthew Scott, 'Refuge from Climate Change-Related Harm: Evaluating the Scope of International Protection within the Common European Asylum System' in Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union* (Brill 2015) 215.

by applying Art 3 ECHR in a more flexible way detached from direct or indirect acts of States or non-State actors. It could be possible that the ECtHR will bring this argument of flexibility once again when finally deciding on a climate-induced migration case.[231] The medical cases do not seem to be an adequate solution to the non-refoulement principle regarding environmental disasters. They lack comparability and the ECtHR has created a very high threshold for the obligation under Art 3 ECHR to be triggered.

It is not ruled out that the ECtHR would decide according to the *Sufi and Elmi* case in the future. However, there are further questions on how the Court would establish the responsibility of a human actor and how an applicant would bring forward evidence in this case. A claim of a violation of Art 3 ECHR upon removal only due to poor socio-economic conditions without an established responsibility of a State or non-State actor will be challenging to maintain.[232]

Further, these cases have a problem with the individual and general risk assessment.

Moreover, it needs to be clarified how the Court will solve the issue that the sending State will usually have contributed to the inflicted harm, sometimes even more than the receiving State. Despite this, the environmentally displaced persons will look for protection in the sending State.[233] This could lead to the adoption of the ECtHR to categorize climate displacement as a *sui generis* claim.[234] Furthermore, it is likely that the ECtHR will adopt or at least be influenced by the decision of the UN Human Rights Committee in the *Teitiota v New Zealand* case.[235]

3. The Court of Justice of the European Union

The Court of Justice of the European Union has yet to rule on a case regarding climate-induced migration. However, the Charter of Fundamental Rights and the Directives of EU asylum law are powerful instruments which also entail the non-refoulement principle. Furthermore, the Charter of Fundamental Rights mirrors rights enshrined in the ECHR and Art 52 (3) of the

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[231] cf Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 International Journal of Refugee Law 404, 420.

[232] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 655; Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 International Journal of Refugee Law 404, 415.

[233] See further Chapter B.II.2.c.

[234] Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 International Journal of Refugee Law 404, 421.

[235] Eugénie Delval, 'From the UN Human Rights Committee for the European Courts: Which protection for climate-induced displaced persons under European Law?' (*EU Migration Law Blog*, 8 April 2020) <https://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/> accessed 11 July 2024.

Charter mentions that the interpretation of the rights of the ECHR serve as the minimum standard of protection for the rights enshrined in the Charter. Therefore, the same rights are of equal importance and scope of protection, which makes the CJEU more or less 'bound' by the ECtHR in its interpretation.[236] This leads to the consequences that the judges in Luxemburg have to consider the decisions of the Strasbourg judges.[237] The following cases will be scrutinized in regard to the case-law of the non-refoulement principle under the CJEU.

a. *Mohamed M'Bodj v État belge*[238]

This case dealt with the proceedings between *Mr M'Bodj*, who is a Mauritanian national and the Belgian State.[239] He was granted leave to reside in Belgium on medical grounds after the State rejected his request for asylum.[240] The law in question concerns the Qualification Directive[241] and what kind of obligations in regard to social welfare and health care the Member States have towards third-country nationals. More specifically, the Court was asked if Art 28 and Art 29 of the Directive, which deal with social welfare, have to be granted not only to refugees and persons eligible for subsidiary protection but also to foreign nationals who have been granted residence on medical grounds without being eligible for subsidiary protection.[242] In this context the CJEU decided on the interpretation of Art 15 (b) of the Qualification Directive which deals with subsidiary protection in cases of 'torture or other inhuman or degrading treatment or punishment'.

The Qualification Directive lists specific human acts as a source of persecution or serious harm.[243] As medical cases usually lack human conduct, lack of medical resources or inadequate treatment in the health care system cannot fall within the interpretation of 'torture or other inhuman or degrading treatment or punishment' under Art 15 (b) of the Qualification Directive. However, an exception can be made in cases of intentional deprivation of health care.[244] The CJEU used a similar approach as the ECtHR, examining in detail where the harm stems from.

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[236] Case C-617/10 *Åklagare v Hans Åkerberg Fransson* (CJEU, 26 February 2013) para 44.
[237] This interconnection is assessed in relation to the *VereinKlimaSeniorinnen* judgment which could also inflict potential case-law before the CJEU, see in detail here: Piet Eeckhout, 'From Strasbourg to Luxembourg? The KlimaSeniorinnen judgment and EU remedies' (*Verfassungsblog on matters constitutional*, 5 June 2024) <https://verfassungsblog.de/from-strasbourg-to-luxembourg/> accessed 12 July 2024.
[238] Case C-542/13 *Mohamed M'Bodj v État belge* (CJEU, 18 December 2014).
[239] Case C-542/13 *Mohamed M'Bodj v État belge* (CJEU, 18 December 2014) para 2.
[240] Case C-542/13 *Mohamed M'Bodj v État belge* (CJEU, 18 December 2014) para 16.
[241] Specifically, an older version from 2004: Council Directive 2004/83/EC of 29 April 2004 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] OJ L304/12. However, the provisions in question did not differ from the newer Qualification Directive.
[242] Case C-542/13 *Mohamed M'Bodj v État belge* (CJEU, 18 December 2014) para 24 (1).
[243] Case C-542/13 *Mohamed M'Bodj v État belge* (CJEU, 18 December 2014) para 35.
[244] Case C-542/13 *Mohamed M'Bodj v État belge* (CJEU, 18 December 2014) para 36.

It decided that only when a human actor is involved can a person with a serious illness not be returned. In the present case the CJEU found no involvement of a human actor and therefore applied the case-law of the judgment *N v the United Kingdom*. It declared that a violation of Art 3 ECHR could be considered in comparable situations that amount to a 'very exceptional case'. Nevertheless, this would not automatically mean that the person is entitled to subsidiary protection.[245] However, the State could not send the person back because of its obligation under Art 3 ECHR.

b. *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida*[246]

The case dealt with *Mr Abdida* a Nigerian citizen who applied for leave to reside because he was suffering from serious illness. After rejecting his application, he was ordered to leave Belgium.[247] The CJEU had to decide *inter alia* if a Member State must provide a suspensive effect when there is an administrative decision ordering the person to leave the territory of the State, but the judicial decision of appeal is still pending.[248] Firstly, it found no grounds for granting the applicant subsidiary protection which was in line with the judgment issued that same day regarding *M'Bodj*.[249] Secondly, the CJEU found that the decision to remove *Mr Abdida* would touch upon the Returns Directive, mostly Art 5 of the Returns Directive.[250] In connection to this decision, the CJEU ruled on the interpretation of Art 19 (2) of the Charter of Fundamental Rights which has to be seen in the light of Art 3 ECHR and its case-law prohibiting a Member State to remove an alien who is suffering from serious illness in very exceptional cases where humanitarian considerations prevail.[251] The requirement of a 'very exceptional case' is fulfilled if the risk faced by the alien would amount to an inhuman or degrading treatment. To guarantee effective remedy and prohibition of refoulement, the decision to refrain from granting residence on medical grounds must at least have a suspensive effect if there is a judicial decision pending and the removal would lead to irreversible and severe deterioration of the applicant's health

[245] Case C-542/13 *Mohamed M'Bodj v État belge* (CJEU, 18 December 2014) paras 39 f.
[246] Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* (CJEU, 18 December 2014).
[247] Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* (CJEU, 18 December 2014) paras 21, 23.
[248] Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* (CJEU, 18 December 2014) para 30.
[249] Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* (CJEU, 18 December 2014) para 33.
[250] Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* (CJEU, 18 December 2014) paras 39, 49.
[251] Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* (CJEU, 18 December 2014) para 47.

status, in accordance with the ECtHR case-law.[252] This decision has an impact on the Returns Directive meaning that Member States cannot proceed with the removal if it would violate the principle of non-refoulement due to medical conditions. This created the 'alternative protection'.[253] Even though the applicant falls out of the scope of Art 15 (b) of the Qualification Directive, the decision to remove him to a country where appropriate treatment for his serious illness is not available could constitute a direct infringement of Art 5 of the Returns Directive.[254] The decision not to remove the applicant was a 'de-facto postponed removal'.[255] Art 5 of the Returns Directive stresses to 'take due account' of the health status and respect the non-refoulement principle. The CJEU converted this provision into an obligation of the State to refrain from deporting the alien (at least until the judicial proceedings were terminated).[256]

c. *MP v Secretary of State for the Home Department*[257]

In this case, the CJEU decided accordingly to its findings in the *M'Bodj case* over a case that concerned an asylum seeker from Sri Lanka who filed for asylum in the United Kingdom. This was based on his claims that he had been detained and tortured by Sri Lankan security forces for being a member of a persecuted group.[258] The authorities did not believe him that upon return he would still, more than three years later, face ill-treatment in Sri Lanka.[259] Furthermore, the applicant insisted on his ill-treatment in the past being 'itself sufficient justification for him to be eligible for subsidiary protection' which is not the case.[260] A Member State needs to refrain from removing an alien to a country where he would suffer from 'significant and permanent deterioration of that person's mental health disorder, particularly where, as in the present

