

Tilburg Law School Master Thesis | LLM. International and European Law

Track ‘The EU in a Global Legal Context’



*The legal obligations for the European Union to protect climate-induced migrants
crossing European borders*

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List of Abbreviations

CAT	United Nations Covenant against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
COP	Conference of the Parties
CRC	Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
GHG	Greenhouse Gas
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
MS	Member States
QD	Qualification Directive
TCN	Third Country National
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPD	Temporary Protection Directive
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNFCCC	United Nations Framework Convention for Climate Change
UNHCR	United Nations High Commissioner for Refugees
WIM	International Mechanism for Loss and Damage

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Introduction

*'No challenge poses a greater threat to future generations than climate change.'*¹

Over the last six years, approximately 140 million people were forced to move because of climate-related disasters, according to the United Nations (UN).² By 2050, the number of climate-induced migrants will be, according to scientific estimations, 200 million.³ There is a direct and determinative link between environmental change and migration, but the degree to which environmental factors will lead to displacement is part of a controversial debate.⁴ It is difficult to make predictions since the effects of environmental change are subject to a high level of uncertainty and the impacts of the changes are different in every region. Still, the United Nations High Commissioner for Refugees (UNHCR) has predicted that climate change will become the largest driver of human migration in the world.⁵ The migration flow will cause multiple risks, such as human rights violations, political, economic and even global instability and security concerns.⁶ Migration can be seen as the human face of climate change and is a serious problem that is hugely underestimated by much of the international community.⁷ European Union (EU) law and international law regarding climate-related displacement of persons contain serious gaps regarding stay, status, admission, assistance and most importantly: protection.⁸

The United Nations Framework Convention on Climate Change (UNFCCC) defines climate change as 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.'⁹ Greenhouse gasses (GHG) are natural and

¹ Barack Obama, U.S. President, Remarks by the President in State of the Union Address, 2015.

² M. Yonetani, *'Global Estimates 2014, people displaced by disasters'*, [2014] Internal Displacement Monitoring Centre, Norwegian Refugee Council.

³ N. Stern, *The Economics of Climate change: the Stern review'*, (Cambridge University Press 2007) 3.

⁴ A. Kraler, T. Cernei, and M. Noack, 'Directorate-General for Internal Policies: "Climate refugees", legal and policy responses to environmentally induced migration', [2011] European Parliament 1, 71.

⁵ M. Fleming, *'Climate change could become the biggest driver of displacement: UNHCR Chief'*, [2009] UNHCR, <http://www.unhcr.org/news/latest/2009/12/4b2910239/climate-change-become-biggest-driver-displacement-unhcr-chief.html> assessed 10 June 2018.

⁶ W. Kälin and N. Schrepfer, *'Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches'*, [2012] University of Bern 1, 69.

⁷ Conference of the Parties, Report of the Conference of the Parties on its sixteenth session, Held in Cancun from 29 November to 10 December 2010, United Nations Framework Convention on Climate Change, <<https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>> assessed 13 June 2018.

⁸ Kraler, Cernei, and Noack (n 4) 1-37.

⁹ Article 1 (2) United Nations Framework Convention on Climate Change.

essential for people to survive on planet Earth. It keeps some of the sun's warmth from reflecting, which makes the Earth liveable. The primary cause of climate change is the burning of fossil fuels, which emits GHG such as carbon dioxide into the atmosphere. Mainly due to industrialisation, the emission of GHG increased and the global temperature on Earth is rising. This results in the rise of the seawater temperature, the melting of the ice, and the rising of the sea level.¹⁰ The event of climate change will lead to numerous environmental hazards, such as hurricanes, floods, storms, and droughts.¹¹ Sea level rise can have a significant impact on people living in coastal areas or islands. Researchers have defined an environmental hazard as a threat to people and their valuables.¹² These hazards often affect relatively higher numbers of individuals and are even more frequent than social-political phenomena.¹³ According to the Intergovernmental Panel on Climate Change (IPCC), 'an increased availability of water in some parts of the world and a reduced availability of water in others, a risk of hunger resulting from a decrease in crop yields, an increased risk of storms, floods, coastal flooding and submersion due to a rising sea-level and an overall negative impact on health, are overall the most relevant to the displacement of people.'¹⁴

Areas most affected by environmental hazards due to climate change will be Africa, Asian mega-deltas, and small island states. This shows that the impact of climate change will mainly be disastrous towards poor communities in developing countries.¹⁵ Ironically, these countries are the least responsible for the emission of GHG. The fact that these countries will be the most affected depends on several factors, such as their geographic position and their inability to deal with the effects of climate change.¹⁶ However, the risks associated with climate-induced migration are not limited to the countries affected by climate change.¹⁷ The UN Secretary-General has identified

¹⁰ United Nations Framework Convention on Climate Change, '*Climate change: impacts, vulnerabilities and adaptation in developing countries*', [2007] <<https://unfccc.int/resource/docs/publications/impacts.pdf>> assessed 19 June 2018.

¹¹ L.M. Hunter, '*Migration and Environmental Hazards*', (2005) 26, Institute of Behavioral Science, Program on Environment and Behavior, Department of Sociology, University of Colorado at Boulder 273, 274.

¹² S.L. Cutter, '*American Hazardscapes: The Regionalization of Hazards and Disasters*', (Joseph Hendry Press 2001), 2.

¹³ K. Smith, '*Environmental Hazards, Assessing Risk and Reducing Disaster*', (Routledge 2001).

¹⁴ Intergovernmental Panel on Climate Change, '*Climate Change 2007: Synthesis Report*' [2007] 1, 53. <https://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_full_report.pdf> assessed 19 June 2018.

¹⁵ W. Kälin and N. Schrepfer (N 6) 5.

¹⁶ O. Brown, '*Climate change and forced migration: Observations, projections and implications*', [2007] Human Development Report 1, 22.

¹⁷ United Nations Development Programme, '*Supporting Least Developed Countries to Address Climate Change*', (Sustainable Development Knowledge Platform, May 2011) <<https://sustainabledevelopment.un.org/content/>

Europe as one region to be particularly affected by climate-induced migration.¹⁸ Additionally, the EU is the third biggest GHG emitter behind China and the United States.¹⁹ Arguably, the EU has some moral responsibility to protect climate-induced migrants.²⁰ It cannot be denied that the ‘climate-induced migration issue’ will affect the EU. Therefore, this thesis will focus on climate-induced migrants entering European territory.

Although the nexus between climate change and migration cannot be denied, there are difficulties in defining the exact relationship. Different types of hazards cause different types of migration. A distinction can be made between rapid-onset climate events, such as extreme weather, and slow-onset climate events, such as sea-level rise, desertification, and land degradation. Most people affected by rapid-onset climate events do not cross borders and move back soon after the event, which does not make them refugees in a legal sense. Especially the link between the slow-onset climate events and migration is difficult to identify.²¹ An example: it is difficult to identify whether a farmer is forced to migrate mainly because of the desertification of his land since other push-factors generally also play a role.²² This makes it difficult to define whether a person migrates voluntary or forced, since people may be urged to migrate for compelling humanitarian or economic reasons.²³ This is important since the law of forced migration developed along other lines than the law on voluntary migration.²⁴ Additionally, it is not climate change that is causing the displacement of people, but the effects of climate change. It is often challenging to define to what extent climate change contributes to the environmental hazard. Would a certain flood also have happened without the impact of climate change?²⁵ Defining climate-induced migration has been an issue of hot debate.²⁶ The following table demonstrates the characteristics of a climate-

[documents/952014_Supporting%20Least%20Developed%20Countries%20to%20Address%20Climate%20Change_Flyer.pdf](#)> assessed 10 June 2018.

¹⁸ Report of the Secretary-General on Climate Change and its possible security implications, above note 6, para. 70. <<http://www.unhcr.org/protection/environment/543e73f69/climate-change-its-possible-security-implications-report-secretary-general.html>> assessed 11 June 2018.

¹⁹ European Commission, ‘*Global growth in CO2 emissions stagnates*’, (EU Science Hub, 25 November 2015) <<https://ec.europa.eu/jrc/en/news/global-growth-co2-emissions-stagnates>> assessed 20 June 2018.

²⁰ O. Serdeczny, ‘*What does it mean to ‘Address Displacement’ under the UNFCCC? An Analysis of the Negotiations Process and the Role of Research*’, [2017] German Development Institute.

²¹ Kraler, Cernei, and Noack (n 4) 1-29.

²² H. Flautre and others, ‘*Climate Change, Refugees and Migration, Position Paper*’, [2013] EFA in the European Parliament 1, 2.

²³ P. Boeles and others, ‘*European Migration Law*’, (Ius Communitatis III 2014), 3.

²⁴ Ibid.

²⁵ Kraler, Cernei, and Noack (N 4) 1, 16-28.

²⁶ Ibid.

induced migrant. It demonstrates that the causality problem between the environmental hazards and the migration applies particularly regarding people displaced due to slow-onset environmental hazards.

Table 1 - *Characteristics of climate-induced migrants*

Climate-induced migrants	
People fleeing from slow-onset environmental hazards (sea level rise/drought/desertification)	People fleeing from rapid-onset environmental hazards (hurricanes/storms/floods)
Often internationally displaced	Often internally displaced
Often permanently displaced (not able to move back to their country of origin)	Often temporary displaced (move back to their country of origin)
Link between environmental hazard and migration difficult to determine	Link between environmental hazard and migration can be determined
Voluntary or forced migrants? Slow impact lead to more pro-active forms of migration	Forced migrants
If forced: base claim for protection on socio-economic deprivation (for example right to health, water and food)	Base claim for protection on civil rights deprivation (for example right to life)
Feared harm does not immediately come from the infliction of physical violence, but rather from different forms of socio-economic vulnerabilities	People have to leave their place quickly to avoid loss of life or physical harm, or because of the destruction of their livelihoods
The risk of the feared harm does not appears directly after the removal. The degree of harm feared would be considerably speculative	The risk of the feared harm appears directly after the removal. No degree of speculation

Research question

The purpose of this thesis is to analyse the legal responsibilities for the EU to fill the protection gaps faced by climate-induced migrants. The European policies regarding both climate change and migration are ambitious, strong and advanced. At the same time, offering protection to the

predicted flow of millions of climate-induced migrants towards Europe will be problematic.²⁷ Human rights violations, political and economic instability and security concerns are emerging, and immediate action is needed.²⁸ This thesis will answer the following research question: *'Does the European legal framework provide the EU with responsibilities to fill the protection gaps regarding climate-induced migration?'* To answer this question, the European legal framework will be studied. The scope of the international agreements and case law will be exposed by observing the wording used. In this manner, it can be concluded whether existing international agreements or existing legal frameworks are capable of including climate-induced migrants. The following sub-questions will deal with this:

1. What are the general objectives of the EU climate change policy, focussing on the effects for individuals? To what extent does this provide the EU with binding obligations for the protection of climate-induced migrants?
2. What is the current legal framework for international protection and does the legal gap concerning climate-induced migrants exist?
3. What is the scope of subsidiary protection under Article 3 of the European Convention on Human Rights (ECHR) and Article 15 (b) Qualification Directive (QD) concerning claims based on socio-economic deprivation?

Delimitations

The scope of this thesis is limited in some aspects. Firstly, the thesis is regionally limited since it focuses on the obligations of the EU and its Member States (MS). The climate-induced migrants crossing European borders are within the scope of this thesis Third Country Nationals (TCN), meaning coming from outside EU's territory. This thesis focuses on the obligations imposed on the EU when these migrants enter European territory. Regional adaptation obligations in the migrants' countries of origin are not subject to this research. Secondly, the scope is limited to forced, internationally, and permanently displaced people. Situations where individuals are internally displaced, as those who choose to migrate internationally, are not considered in this thesis. The term 'climate-induced migrants' is picked intentionally, since in a legal sense, people

²⁷ M. Gromilova, *'Legal protection of the people at risk of climate induced cross-border displacement: application of the 1951 Refugee Convention'*, [2011] Tilburg University.

²⁸ Kälin and Schrepfer (N 6).

migrating due to environmental hazards cannot be considered as ‘refugees’.²⁹ Lastly, the first part of the jurisprudence research in chapter 4 is limited to the extent to which Article 3 ECHR can lead to the protection from refoulement. Other Articles in the ECHR can also invoke the principle of non-refoulement. However, Article 3 ECHR corresponds with Article 15 (b) QD, which makes it interesting to compare the scopes of both articles and jurisdictions. Additionally, Article 3 ECHR is the most utilised basis for protection under the principle of non-refoulement.

Methodology

Many scholars already addressed the issue of the legal gap faced by climate-induced migrants. The literature exposes several possible approaches to the phenomenon of climate-induced migration. Some of the most discussed approaches concern additional protocols to the ECHR³⁰, the UNFCCC³¹, the Refugee Convention³², an amendment to Article 15 QD³³, or even the formation of a new convention.³⁴ However, all these approaches are depending on the proactive steps of states.³⁵ In the case of climate-induced migrants, imminent action is needed. Proactive steps of states are often part of a slowly political process. Therefore, this thesis looks at the obligations imposed on the EU and its MS resulting from international agreements and legal frameworks that already exist. To reveal these obligations, a doctrinal study consists of a literature review, a legal analysis and a case law research will be performed. Scholars already addressed the issue of socio-economic deprivation in relation to the Refugee Convention, but less comprehensive in

²⁹ Based on the Refugee Convention, see chapter 2.