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[252] Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* (CJEU, 18 December 2014) para 53; Elspeth Guild, 'Article 19' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart Publishing 2021) para 19.60.
[253] Steve Peers, 'Could EU law save Paddington Bear? The CJEU develops a new type of protection' (*EU Law Analysis*, 21 December 2014) <http://eulawanalysis.blogspot.com/2014/12/could-eu-law-save-paddington-bear-cjeu.html> accessed 15 July 2024.
[254] Fabian Lutz, 'Return Directive 2008/115/EC Article 5 Non-refoulement, best interest of the child, family life and state of health' in Daniel Thym and Kay Hailbronner (eds), *EU Immigration and Asylum Law* (3rd edn, C.H. Beck, Hart Publishing and Nomos 2022) para 8.
[255] Fabian Lutz, 'Return Directive 2008/115/EC Art 9 Postponement of removal' in Daniel Thym and Kay Hailbronner (eds), *EU Immigration and Asylum Law* (3rd edn, C.H. Beck, Hart Publishing and Nomos 2022) para 5.
[256] Steve Peers, 'Could EU law save Paddington Bear? The CJEU develops a new type of protection' (*EU Law Analysis*, 21 December 2014) <http://eulawanalysis.blogspot.com/2014/12/could-eu-law-save-paddington-bear-cjeu.html> accessed 15 July 2024.
[257] Case C-535/16 *MP v Secretary of State for the Home Department* (CJEU, 24 April 2018).
[258] Case C-535/16 *MP v Secretary of State for the Home Department* (CJEU, 24 April 2018) paras 16-17.
[259] Case C-535/16 *MP v Secretary of State for the Home Department* (CJEU, 24 April 2018) para 18.
[260] Case C-535/16 *MP v Secretary of State for the Home Department* (CJEU, 24 April 2018) para 30.

case, such deterioration would endanger his life'.[261] This follows from Art 4 and Art 19 (2) of the Charter of Fundamental Rights which is interpreted in the light of Art 3 ECHR. However, a Member State is only obligated to grant subsidiary protection in the meaning of Art 15 (b) of the Qualification Directive if the person would intentionally be deprived of access to health care in the receiving country.[262]

d. *X v Staatssecretaris van Justitie en Veiligheid*[263]

X was a Russian national whose claim for international protection or a residence permit in the Netherlands was rejected by the authorities and an order for removal was issued. He was suffering from a rare form of blood cancer for which he received treatment based on medicinal cannabis which was not available in Russia.[264] The applicant argued that after removal due to lack of access to the medicinal cannabis his pain would increase significantly.

The CJEU decided that the Return Directive and the Charter of Fundamental Rights stop Member States from carrying out the removal if the person is 'suffering from a serious illness, where there are substantial grounds for believing that returning that third-country national would expose him or her, on account of appropriate care not being available in the receiving country, to a real risk of a significant reduction in his or her life expectancy or a rapid, significant and permanent deterioration in his or her state of health, resulting in intense pain.[265] A Member State would violate Art 4 of the Charter of Fundamental Rights if the person would face such risk upon removal to the extent that it would reach the severity threshold of the mentioned above.[266] The time in which the increase of pain has to become visible and more severe can vary from person to person. A certain amount of time may be necessary for the pain to increase more significantly and permanently.[267] Therefore, a strict period of time for such an increase cannot be laid down by the Member States.[268]

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[261] Case C-535/16 *MP v Secretary of State for the Home Department* (CJEU, 24 April 2018) para 43; Elspeth Guild, 'Article 19' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart Publishing 2021) para 19.61.
[262] Case C-535/16 *MP v Secretary of State for the Home Department* (CJEU, 24 April 2018) para 52.
[263] Case C-69/21 *X v Staatssecretaris van Justitie en Veiligheid* (CJEU, 22 November 2022).
[264] Case C-69/21 *X v Staatssecretaris van Justitie en Veiligheid* (CJEU, 22 November 2022) para 14.
[265] Case C-69/21 *X v Staatssecretaris van Justitie en Veiligheid* (CJEU, 22 November 2022) para 66.
[266] Case C-69/21 *X v Staatssecretaris van Justitie en Veiligheid* (CJEU, 22 November 2022) para 68.
[267] Case C-69/21 *X v Staatssecretaris van Justitie en Veiligheid* (CJEU, 22 November 2022) para 72.
[268] Case C-69/21 *X v Staatssecretaris van Justitie en Veiligheid* (CJEU, 22 November 2022) para 76.

e. Evaluation

The scope of the Qualification Directive as interpreted by the CJEU, leaves no space for subsidiary protection due to the lack of medical resources and medical treatment in the country of origin unless the person has been intentionally deprived of access to health care.[269] Furthermore, a condition which could fall within the scope of subsidiary protection always needs to be caused by an actor or a 'third party'.[270] Before the *M'Bodj case*, legal scholars would have included cases of persons facing poor living conditions in the scope of application of Art 15 (b) of the Qualification Directive.[271]

It seems that the provision of Art 15 (b) of the Qualification Directive cannot be applied in regard to climate-induced migration and climate change effects, since a human actor has to inflict serious harm and general shortcomings are not sufficient.[272] Even though the argument could be made that lack of resources or climate change effects ultimately stem from the insufficiency and passiveness of the government and therefore an actor in the light of the Qualification Directive, it its unlike that the CJEU would adopt such an argument.[273] The 'alternative protection' of the Returns Directive which was created by the CJEU in the *Abdida* judgement is based on the prohibition of non-refoulement which includes medical cases as long as the cases would be protected under Art 3 ECHR. This could also be possible for environmental cases where persons cannot be granted refugee status or subsidiary protection.[274] However, since the case-law is based on the jurisprudence of the ECtHR, it would encounter the same problems that were already discussed above.

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[269] Steve Peers, 'Could EU law save Paddington Bear? The CJEU develops a new type of protection' (*EU Law Analysis*, 21 December 2014) <http://eulawanalysis.blogspot.com/2014/12/could-eu-law-save-paddington-bear-cjeu.html> accessed 15 July 2024.
[270] Steve Peers, 'Could EU law save Paddington Bear? The CJEU develops a new type of protection' (*EU Law Analysis*, 21 December 2014) <http://eulawanalysis.blogspot.com/2014/12/could-eu-law-save-paddington-bear-cjeu.html> accessed 15 July 2024.
[271] With further remarks: Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law 322, 333.
[272] Eugénie Delval, 'From the UN Human Rights Committee for the European Courts: Which protection for climate-induced displaced persons under European Law?' (*EU Migration Law Blog*, 8 April 2020) <https://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/> accessed 11 July 2024.
[273] Steve Peers, 'Could EU law save Paddington Bear? The CJEU develops a new type of protection' (*EU Law Analysis*, 21 December 2014) <http://eulawanalysis.blogspot.com/2014/12/could-eu-law-save-paddington-bear-cjeu.html> accessed 15 July 2024; Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law 322, 334.
[274] Steve Peers, 'Could EU law save Paddington Bear? The CJEU develops a new type of protection' (*EU Law Analysis*, 21 December 2014) <http://eulawanalysis.blogspot.com/2014/12/could-eu-law-save-paddington-bear-cjeu.html> accessed 15 July 2024.

As seen, the CJEU, as well as the ECtHR, have a hard time evaluating the appropriate time for a 'real risk' of suffering to develop in the prognosis. The criteria are vague when a State needs to refrain from removing a person due to the risk assessment.

The CJEU has a more reserved interpretation of subsidiary protection which makes it difficult for an environmental displaced person to fall within the scope of international protection compared to the ECHR which interprets Art 3 ECHR more extensively.[275] The protection of Art 3 ECHR and Art 15 (b) of the Qualification Directive diverge.[276] Effective protection could only be provided if the CJEU would let go of the 'actor' requirement in Art 15 (b) of the Qualification Directive. Practical considerations speak in favor of abandoning the strict requirement of a 'human actor' since international protection should be adapted to the recent challenges.[277] Further, it contravenes the original purpose of the Qualification Directive, which was based purely on protection.[278] The choice to adhere to the premise of the 'actor requirement' will exclude environmentally displaced persons. However, the CJEU will have to deal with the argument that almost every environmental disaster involves at least partly human conduct when finally deciding if a person displaced by disaster can fall into the scope of protection of Art 15 (b) of the Qualification Directive. Since the ECtHR and the CJEU influence each other, it will be interesting to see how they will react to each other's case-law in the future. As the ECtHR can be approached directly by individuals after exhausting all domestic remedies, it will be more likely to deal with a case first.

4. National jurisprudence

The focus of this thesis is the jurisprudence in international and European law. However, there have been a few cases where climate change circumstances played (*inter alia*) a role in judgments of regional or national courts. As the principle of exhaustion of local remedies applies to the ECtHR or UN Committees, it is important to look at the national case-law as well.

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[275] Eugénie Delval, 'From the UN Human Rights Committee for the European Courts: Which protection for climate-induced displaced persons under European Law?' (*EU Migration Law Blog*, 8 April 2020) <https://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/> accessed 11 July 2024.

[276] Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law 322, 333.

[277] Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law 322, 335.