³⁰ Parliamentary Assembly of the Council of Europe: *‘Environmentally-Induced Migration and Displacement: a 21st Century Challenge’*, (Parliamentary Assembly Council of Europe, 23 December 2008) <<http://www.refworld.org/pdfid/49997bbb0.pdf>> assessed 11 June 2018.

³¹ F. Bierman and I. Boas, *‘Protecting Climate Refugees: The Case of a Global Protocol’*, [2008] 50 Environmental 8-16.

³² D. Hodgkinson and others, *‘The Hour when the Ship comes in: a Convention for Persons Displaced by Climate Change’*, (2010) 36 (1) Monash University Law Review.

³³ Kraler, Cernei, and Noack (n 4) 1-53.

³⁴ D. Hodgkinson and L. Young, *‘In the Face of Looming Catastrophe: A Convention for Climate Change Displaced persons’*, (January 2012)

<[http://www.ccdpconvention.com/documents/A%20Convention%20for%20Climate%20Change%20Displaced%20Persons%20\(January%202012\).pdf](http://www.ccdpconvention.com/documents/A%20Convention%20for%20Climate%20Change%20Displaced%20Persons%20(January%202012).pdf)> assessed 11 June 2018.

³⁵ M. Scott, *‘Natural Disasters, Climate Change and Non-refoulement: What Scope of Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?’*, (2014) 26 (3) International Journal of Refugee Law 404-432.

combination with the subsidiary protection regime provided by the EU.³⁶ Also, the most recent cases are now included.³⁷

Research structure

The purpose of the first chapter is to provide an overview of the general objectives of EU policy regarding climate change. The main international treaty on fighting climate change, the UNFCCC, will be studied. This Convention lays the foundation for other mechanism and frameworks dealing with the climate-induced migration issue. When defining the scope of these objectives and responsibilities, it becomes clear whether the EU has an obligation to protect climate-induced migrants entering European territory based international agreements.

The second chapter clarifies the legal refugee framework. The chapter discusses the Refugee Convention and focuses on the possibilities under the European QD and the Temporary Protection Directive (TPD). The objective of this chapter is to demonstrate the problematic legal gap concerning climate-induced migrants. Additionally, this chapter shows where opportunities can be found for climate-induced migrants to receive international protection when crossing European borders.

The third chapter investigates what human rights violations climate-induced migrants face. It demonstrates that climate-induced migrants base their protection claims often on the socio-economic harm feared when returned to their country of origin. Additionally, this chapter determines the relationship between the EU, its MS, and their human rights obligations.

The final chapter contains jurisprudence research, which studies whether the case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) creates opportunities for climate-induced migrants to claim protection under the ECHR and the Charter of Fundamental Rights of the European Union (EU Charter). The legal reasoning of the Courts is analysed to define the scope of 3 ECHR and Article 15 (b) QD.

³⁶ Ibid.

³⁷ *Paposhvili v. Belgium (2016) – 41738/10* and *Case C-353/36 MP v. Secretary of State for the Home Department [2018]*.

1. The EU as a Global Actor in the Field of Climate Change

The purpose of the first chapter is to provide an overview of the general objectives of EU policy regarding climate change. For this thesis, the focus will be on the EU's climate change policy affecting individuals. The first part of this chapter will demonstrate the ambitions of the EU regarding climate change action. The following section will describe the action taken by the EU on an international level. The UNFCCC and the international agreements following from this Convention are described, as is the role and influence of the EU in these agreements.

1.1. European Climate Change ambitions and objectives

Over the years, the EU has claimed to be a pioneer in fighting climate change. Cutting GHG emissions is an important issue on the European agenda.³⁸ The EU addresses climate change actively, and its policy activities in the climate change area have had enormous influence within but also beyond Europe.³⁹ The EU calls for strong action not only by the international community but also by committing itself to cut in its GHG emissions. In 2010, the EU adopted a 10-years strategy named Europe 2020. This strategy contains five ambitious goals, and one of them concerns climate change. Every MS has its national policies, and by 2020 these goals should be reached. The EU has set itself binding climate and energy goals that should be achieved by 2020, which are the following:

1. The EU GHG emissions should be cut by at least 20 % below 1990 levels.
2. The share of EU energy consumption coming from renewable sources should be increased to 20 %.
3. The energy efficiency should be improved to reduce the amount of primary energy used by 20 % compared with projected levels.⁴⁰

The EU also tries to encourage other nations and regions to cut GHG excessively by committing themselves to increase its emissions reduction to 30 % on the condition that other major economies commit doing their fair share of global reduction efforts. For 2030, the targets set are even more ambitious and bind the EU to cut at least 40 % of the GHG emissions from 1990 level, have at

³⁸ T. Rayner and A. Jordan, *'Climate Change Policy in the European Union'*, [2016] Oxford Research Encyclopedia of Climate Science.

³⁹ Rayner and Jordan (n 38).

⁴⁰ European Union, *'Climate Action'*, (European Union Explained, November 2014) <https://europa.eu/european-union/topics/climate-action_en> accessed 10 June 2018.

least 27% share for renewable energy and improve the energy efficiency by at least 27 %.⁴¹ To reach these goals, the EU is taking action at international level and European level.

1.2. European Union's environmental policy

When observing the action taken by the EU to combat climate change, attention should be drawn to the position of the EU as an actor in international climate change negotiations. The EU is not a state and also not an international organisation, but can rather be seen as a 'sui generis' system with partly intergovernmental and partly supranational structures.⁴² The Treaty of Lisbon confirms the international legal personality of the EU and in Article 216 of the Treaty on the Functioning of the European Union (TFEU) is defined that the EU can conclude agreements with one or more third countries or international organisations.⁴³

The EU's environment policy aims to preserve, protect, and improve the quality of the environment.⁴⁴ The objective of combating climate change results from this and also stresses the importance of combating climate change on an international level.⁴⁵ The EU's competences are based on the principle of conferral, which means that the EU can only act within the limits that MS conferred to the EU in the Treaties.⁴⁶ According to the Treaty, climate change policy is a shared competence, and both the EU and MS are granted rights to adopt environmental measures.⁴⁷ However, MS will not be prevented to introduce stricter protective measures.⁴⁸ Since the competences are shared, the discussion about who concludes international agreements is open. The CJEU has decided that the internal competences of the EU extend to the external sphere.⁴⁹ This means that both the EU and the MS may act externally and are able to conclude multilateral agreements. However, MS are bound by a duty to cooperate on the achievements of the EU

⁴¹ European Union, '2030 climate & energy framework', <https://ec.europa.eu/clima/policies/strategies/2030_en> assessed 10 June 2018.

⁴² C. Bretherton and J. Vogler, *The European Union as a Global Actor*, (Routledge 2006) 80, 108.

⁴³ Only if the treaties so provide, or where the conclusion of an agreement is necessary to achieve the objectives, or is provided for in a legally binding Union act, or is likely to affect common rules or alter their scope. Article 216 Treaty on the Function of the European Union. See also Article 47 Treaty on European Union for legal personality.

⁴⁴ Article 191 Treaty on the Functioning of the European Union.

⁴⁵ Article 191 to 193 Treaty on the Functioning of the European Union.

⁴⁶ Article 5 (1)-(2) Treaty on European Union.

⁴⁷ B. Labuhn, *The Role of the European Union in International Climate Policies, from the leader to a watcher?*, [2011] Universiteit van Twente 1, 8.

⁴⁸ Article 4 (2) (e) and Article 191 (4) Treaty on the Functioning of the European Union.

⁴⁹ Case C-22/10 *Commission of the European Communities v Council of the European Communities* [1970].

objectives and therefore indirectly bound by the agreements concluded by the EU.⁵⁰ Recently, the law on climate change policies derives largely from requirements set at EU level which results in a diminished policy space for MS.⁵¹ The EU tries to speak with one voice concerning climate change and environmental matters, which is demonstrated by the fact that the EU is party to, for example, the UNFCCC. Consequently, the EU is able to gain more influence in the international climate debate. Article 22 (2) UNFCCC relates to the situation where a regional economic integration organisation (the EU) and its MS are both Party to the Convention. This article affirms that the MS and EU mutually decide on their respective responsibilities under the Convention.⁵²

1.2.1. UNFCCC

In 1991, the UN's Earth Summit produced the UNFCCC as a first step addressing the climate change problem.⁵³ The UNFCCC is the main international treaty on fighting climate change and its objective is 'to prevent dangerous man-made interference with the global climate system'.⁵⁴ The UNFCCC entered into force in 1994 and currently, there are 197 Parties to the Convention: one of them is the EU, as are all MS individually. The Convention does not set binding limits on GHG emissions and also does not contain an enforcement mechanism, but it does establish a framework for future agreements.⁵⁵ The provisions in the UNFCCC cover both climate change mitigation and adaptation. Articles that might be relevant for climate-induced migration are:

- Article 4 (1)(b) UNFCCC: '...and measures to facilitate adequate adaptation to climate change';
- Article 4 (1)(e) UNFCCC: 'cooperate in preparing for adaptation to the impact of climate-change';
- Article 4 (1)(f) UNFCCC: 'take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods... to minimize adverse effects';

⁵⁰ Article 4 (3) Treaty on European Union.

⁵¹ Rayner and Jordan (n 38).

⁵² Article 22 (2) United Nations Framework Convention on Climate Change.

⁵³ IPCC Fifth Assessment Report

⁵⁴ Article 2 United Nations Framework Convention on Climate Change.

⁵⁵ United Nations Climate Change, 'What is the United Nations Framework Convention on Climate Change?' <<https://unfccc.int/process/the-convention/what-is-the-united-nations-framework-convention-on-climate-change>> assessed 11 June 2018.

- Article 4 (4) UNFCCC: ‘the developed countries assist the developing country Parties ... in meeting costs of adaptation to those adverse effects’.⁵⁶

It can be noticed that these provisions mainly emphasise adaptation. Adaptation involves the addressing of current vulnerabilities to climate change impacts, which would extend to initiatives in respect of climate-induced migration.⁵⁷ Article 4 UNFCCC promotes regional policy developments by focusing on adaptation. However, the development of regional policies does not create protection for climate-induced migrants crossing EU’s borders. The Convention does not explicitly deal with the situation of climate-induced migration. Additionally, the UNFCCC is an international environmental law treaty, primarily focused on state-to-state relations. Therefore, the Convention does not impose duties on states or the EU to protect individuals.⁵⁸

However, the UNFCCC serves a formal meeting of the UNFCCC Parties (‘the Parties’) to assess progress in dealing with climate change. Article 7.2 of the UNFCCC states that the Conference of the Parties (COP) shall take ‘decisions necessary to promote the effective implementation of the Convention.’⁵⁹ These COPs eventually resulted, among other things, in the negotiations of the legally binding obligations of the Kyoto Protocol. The Kyoto Protocol commits its Parties by setting internationally binding targets. The Protocol, agreed upon in 1997, has been ratified by 192 Parties, including the EU and all its MS individually.⁶⁰ However, the Kyoto Protocol also does not include any provisions concerning protection for climate-induced displaced people. From 2011 onwards, the COP meetings have been used to negotiate the Paris Agreement.⁶¹ The UNFCCC can be seen as the foundation for the following agreements and provisions.

1.2.1.1. Cancun Adaptation Framework

Research from the UN and other humanitarian organisations contributed to climate-induced migration becoming a topic of discussion among the Parties.⁶² In 2007, a case study informed the

⁵⁶ Article 4 United Nations Framework Convention on Climate Change.

⁵⁷ A. Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, (2008) 30 (4) Law & Policy 502, 519.

⁵⁸ Ibid.

⁵⁹ Article 7 (2) United Nations Framework Convention on Climate Change.

⁶⁰ United Nations Climate Change, *‘KP Introduction’*, [2018] <<https://unfccc.int/process/the-kyoto-protocol>> assessed 10 June 2018.

⁶¹ United Nations Climate Change, *‘The Paris Agreement’*, [2018] <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> assessed 10 June 2018.

⁶² K. Warner, *‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’*, [2011] United Nations High Commissioner for Refugees 1, 3.

EU and the United States Government about the impact of climate change on population movement. In 2008, this project was reported to the UNFCCC, leading to the first international conference on this theme in Bonn.⁶³ From 2009 onwards, more information and case studies were developed, and the relevance of the climate-induced migration topic became apparent.⁶⁴ In 2010, during the COP16, the Parties agreed on the final text of the Cancun Adaptation Framework.⁶⁵ The Cancun Agreement is a non-binding instrument and has as its objective ‘to enhance action on adaptation through international cooperation’.⁶⁶ The Framework includes paragraph 14 (f), which states that all Parties should enhance action on adaptation under the Cancun Adaptation Framework, by undertaking ‘measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.’⁶⁷

Now that the issue is part of the Cancun Adaptation Framework, Parties are more likely than ever to seek information about climate-induced migration. COP16 placed climate-induced migration on the climate change agenda.⁶⁸ Also interesting to mention is the fact that the COP recognised that the effective enjoyment of human rights is directly or indirectly at stake regarding the adverse effects of climate change.⁶⁹ This observation will be relevant later in this thesis. Although the Cancun Adaptation Framework is a relevant step forward in addressing the legal climate-induced migration gap, it cannot be seen as a concrete commitment. Specific decisions and solutions regarding the climate-induced migration issue were not mentioned.⁷⁰

1.2.1.2. Warsaw International Mechanism for Loss and Damage

During the COP18 in Doha, the Parties acknowledge the necessity of strengthening institutional

⁶³ UNU-EHS, International Conference on ‘Environment, Forced Migration and Social Vulnerability (EFMSV)’, 9-11 October 2008, Bonn, Germany.

⁶⁴ Warner (N 62) 1, 6.

⁶⁵ Ibid 9.

⁶⁶ Paragraph 14 Cancun Adaptation Framework.

⁶⁷ Paragraph 14 (f) Cancun Adaptation Framework.

⁶⁸ Warner (N 62) 1, 12.

⁶⁹ J. H. Knox, ‘Human Rights Principles and Climate Change’, [2015] Oxford Handbook of International Climate Change Law, Wake Forest University.

⁷⁰ L. Vandamme and F. Dibben, ‘Klimaatvluchtelingen bestaan niet, toch zijn miljoenen mensen op de vlucht voor het klimaat’, (Briefingpaper 11-11-11, 22 February 2016) <<https://www.11.be/artikels/item/briefing-paper-klimaatvluchtelingen-bestaan-niet>> assessed 10 June 2018.

arrangements at all levels.⁷¹ The Parties launched a process to consider the establishment of a new mechanism to address loss and damage from slow- and rapid-onset climate impacts.⁷² During the COP19, the Parties established the Executive Committee of the Warsaw International Mechanism for Loss and Damage (WIM). It is the task of the Executive Committee to guide the implementation of the functions of the WIM. The WIM was established to ‘address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change’.⁷³ The WIM focuses on developing countries, especially those not able to adapt to the adverse impacts of climate change. The Executive Committee established the initial two-year workplan, which outlines the activities that will be coordinated to start the implementation of the loss and damage mechanism.⁷⁴ Action area 6 of the workplan is, in correspondence with the Cancun Adaptation Framework, focused on ‘enhancing the understanding of and expertise on how the impacts of climate change are affecting patterns of migration, displacement and human mobility; and the application of such understanding and expertise.’⁷⁵ Under the WIM, the Task Force was established as a result of the Paris Agreements. This will be discussed in the next section.

1.2.1.3. The Paris Agreement

The Paris Agreement is the first-ever universal global climate agreement.⁷⁶ It is a hybrid of legally binding and non-binding provisions.⁷⁷ Parties adopted the agreement in December 2015 during COP21 in Paris. On the 5th of October, the EU formally ratified the Paris Agreement, which then came into force on 4 November 2016. The main objective of the Agreements is to have climate mitigation and adaptation to keep the global temperature rise below 2 degrees by the end of the

⁷¹ A. Durand and S. Huq, ‘A Simple Guide to the Warsaw International Mechanism on Loss and Damage’, International Centre for Climate Change and Development, Independent University Bangladesh.

⁷² Ibid.

⁷³ Report of the Conference of the Parties on its nineteenth session, Held in Warsaw from 11 to 23 November 2013.

⁷⁴ United Nations Climate Change, ‘Approaches to address loss and damage associated with climate change impacts in developing countries’, (2018) <<https://unfccc.int/topics/adaptation-and-resilience/workstreams/approaches-to-address-loss-and-damage-associated-with-climate-change-impacts-in-developing-countries>> assessed June 10 2018.

⁷⁵ Action area 6 of the Initial two-year Workplan of the Executive Committee.

⁷⁶ European Commission, ‘Paris Agreement’,

<https://ec.europa.eu/clima/policies/international/negotiations/paris_en> assessed 10 June 2018.

⁷⁷ United Nations, ‘The Paris Agreement: Frequently Asked Questions’, (2016)

<<https://www.un.org/sustainabledevelopment/blog/2016/09/the-paris-agreement-faqs/>> assessed 10 June 2018.

century.⁷⁸ Today, 175 Parties have ratified the Agreement. The Paris Agreement was seen by, for example the UNHCR, as giving a unique opportunity for the UNFCCC Parties to support the implementation of mitigation and adaptation strategies that will reduce climate-induced migration.⁷⁹ Most of the statements made at the Nansen Initiative Global Consultation called for the COP21 to recognise the importance of the UNFCCC to address climate-induced migration.⁸⁰ In the first draft of the Paris Agreement, the text included a creation of a ‘climate change displacement coordination facility’. By removing this section from the second revision of the text, the COP21 did not show any clear commitment to address the needs of climate-induced migrants. The main reason behind the removal was the fact that the Australian government preferred not to create a multilateral accepted status for the climate-induced migrants. By the time, Australia did not accept climate-induced displaced people from Tuvalu, who needed to be resettled for purely environmental reasons.⁸¹ It shows the political sensitivity of the topic.

Nonetheless, climate change and migration are mentioned twice in the Paris Agreements. Firstly, the preamble mentions the vulnerability of climate-induced migrants. Secondly, Article 8 of the Agreement emphasizes the importance of ‘averting, minimizing and addressing loss and damages associated with the adverse effects of climate change’.⁸² This was also adopted in paragraph 48-52 of the Agreement, which at the same time requests the establishment of a Task Force for Displacement.⁸³ No details were provided on how this Task Force is supposed to operate, how its recommendations will be implemented, or how they will be financed.⁸⁴ The Task Force of Displacement was established under the WIM, and the first meeting took place on May 2017 in Bonn. The mandate of the Task Force can be considered substantive, since it is the outcome of political negotiations at the high level: the Paris Agreement. At this moment, the Task Force is

⁷⁸ European Commission (N 79).

⁷⁹ Recommendations from the Advisory Group on Climate Change and Human Mobility, *‘Human mobility in the context of climate change UNFCCC – Paris COP21’*, (November 2015)

<https://environmentalmigration.iom.int/sites/default/files/Research%20Database/Paris_COP21-Human_Mobility-AdvisoryGroup.pdf> assessed 19 June 2018.

⁸⁰ Ibid.

⁸¹ Foresight, *‘Migration and Global Environmental Change, future challenges and opportunities’*, [2011], Government Office for Science 1, 178.

⁸² Article 8 Paris Agreement.

⁸³ Decision 1/CP. 21, paragraph 49.

⁸⁴ J. McAdam, *‘From the Nansen Initiative to the Platform on Disaster Displacement: shaping international approaches to climate change, disasters and displacement’*, (2017) 39 (4) UNSW Law Journal 1518, 1529.

working to finalize its recommendations to the WIM in the fall of 2018.⁸⁵ It remains to be seen how the COP will receive these and how far-reaching the recommendations will be.⁸⁶ The Task Force needs to find a solution to the intricate link between climate change and migration, which will be challenging since many questions still exist regarding composition, accountability, and authority. The Task Force finds itself in a highly politicised process.⁸⁷

It can be concluded that the Paris Agreement did not live up to the high expectations, mainly since it does not address the legal status of climate-induced migrants. The Paris Agreement lacks the depth, urgency and the coordinated framework necessary for addressing the challenges faced by climate-induced migrants.⁸⁸

1.2.1.4. The Nansen Initiative

In 2012, Switzerland and Norway launched the state-led and bottom-up Nansen Initiative, build on paragraph 14 (f) of the Cancun Adaptation Framework.⁸⁹ Its Steering Group consists of nine Member States. The International Organization for Migration (IOM) and the UNHCR are standing invitees and the Steering Group is joined by the EU and Morocco as co-chairs of the ‘Group of Friends’.⁹⁰ Norway and Switzerland primarily fund the Nansen Initiative, but also the European Commission contributes. The objective of the Initiative is to ensure the protection of people who are forced to flee across borders in the context of natural disasters, including the disasters linked to the effects of climate change. It wants to identify effective measures and build a consensus

⁸⁵ United Nations Climate Change, ‘Task Force on Displacement’ <<https://unfccc.int/index.php/wim-excom/sub-groups/TFD>> assessed 10 June 2018.

⁸⁶ S. Behram and A. Kent, ‘Climate refugees, beyond the legal impasse?’ [2018] Routledge 1, 12.

⁸⁷ A. Thomas, ‘Paris Climate Deal: it’s time to get real’, (Refugee International, 20 April 2016) <<https://www.refugeesinternational.org/blog/2016/4/20/its-time-to-get-real-about-addressing-climate-displacement>> assessed 10 June 2018.

⁸⁸ K. Lambert, ‘The Paris Agreement: Spotlight on Climate Migrants’ [2015] Yale school of Forestry & Environmental Studies Blog <<https://environment.yale.edu/blog/2015/12/the-paris-agreement-spotlight-on-climate-migrants/>> assessed 10 June 2018.

⁸⁹ McAdam (N 84) 1518, 1520.

⁹⁰ As part of the ‘Group of Friends of the Nansen Initiative’ you will receive information about the activities and relevant documentation, you are invited to meetings and provide substantive input, and be called upon to cooperate with the Nansen Initiative. The Nansen Initiative Secretariat, ‘Frequently Asked Questions’ <https://www.eda.admin.ch/dam/eda/en/documents/publications/MenschenrechtehumanitaerePolitikundMigration/20150521-nansen-initiative-faqs_EN.pdf> assessed 19 June 2018.

regarding the protection of this vulnerable group of people by holding consultations with affected states, civil society itself and international organisations.⁹¹

In the context of increasing international recognition of the challenges of climate-induced migration, the non-binding Protection Agenda for Cross-Border Displacement in the Context of Disasters and Climate Change was established. The Protection Agenda, endorsed by 109 states, compiles the findings and conclusions of the Nansen Initiative. The purpose of this agenda is ‘to strengthen the protection of climate-induced migrants, to enhance understanding and to provide a conceptual framework’.⁹² The focus of this Initiative lays on the potential measures that states may adopt and harmonise to admit climate-induced migrants on their territory on the grounds of humanitarian reasons. It also tries to prevent displacement by addressing risk factors in the country of origin, helping people move out of these high-risk areas and address the needs of the displaced people that moved internally.⁹³ By approaching the issue from many different perspectives, the Protection Agenda allows a comprehensive approach to the issue. The Agenda emphasises key actions that can be taken by regional organisations, the international community, and the states themselves.⁹⁴

During the World Humanitarian Summit in Istanbul in 2016, the Platform on Disaster Displacement was launched as a follow-up mechanism of the Nansen Initiative. Its role is to follow up the work started by the Nansen Initiative and to implement the Protection Agenda.⁹⁵ The Platform does not aim at making new global legal norms but tries to enhance the use of effective practices by linking existing initiatives.⁹⁶ It is focused on cooperation with, for example, the IOM and UNHCR. Due to the strategic effort by the Nansen Initiative, a considerable development in knowledge about the impact of climate change on human mobility has been made.⁹⁷ This might be relevant for establishing the link between the environmental hazards and the migration. The Nansen Initiative’s ability to influence global processes is partly because state members of the

⁹¹ The Nansen Initiative, *Towards a Protection Agenda for People Displaced across Borders in the Context of Disasters and the Effects of Climate Change, the challenge*, < <https://www.nanseninitiative.org/secretariat/>> assessed June 10 2018.

⁹² Agenda for the protection of cross-border displaced persons in the context of disasters and climate change, volume I, The Nansen Initiative.

⁹³ E. Wilkinson and others, *Climate-induced migration and displacement: closing the policy gap*, [2016] Overseas Development Institute 1, 8.

⁹⁴ McAdam (N 84) 1518, 1525.

⁹⁵ McAdam (N 84) 1518, 1532.

⁹⁶ McAdam (N 84) 1518, 1533.

⁹⁷ McAdam (N 84) 1518, 1527.

Steering Group proactively voiced their concerns in relevant international meetings.⁹⁸ The Initiative has demonstrated how a politically sensitive topic can bind stakeholders with a participatory approach.⁹⁹ The Nepalese Government even described the Nansen Initiative as ‘one of the most effective forums to accelerate collaborative efforts among all the related stakeholders to tackle these issues’.¹⁰⁰

The Nansen Initiative is a sign of significant progress. Nevertheless, its lasting success will be measured by the extent to which its recommendations will be implemented in practice.¹⁰¹ Assistance and guidance will be needed for states to be able to adapt the findings into their region frameworks.¹⁰²

1.2.1. Conclusion

To conclude whether the EU has responsibilities to address the legal gap climate-induced migrants face when crossing European borders, the ambitions and objectives of the EU’s climate policy are demonstrated. The EU has claimed to be a pioneer in fighting climate change and calls for strong action to reach the 20/20/20 goals. The EU not only sets itself to cut GHG excessively but also encourage other nations. To reach these goals, the EU is taking action on the international and European level.

The UNFCCC is the main international treaty regarding climate change and the EU, and its MS individually, are Party to this Convention. Under the UNFCCC, albeit one step at a time, progress has been made regarding the issue of climate-induced migrants. Article 4 UNFCCC addresses climate change adaptation, which can be seen as the source of climate-induced migration policy in the agreements following from the Convention.