[278] Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law 322, 334.

a. Constitutional Court of Austria[279]

The Constitutional Court of Austria had to decide a case of a Somali national who applied for international protection in Austria where his application was dismissed regarding refugee status and subsidiary protection.[280] Further, an expulsion order was issued.[281] The applicant claimed that in case of his return and the humanitarian crisis in Somalia, he would be exposed to real danger that would threaten his existence.[282]

The Constitutional Court of Austria ruled based on information regarding the situation in Somalia, which entailed information that droughts led to the danger of famine in some regions.[283] It decided that the Federal Administrative Court of Austria (Bundesverwaltungsgericht) misjudged the situation of the applicant upon removal in Somalia due to unbearable living conditions of famine and did not sufficiently substantiated its conclusion regarding the protection of the applicant in light of the obligations under Art 3 ECHR. The decision of the Federal Administrative Court of Austria was therefore taken at least partly arbitrarily[284].

The decision was *inter alia* based on famine in Somalia because of droughts in the country. Droughts are categorized as a slow-onset disaster which will increase due to climate change as temperatures rise and regions will get drier.[285] This decision already considered environmental circumstances in a country, and based on existential crisis there, the Court granted the applicant protection. However, various factors played a role, which were *inter alia* the affiliation of the applicant to a minority clan in Somalia, which is repressed by majority clans in Somalia, the constant fear of terrorist groups and the dire humanitarian conditions as famine exacerbated by droughts. There has been an accumulation of factors which were taken into consideration when deciding on the international protection of the applicant. The requirements for subsidiary protection in Austria are broader than in the Qualification Directive because Austria acknowledges the case-law of Art 2 or Art 3 of the ECHR regarding non-refoulement for the interpretation of the scope of application of subsidiary protection. An 'actor of serious harm' is not needed.[286]

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[279] VfGH (Constitutional Court of Austria) 5 October 2023, E 1000/2023 <https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_20231005_23E01000_00/JFT_20231005_23E01000_00.pdf> accessed 10 July 2024.
[280] VfGH (Constitutional Court of Austria) 5 October 2023, E 1000/2023 paras 1-2.
[281] VfGH (Constitutional Court of Austria) 5 October 2023, E 1000/2023 para 2.
[282] VfGH (Constitutional Court of Austria) 5 October 2023, E 1000/2023 para 3.
[283] VfGH (Constitutional Court of Austria) 5 October 2023, E 1000/2023 para 2.1.
[284] VfGH (Constitutional Court of Austria) 5 October 2023, E 1000/2023 para A.2.2.
[285] World Health Organization, 'Drought' <https://www.who.int/health-topics/drought#tab=tab_1> accessed 10 July 2024.
[286] Monika Mayrhofer and Margit Ammer, 'Climate mobility to Europe: The case of disaster displacement in Austrian asylum procedures' (2022) 4 Frontiers in Climate <https://www.frontiersin.org/journals/climate/articles/10.3389/fclim.2022.990558/full> accessed 17 July 2024. See the whole article for case studies on Austrian asylum decisions and the role of disasters.

Consequently, it is easier for environmentally displaced person to be granted subsidiary protection. Still, as the judgement shows, various factors will be considered, and a crucial point is still tbelonging to a vulnerable group.

b. Higher Administrative Court Baden-Wuerttemberg, Germany[287]

The applicant, an Afghan national, claimed that § 60 (5) of the German Residence Law in conjunction with Art 3 ECHR, which suspends he deportation of aliens to their country of origin, would apply in his case.

The Court decided that in very exceptional cases humanitarian conditions which are not directly or indirectly attributable to a State or a non-State actor can be seen as inhuman or degrading treatment in light of Art 3 ECHR.[288] Factors that influence this assessment can *inter alia* be 'environmental circumstances like temperature and climate or environmental disasters'.[289]

Although the environmental factors ultimately did not play a role in assessing the decision to grant the applicant protection,[290] the Higher Administrative Court took into account the importance of these factors as complementary considerations to other socio-economic factors. This shows the importance of including environmental factors when scrutinizing a deportation case. The judgment was overturned by the Federal Administrative Court of Germany (Bundesverwaltungsgericht) with the assumption that it could not be said conclusively whether the financial return aid would help the applicant sufficiently in Afghanistan or not.[291] Therefore, it was indecisive if the individual situation in the receiving country would have amounted to a violation of Art 3 ECHR.

c. Administrative Court of Appeal of Bordeaux, France[292]

The case dealt with a Bangladeshi man who suffered from respiratory pathology, including asthma and sleep apnea, and was ordered to leave France. The decision of the Court did not rule

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[287] VGH Baden-Wuerttemberg (Higher Administrative Court of Baden-Wuerttemberg, Germany) 17 December 2020 – A 11 S 2042/20 <https://www.landesrecht-bw.de/bsbw/document/NJRE001452105> accessed 10 July 2024.

[288] VGH Baden-Wuerttemberg (Higher Administrative Court of Baden-Wuerttemberg, Germany) 17 December 2020 – A 11 S 2042/20, para 23.

[289] VGH Baden-Wuerttemberg (Higher Administrative Court of Baden-Wuerttemberg, Germany) 17 December 2020 – A 11 S 2042/20, para 25.

[290] The court did mention droughts in para 68 and water shortage in para 76 but both factors did not apply to the situation in Kabul.

[291] BVerwG (Federal Administrative Court of Germany) 21 April 2022 – 1 C 10/21 <https://www.bverwg.de/210422U1C10.21.0> accessed 10 July 2024.

[292] Court administrative d'appel de Bordeaux (Administrative Court of Appeal of Bordeaux, France), 2ème chambre (second chamber) 18 December 2020, 20BX02193, 20BX02195 <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042737615> accessed 11 July 2024.

on refoulement but on the French law, which grants aliens suffering from a medical condition, a residence permit under certain circumstances. In light of this decision, the applicant argued that due to his medical condition, he could not be sent back to Bangladesh, where he faced a risk of a severe deterioration of his respiratory pathology. His father had already died of asthma in Bangladesh. Bangladesh has one of the worst air qualities in the world due to heavy air pollution.[293] The French Court ruled that the applicant would face severe deterioration of his health condition in Bangladesh due to inappropriate health treatment and air pollution and would ultimately face premature death.[294] Further, the applicant was persecuted in Bangladesh which made him part of a vulnerable group.[295] In this case, however, the French Court dealt in particular with the health care situation and general air pollution in Bangladesh and came to the conclusion that the applicant's residence permit should be prolonged.

The case is of great importance and could influence the French migration system to take into consideration environmental factors in decisions.[296] The effects of air pollution on human health should certainly not be overlooked and will presumably have a greater impact on cases like this in the following years.[297]

5. Selected problems

a. Responsibility of the sending State in climate-induced migration

The purpose of the principle of non-refoulement is to impose responsibility on the sending State for its decision to send people back to the receiving State in light of the risks of torture or inhuman or degrading treatment. The receiving State either directly inflicts harm on the affected person, human predominantly cause acts or there are no human acts involved in the circumstances. Still, the situation in the receiving State is being assessed and is decisive for the application of the non-refoulement principle. Ironically, in cases of climate-induced migration, the roots of the dire circumstances in the receiving State might stem from acts of the sending State

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[293] 'Air pollution and asylum: a legal first' <https://www.hausfeld.com/de-de/was-wir-denken/perspektiven-blogs/air-pollution-and-asylum-a-legal-first/> accessed 11 July 2024.

[294] Ruby Peacock, 'Atmospheric pollution relevant to asylum claim, holds French court' (*UK Human Rights Blog*, 2 February 2021) <https://ukhumanrightsblog.com/2021/02/02/atmospheric-pollution-relevant-to-asylum-claim-holds-french-court/> accessed 11 July 2024.

[295] Court administrative d'appel de Bordeaux (Administrative Court of Appeal of Bordeaux, France), 2ème chambre (second chamber) 18 December 2020, 20BX02193, 20BX02195 <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042737615> accessed 11 July 2024 para 1.

[296] Ruby Peacock, 'Atmospheric pollution relevant to asylum claim, holds French court' (*UK Human Rights Blog*, 2 February 2021) <https://ukhumanrightsblog.com/2021/02/02/atmospheric-pollution-relevant-to-asylum-claim-holds-french-court/> accessed 11 July 2024.

[297] 'Air pollution and asylum: a legal first' <https://www.hausfeld.com/de-de/was-wir-denken/perspektiven-blogs/air-pollution-and-asylum-a-legal-first/> accessed 11 July 2024.

which possibly contributes more carbon emissions than the receiving State. The affected person is therefore looking for protection in a State that shares responsibility for the dire situation in the receiving country.[298] This contradicts the original purpose of the non-refoulement principle. It does not change anything for the mere application of the non-refoulement principle as the requirements of the non-refoulement principle still stay the same. The obligation of the sending State still is that an individual cannot be expelled if there is a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country.[299] This problem is mainly concerned with ethical considerations.

b. Actions of States in time

Regarding the assessment of courts whether living conditions after a disaster could lead to the violation of the right to life or prohibition of torture or inhuman or degrading treatment in the light of the non-refoulement principle, difficulties exist with the acts of States or lack of acts of States.[300] The capability of the State to mitigate climate change or at least take adaptive measures influences the 'real risk' that a person could be suffering from inhuman or degrading treatment. Neither the ECtHR nor the CJEU have declared a strict timeline when the 'real risk' should be developed in the receiving country. As for the consequences of climate change, this is important since the affected person needs to bring forward claims of unbearable circumstances. The UN Human Rights Committee referred *Teitiota* back to the receiving State, remarking that the State would still have time to manage the consequences of the climate change crisis in its territory. A reference back to the receiving State, in some cases, could amount to degrading treatment if there is evidence that the adverse effect of climate change is already irreversible.

The question of how much time the courts will grant in this regard is essential for assessing the 'real risk'.

[298] Jane Mc Adam and Ben Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' [2008] Sydney Law School Legal Studies Research Paper No 08/131, 12.
[299] *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016) para 173.
[300] Jane McAdam, 'Displacement in the Context of Climate Change and Disasters' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 839.

6. Application on environmental events

Kälin included mainly two categories of climate disasters in the term 'climate-induced migration'.[301] The following will assess whether the analyzed case-law above can be applied either to slow-onset events or to sudden-onset events.

a. Slow-onset events

Slow-onset events are categorized mostly by one environmental factor which can ultimately lead to displacement. The most prominent examples are small sinking islands. The constant sea-level rise threatens the existence of territory and ability to live there. The evaluation of a case depends on whether the affected person can bring forward other risk factors besides the rising sea-level, such as internal conflict or affiliation to a vulnerable group. As seen in the *Teitiota v New Zealand* case, time is of the essence in these cases. Whether a case of non-refoulement will be decided positively depends on the capability of the receiving State to change the consequences of climate change. Most of the time, the consequences will be irreversible. However, the question remains: Is it still unbearable to send people back if it is already certain that they would need to leave the receiving State again due to unbearable living conditions? This would depend on the measures the receiving State can take in the meantime to protect its citizens and on the time frame scientists will give until the disaster. With the existing case-law, a general prospect that livelihood will cease to exist is not enough to trigger the non-refoulement principle. Unless there is a change in the case-law and legislation, slow-onset events are not (yet) covered by the existing case-law and legislation. The only exception would be that the island's existence has already been extinguished, which would then not only trigger the prohibition of inhuman or degrading treatment but also the obligation to protect the right to life.

b. Sudden-onset events

In contrast, sudden-onset events are characterized by a sudden environmental factor threatening humanitarian conditions or existence. Usually, floods, droughts or wildfire would fall into this category. As they are 'sudden', it is easier to claim that a 'real risk' in the receiving State exists as the disaster has already happened. However, applying the case-law to sudden-onset events shows, similar to the first case group, that the non-refoulement principle is not triggered by general circumstances in the receiving country. A combination of various individual factors

[301] See Chapter A.I.

needs to be claimed to assess the prohibition of refoulement positively. This can be compared to the national case-law that is listed above. The capability of the receiving State to answer the disaster is essential for the assessment of the 'real risk'. Further, if the already existing case-law were applied, the question would remain how the 'human conduct' in the sudden-onset disaster would be considered.

III. Conclusion

The case-law analysis above sheds some light on the application of non-refoulement regarding climate-induced migration.

Firstly, as climate-induced migration includes many different circumstances, courts will have to look closely at the facts of the individual cases. If the migration movement is rooted in health issues, it could fall within the scope of medical cases and the so called 'purely naturally occurring cases' of the ECtHR. However, the involvement of human conduct in the development of climate change makes the application difficult. It will be seen how human conduct will be evaluated and what kind of factor and focus it will be given. The application of the case-law depends on this assessment.

Secondly, the criteria that would have to be applied are unclear. There is a problem with the timeline when assessing a prognosis for a 'real risk' in the receiving country. Moreover, it is not clear how severe a person needs to suffer, and the health status needs to deteriorate. With the existing legislation, this will be based on an individual approach and ultimately decided by a court.

Thirdly, the cases where environmental factors played a role, namely *the Teitiota v New Zealand* case and the national case-law, usually took environmental factors into account, but the individual circumstances upon removal and most importantly the affiliation with a vulnerable group were decisive for the case. It is questionable if a case will be purely decided on the environmental situation in a country. Usually, various factors decide that a removal would violate the non-refoulement principle. Only individual cases can be protected by the principle of non-refoulement. It is not an instrument for the effective protection of groups. Dire humanitarian conditions stem from environmental disasters, and conflict is a consequence. Cases where the only reason for flight is environmental circumstances, which could be thought of in cases of rising sea-level, could ultimately be decided positively if it is already endangering the right to

life, which is also protected by the non-refoulement principle. This can be seen in the reasoning of the UN Human Rights Committee.

Lastly, which also corresponds to the second finding, existing legislation is not sufficient to protect people in case of climate-induced migration. The EU Qualification Directive is not suitable for environmental displacement. The principle of non-refoulement, which is universally recognized, will be the ‘last straw’ for environmentally displaced people. However, as of now, it is not a general instrument, and vulnerability to a ‘real risk’ in the receiving country is crucial for a judgment in favor of an environmentally displaced person.

D. Selected solutions regarding climate-induced migration

Although the principle of non-refoulement is expected to be applied in future cases regarding climate-induced migration and courts might be influenced by the *Teitiota case* to decide on the prohibition of refoulement, the principle of non-refoulement in international human rights law and customary international law cannot offer legal status to environmentally displaced persons. Solutions must go further to protect affected people effectively.

The analysis above showed that there exists a broad protection gab between the current legal provisions and the numbers of climate-induced migration. The principle of non-refoulement is just one of many instruments that could help. While scholars agree that the non-refoulement principle in international human rights law with its broad scope can be used as an measure of protection, it should be developed further in order to guarantee an effective remedy.[302] This is even stressed by the United Nations Human Rights Council.[303] Some scholars argue that the already existing instruments are sufficient but need to be applied with more leeway and adapted to the current challenges. The application should be guided by 'pragmatic reference to factual experience and legal reasoning'.[304]

This thesis is focused on the principle of non-refoulement, but this last chapter will show some solutions that could help environmentally displaced persons who cross borders apart from relying on the non-refoulement principle.

I. Legislation

The most basic solution to climate-induced migration would be to amend national migration law. There are some countries who have already established protection in that regard, although it might not be sufficient as an answer to the pressing need of climate-induced migration now and in the upcoming years.

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[302] Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law 322, 324; Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 648.

[303] UN Human Rights Council, 'The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants', UN Doc A/HRC/37/CRP.4 (22 March 2018) para 68.

[304] Rafiqul Islam, 'Climate Refugees and International Refugee Law' in Rafiqul Islam and Jahid Hossain Bhuiyan (eds), *An Introduction to International Refugee Law* (Martinus Nijhoff Publishers 2013) 240.

1. Domestic migration law

Sweden had an option of protection for environmentally displaced individuals enshrined in its national immigration laws.[305] The law in Sweden was passed to offer protection from environmental disasters such as what happened in Chernobyl, which makes it questionable if victims of slow-onset disasters as a result of climate change would fall into the scope of protection.[306] However, the provision was never claimed successfully in a case of national protection and was subsequently suspended within a reform of Swedish immigration law.[307]

Italy offers protection to environmentally displaced individuals due to natural disasters which occur outside of EU territory in Art 20 of the Consolidated Act on Immigration (CAI).[308] It includes a six-month residence which can be prolonged as long as the country of origin is instable due to the disaster.[309] Further, Art 19 CIA offers protection against refoulement in cases of torture or inhuman or degrading treatment.[310] In combination with a form of humanitarian protection which prevents effective deprivation of human rights in the country of origin the Italian authorities can offer (temporary) protection in cases of 'famine, floods, earthquakes, and land grabbing'.[311]

Although Austrian asylum law does not explicitly offer protection for environmentally displaced persons, it does have more leeway in granting subsidiary protection for people suffering

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[305] Rafael Leal-Arcas, 'Climate migrants: Legal options' (2012) 37 Procedia – Social and Behavioral Sciences 86, 92; in the case of Finland see here European Migration Network, 'Displacement and migration related to disasters, climate change and environmental degradation – EMN Inform' (May 2023) <https://home-affairs.ec.europa.eu/system/files/2023-05/EMN_Inform_climate_related_migration_final_May2023_090523.pdf> accessed 19 July 2024, 7 (Box 2).

[306] Rafael Leal-Arcas, 'Climate migrants: Legal options' (2012) 37 Procedia – Social and Behavioral Sciences 86, 92.

[307] Chiara Scissa et al, 'Legal and Judicial Responses to Disaster Displacement in Italy, Austria and Sweden' (*Völkerrechtsblog*, 19 October 2022) <https://voelkerrechtsblog.org/de/legal-and-judicial-responses-to-disaster-displacement-in-italy-austria-and-sweden/> accessed 19 July 2024; European Migration Network, 'Displacement and migration related to disasters, climate change and environmental degradation – EMN Inform' (May 2023) <https://home-affairs.ec.europa.eu/system/files/2023-05/EMN_Inform_climate_related_migration_final_May2023_090523.pdf> accessed 19 July 2024, 6.