The wording used in both the Cancun Adaptation Framework and the workplan of the WIM is broad. Their task applies to ‘migration, displacement and human mobility’, which leaves the type of human mobility open and therefore might apply to temporary and permanent displacement, and internally and internationally movement. However, both will most probably focus on forced

⁹⁸ McAdam (N 84) 1518, 1532.

⁹⁹ E. Ferris and J. Bergmann, *Soft law, migration and climate change governance*, (2017) 8 (1) *Journal of Human Rights and Environment* 6, 29.

¹⁰⁰ Comments by EU delegation in The Nansen Initiative, *Global Consultation Conference Report: Geneva, 12-13 October 2015*, (Report December 2015) 155 (Global Consultation Conference Report).

¹⁰¹ McAdam (N 84) 1518, 1545.

¹⁰² *Ibid.*

migration where the drivers of migration are clear.¹⁰³ The causality problem between slow-onset environmental hazards and migration makes that these people are not directly addressed by the Cancun Adaptation Framework or the workplan of the WIM. The solutions are likely to protect only climate-induced migrants fleeing from rapid-onset environmental hazards.¹⁰⁴ Additionally, the ‘enhancing of understanding and cooperation’ does not clarify which policies will be used and also not by whom.¹⁰⁵ The Task Force, based on the Paris Agreements, uses a more substantive language with its mandate ‘to develop recommendations on integrated approaches to avert, minimize and address displacement’.¹⁰⁶ While the scope of the policies following from these decisions remains unclear, this shows that focus is shifted from focussing on attaining information towards establishing action.

A shift of focus from adaptation in the Cancun Adaptation Framework towards loss and damages in the WIM can also be noticed. The scope of loss and damages is broader than the scope of adaptation, since it also includes situations where losses cannot be avoided anymore, as already too much GHG is emitted. Since this thesis addresses migrants for whom adaptation is too late, this can be seen as a positive development. Where the objective of the WIM is to ‘address loss and damages’, the Paris Agreements included the words ‘avert and minimize’. Serdeczny argues that this development can be argued by political reasoning. In the political environment, the discussion about ‘addressing loss and damages’ frequently involved questions of compensation and liability. Including the words ‘averting and minimizing’ shifted the focus away from this topic.¹⁰⁷ This reasoning can be confirmed by the fact that paragraph 54 of the Paris Agreement includes that ‘Article 8 of the Agreement does not involve or provide a basis for any liability or compensation’.¹⁰⁸ Weakening the notion by using vague words allowed for all Parties to agree.¹⁰⁹ This shows the complex relationship between states concerned to be affected by climate change and states concerned to be assigned to cope with the adverse effects such as migration.¹¹⁰

¹⁰³ Wilkinson and others (N 93) 1, 8.

¹⁰⁴ Ibid.

¹⁰⁵ Serdeczny (N 20) 1, 12.

¹⁰⁶ Paragraph 50 Paris Agreement.

¹⁰⁷ Serdeczny (N 20) 1, 20.

¹⁰⁸ Decision 1/CP. 21, paragraph 54.

¹⁰⁹ Serdeczny (N 20) 1, 2.

¹¹⁰ Ibid.

Further, progress is seen in the establishment of the Nansen Initiative. The considerable development in knowledge about the impact of climate change on human mobility might contribute to the illustration of the link between climate change and migration. However, the Nansen Initiative does not establish a binding legal framework, which seems a complicated process. It has to be seen to what extent its recommendations will be implemented. The developments under the recent COPs suggest that the international community at least tries to fill the ‘legal gap’ on behalf of the UNFCCC.¹¹¹

It can be concluded that the international policy response is lacking a coordinated framework and does not directly address the legal status of the climate-induced migrants. The issue of climate-induced migrants is highly political, and the discussion concerning loss and damages is predominantly led by states’ concern about their sovereignty.¹¹² Filling up the protection gap through international agreements becomes therefore problematic since these agreements remain often too vague to impose binding obligations on the Parties, and also do not address the legal status of climate-induced migrants. The only obligation for the EU to grant climate-induced migrants protection when they enter European borders seems to be a moral one. The principle of non-refoulement and human rights law might offer more possibilities for climate-induced migrants to find protection in the EU. In order to examine this, the current legal framework for refugees should be discussed first.

¹¹¹ Behram and Kent (N 86) 1, 9.

¹¹² Wilkinson and others (N 93) 1, 8.

2. Current Legal Framework of Refugee Protection

The purpose of the chapter is to provide an overview of the existing legal framework for the protection of refugees in general, to determine whether it applies in the situation of climate-induced migrants. The following section will describe the application of international legal norms such as the 1951 Convention relating to the status of refugees (Refugee Convention), the regional QD which provides for the possibility of subsidiary protection, and the TPD.

2.1. 1951 Convention relating to the status of refugees

UN human rights treaties secure rights to every person that falls within the jurisdiction or is on the territory of a contracting party.¹¹³ The only international legal norms applying specifically to refugees are the Refugee Convention and the 1967 Protocol relating to the status of refugees.¹¹⁴ The Refugee Convention provides the cornerstone of the international legal regime for the protection of refugees.¹¹⁵ In Article 1 (a)(2) Refugee Convention, the definition of the term ‘refugee’ is laid down. The convention defines refugees as people who have left their home country and cannot return because of:

‘a well-founded fear of being prosecuted for reasons of race, religion, nationality, membership of a particular social group or political opinions, 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.’¹¹⁶

Asylum seekers who define as refugees must benefit from core rights, applicable to all refugees.¹¹⁷ This means that refugees receive at least the same rights as any other foreigner who is a legal

¹¹³ Gromilova (N 27) 1, 94.

¹¹⁴ I. Zamfir, ‘Refugee status under international law’, (European Parliament Research Service Blog, 27 October 2015) <<https://epthinktank.eu/2015/10/27/refugee-status-under-international-law/>> assessed 10 June 2018.

¹¹⁵ United Nations High Commissioner for Refugees, ‘The 1951 Convention relating to the Status of Refugees: Its relevance in the Contemporary Context’, <<http://www.refworld.org/pdfid/3ae6b3388.pdf>> assessed 19 June 2018.

¹¹⁶ Article 1 (a)(2) of the 1951 Convention relating to the status of refugees.

¹¹⁷ Boeles and others (N 23) 298.

resident.¹¹⁸ In order to qualify as a refugee, a person has to comply with the following requirements:

1. Presence outside home country

People who are internally displaced cannot seek asylum. Internally displaced people are people forced to flee their homes, but never cross an international border.¹¹⁹ Therefore, internally displaced people are not protected by international law.

2. Well-founded fear

A risk of persecution should be based on one of the reasons or grounds mentioned in the definition of a refugee. Such threat is established when the person concerned may reasonably fear that he will be subject to acts of persecution. The standard of a 'reasonable possibility or chance' is widely accepted.¹²⁰ Only fear is neither decisive nor sufficient to claim refugee protection.¹²¹

3. Acts of persecution

The meaning of persecution is linked to Article 33 (1) Refugee Convention. The seriousness of the violation of a human right is decisive to establish persecution. In the Y and Z case, the CJEU concluded that not every interference with the right of religion constitutes an act of persecution since 'there must be a severe violation having a significant effect on the person concerned.'¹²² Also, a claim for protection must be based on facts that directly relate to the individual.¹²³ The risk of persecution stems from a persecutor, which can be interpreted in the way that the risk of persecution must be linked to human activities and therefore cannot be linked to for example natural disasters.¹²⁴

¹¹⁸ UNHCR, *Protecting Refugees, questions and answers*, [2002] <<http://www.unhcr.org/afr/publications/brochures/3b779dfe2/protecting-refugees-questions-answers.html>> assessed 10 June 2018.

¹¹⁹ UNHCR, *What is a Refugee*, <<https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>> assessed 10 June 2018.

¹²⁰ UNHCR Handbook para. 45.

¹²¹ Boeles and others (N 23) 300.

¹²² Joint Cases C-71/99 and C-99 *Y and Z* [2012], paras. 58, 59.

¹²³ Boeles and others (N 23) 300 – 303.

¹²⁴ *Ibid.*

4. Reasons for persecution

The reasons for persecution are religion, nationality, race, and membership of a particular social group or political opinion.¹²⁵ These five protected statuses derive from the foundational Universal Declaration on Human Rights (UDHR).¹²⁶ This definition does not leave open to interpretation. People who are forced to leave their home country for reasons such as a rising sea level or drought thus do not fall within this scope.

5. Connection between acts of persecution and the reasons for persecution

There needs to be a nexus between the well-founded fear of persecution and one of the grounds listed in the refugee definition.¹²⁷

6. Incapacity to enjoy the protection of one's own state

The role of international protection is to make up for the failure of the country of origin to protect the concerned person against the persecution feared.¹²⁸ The protection of the refugees is assured by making sure that the refugees are not returned to the country where they could face persecution. This is also known as the principle of non-refoulement, which will be explained later in this thesis.

The definition excludes someone who does not cross a border, someone who cannot be seen as 'forced' and more importantly for this research: someone who crosses a border solely because of environmental degradation in their nations of origin. During several debates, it was consulted that the terminology of a climate refugee should not be added to the Refugee Convention since policy-makers fear that a re-opening of negotiations would lead to a more restrictive convention than it is today.¹²⁹ The Refugee Convention does not impose an obligation on states to grant asylum. Whether an asylum-seeker receives a refugee status remains at the state discretion. There is a gap between the existence of the right to *seek* asylum and the lack of a corresponding state duty to *grant* asylum.¹³⁰

¹²⁵ Article 1 (a)(2) of the 1951 Convention Relating to the Status of Refugees.

¹²⁶ S. Ataputta, 'Climate Change, Human Rights and Forced Migration: Implications for International Law', [2009] 27 Wisconsin International Law Journal 607, 624-625.

¹²⁷ Boeles and others (N 23) 306 – 307.

¹²⁸ J.C. Hathaway and M. Foster, 'The Law of Refugee Status', (Cambridge University Press 2014).

¹²⁹ Gromilova, (N 27) 1-33.

¹³⁰ C. Phuong, 'Identifying States' Responsibilities towards Refugees and Asylum Seekers', [2005], Paper presented at the ESIL Research Forum on International Law.

2.2. Qualification Directive

In the EU, refugee protection is part of the Common European Asylum System, which is based on a full and inclusive application of the Refugee Convention. According to the TFEU and the CJEU's case law, all legal and policy measures adopted by the EU legislator on asylum must be in accordance with the 1951 UN Refugee Convention.¹³¹ Similarly, the QD aims at ensuring that MS apply common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 Refugee Convention. The refugee definition and the content of refugee protection laid down in the QD are to guide MS in the application of the Refugee Convention.¹³² Article 2 (d) QD defines a refugee for the purpose of that Directive. The only difference between this definition and the definition given in the Refugee Convention is that the definition in the QD only refers to TCN. Therefore, EU citizens are excluded from protection offered by the QD and climate-induced migrants do not fall within the scope of the definition of a refugee as stated in the QD.

However, the subsidiary protection regime might offer some opportunities for climate-induced migrants to receive international protection. Subsidiary protection is the term used to describe the protection regime of the QD, for forced migrants who fail to meet the formal definition of a refugee and therefore fall outside the framework of the Refugee Convention.¹³³ Subsidiary protection should be granted based on the right to life (Article 2 ECHR) and the ban on torture, inhuman or degrading treatment or punishment (Article 3 ECHR).¹³⁴ Resulting from these Articles is the principle of non-refoulement, which prohibits countries to return asylum seekers to a country in which they would be in danger of being subject to torture or inhuman or degrading treatment or punishment. This is stated in Article 3 of the United Nations Convention against Torture (CAT), Article 6 and 7 International Covenant on Civil and Political Rights (ICCPR) and Article 3 ECHR.¹³⁵ Chapter 3 will discuss the principle of non-refoulement more extensively.

To receive subsidiary protection, the individual should face 'a serious harm' as defined in Article 15 QD. In this provision, a non-exhaustive list of situations constituting serious harm is listed.

¹³¹ Article 78 Treaty on the Functioning of the European Union and Case C-31/09 *Nawras Bohol v Bevandorlasi es Allampolgarsagi Hivatal* [2010].

¹³² Case C-31/09 *Nawras Bohol v Bevandorlasi es Allampolgarsagi Hivatal* [2010].

¹³³ Article 2 (f) Directive 2011/95/EU.

¹³⁴ *Ibid* 321.

¹³⁵ A. Farmer, 'Non-refoulement and Jus Cogens: Limiting anti-terror measures that threaten refugee protection', (2009) 23 (1) *Georgetown Immigration Law Journal* 1, 18-19.

Serious harm consists of (a) ‘death penalty or execution’, or (b) ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’ or (c) ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’.¹³⁶ None of these grounds is directly applicable to environmentally displaced individuals. Subsection (a) certainly does not apply to climate-induced migrants. Subsection (b) involves the words treatment or punishment, which initially does not seem applicable to environmental hazards, and subsection (c) is not applicable since the scope of the section is narrowed down to situations of internal and international armed conflict.¹³⁷ Nevertheless, some scholars argue that subsection (b) provides for opportunities in times of extreme cases of natural disasters or degradation.¹³⁸ Whether climate-induced migrants could be granted protection under Article 15 (b) QD will be the subject of the case law studied in chapter 4.