[308] Chiara Scissa et al, 'Legal and Judicial Responses to Disaster Displacement in Italy, Austria and Sweden' (*Völkerrechtsblog*, 19 October 2022) <https://voelkerrechtsblog.org/de/legal-and-judicial-responses-to-disaster-displacement-in-italy-austria-and-sweden/> accessed 19 July 2024; European Migration Network, 'Displacement and migration related to disasters, climate change and environmental degradation – EMN Inform' (May 2023) <https://home-affairs.ec.europa.eu/system/files/2023-05/EMN_Inform_climate_related_migration_final_May2023_090523.pdf> accessed 19 July 2024, 6.

[309] Chiara Scissa et al, 'Legal and Judicial Responses to Disaster Displacement in Italy, Austria and Sweden' (*Völkerrechtsblog*, 19 October 2022) <https://voelkerrechtsblog.org/de/legal-and-judicial-responses-to-disaster-displacement-in-italy-austria-and-sweden/> accessed 19 July 2024.

[310] Chiara Scissa et al, 'Legal and Judicial Responses to Disaster Displacement in Italy, Austria and Sweden' (*Völkerrechtsblog*, 19 October 2022) <https://voelkerrechtsblog.org/de/legal-and-judicial-responses-to-disaster-displacement-in-italy-austria-and-sweden/> accessed 19 July 2024.

[311] Chiara Scissa et al, 'Legal and Judicial Responses to Disaster Displacement in Italy, Austria and Sweden' (*Völkerrechtsblog*, 19 October 2022) <https://voelkerrechtsblog.org/de/legal-and-judicial-responses-to-disaster-displacement-in-italy-austria-and-sweden/> accessed 19 July 2024.

from the consequences of climate change, for example, droughts. The Austrian jurisprudence does interpret the requirements of the Qualification Directive regarding subsidiary protection under Art 15 (b) more freely as it does not request a human actor as the source of serious harm.[312]

A permanent solution to resettle is nowhere to be found in domestic immigration laws.[313] Most possibilities of protection offer short term solutions like in the United States (US) which adopted the Temporary Protected Status (TPS) to help in cases of natural disasters.[314] But this legislation has many shortcomings and limitations, for example, that it is only applicable to people already inside US territory and therefore it does not extend to cross-border movement.[315]

2. European asylum law

If the CJEU would adapt the Austrian case-law and amend its requirement regarding the human actor in Art 15 (b) of the Qualification Directive, climate-induced migration would benefit. it would be easier to possibly grant environmentally displaced persons subsidiary protection with the condition that additional individual risk factors exist if the scope of protection of Art 15 (b) would be the same as Art 3 ECHR.[316] This would offer them more effective protection. As mentioned above, it is unlikely that the CJEU will change its case-law unless the ECtHR will does it.

It is often forgotten that the EU has also passed a Temporary Protection Directive which is applicable in case of mass influxes.[317] The existence of a mass influx of displaced persons has

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[312] Already discussed above. See further, Chiara Scissa et al, 'Legal and Judicial Responses to Disaster Displacement in Italy, Austria and Sweden' (*Völkerrechtsblog*, 19 October 2022) <https://voelkerrechtsblog.org/de/legal-and-judicial-responses-to-disaster-displacement-in-italy-austria-and-sweden/> accessed 19 July 2024; Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law, 322, 336.

[313] Rafael Leal-Arcas, 'Climate migrants: Legal options' (2012) 37 Procedia – Social and Behavioral Sciences 86, 92.

[314] For a detailed analysis of the protection gap in the US and proposals for new legislation see: Carey DeGenaro, 'Looking Inward: Domestic Policy for Climate Change Refugees in the United States and Beyond' (2015) 86 University of Colorado Law Review 991, 1009 ff.

[315] Carey DeGenaro, 'Looking Inward: Domestic Policy for Climate Change Refugees in the United States and Beyond' (2015) 86 University of Colorado Law Review 991, 1017

[316] The case-law of the CJEU makes Art 15 (b) 'drift' from Art 3 ECHR, the CJEU does not explain why this is possible when in essence Art 3 ECHR corresponds to Art 15 (b), see here Margit Ammer and Monika Mayrhofer, 'Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria' (2023) 35 International Journal of Refugee Law, 322, 333.

[317] Council Directive 2001/55/EC of 20 July on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12 (Temporary Protection Directive); Rafael Leal-Arcas, 'Climate migrants: Legal options' (2012) 37 Procedia – Social and Behavioral Sciences 86, 92.

to be recognized by the Committee of Ministers which is a political decision.[318] Further, the requirement of an armed conflict or endemic violence, with serious risks of systematic or generalized violations of human rights has to be fulfilled.[319] The first and only time it was applied since its adoption in 2001 was in the case of mass influxes of Ukrainian refugees after the Russian invasion in Ukraine.[320] It is unlikely that it will be used in a case of climate-induced migration any time soon. Moreover, the protection would only be temporary.

3. Regional refugee law

The Convention Governing the Specific Aspects of Refugee Problems in Africa (AU Refugee Convention)[321] and the Cartagena Declaration on Refugees (Cartagena Declaration)[322] are often mentioned in the literature because of their broader refugee definitions, which could offer more protection in cases regarding climate-induced migration.

The AU Refugee Convention is a legally binding African instrument that complements the Refugee Convention and forms part of regional refugee law. Specifically, the refugee definition is broadened meaning that people who flee from external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of the country are also protected and should be granted refugee status, Art 1 (2). Furthermore, the AU Refugee Convention does not adopt Art 33 (2) of the Refugee Convention which gives certain exceptions from the non-refoulement principle.[323]

Flight due to environmental disasters could fall within the interpretation of 'disruption of the public order'.[324] It could be understood that 'events seriously disturbing the public order' could

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[318] Matthew Scott, 'Refuge from Climate Change-Related Harm: Evaluating the Scope of International Protection within the Common European Asylum System' in Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union* (Brill 2015) 209.

[319] European Migration Network, 'Displacement and migration related to disasters, climate change and environmental degradation – EMN Inform' (May 2023) <https://home-affairs.ec.europa.eu/system/files/2023-05/EMN_Inform_climate_related_migration_final_May2023_090523.pdf> accessed 19 July 2024, 6.

[320] 'Temporary protection' <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en> accessed 19 July 2024.

[321] Organization of African Unity Convention (now African Union) Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (AU Refugee Convention).

[322] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984) (Cartagena Declaration).

[323] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) para 38.

[324] Rafiqul Islam, 'Climate Refugees and International Refugee Law' in Rafiqul Islam and Jahid Hossain Bhuiyan (eds), *An Introduction to International Refugee Law* (Martinus Nijhoff Publishers 2013) 229; Michael Addaney, Ademola Oluborode Jegede and Miriam Z Matinda, 'The protection of climate refugees under the African human rights system: proposing a value-driven approach' (2019) 3 African Human Rights Yearbook 242, 250.

be environmental disasters and extreme weather events, but this would need further clarification.[325] As the AU Refugee Convention has no monitoring mechanism, the scope of protection relies on the actual numbers of application in African States which has hardly been the case.[326] The definition of the AU Refugee Convention was applied in cases of droughts in Somalia in 2011-2012.[327]

The Cartagena Declaration provides a similar provision regarding the refugee definition which includes refugee status due to 'serious disruption of public order'.[328] After the earthquake in Haiti, States in Latin America granted asylum to displaced persons by taking into consideration the Cartagena Declaration.[329]

However, the Cartagena Declaration is considered soft law.[330] It was expressed after the adoption of the Declaration that the extended definition refers only to situations with a human actor which excludes an application of natural disasters as 'seriously disturbing public order'.[331]

Both legal instruments could be used in future cases with thousands of people fleeing from the effects of climate change.[332] Whether they will, depends on political, economic and humanitarian considerations. Further, the expression 'serious disruption of public order' could be used in negotiations regarding a new refugee definition or while drafting a new convention regarding environmentally displaced persons.

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[325] Michael Addaney, Ademola Oluborode Jegede and Miriam Z Matinda, 'The protection of climate refugees under the African human rights system: proposing a value-driven approach' (2019) 3 African Human Rights Yearbook 242, 250.

[326] Michael Addaney, Ademola Oluborode Jegede and Miriam Z Matinda, 'The protection of climate refugees under the African human rights system: proposing a value-driven approach' (2019) 3 African Human Rights Yearbook 242, 251.

[327] Michael Addaney, Ademola Oluborode Jegede and Miriam Z Matinda, 'The protection of climate refugees under the African human rights system: proposing a value-driven approach' (2019) 3 African Human Rights Yearbook 242, 250 f.

[328] Michael Addaney, Ademola Oluborode Jegede and Miriam Z Matinda, 'The protection of climate refugees under the African human rights system: proposing a value-driven approach' (2019) 3 African Human Rights Yearbook 242, 250.

[329] Michael Addaney, Ademola Oluborode Jegede and Miriam Z Matinda, 'The protection of climate refugees under the African human rights system: proposing a value-driven approach' (2019) 3 African Human Rights Yearbook 242, 251.

[330] Michael Addaney, Ademola Oluborode Jegede and Miriam Z Matinda, 'The protection of climate refugees under the African human rights system: proposing a value-driven approach' (2019) 3 African Human Rights Yearbook 242, 251; Thekli Anastasiou, 'Public international law's applicability to migration as adaptation: fit for purpose?' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 178.

[331] Thekli Anastasiou, 'Public international law's applicability to migration as adaptation: fit for purpose?' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 178.

[332] Michael Addaney, Ademola Oluborode Jegede and Miriam Z Matinda, 'The protection of climate refugees under the African human rights system: proposing a value-driven approach' (2019) 3 African Human Rights Yearbook 242, 251.

II. Separate Convention/Treaty

The calls for a new treaty *sui generis* treating the topic of climate-induced migration are growing louder as time progresses.[333]

This opens up many discussions, primarily, the purpose of a new convention and if it should be adopted as a human rights instrument or an environmental agreement.[334] Since climate-induced migration will be one of the pressing issues of the upcoming years, it is important to close the protection gap. Furthermore, the Refugee Convention was designed to respond to the post-war context rather than climate disasters.[335] To aim for amending the Refugee Convention seems politically and legally impossible. In addition, opening discussion about the definition of 'refugees' bears the risk of stepping backwards rather than forwards.[336] Tendencies of States show that regarding the high influx of people already seeking asylum due to conflicts all over the world, they are rather reluctant to negotiate over ways to offer protection to more people by broadening the definition. This counts for either amending the existing Refugee Convention or adopting a new treaty.

Nevertheless, a new treaty could offer a solution in terms of defining climate-induced migration and the people affected by it.[337] This would certainly help to clarify the margins of climate-induced migration and its different categories.

Discussions include questions about the dimensions of an international approach (whether to include internal displacement as well as external displacement) and questions about the measures and enforcement.[338]

A new convention could be based on a lot of existing conventions and many elements could be taken from different already established frameworks.[339] Therefore, it would have better legal

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[333] Simon Behrman and Avidan Kent, 'Overcoming the legal impasse? Setting the scene' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 5; against an adoption of a new treaty is Jane McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' (2011) 23 International Journal of Refugee Law 2.

[334] Michel Prieur, 'Towards an International Legal Status of Environmentally Displaced Persons' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 234.

[335] Michel Prieur, 'Towards an International Legal Status of Environmentally Displaced Persons' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 235.

[336] Michel Prieur, 'Towards an International Legal Status of Environmentally Displaced Persons' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 235.

[337] Carey DeGenaro, 'Looking Inward: Domestic Policy for Climate Change Refugees in the United States and Beyond' (2015) 86 University of Colorado Law Review 991, 1027.

[338] Rafael Leal-Arcas, 'Climate migrants: Legal options' (2012) 37 Procedia – Social and Behavioral Sciences 86, 94 f.

[339] See for a whole selection of elements from different frameworks Hélène Ragheboom, 'The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective, Volume 8' in David James Cantor (ed) *International Refugee Law Series* (Brill Nijhoff 2017) 507 f.

standing.[340] Furthermore, a newly adopted treaty can be created with flexibility in regard to more recent developments.[341] The problem of climate-induced migration will require 'a new holistic and interdisciplinary approach because the problem does not fit solely within a human rights or an international environmental law framework'.[342] A role model could be the *Kampala Convention* which is a binding-instrument and protects internally displaced persons concerning 'natural or human-made disasters'.[343] Moreover, the definitions of the AU Refugee Convention and the Cartagena Declaration could help.[344]

Another proposal is to establish principles and soft law based on the already existing principles regarding internal disaster displacement. *Schloss* suggests creating the 'UN Guiding Principles on Cross-Border Displacement Due to Environmental Disasters' based on the already existing UN Guiding Principles on Internal Displacement.[345] In her eyes, the benefit would be flexibility for future development.[346] Although this argument is valid and States would be more eager to agree with non-binding principles, soft law is often not even recognized, and it cannot be enforced which leaves little room for effective protection of affected individuals.

Although a new binding normative framework would be an excellent solution to the problem of the protection gap, there is a lack of political will among States.[347] Awareness for the problem is rising and there are already frameworks regarding the protection of the environment. The more pressing the issue of climate-induced migration becomes, the more States or international

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[340] Michel Prieur, 'Towards an International Legal Status of Environmentally Displaced Persons' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 235.

[341] Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 Harvard Environmental Law Review 349, 350.

[342] Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 Harvard Environmental Law Review 349, 352; for a detailed written proposal of a new convention see Michel Prieur, 'Towards an International Legal Status of Environmentally Displaced Persons' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 238 ff.

[342] Rafael Leal-Arcas, 'Climate migrants: Legal options' (2012) 37 Procedia – Social and Behavioral Sciences 86, 94 f.

[343] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) (Kampala Convention); Jane McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement' (2016) 39 UNSW Law Journal 1518, 1541 f.

[344] See Chapter D.I.3.

[345] Camilla Schloss, 'Cross-border Displacement Due to Environmental Disaster. A proposal for UN Guiding Principles to fill the legal protection gap' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 243.

[346] Camilla Schloss, 'Cross-border Displacement Due to Environmental Disaster. A proposal for UN Guiding Principles to fill the legal protection gap' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 243.

[347] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 668.

organizations will push to draft a new convention. However, a lot of States are already struggling to mitigate climate change and adapt to a new reality. It will presumably take time before a new convention is considered necessary among States.

III. Expected Advisory Opinion of the International Court of Justice

The International Court of Justice (ICJ) was approached on 12 April 2023 by the UN General Assembly (UNGA) to create an advisory opinion on obligation of States in respect of climate change.[348] This is based on an UNGA resolution which was adopted on 29 March 2023 in the 64th plenary meeting.[349] It was requested of the ICJ to answer the following questions regarding the 'obligations of States under international law to ensure protection of the clime system' and their 'legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system' where small islands and affected people by the adverse effects of climate change were specifically listed.[350]

Human Rights are expected to play a role in the advisory opinion. As obligations will explicitly be assessed, the non-refoulement principle could also be mentioned. An alliance of several NGOs submitted a brief on key issues regarding climate displacement in the hope that the ICJ will include these considerations in its findings.[351]
In a press release on 12 April 2024, exactly one year after the request of the UNGA was delivered, it was mentioned that the ICJ has received 91 written statements, which is the highest number of submissions ever to an advisory opinion before the Court.[352]
Currently, the Court has received the written submissions of States and international organizations. The oral pleadings will take place in late 2024. The advisory opinion is expected to be delivered in early 2025 and eagerly awaited by some States.[353] Although the advisory opinion

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[348] ICJ, 'Request for an advisory opinion transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023. Obligations of States in Respect of Climate Change' <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf> accessed 12 July 2024.
[349] UNGA Res 77/276 (29 March 2023) UN Doc A/Res/77/276.
[350] UNGA Res 77/276 (29 March 2023) UN Doc A/Res/77/276, p 3.
[351] Camila Bustos et al, 'International Court of Justice NGO submissions on the Request for Advisory Opinion as to Obligations of States in respect of climate change' (22 March 2024) <https://static1.squarespace.com/static/5623abb2e4b083b724b5a154/t/660e5a4ff889286df37ce982/1712216656660/NGO%2BSubmision%2Bto%2Bthe%2BICJ%2Bon%2Bthe%2BRequest%2Bfor%2BAO%2Bon%2BClimate%2BChange.pdf> accessed 12 July 2024.
[352] ICJ, 'Obligations of States in respect of Climate Change. Request for Advisory Opinion. Filing of written statements' (ICJ Press Release, 12 April 2024) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240412-pre-01-00-en.pdf> accessed 12 July 2024.
[353] Elena Kosolapova, 'ICJ to Rule on States' Climate-related Obligations: How Did We Get Here?' (*SDG Knowledge Hub*, 20 March 2024) <https://sdg.iisd.org/commentary/policy-briefs/icj-to-rule-on-states-climate-related-obligations-how-did-we-get-here/> accessed 12 July 2024.

is not binding, the findings will be observed closely.[354] As the ICJ will also scrutinize 'legal consequences', it is expected to have a significant impact on States and their climate mitigation efforts.

IV. Expected Advisory Opinion of the Inter-American Court of Human Rights

Not only was the ICJ asked to address the issues of climate change and State responsibility but the Inter-American Court of Human Rights was as well.[355] At the beginning of 2023, the Republic of Chile and the Republic of Colombia issued a joined request for an advisory opinion on the climate emergency and human rights.[356] The two countries stress the problem of climate-induced migration which they also address in one of the questions for the Court: B.1. 'What is the scope that States should give to their obligations under the Convention vis-á-vis the climate emergency, in relation to: v) Determination of human impacts, such as human mobility – migration and forced displacement (…)?'.[357]

The Inter-American Court of Human Rights will answer these questions under the American Convention on Human Rights (ACHR)[358] and international human rights law as well. Regarding the question addressed above, the Office of the United Nations High Commissioner for Refugees (UNHCR) sent an *amicus brief* to the Inter-American Court of Human Rights.[359] The UNHCR firstly stresses the importance of climate-induced migration and the impact climate change already has and will have in the upcoming years.[360] Then, the protection under the Refugee Convention and the Cartagena Declaration is assessed. When naming important principles, the UNCHR stresses the importance of the non-refoulement principle. It concludes that States

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[354] cf ICJ, 'Advisory Jurisdiction' <https://www.icj-cij.org/advisory-jurisdiction> accessed 15 August 2024.