During the drafting of the QD, a subsection (d) was discussed. This section would entitle the applicant to be protected against refoulement and therefore provide subsidiary protection for persons not falling within the scope of subsection (a)-(c). The section never made it to the final version. According to several MS, the wording was too vague and therefore able to provide for a wide margin of interpretation.¹³⁹ Given that environmental disasters cannot be separated from political and economic factors, it is not likely that such a wide margin of interpretation is granted.¹⁴⁰ Although subsection (d) was omitted, subsection (b) is conceivably capable of offering the same protection that was intended to be offered under subsection (d).

2.3. Temporary Protection Directive

In the case of a mass influx of environmental displaced individuals, the TPD may be applicable. The TPD has two objectives.¹⁴¹ The first one is to give minimum standards for providing temporary protection in the event of a mass influx of displaced people from third countries who are unable to return to their home country. The second one is to balance the efforts between MS in bearing the consequences of receiving a mass influx of displaced people.¹⁴² Chapter III of the TPD affirms the

¹³⁶ Article 15 Directive 2011/95/EU.

¹³⁷ Case C-465/07 *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie* [2009] ECR I-00921, para. 35.

¹³⁸ V. Kolmannskog and F. Myrstad, ‘*Environmental Displacement in European Asylum Law*’, (2009) 11 *European Journal of Migration and Law* 313, 322.

¹³⁹ *Ibid* 320.

¹⁴⁰ N. Southard, ‘*The Socio-Political and Economic Causes of Natural Disasters*’, [2017] CMC Senior Thesis.

¹⁴¹ Article 1 Directive 2001/55/EC.

¹⁴² *Ibid*.

obligations of MS towards those granted temporary protection, concerning employment, social assistance, education, medical care, and etcetera.¹⁴³ Articles 2 (c)(i) and (c)(ii) describe displaced persons as ‘in particular’ persons who have fled areas of armed conflict or endemic violence and as persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.¹⁴⁴ The use of the language ‘in particular’ shows that this list is not exhaustive and may extend to climate-induced migrants.¹⁴⁵ These people ‘may’ fall within the scope of the Refugee Convention, or in other international or national instruments giving international protection.¹⁴⁶ The description is broader than the description under the Refugee Convention and the QD.

However, this Directive does show some limitations. The TPD is only applicable in case of a mass influx and does not apply to individual application cases.¹⁴⁷ It is unlikely that slow-onset environmental hazards will cause a situation of mass influx. Nonetheless, rapid-onset environmental hazards could result in a mass influx of people, and the TPD seems an appropriate mechanism to provide climate-induced migrants at least with immediate and temporary protection. However, it should be noticed that the Council has never used the TPD.¹⁴⁸ Italy and Malta tried to invoke the TPD as a response to the mass influx of individuals from Libya and Tunisia at the height of the Arab Spring. However, the Commission has stated that the inflow of persons from Libya and Tunisia could not be considered as a ‘mass influx’.¹⁴⁹ Article 2 (a) TPD also affirms that temporary protection should only be granted in exceptional cases.¹⁵⁰ This exceptional character is also established by the fact that the Council needs to take a decision following Commission’s proposal. A qualified majority of the Council has to define the situation as one of ‘mass influx’, since the definition is not given in the TPD.¹⁵¹ This makes the TPD subject to a high political threshold. Therefore, not only people fleeing from slow-environmental hazards will have problems to fall within the scope of this Directive, it will also be problematic for people migrating due to rapid-onset climate events. Furthermore, the Directive does not provide a well-defined protection

¹⁴³ Article 8-19 Directive 2001/55/EC.

¹⁴⁴ Article 2 (c)(i) – (ii) Directive 2001/55/EC.

¹⁴⁵ M.D. Cooper, *‘Migration and Disaster-Induced Displacement: European Policy, Practice, and Perspective’*, [2012] Center for Global Development, Working Paper 308 1, 38 – 46.

¹⁴⁶ Article 2 (c) Directive 2001/55/EC.

¹⁴⁷ Article 1 Directive 2001/55/EC.

¹⁴⁸ Cooper (N 143) 1, 38 – 46.

¹⁴⁹ Kraler, Cernei, and Noack (N 4) 1, 54.

¹⁵⁰ Article 2 (a) Directive 2001/55/EC.

¹⁵¹ Kolmannskog and Myrstad (N 138) 313, 317.

mechanism. Moreover, the Directive provides only temporary protection, and will therefore not establish a long-term solution, which is relevant for those displaced permanently.¹⁵²

Considering the objectives and scope of this Directive, the TPD would be the most appropriate legal framework to provide climate-induced migrants crossing EU's borders at least with immediate protection. Nevertheless, the high political threshold, the lack of a clear protection mechanism, and the exceptional situation in which temporary protection can be granted makes the TPD not an effective mechanism to address the issue of climate-induced migration.

2.4. Conclusion

Under the Refugee Convention, climate-induced migrants cannot find international protection. The Convention does not see environmental hazards as reasons for persecution and therefore does not impose an obligation on states to grant people international protection. The European QD contains the possibility to protect people who fail to meet the definition of a refugee and leaves more open to interpretation. However, the grounds stated in this Directive do not seem to be applicable to people migrating due to environmental hazard either. Only Article 15 (b) QD provides for opportunities if it can be established that climate-induced migrants face serious harm which consists of torture or inhuman or degrading treatment or punishment of an applicant in the country of origin. The scope of Article 15 (b) QD will be studied later to examine whether people forced to move due to environmental hazards possibly receive subsidiary protection. The TPD is only able to protect displaced people in times of mass influx and is therefore not applicable to individual applications. Consequently, people migrating because of slow-onset environmental hazards will probably not fall within this scope. Besides, the TPD is subject to a high political threshold, which makes it very improbable that it applies to people fleeing from rapid-onset environmental hazards. Although the scope and objective of the TPD seem to be the most appropriate legal mechanism to address climate-induced migration, in reality, it will not be the most effective one. It can be concluded that the Refugee Convention, the QD, and the TPD were drafted in a pre-recognition state regarding climate change.¹⁵³ Protection gaps regarding climate-induced migrants do exist, but especially the subsidiary protection mechanism from Article 15 (b) QD might provide for opportunities that will be studied subsequently.

¹⁵² Kraler, Cernei, and Noack (N 4) 1, 54.

¹⁵³ Kolmannskog and Myrstad (N 138) 313, 325.

3. Obligations for the European Union under the International Human Rights Framework

As the previous sections have shown, neither the existing international agreements the EU is party to, nor the current legal framework protect climate-induced migrants. A non-exhaustive list of possible human rights violations faced by climate-induced migrants is presented. Subsequently, the relationship between the two overlapping transnational processes intending to protect human rights in Europe will be explained: the ECHR and the EU Charter. Since human rights impose obligations on states, the relationship between human rights and the EU is further enlightened.

3.1. International Human Rights

Human rights treaties secure rights to every person who falls within the jurisdiction of the contracting state or who is on the territory of the contracting party.¹⁵⁴ This is beneficial for climate-induced migrants since this avoids the causality challenge.¹⁵⁵ The international legal framework endows every human being with these fundamental human rights and might, therefore, be the most effective framework for addressing the human rights consequences of climate change.¹⁵⁶ Climate-induced migration impacts social, economic, and political stability and also the human rights of the involved actors.¹⁵⁷ The adverse effect of climate change on the enjoyment of human rights is also mentioned during the COP16.¹⁵⁸ The list of the human rights that are possibly at stake concerning climate-induced migrants is non-exhaustive, particularly since all human rights are interdependent, interrelated, and indivisible.¹⁵⁹ The violation of one right will often facilitate the violation of another. A distinction can be made between civil and political rights such as freedom of expression, the right to life and the right to religion, and social, economic, and cultural rights,

¹⁵⁴ M.M. Naser and T. Afroz, 'Human Rights Implications of Climate Change Induced Displacement', (2009) 21 (3) Bond Law Review 139, 150.

¹⁵⁵ M. Gromilova, 'Revisiting Planned Relocation as a Climate Change Adaptation Strategy: The Added Value of a Human Rights-Based Approach', (2014) 10 (1) Utrecht Law Review 76, 90.

¹⁵⁶ Kyung-wha Kang, Conference on Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities, Geneva, 19 February 2008, (UN Press Release on Climate Change, Migration and Human Rights: Address by Ms. Kyung-wha Kang Deputy High Commissioner for Human Rights Office of the United Nations High Commissioner for Human Rights), 1, at 20 April 2009.

¹⁵⁷ R. McLeman, 'Climate Change, Migration and Critical International Security Considerations', [2011] IOM Migration Research Series no. 42, 1, 15.

¹⁵⁸ Knox (N 69) 1, 3.

¹⁵⁹ Article (I) 5 Vienna Declaration and Programme of Action.

such as the rights to education, the right to health and the right to work.¹⁶⁰ States that have ratified international human rights treaties must ‘respect, protect and fulfil’ the rights laid down in that treaty.¹⁶¹ They have to respect human rights and have a negative obligation not to take measures that result in a violation of the relevant human right. States also must protect human rights, which means they have to take positive steps to realise for example the rights to life, adequate food, and health.¹⁶² States should adopt appropriate laws that implement their international undertakings to fulfil human rights.¹⁶³ The rights at risk that seem particularly relevant and vulnerable to the impacts of climate change will now be further discussed.

3.1.1. The right to life

Every human being has the inherent right to life. The right to life is an absolute right and does not allow for any derogation, even in times of public emergency.¹⁶⁴ The right is protected in multiple international treaties such as the UDHR, the Convention on the Rights of the Child (CRC), and the ICCPR.¹⁶⁵ It does not only mean that people cannot be deprived of their lives, but it also constitutes positive obligations for State Parties.¹⁶⁶ The protection of the right to life is relevant for climate-induced migration, since it is closely related to, for example, the right to health, housing, food, and water. It has been argued that these rights are necessary components to fulfil the right to life.¹⁶⁷ According to the Deputy High Commissioner for Human Rights, climate change can have both a direct and indirect impact on human life.¹⁶⁸ Rapid-onset environmental hazards can cause immediate impacts on human life, but these impacts may also appear gradually, for example through slow-onset environmental hazards resulting in diminished access to safe drinking water or the deterioration in health.¹⁶⁹

¹⁶⁰ D. Moeckli, S. Shah, and S. Sivakumaran, *‘International Human Rights Law’*, (Oxford University Press 2010) 144.

¹⁶¹ *Ibid* 101.

¹⁶² McAdam (N 84) 1518, 1537.

¹⁶³ Moeckli, Shah, and Sivakumaran (N 160).

¹⁶⁴ *Ibid*.

¹⁶⁵ Article 3 Universal Declaration of Human Rights, Article 6 Rights of the Child and Article 6 International Covenant on Civil and Political Rights.

¹⁶⁶ UN Human Rights Committee, General Comment No 6 (1982) on the Right to Life (Article 6).

¹⁶⁷ J. McAdam, *‘Climate Change Displacement and International Law, Complementary Protection Standard’*, [2011] United Nations High Commissioner for Refugees 1, 19.

¹⁶⁸ Naser and Afroz (N 154) 139, 140-141.

¹⁶⁹ J. von Doussa, A. Corkery and R. Chartres, *‘Human Rights and Climate Change’*, (2007) 14 Australian International Law Journal 161, 163.

Regionally, the right to life is also written down in Article 2 of the ECHR. An Article 2 claim is generally raised in combination with Article 3 ECHR (the prohibition of torture), since a violation of Article 3 normally results in the breach of Article 2. The UNHRC considers a positive obligation to ensure survival under Article 2 ECHR.¹⁷⁰ The positive obligation under Article 3 ECHR reaches further than that: not just the survival should be protected, but life in dignity.¹⁷¹ The ECtHR ruled that the obligation to protect the right to life also includes the protection from environmental harm.¹⁷² In the *Budayeva v. Russia* case, the ECtHR decided that the state violated Article 2 ECHR by a failure to implement emergency relief policies, while the authorities were aware of an increased risk of a large-scale mudslide.¹⁷³ This thesis concerns climate-induced migrants victimised by environmental hazards. In this situation, the state has failed to fulfil its obligation to protect their citizens against environmental harm. In Article 2 EU Charter the right to life is also affirmed.¹⁷⁴

3.1.2. *The right to health*

Climate change poses risks causing many impacts on human health. The IPCC has shown that climate change is likely to affect the health of millions of people. Climate change will cause an increased risk of diseases and death due to heat waves, floods, droughts, storms, and fires.¹⁷⁵ The process of migration can result in vulnerability and health problems.¹⁷⁶ The right to health is stated in Article 25 (1) of the UDHR and Article 12 (a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to health is also referred to in for example the CRC and the Convention on the Elimination of Discrimination against Women (CEDAW).¹⁷⁷ The

¹⁷⁰ UN Commission on Human Rights, '*Human Rights and Extreme Poverty*', [2005] Human Rights 1 (b).