[355] Further, the International Tribunal for the Law of the Sea (ITLOS) issued its advisory opinion on climate change on 21 May 2024: ITLOS, 'Request for an advisory opinion submitted by the commission of small island states on climate change and international law. Advisory opinion' (21 May 2024) Case No 31 <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf> accessed 15 August 2024.

[356] 'Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile (9 January 2023) <https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf> accessed 23 July 2024.

[357] 'Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile (9 January 2023) 9, <https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf> accessed 23 July 2024.

[358] American Convention on Human Rights "Pact of San José, Costa Rica" (adopted 22 November 1969) 1144 UNTS 123 (ACHR).

[359] 'Amicus Brief of the Office of the United Nations High Commissioner for Refugees to the Inter-American Court of Human Rights regarding the Request for an Advisory Opinion on the Climate Emergency and Human Rights from the Republic of Colombia and the Republic of Chile' (18 December 2023) <https://www.refworld.org/es/jur/participacnur/acnur/2023/es/147049> accessed 23 July 2024.

[360] 'Amicus Brief of the Office of the United Nations High Commissioner for Refugees to the Inter-American Court of Human Rights regarding the Request for an Advisory Opinion on the Climate Emergency and Human Rights from the Republic of Colombia and the Republic of Chile' (18 December 2023) <https://www.refworld.org/es/jur/participacnur/acnur/2023/es/147049> accessed 23 July 2024 paras 17-19.

must provide protection to environmentally displaced persons and stresses the importance of the Inter-American Court recognizing the application of international refugee law and the Cartagena Declaration.

This advisory opinion will address the question of protecting environmentally displaced persons. It is a chance not only to assess the scope of protection of the ACHR but also in a broader way to assess international human rights and refugee law which will not be the focus of the advisory opinion by the ICJ.

V. Nansen-Initiative/Platform on Disaster Displacement

The Swiss-Norwegian Nansen-Initiative was created to share knowledge and existing best practices worldwide in cases of cross-border disaster displacement.[361] It was and still is a State-led initiative. The goal was to assess potential policy options which were already used by States in regard to climate-induced migration and disaster contexts.[362] The necessity to launch such an initiative stemmed from the recognition that in regard to cross-border disaster displacement, besides the legal gap,[363] there need to be durable solutions which are 'also operational, institutional and funding challenges, since no international organization has a clear mandate for such people'.[364] Furthermore, it was also pursued to find consensus among the affected States to find practices to respond to cross-border movement due to climate disasters.[365] The measures and practices that were found 'include issuing humanitarian visas, stays of deportation, granting refugee status in exceptional cases, bilateral or regional arrangements on free movement of persons, expediting normal migratory channels, or the issuance of work permits'.[366] Furthermore, the findings also entailed to adopt measures which prevent cross-border movement by mitigating climate change, resettlement programs or measures which help people to become more resilient against possible disaster risks.[367]

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[361] Simon Behrman and Avidan Kent, 'Overcoming the legal impasse? Setting the scene' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 6.
[362] Walter Kälin, 'The Nasen Initiative: building consensus on displacement in disaster contexts' (2015) 49 Forced Migration Review 5.
[363] Platform on Disaster Displacement, 'State-Led, Regional, Consultative Processes. Opportunities to develop legal frameworks on disaster displacement' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 126 f.
[364] Walter Kälin, 'The Nasen Initiative: building consensus on displacement in disaster contexts' (2015) 49 Forced Migration Review 5.
[365] Walter Kälin, 'The Nasen Initiative: building consensus on displacement in disaster contexts' (2015) 49 Forced Migration Review 5.
[366] Walter Kälin, 'The Nasen Initiative: building consensus on displacement in disaster contexts' (2015) 49 Forced Migration Review 5, 6.
[367] Walter Kälin, 'The Nasen Initiative: building consensus on displacement in disaster contexts' (2015) 49 Forced Migration Review 5, 6.

The best practices and findings were combined in the *Nansen Initiative Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disaster and Climate Change*.[368] It was endorsed by 109 States which shows that States are aware of the issue and best practices are welcomed.[369]

However, the document is non-binding and non-standard-setting.[370] Its aim was not to create new legal standards, and it did not specifically mention international law and international principles.[371] In order to implement the recommendations, the Nansen-Initiative was turned into the Platform on Disaster Displacement. It 'builds partnerships between policymakers, practitioners and researchers and constitute a multi-stakeholder forum for dialogue, information sharing as well as policy and normative development' and is currently led by the EU and Kenya.[372] As seen it is a State-led initiative detached from any UN organization.

The Nansen Initiative and Platform on Disaster Displacement focus on the reality dealing with the social phenomenon of disaster displacement.[373] The project showed that practical steps were already taken at the national and regional levels without having a clear international treaty.[374] The Nansen-Initiative is not an exclusive tool to target the problem of climate-induced migration, but it can be used while and parallel to find new legal ways.[375]

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[368] For Volume I see here <https://disasterdisplacement.org/wp-content/uploads/2014/08/EN_Protection_Agenda_Volume_I_-low_res.pdf> accessed 23 July 2024; for Volume II see here <https://disasterdisplacement.org/wp-content/uploads/2014/08/EN_Protection_Agenda_Volume_II_-low_res.pdf> accessed 23 July 2024.; Platform on Disaster Displacement, 'State-Led, Regional, Consultative Processes. Opportunities to develop legal frameworks on disaster displacement' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 126 f.

[369] Jane McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement' (2016) 39 UNSW Law Journal 1518.

[370] Platform on Disaster Displacement, 'State-Led, Regional, Consultative Processes. Opportunities to develop legal frameworks on disaster displacement' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 129.

[371] Camilla Schloss, 'Cross-border Displacement Due to Environmental Disaster. A proposal for UN Guiding Principles to fill the legal protection gap' in Simon Behrman and Avidan Kent (eds), *'Climate Refugees' Beyond the Legal Impasse?* (Routledge 2018) 245; Jane McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement' (2016) 39 UNSW Law Journal 1518, 1534.

[372] <https://disasterdisplacement.org/> accessed 23 July 2024.

[373] Jane McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement' (2016) 39 UNSW Law Journal 1518, 1539.

[374] Jane McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement' (2016) 39 UNSW Law Journal 1518, 1542.

[375] Jane McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement' (2016) 39 UNSW Law Journal 1518, 1542.

VI. UN mechanisms

In 2015, *Kälin* suggested that cross-border displacement and climate change need to be situated inside the UN to have an institutional arrangement for this pressing issue.[376]
The UN's answer to disaster displacement has come a long way, but there are no binding instruments. Still, there is no visible preparation to adopt a new treaty or other work to give climate-induced migration the platform it needs to resolve this matter.

The role of the UN Framework Convention on Climate Change (UNFCCC)[377] is mainly to mitigate climate change as part of international environmental law.[378] In 2010 climate-induced migration was included under the Cancun Adaptation Framework[379] to stress the importance of this movement, Art 14 (f).[380] Within the UNFCC, Art 4 (4) states that developed countries have to help developing countries financially with the 'adverse effects of climate change'. Climate-induced migration could be interpreted as 'an adverse effect' which would mean that States have to assist on issues relating to climate-induced migration financially.[381]

The 2015 Paris Agreement allowed establishing the Task Force on Displacement (TFD). It is attached to the Executive Committee of the Warsaw International Mechanism for Loss and Damage and was of the UNFCCC process.[382] The Platform on Disaster Displacement is a member of the TDF.[383] The purpose of the TFD was to develop recommendations on how to deal with displacement related to climate change effects. It later catalyzed a wide range of action and is currently focusing on cooperation and facilitation *inter alia* in climate-induced migration

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[376] Walter Kälin, 'The Nasen Initiative: building consensus on displacement in disaster contexts' (2015) 49 Forced Migration Review 5, 7.
[377] United Nations Framework Convention on Climate Change (adopted on 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).
[378] Rina Kuusipalo, 'Exiled by emissions - climate change related displacement and migration in international law: gaps in global governance and the role of the UN Climate Convention' (2017) 18 Vermont Journal of Environmental Law 615, 636.
[379] Conference of the Parties to the Framework Convention on Climate Change, The Cancun Agreements: Outcome of the work of the Ad hoc Working Group on Long-term Cooperative Action under the Convention UN Doc FCCC/CP/2010/7/Add. 1 (Cancun Adaptation Framework).
[380] Rina Kuusipalo, 'Exiled by emissions - climate change related displacement and migration in international law: gaps in global governance and the role of the UN Climate Convention' (2017) 18 Vermont Journal of Environmental Law 615, 636.
[381] Rina Kuusipalo, 'Exiled by emissions - climate change related displacement and migration in international law: gaps in global governance and the role of the UN Climate Convention' (2017) 18 Vermont Journal of Environmental Law 615, 639.
[382] Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 663.
[383] <https://disasterdisplacement.org/resource/the-un-system-mandates-with-respect-to-averting-minimizing-and-addressing-displacement-related-to-climate-change-considerations-for-the-future/> accessed 23 July 2024.

and planned relocation with a focus on 'understanding the impacts of climate change on human mobility'.[384]

Another instrument created inside the UN was the Sendai Framework for Disaster Risk Reduction 2015-2030 (Sendai Framework) where the UN Office for Disaster Risk Reduction (UNDRR) oversees the implementation, follow-up and review of.[385] It aims to prevent risk rather than manage disasters and pursues 'the adoption of measures which address the three dimensions of disaster risk (exposure to hazards, vulnerability and capacity, and hazard's characteristics)'.[386] It is therefore essential for climate-induced migration as it tackles the source of cross-border movement.

Furthermore, the New York Declaration for Refugees and Migration[387] stresses the importance of the protection of international refugees and the obligations of UN Member States. It does recognize that migration can take place because of the effects of climate change and environmental disasters.[388]
This was the basis for the adoption of two global compacts in 2018: The Global Compact on Refugees[389] and the Global Compact for Safe, Orderly and Regular Migration[390]. The latter deals with consequences of climate change, disasters and other environmental factor which lead to displacement.[391] The Compact on Refugees unfortunately does not say a lot about disaster displacement.[392]

VII. Evaluation

The above-mentioned solutions are only a selection of various topics that have been suggest in regard to climate-induced migration. As has been stressed throughout the thesis, climate change

[384] 'Task Force on Displacement' <https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD> accessed 23 July 2024.
[385] <https://www.undrr.org/implementing-sendai-framework/what-sendai-framework> accessed 23 July 2024.
[386] <https://www.undrr.org/implementing-sendai-framework/what-sendai-framework> accessed 23 July 2024.
[387] UNGA Res 71/1 'New York Declaration for Refugees and Migrants' (3 October 2016) UN Doc A/Res/71/1.
[388] UNGA Res 71/1 'New York Declaration for Refugees and Migrants' (3 October 2016) UN Doc A/Res/71/1 para 1.
[389] UNHCR 'Global Compact of Refugees' (13 September 2018) UN Doc A/73/12 (Part II).
[390] UNGA 'Global Compact for Safe, Orderly and Regular Migration' (19 December 2018) UN Doc A/Res/73/195.
[391] UNGA 'Global Compact for Safe, Orderly and Regular Migration' (19 December 2018) UN Doc A/Res/73/195, Objective 2 (h) – (l); Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 663; <https://www.unhcr.org/what-we-do/protect-human-rights/asylum-and-migration/new-york-declaration-refugees-and-migrants> accessed 24 July 2024.
[392] UNHCR 'Global Compact of Refugees' (13 September 2018) UN Doc A/73/12 (Part II).

and its consequences are complex matters that will not only need one but several solutions. They will differ in levels, purposes and time.

Although a binding treaty within the UN mechanism would be preferably, negotiations are unlikely any time soon. As the problem will first affect specific regions of the world, regional agreements are more likely to be adopted first. National legislation should not be disregarded as well. Some protection is already available, although only temporary.

The latter is also important. Existing protection is focused on creating temporary solutions, but it should at least be considered creating long-term solutions as well.

Lastly, climate-induced migration is not solely a human rights and migration problem. Human rights and migration law can help in cases where the danger has already occurred. To tackle the problem at its roots, climate mitigation is of great importance and obligations of States should be developed further. The UN Framework Convention on Climate Change and the Paris Agreement are already very important existing binding instruments in this regard. The analysis has also shown that States are more open to cooperation and best practices that can be adopted in times of crisis.

E. Conclusion

The protection gap in the case of cross-border movement regarding climate-induced migration is evident.

The non-refoulement principle is one tool that offers some protection in case of climate-induced migration. However, its weakness of not corresponding with the legal status of people granting protection from non-refoulement makes it somehow ineffective. It is enshrined in several (human rights) conventions and considered customary international law.

There exists a lot of case-law on the non-refoulement principle that can help to find criteria regarding the application of climate-induced migration.

The case of *Teitiota v New Zealand* was the first case to acknowledge a possible application of the non-refoulement principle in this regard. Although courts have never referred to it until now, it will be a guide and inspiration in the upcoming years.

The current case-law of the ECtHR distinguishes between the reasons of the risk people would face upon removal to the receiving State. Cases which deal with 'naturally occurring causes' have been established with a high threshold and can only be decided positively in 'very exceptional circumstances'. This is insufficient to provide adequate protection in cases of climate-induced migration, which will be one of the biggest challenges of this century. The category of 'predominated human cause' is more likely to be applied to climate-induced migration although it will be challenging to maintain a predominant human role in environmental disasters that are rooted in the consequences of climate change. The categories of the case-law do not fit the complexities of climate-induced migration. Most likely and preferred, the case-law will not be transferred to climate-induced migration, but new case-law will be created as a *sui generis* claim. The subsidiary protection in the EU asylum law could also play a significant role in protecting environmentally affected people. If the CJEU holds on to the requirement of an actor, climate-induced migration will mostly fall out of the scope of application. The Austrian legislation shows that it could be applied more broadly.

The question remains how the 'real risk' of facing inhuman or degrading treatment will be assessed. At least, it is not yet clear how the time period will be taken into consideration regarding the development of the 'real risk' and if it is considered degrading treatment if the consequences of climate change are irreversible. Furthermore, the purpose of the principle of non-refoulement is undermined, taking into account the responsibilities of the sending State to the circumstances in the receiving State. However, this is more of an ethical problem.

If courts would look closely enough at this interconnection, is not known. The ECtHR is known for its flexibility in interpreting the ECHR and is a forerunner regarding climate mitigation

cases. Most likely, it will deal with this matter in depth in the future. The landmark views of the UN Human Rights Committee in the *Teitiota case* brought the focus back to the non-refoulement principle and courts are expected to follow that example.

Regarding alternative solutions, there exist a lot of approaches, some of which are legal, others are political or not related to human rights or migration law at all. The preferred option of adopting a new treaty which could deliver clear definitions on the topic of climate-induced migration seems out of reach. However, the complexity of climate change makes it necessary to address the cause and effects and take preventive measures.

States seem to take interest in cooperation and exchange of best practices. The awareness of this problem will rise in the upcoming years. Further, regional agreements are expected to increase since cross-border movement will be mostly local. The principle of non-refoulement only offers protection in individual cases. Group solutions have been found in political ways in the past.[393]

It should not be disregarded that courts all over the world are doing their best to remind the States of their responsibility. The advisory opinions of the ICJ and the Inter-American Court of Human Rights are expected with great anticipation.

As long as the political will does not exist to amend legislation to offer protection to environmentally displaced person, the non-refoulement principle will certainly be claimed infront of courts by affected individuals.

[393] Jane McAdam, 'Australia's offer of climate migration to Tuvalu residents is groundbreaking - and could be a lifeline across the Pacific' <https://www.unsw.edu.au/newsroom/news/2023/11/australia-s-offer-of-climate-migration-to-tuvalu-residents-is-gr> accessed 16 August 2024.

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ABSTRACT

This thesis deals with the non-refoulement principle regarding climate-induced migration. First, an overview of the legal foundations of the non-refoulement principle will be provided, including an examination of its status in customary international law and the *jus cogens* nature of the principle. The central focus of this work, however, is on the analysis of the existing case law regarding the principle of non-refoulement, in which cases from the UN Human Rights Committee, the European Court of Human Rights, the Court of Justice of the European Union and national courts are examined. Criteria and indications are analyzed that could be transferred to cases in which climate conditions in the receiving State could lead to the application of the principle of non-refoulement. It appears that the complexity of climate change and not yet conclusively clarified role of human responsibility create challenges in applying existing case law to climate-related migration. Ultimately, new and alternative solutions must be considered. In addition to the preferred solution at the UN level, it becomes clear that the issue's complexity can only be addressed through a combination and an interaction of human rights, migration law and environmental law.

ABSTRAKT

Diese Arbeit behandelt das Non-Refoulement Prinzip und wie es im Hinblick auf klimabedingte Migration anwendbar ist. Zunächst wird ein Überblick über die rechtlichen Grundlagen des Non-Refoulement Prinzips gegeben, wobei auch die Zugehörigkeit zum Völkergewohnheitsrecht und die *jus cogens* Natur des Prinzips beleuchtet werden. Der zentrale Fokus dieser Arbeit liegt jedoch auf der Auseinandersetzung mit bereits existierender Rechtsprechung zum Non-Refoulement Prinzip, bei der Fälle des UN-Menschenrechtsausschusses, des Europäischen Gerichtshofs für Menschenrechte, des Gerichtshof der Europäischen Union und nationalen Gerichten herangezogen werden. Hierbei werden Kriterien und Anhaltspunkte analysiert, die sich auf Fälle übertragen lassen könnten, bei denen Klimabedingungen im Zielstaat die Anwendung des Non-Refoulement Prinzips hervorrufen könnten. Dabei kristallisiert sich heraus, dass vor allem die Komplexität des Klimawandels und die nicht abschließend geklärte menschliche Verantwortung Probleme bereiten bisherige Rechtsprechung auf klimabedingte Migration anzuwenden. Dies lässt schließlich erkennen, dass auch alternative Lösungsvorschläge beachtet werden müssen. Dabei wird neben der präferierten Lösung auf UN-Ebene deutlich, dass der Komplexität des Themas nur eine Kombination und ein Zusammenspiel aus Menschenrechten, Migrationsrecht und Umweltrecht gerecht werden kann.