¹⁷¹ K. Röhl, '*Fleeing violence and poverty: non-refoulement obligations under the European Convention on Human Rights*', [2005] United Nations High Commissioner for Refugees, Oxford University, Working Paper No. 111.

¹⁷² *Öneryildiz v. Turkey* [2005] 48939/99, paras 71–72.

¹⁷³ *Budayeva v. Russia* [2008] 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, para. 144.

¹⁷⁴ Article 2 EU Charter of Fundamental Rights.

¹⁷⁵ IPCC, '*Summary for Policymakers*', (Climate Change 2007: Impacts, Adaptation and Vulnerability, 2007) <https://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_summary-for-policymakers.pdf> assessed 10 June 2018.

¹⁷⁶ P. Pace and S. Shapiro, '*Migration and the Right to Health in Europe*', [2009] IOM International Migration Law and Legal Affairs Department.

¹⁷⁷ Article 24 of the Convention for the Protection of the Child & Article 12 Convention on the Elimination of Discrimination against Women.

right to health is not guaranteed in the ECHR. Article 35 EU Charter states the right to healthcare.¹⁷⁸

3.1.3. The right to adequate food

Climate change will harm the right to food in a significant way.¹⁷⁹ If the global temperature is rising, agriculture will be disrupted. This will lead to the decline of the global food production. The shift in the rainfall pattern will reduce productive land, and sea level rise will make the coastal area unusable for cultivation.¹⁸⁰ Additionally, during the relocation, the right to adequate food could be infringed. Receiving areas have to deal with an increasing demand for food. It is shown that inadequate resettlement can lead to food insecurity and undernourishment.¹⁸¹ The right to adequate food is most comprehensively stated in Article 11 of the ICESCR, but also incorporated in the CRDP and the CEDAW.¹⁸² The EU Charter and the ECHR do not mention the right to adequate food.

3.1.4. The right to water

Another human right which is likely to be infringed is the right to water. The resulting water shortages will make access to safe drinking water more difficult.¹⁸³ The areas that receive climate-induced migrants have to deal with an increased demand for water. This will have a negative impact on water availability. Eventually, this might lead to unsafe drinking water or sewage problems which increases vulnerability to diseases. As a result, resettlement may lead to an increase in morbidity among both local and displaced people.¹⁸⁴ The right to water is not expressly stated in the ICESCR, but is elaborately related with the right of health and the right to adequate food. The UN Committee on Economic, Social and Cultural Rights has adopted some General Comments which interprets Articles 11 and 12 ICESCR to include access to sufficient

¹⁷⁸ Article 35 EU Charter of Fundamental Rights.

¹⁷⁹ Von Doussa, Corkery, and Chartres (N 169) 161, 163.

¹⁸⁰ A. Dupont and G. Pearman, *'Heating up the Planet: climate change and security'*, [2006] Lowy Institute Paper.

¹⁸¹ M.M. Cernea, *'Impoverishment Risks, Risk Management, and Reconstruction: A Model of Population Displacement and Resettlement'*, [2000] George Washington University.

¹⁸² Art. 24(2)(c) Convention for the Right of the Child and Article 28 (1) Convention on the Rights of Persons with Disabilities.

¹⁸³ Von Doussa, Corkery, and Chartres (N 169) 161, 163.

¹⁸⁴ Cernea (N 180).

and safe water for domestic uses and sanitation.¹⁸⁵ In the CRC and the CEDAW, the right to water is also specifically articulated.¹⁸⁶ The EU Charter and the ECHR do not mention the right to water.

3.1.5. The right to adequate housing

Adequate housing is recognised as part of the right to an adequate standard of living in the UDHR and the ICESCR.¹⁸⁷ Since then, other international human rights treaties have referred to an adequate standard of living. Climate-induced migrants are vulnerable to the violation of the right to adequate housing since they will often be homeless. People who cannot return to their homes should be enabled to resettle in conditions that respect their right to adequate housing.¹⁸⁸ The EU Charter and the ECHR do not mention the right to water.

3.1.6. Prohibition of torture

The prohibition of torture is laid down in human rights provisions such as Article 7 ICCPR and Article 3 ECHR. Article 3 ECHR is absolute, which means that a violation can never be justified by other interests and is prohibited by all means.¹⁸⁹ From the prohibition of torture, complementary protection for climate-induced migrants is established, explicitly the principle of non-refoulement. In case *Soering v. UK*, the ECtHR interpreted Article 3 ECHR for the first time as precluding the removal of a person to a situation where ‘the applicant would be exposed to a real risk of being subject to severe forms of ill-treatment’.¹⁹⁰ The Contracting Parties of the ECHR are therefore not only required to safeguard Article 3 ECHR within their jurisdiction but also are prohibited from sending someone back to a country where there is a risk of breaching Article 3 ECHR.¹⁹¹ It has

¹⁸⁵ UNCESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc.E/C.12/2000/4 (2000); General Comment No. 15: The Right to Water, UN Doc.E/C.12/2002/11 (2003). The ICJ has held that ‘great weight’ should be attributed to interpretations adopted by independent treaty supervisory bodies: see *Diallo Case (Guinea v. DRC)*, supra note 5, at paras 66–67.

¹⁸⁶ Article 24 Convention of the Right of the Child and Article 14 (2)(h) of the Committee on the Elimination of Discrimination Against Women.

¹⁸⁷ Article 25 Universal Declaration on Human Rights and Article 11 International Convention on Economic, Social and Cultural Rights.

¹⁸⁸ UN Habitat, *‘The Right to Adequate Housing’*, (Office of the United Nations High Commissioner for Human Rights, 2009) <http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf> assessed 10 June 2018.

¹⁸⁹ Article 15 (2) European Convention for Human Rights.

¹⁹⁰ *Soering v. the United Kingdom* [1989] – 14038/88, para. 91.

¹⁹¹ L. Wallenberg, *‘Return to Socio-Economic Deprivation, A critical Analysis of the Scope of Complementary Protection under European law*, [2016] Faculty of Law, Lund University 1, 19.

been argued that the principle of non-refoulement has become a principle of customary law and is therefore binding on all states, regardless the fact of signing the treaty or not.¹⁹² The principle of non-refoulement creates a form of subsidiary protection and relates to people already present in the territory of a MS, only in limited instances a right to entry is included.¹⁹³ At the Nansen Conference in 2011, the principle of non-refoulement was highlighted as a possible protection framework for climate-induced migrants.¹⁹⁴ It is questionable whether the principle of non-refoulement applies to migrants risking human rights violations proceeding from environmental hazards caused by climate change. This question is the subject of the jurisprudence research in Chapter 4.

3.1.7. The right to a clean environment

It can be concluded that environmental hazards may result in the deprivation of human rights. As mentioned in section 3.1.1., the duty to prevent environmental harm is established by the ECtHR.¹⁹⁵ Whether the right to a clean environment has become a free-standing human right on its own is an interesting question. None of the international human rights treaties guarantees a right to a clean environment. The right to water, food, and health already helps to safeguard some of the essential characteristics of a clean environment, which makes the recognition of a human right to environment perhaps not necessary.¹⁹⁶ However, an explicit recognition of the right to environment will make the right equal to other human rights, which offers compelling opportunities to address climate change and its effects since it would be placed on the same human rights level as for example economic development and natural resource exploitation.¹⁹⁷ Important cases such as *Guerra*¹⁹⁸, *Lopez Ostra*¹⁹⁹, and *Taskin*²⁰⁰, demonstrate that states have a positive obligation to act and prevent environmental harm. This is relevant in the context of climate change,

¹⁹² Farmer (N 135).

¹⁹³ G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', (2005) 17 (3) International Journal of Refugee Law 542, 548.

¹⁹⁴ The Nansen Conference, '*Climate Change and Displacement in the 21st Century*', Oslo, 5-7 June 2011, Chairperson's summary, para. 22.

¹⁹⁵ *Budayeva v. Russia* (2008) 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

¹⁹⁶ M. Ostberg, 'The role of the European Court of Human Right in enforcing environmental norms and principles', [2006] University of Lund 1, 15.

¹⁹⁷ A. Boyle, 'Human Rights and the Environment, Where Next?', (2012) 23 (3) Oxford University Press 613-642.

¹⁹⁸ *Guerra and others v. Italy* [1998] 116/1996/735/932.

¹⁹⁹ *Lopez Ostra v. Spain* [1994] 16798/90.

²⁰⁰ *Taskin and Others v. Turkey* [2005] 46117/99.

where the connection between the environmental hazard and the activities of the state is difficult to establish.²⁰¹

In case C-176/03, the CJEU stated that the protection of the environment is one of the essential objectives of the EU, which was a substantial contribution to the concept of the right to environment.²⁰² A more comprehensive right to environmental protection is based on the decision by the ECtHR in the *Lopez Ostra* case. The ECtHR ruled that the state has a margin of appreciation when it comes to the balance between the interest of the individual and the interest of a community. In this case, the ECtHR concluded that the state did not succeed in striking a fair balance between the interests of the town's economic well-being and the applicant's enjoyment of the right to respect for her home and her private and family life. The ECtHR concluded that Article 8 ECHR was violated, primarily since there was a combination of a significant risk to health, a serious breach of the right to life and lack of effective steps to deal with the situation.²⁰³ This decision is particularly significant since the ECtHR considered environmental harm as a breach of the right to private life for the first time. The judgement in the *Powell and Rayner* case, on the other hand, shows reluctance by the ECtHR to allow environmental concerns of an individual to be prevailing over the economic concerns of the state. This is especially the case when the government can show its compliance with international standards. In this case, the applicants complained about excessive noise levels emerging from an airport. The ECtHR emphasised the necessity in the interests of a country's economic well-being.²⁰⁴

Consequently, it can be concluded that the ECtHR only derives environmental protection rights from the ECHR, when the link between the infringement of the applicant's right and the environmental harm is evident and direct.²⁰⁵ This is problematic concerning the protection of climate-induced migrants, especially regarding slow-onset environmental hazards. Additionally, the lack of a clear definition of the content and scope of the right to environment will be problematic.²⁰⁶ The ECtHR can play an important role in enforcing environmental issues, but the existence of the right to a clean environment would not be able to protect climate-induced migrants.

²⁰¹ Von Doussa, Corkery, and Chartres (N 169) 161, 169.

²⁰² Case C-176/03 *Commission v. Council Judgment* [2005], para. 41.

²⁰³ *Lopez Ostra v. Spain* (1994) 16798/90.

²⁰⁴ *Powell and Rayner v. the United Kingdom* (1990) – 9310/81.

²⁰⁵ Ostberg (n 196) 1, 43.

²⁰⁶ E. Lafontaine, 'The need for a new instrument to deal with 'Environment Refugees'', [2017], University of Oslo 1, 8.

3.2. Human Rights and the European Union

The relationship between the EU, its MS, and human rights treaties should be illustrated to determine whether the EU has obligations to protect climate-induced migrants based on human rights. All MS of the EU are party to the majority of the ‘core’ human rights treaties such as the ICESCR, ICCPR, CEDAW, CAT, CRC, and Convention on the Rights of Persons with Disabilities (CRPD). The MS are also subject to obligations deriving from the UN Charter. Regionally, all MS are party to the ECHR and bound by the EU Charter as far as they are implementing EU law. Conversely, the only multilateral international human rights treaty the EU itself has acceded to is the CRPD.²⁰⁷ The EU is required to respect international human rights obligations to the extent that these are binding on the EU under treaties or customary international law.²⁰⁸ This monist approach was established by a judgement of the CJEU in the *Air Transport Association of America* case.²⁰⁹ Consequently, the EU is, formally, not bound by the decisions of the ECtHR, although its MS, all party to the ECHR, have an obligation to respect the system, even when applying EU law.²¹⁰

Nevertheless, respect for human rights is a condition for the legality of EU law according to the CJEU.²¹¹ The EU policies are based on the values of respect for human rights, which makes this a core element of EU policies in the areas of asylum and migration.²¹² Thus, when the EU takes measures, it has to ensure that these do not infringe upon the body of human rights recognised as part of the ‘general principles’ of the EU. The scope of the human rights recognised by the EU as ‘general principles’ of EU law are primarily based on the ECHR. This arises from, for example Article 6 (3) Treaty on European Union (TEU), but is also decided in several judgements of the CJEU.²¹³ The CJEU even decided that EU institutions cannot take measures that are incompatible with the ECHR.²¹⁴ This results in two overlapping transnational legal processes intending to

²⁰⁷ The European Union and International Human Rights Law (United Nations Human Rights Office of the High Commissioner, Europe, Regional Office) 8
<http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf> assessed 10 June 2018.

²⁰⁸ L. Bartels, *The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, (2014) 25 (4) European Journal of International Law 1071 – 1078.

²⁰⁹ Case C-366/10 *Air Transport Association of America* [2011] ECR I-13755, para. 101.

²¹⁰ The European Union and International Human Rights Law (N 207), 8.

²¹¹ *Ibid* 9.

²¹² Article 2 Treaty of the European Union.

²¹³ Case C-540/03, *Parliament v Council* [2006] ECR I-5769, para. 35.

²¹⁴ Case C-260/89 *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925, par. 41.

protect human rights in Europe: the ECHR and the EU Charter. The ECtHR is often mistakenly believed to be an EU institution and is also described as the world's most successful international human right tribunal.²¹⁵ With the adoption of the Treaty of Lisbon, the EU Charter came into direct effect. Article 6 (1) TEU gives the EU Charter the same legal value as the Treaties and now constitutes primary EU law.²¹⁶ The EU Charter and the ECHR differ in numerous ways. For instance, the ECHR largely focuses on civil and political rights, while the EU Charter also includes a wide range of social, economic and cultural rights. The ECHR generally binds MS in any of their activities, while in Article 51 (1) EU Charter is mentioned that it addresses the institutions of the EU and, as far as the implementation as EU law goes, also to MS.²¹⁷ Still, it should be noticed that to a large extent the EU Charter and the ECHR include similar protection of human rights.

Article 52 (2) EU Charter installs the instrument for the interpretation of provisions that are also stated in other fundamental rights treaties. If the rights demonstrated in the EU Charter are similar to the rights in the ECHR, their scope and meaning are recognised as being the same as laid down in the ECHR.²¹⁸ At the same time, the provision in Article 52 (3) EU Charter grants the EU the possibility to allow more extensive protection than laid down in the ECHR. However, based on Article 18 of the EU Charter, in asylum issues, the Charter is only confirming the principles that are already laid down in the Refugee Convention, the Protocol relating to the status of refugees and the Treaty establishing the European Community.²¹⁹

Concluding, although the EU is formally not bound by decisions of the ECtHR, the ECHR is the CJEU's main source of inspiration. The CJEU frequently cites ECHR-jurisprudence.²²⁰ Conversely, the ECtHR frequently refers to EU law.²²¹ The two Courts aim at a harmonious co-existence and are interconnected and involved in an important dialogue. Therefore, both the

²¹⁵ Moeckli, Shah, and Sivakumaran (N 160).

²¹⁶ S. Sy, 'Fact Sheets on the European Union: The Charter of Fundamental Rights', (March 2018) <http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.1.2.pdf> assessed June 10 2018.

²¹⁷ Moeckli, Shah, and Sivakumaran (N 160).

²¹⁸ Article 52 (3) Charter of Fundamental Rights of the European Union.

²¹⁹ V. Muraviov and O. Sviatun, 'Protection of Human Rights in the European Union', [2016] in 'The Convergence of the Fundamental Rights Protection in Europe, Ius Gentium: Comparative Perspectives on Law and Justice' 185.

²²⁰ J. Gerards and L. Glas, 'De verhouding tussen het EHRM en het HvJ EU na toetreding van EU tot het EVRM', [2012] *Ars Aequi* 520 - 530. <<http://repository.ubn.ru.nl/bitstream/handle/2066/106153/106153.pdf>> assessed June 10 2018.

²²¹ D. Scott and T. Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts', (2009) 8 *The Law and Practice of International Courts and Tribunals* 376, 380.

ECtHR and CJEU jurisprudence is relevant when determining the human rights obligations of the EU regarding the protection of climate-induced migrants.

4. Jurisprudence research

The previous chapter showed that many human rights are at stake regarding climate-induced migrants. To expose whether this results in obligations for the EU to protect these, the case law of both the CJEU and the ECtHR will be studied. The case law study shows the reasoning of both Courts and reveals the scope of Articles 3 ECHR and Article 15 (b) QD. When the scope of these articles is determined, it can be studied whether the climate-induced migrants entering EU's territory could be protected by human rights law. In this chapter, the country of origin is also referred to as receiving state. The EU MS is in this context the host state.

4.1. The scope of jurisprudence research

Section 3.1. mentioned that all human rights are interdependent, interrelated and indivisible.²²² However, in fact, they are not treated this way. Civil and political rights are subject to immediate implementation and create negative obligations for the state. Cultural, social, and economic rights are regarded as vague, resource demanding, positive, and subject to progressive implementation.²²³ Human rights treaties often fail to grant the same weight to economic, social, and cultural rights as they do to civil and political rights.²²⁴ This is for example shown in the ICESCR. Article 2 ICESCR states that the cultural, social, and economic obligations in the Convention have a character of progressive realisation and are subject to the availability of resources.²²⁵ The ICCPR, containing political and civil rights, does not include such a provision.

As seen in chapter 3, most of the human rights at stake are economic, social, and cultural rights, such as the right to health, water, food, and housing. It was also affirmed that these rights are necessary components to fulfil the right to life.²²⁶ This shows that civil and political rights often exhibit characteristics of socio-economic elements, since socio-economic rights are necessary components to fulfil civil and political rights.²²⁷ This results in the fact that treaties dealing with civil and political rights can also establish the direct or indirect protection of socio-economic rights

²²² Article I (5) Vienna Declaration and Programme of Action.

²²³ Moeckli, Shah, and Sivakumaran (N 160) 144.

²²⁴ I.E. Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective', (2006) 10 (14) *The International Journal of Human Rights* 405 – 430.

²²⁵ Article 2 International Declaration on Economic, Social and Cultural Rights.

²²⁶ J. McAdam, 'Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection', [2012] Oxford University Press 52, 56.

²²⁷ *Ibid.*

stated in a different treaty. For this reason, breaches of social, cultural or economic rights are often linked to Article 3 ECHR. Article 3 ECHR is an absolute right, and a violation is therefore impossible to be justified on the ground of insufficient resources.²²⁸ Also, the positive obligations of states under Article 3 ECHR reach further than under Article 2 ECHR, which increases the chances of a successful violation claim. Therefore, this jurisprudence research examines the potential of Article 3 ECHR to assist in protecting climate-induced migrants. This results in the question whether sending climate-induced migrants back to their country of origin makes them subject to inhuman or degrading treatment or punishment. The examination of the case law of the CJEU and the ECtHR will clarify the legal obligations of MS under Article 3 ECHR and Article 15 (b) QD, for the return to situations where people risk violations of their human rights due to environmental hazards. This will eventually contribute to the conclusion whether the judgements of both Courts create flexibility and broadens the scope of the principle of non-refoulement to the extent that climate-induced migrants might be offered protection under Article 3 ECHR or Article 15 (b) QD.

What characterises the situation of climate-induced migrants, especially of those fleeing from slow-onset environmental hazards, is that the feared harm often does not come from an immediate infliction of physical violence, but rather from socio-economic vulnerabilities.²²⁹ Moreover, the risk the faced harm often does not appear directly after the removal. Therefore, the degree of harm feared when removed would be considered speculative. Since no case law exists regarding the principle of non-refoulement concerning climate-induced migrants, the cases studied concern predominantly ill persons deprived of their access to medical treatment when send back to their country of origin. This is because these people encompass the same characteristics as climate-induced migrants. The feared harm of the ill person also does not come from an immediate infliction of physical violence, but rather from socio-economic vulnerabilities. Additionally, the degree of harm which the ill applicant would suffer when returned to its country of origin includes a level of speculation, since this would depend on various factors such as the extent to which the applicant receives medical treatment and help from relatives.

²²⁸ Ibid 52, 65.

²²⁹ Ibid 5, 61.

4.2. Case law European Court of Human Rights

4.2.1. The scope of Article 3 ECHR

In the *D. v. UK* case from 1997, the ECtHR considered whether the returning of an Aids patient back to St. Kitts would amount to ‘inhuman treatment’, as mentioned in Article 3 ECHR. In *St. Kitts*, the applicant would lack sufficient medical treatment, a home, any prospect of income or a social network. The ECtHR decided that the return of the applicant would amount to inhuman treatment and would be in breach of Article 3 ECHR.²³⁰ The ECtHR added that it did not matter whether the risk of the breach of these rights could be engaged directly or indirectly to the responsibility of the public authority of the state.²³¹ From the reasoning of the ECtHR, it can be derived that primarily the situation of the applicant is decisive, and not the conditions in the country of origin.²³² This case shows that Article 3 ECHR can be violated by socio-economic harm in the country of origin and that therefore the principle of non-refoulement applies. On the other hand, the ECtHR described the circumstances in this case as ‘very exceptional’.²³³ In this case, the applicant was in the terminal stage of his illness. There was no guarantee that he would obtain medical care in St. Kitts, and he did not have any family that could take care of him.²³⁴ The ECtHR stressed that it was this exceptional combination of factors that made sending back the applicant in breach of Article 3 ECHR.²³⁵ By doing so, the ECtHR set the standard extremely high. Based on the decision in *D. v. UK*, it is possible, although exceptional, that the principle of non-refoulement is applicable where deprivation of socio-economic rights in the country of origin results in torture, inhuman or degrading treatment. The restrictive approach of the ECtHR was confirmed in case *Bensaid v. UK*. In this case, the applicant had schizophrenia. The applicant claimed that the removal back to Algeria would deprive him of essential medical treatment and that this would result in a violation of Article 3 ECHR.²³⁶ The risk that the applicant would suffer

²³⁰ *D. v. the United Kingdom* (1997) – 30240/96, para. 39.

²³¹ *Ibid*, para. 49.

²³² *Ibid*, para. 52.

²³³ *Ibid*, para. 53.

²³⁴ *Ibid*, para. 52.

²³⁵ *Ibid*, para. 53.

²³⁶ *Bensaid v. the United Kingdom* (2001) – 44599/98, para. 30.

inhuman or degrading treatment was considered more speculative than in *D. v. UK*. The ECtHR ruled that the principle of non-refoulement did not protect the applicant.²³⁷

In the case *N. v UK*, the Ugandan applicant was suffering from a less severe stadium of Aids than the applicant in *D. v. UK*.²³⁸ The applicant claimed to be raped by the National Resistance Movement because of her association with the Resistance Army. Research showed that without treatment, her life expectancy would be less than a year. The medication needed was available in Uganda, but only in limited supply and at considerable expense.²³⁹ The ECtHR decided that no breach of Article 3 ECHR could be established and confirmed that the Convention is ‘essentially directed at the protection of civil and political rights’.²⁴⁰ The claim under Article 3 ECHR was also rejected on the basis that the future conditions of the applicant would involve a certain degree of speculations.²⁴¹ Additionally, the ECtHR has found that the applicant was not critically ill at the time, even though this was partly due to the medication the applicant received in the UK and would be deprived of when returned to Uganda.²⁴² Most relevant for this thesis, the ECtHR ruled that this high threshold should be maintained in medical cases since ‘the alleged future harm would emanate not from the intentional acts or omission of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.’²⁴³ The interests between those of the applicant and those of the state should be balanced. If the host state has to provide every person within its jurisdiction with ‘free and unlimited healthcare’, a heavy burden would be placed upon that state.²⁴⁴ Case *N. v UK* stresses the exceptional nature of what was decided in *D. v. UK* and confirms a high threshold for socio-economic right violations in the country of origin to constitute a breach of Article 3 ECHR. Three judges disagreed with this decision, and their dissenting opinion expressed their concern about the reason why the majority of the judges voted against a violation of Article 3 ECHR, namely that finding in favour of the applicant would open Europe to medical immigration.²⁴⁵ According to

²³⁷ *Ibid*, para 39.

²³⁸ *N. v. the United Kingdom* (2008) – 26565/05, para. 36.

²³⁹ *Ibid*, para. 12.

²⁴⁰ *Ibid*, para. 44.

²⁴¹ *Ibid*, para. 50.

²⁴² *Ibid*, para. 36.

²⁴³ *Ibid*, para. 43.

²⁴⁴ *Ibid*, para. 44.

²⁴⁵ M. Scott, ‘*Natural Disasters, Climate Change and Non-refoulement: What Scope of Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?*’, (2014) 26 (3) *International Journal of Refugee Law* 404, 414.

Judges Tulkens, Bonello, and Spielmann, this reasoning offends the absolute nature of Article 3 ECHR.²⁴⁶

The decision of the ECtHR in the *M.S.S. v. Belgium and Greece* case provides for a reinterpretation of the principle of non-refoulement.²⁴⁷ In this case, an asylum seeker from Afghanistan applied for protection in Belgium, while he first entered Europe through Greece. Based on the Dublin III Regulation, Belgium returned the applicant to Greece.²⁴⁸ In Greece, the applicant was subject to ‘degrading treatment in the form of conditions of most extreme poverty’.²⁴⁹ The question was raised whether this could establish a violation of Article 3 ECHR. The ECHR reaffirmed that a certain level of severity had to be met, but in this case concluded that Article 3 ECHR was indeed violated.²⁵⁰ Interestingly, this time the ECtHR did not mention ‘exceptional circumstances’ and not only considered medical conditions but explicitly referred to the applicant’s living conditions.²⁵¹ Based on what was decided in this case, it seems that the ECtHR is reducing the threshold for socio-economic rights violations in the country of origin to establish a breach of Article 3 ECHR. The judgement widens the restrictive approach of *N. v. UK*.

In the *Sufi and Elmi v. UK* case, the ECtHR dealt with two Somali applicants. The UK wanted to deport the applicants back to Somalia based on their criminal offences. In this case, the ECtHR reaffirmed what was decided in *M.S.S. v. Belgium and Greece* and concluded that the applicants would face a real risk of being subject to torture and inhuman or degrading treatment or punishment if they were sent back to Somalia.²⁵² This case could be distinguished from *N. v. UK*, because in *N. v. UK* the socio-economic right violations could be predominantly attributed to the state’s lack of resources to deal with a natural occurring. In *Sufi and Elmi v. UK*, the socio-economic right violations in Somalia were predominantly due to direct or indirect actions of the parties to the conflict.²⁵³

²⁴⁶ Ibid.

²⁴⁷ V. Flegar, ‘Vulnerability and the Principle of Non-refoulement in the European Court of Human Rights, Contemporary Readings in Law and Social Justice, [2016] Law and Social Justice 148, 156.

²⁴⁸ Article 3 (2) Regulation No 604/2013.

²⁴⁹ *M.S.S. v. Belgium and Greece* (2011) – 30696/09, para. 254.

²⁵⁰ Ibid, para. 263.

²⁵¹ Ibid, para. 229.

²⁵² *Sufi and Elmi v. the United Kingdom* (2011) – 8319/07 and 11449/07, para. 283.

²⁵³ Ibid, para 282-283.

The *S.H.H. v. UK* case involves an Afghani applicant left disabled after a rocket launch in Afghanistan. This time, the ECtHR relied again on the higher *N. v. UK* threshold.²⁵⁴ The ECtHR ruled that the *M.S.S. v. Belgium and Greece* conditions were exceptional and extreme.²⁵⁵ The case can also be distinguished from *Sufi and Elmi v. UK*. The indirect and direct actions of the parties to the conflict in Somalia predominantly caused the real risk of ill-treatment, and the ECtHR concluded that this was not or less the case in Afghanistan.²⁵⁶ The *S.S.H. v. UK* case demonstrates the difficulty of determining which threshold should be applied.²⁵⁷

In the recent *Paposhvili v. Belgium* case, the ECtHR dealt with the removal of a seriously ill individual back to Georgia. Since his arrival, the applicant committed several crimes, and for that reason, his applications for a residence permit were denied.²⁵⁸ The applicant argued that, if he were to be removed to Georgia, he would risk facing an early death as he would not have access to medical treatment, and called upon a violation of Article 3 ECHR. In Georgia, the treatment for leukaemia was available in theory, but the treatment was practically inaccessible for him due to the high costs.²⁵⁹ The ECtHR, once again, highlighted that a violation of Article 3 ECHR based on socio-economic rights violations is only attained in exceptional cases.²⁶⁰ However, the ECtHR has found that there would be a violation of Article 3 ECHR if the applicant were removed to Georgia, although his life was not in ‘imminent danger’ due to the treatment received in Belgium.²⁶¹ In *N. v. UK*, the ECtHR tried to balance the interests of the applicant and those of the state. In *Paposhvili v. Belgium*, the ECtHR rejected the fair balance test since this would violate the absolute nature of Article 3 ECHR.²⁶² The ECtHR reasoned that a certain level of speculation is inherent in Article 3 cases and that science and experts are able to add to predictive certainty.²⁶³ In this case, the inhuman or degrading treatment can be seen as a result of a naturally occurring phenomenon and the lack of sufficient resources to deal with this.²⁶⁴ Normally, this would mean that the high *N. v.*

²⁵⁴ *S.H.H. v. the United Kingdom* (2013) – 60367/10, para. 14.

²⁵⁵ *Ibid*, para. 76.

²⁵⁶ *Ibid*, para. 77.

²⁵⁷ C. Costello, *The Human Rights of Migrants and Refugees in European Law*, [2015] Oxford University Press 1, 46.

²⁵⁸ *Paposhvili v. Belgium* (2016) – 41738/10, para. 55-56.

²⁵⁹ *Ibid*, para. 30.

²⁶⁰ *Ibid*, para. 121 – 122.

²⁶¹ *Ibid*, para. 137.

²⁶² *Ibid*, para. 168.

²⁶³ A. Anderson, *Comment on Paposhvili v. Belgium and the Temporal Scope of Risk Assessment*, [2017] Blog of European Journal of International Law. <<https://www.ejiltalk.org/comment-on-paposhvili-v-belgium-and-the-temporal-scope-of-risk-assessment/>> assessed 10 June 2018.

²⁶⁴ *Paposhvili v. Belgium* (2016) – 41738/10, para. 174.

UK threshold would be applicable. However, the ‘very exceptional’ threshold from *N. v. UK* was adjusted to some extent: from risk of ‘imminent death’ to risk of ‘a serious, rapid and irreversible decline’ in health when removed.²⁶⁵

4.2.2. *Lack of resources or intentional act by receiving state?*

After studying the cases mentioned above, the reasoning of the ECHR demonstrates some developments which could be relevant for climate-induced migrants entering the EU’s territory. The first noticeable reasoning relates to whether the breach of Article 3 ECHR is a result of inability or unwillingness of the state to protect the person against torture or inhuman or degrading treatment. An interesting correlation between the higher threshold from *N. v. UK* and the lower threshold from *M.S.S. v. Belgium and Greece* becomes evident.

In *D. v. UK*, the ill-treatment was not an intentional act by the state, but a result of general poor living conditions.²⁶⁶ In *N. v. UK*, the socio-economic deprivations could be predominantly attributed to the lack of resources of the receiving state to deal with a natural occurring.²⁶⁷ Aids, in this case, has been perceived as a naturally occurring. The harm faced by the applicant is not deriving from omission or the intentional act of the state, but more likely occurring due to the lack of sufficient resources to deal with the disease.²⁶⁸ Similarly, *S.H.H. v. UK*, the ECtHR ruled that the problems facing the applicant would be a result of inadequate social facilities through lack of resources.²⁶⁹ In above cases, the high threshold had to be met to establish a breach of Article 3 ECHR. In the cases where the lower threshold is used, such as *Sufi and Elmi v. UK* and *M.S.S. v. Belgium and Greece*, the socio-economic deprivations were predominantly due to direct or indirect actions of the parties to the conflict. Which threshold should be applied in cases concerning climate-induced migrants is open to discussion.

‘Pure’ natural disasters can be compared to natural occurring illnesses such as Aids. The future harm facing a displaced person due to ‘pure’ natural disasters would not be derived directly from the intentional act or omission of the state, but instead from a naturally occurring phenomenon and

²⁶⁵ V. Stoyanova, ‘How Exceptional Must ‘Very Exceptional’ Be? Non-Refoulement, Socio-Economic Deprivation and *Paposhvili v. Belgium*’, (2017) 29 (4) International Journal of Refugee Law 580-616.

²⁶⁶ *D. v. the United Kingdom*, para. 32.

²⁶⁷ *N. v. the United Kingdom*, para. 49.

²⁶⁸ Scott (N 245) 404, 415.

²⁶⁹ *S.H.H. v. the United Kingdom*, para. 92.

the lack of sufficient resources to deal with that.²⁷⁰ As a result, in cases of people forced to migrate due to the effects of a ‘pure’ natural disaster, the higher threshold will most probably be applicable. Most likely, these people will not find protection by the principle of non-refoulement.

However, environmental hazards cannot be compared to the situation where a state is unable to deal with a naturally occurring, since the occurring of climate change is not natural.²⁷¹ The receiving state has probably contributed to the climate change. Also, the country of origin contributed to the emission of GHG and cannot be seen as innocent. In *S.H.H. v. UK*, the applicant suffered from illness due to a rocket attack, which also could not be seen as a naturally occurring event. The ECtHR concluded that the same severity must be met to preclude the expulsion of the applicant on the ground of Article 3 ECHR, as when the illness would derive from a naturally occurring disease. The ECtHR decided that the high threshold is applicable. Important is whether the ill-treatment results from direct or indirect actions of the receiving state or the lack of sufficient resources to deal with it.²⁷²

According to Scott, in circumstances where the applicant can demonstrate that climate change has played a role in the ‘natural’ occurrence, the lower threshold as established in *MSS v. Belgium and Greece* should be applied.²⁷³ His opinion is based on the fact that the host state itself contributed to the emission of GHG. He even argues that the host state might be the predominant cause of the faced harm since the host state is often a developed country, probably responsible for emitting the most significant share of GHG that causes climate change.²⁷⁴ McAdam has also highlighted the possibility to use the lower threshold in climate-induced migration cases. She argues that the responsibility of the displacement is hugely dispersed, which makes it inappropriate to require the individual applicants to show that they meet a definition to receive international protection.²⁷⁵ Kälin, Kolmannskog, and Trebbi suggest that the focus should be removed from the source of the feared harm to the nature of the potential harm.²⁷⁶ According to Kälin, it should be

²⁷⁰ Scott (N 245) 404, 422.

²⁷¹ Scott (N 245) 404, 421.

²⁷² *S.H.H. v. the United Kingdom*, para. 89.

²⁷³ Scott (N 245) 404, 404.

²⁷⁴ Scott (N 245) 404, 422.

²⁷⁵ McAdam (N 226) 52, 98.

²⁷⁶ V. Kolmannskog and L. Trebbi, ‘Climate Change, Displacement and Protection: A Multi-Track Approach’ (2010) 92 *International Review of the Red Cross* 713-730.

determined whether returning the applicant to the home country will breach Article 3 ECHR, not what the cause of that harm might be.²⁷⁷

The causality problem will make it almost impossible to keep the host state responsible for the effects of climate change, especially regarding slow-onset environmental hazards. The removal of focus on the source of the feared harm to the nature of the potential harm seems to be the most appropriate solution. The focus on the source of the feared harm can be explained by political argumentation of the ECtHR, since the judges are afraid to open up the floodgates for medical migration. However, this reasoning is conflicting with the absolute nature of Article 3 ECHR. It can be argued that in *Paposhvili v. Belgium*, a gentle development towards the ‘nature of the potential harm’ approach is made by the ECtHR. It rejected the argument for balancing the physical integrity of the applicant against the economic interest of the host state and lowered the threshold from ‘risking imminent death’ to ‘a serious, rapid, and irreversible decline in health’.²⁷⁸ The transition towards the ‘nature of the potential harm’ approach is also shown in the following section.

4.2.3. Individual or group approach?

In *Vilvarajah and Others v. UK*, the ECtHR decided that applicant is facing ‘real risk’ when he can demonstrate that he is facing a worse position than ‘the generality of people in a similar situation’.²⁷⁹ In the *D. v. UK* case, the ECtHR held that the situation of the applicant is decisive, not the conditions in the country of origin.²⁸⁰ Based on the Court’s reasoning in these cases, climate-induced migrants would have to demonstrate that they are in a more severe danger to be subject of inhuman or degrading treatment due to the circumstances in their country of origin than everyone else living there. Consequently, this would set the threshold for climate-induced migrants to fall within the scope of Article 3 ECHR very high. In *Salah Sheekh v. the Netherlands*, the ECtHR introduced a more collective approach. It was decided that a real risk was established without the person having to show ‘special distinguishing features’.²⁸¹ In *M.S.S. v. Belgium and Greece*, the ECtHR ruled that the applicant’s living conditions violated Article 3 ECHR, whereas the situation of the applicant was comparable to other asylum-seekers. The ECtHR ruled for the

²⁷⁷ W. Kälin, ‘*Conceptualising Climate-Induced Displacement*’ in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* [2010] Hart Publishing 85, 103.

²⁷⁸ *Paposhvili v. Belgium*, para. 183.

²⁷⁹ *Vilvarajah and Others v. the United Kingdom* (1991) – 13163/87; 13164/87; 13165/87; 1344/87; 13448/87, para. 111.

²⁸⁰ *Wallenberg* (N 191) 1, 39.

²⁸¹ *Salah Sheekh v. The Netherlands*, (2007) – 1948/04, para. 148.

first time that general living conditions could fall under Article 3 ECHR and emphasised the vulnerable position of an asylum-seeker.²⁸² In the recent *Tarakhel v. Switzerland* case, the ECtHR confirmed the vulnerable position of an asylum-seeker again and decided that the individual situation has to be viewed in the light of the overall situation.²⁸³ *Paposhvili v. Belgium* also critically examined the availability and accessibility of the care and treatment in the receiving state.²⁸⁴

There seems to be a transition towards a situation where more attention has been paid to the situation in the country of origin instead of only the individual circumstances of the applicant.²⁸⁵ The case law developed emphasises the vulnerability of the refugee. The overall situation in the receiving country becomes more important which shows the shift of focus towards the determination of the nature of the potential harm. This will provide for more opportunities to receive subsidiary protection for climate-induced migrants. The special characteristics of the climate-induced migrant improve the possibility of protection being granted.²⁸⁶

4.3. Case Law European Court of Justice

Article 15 (b) QD obliges MS to grant subsidiary protection to individuals if they risk suffering torture or inhuman or degrading treatment or punishment in the country of origin.²⁸⁷ Article 15 (b) QD is based on Article 3 ECHR and the principle of non-refoulement.²⁸⁸ However, subsidiary protection under the QD produces a legal status for the applicant, to which rights are attached.²⁸⁹ In the first part of this chapter, the case law of the ECtHR has been studied. Accordingly, it is interesting to find out the scope of ‘inhuman or degrading treatment or punishment in the country of origin’ under the jurisdiction of the CJEU, to examine if climate-induced migrants could be granted international protection under this Article 15 (b) QD.

²⁸² *M.S.S. v. Belgium and Greece*, para. 263.

²⁸³ *Tarakhel v. Switzerland*, (2014) – 29217/12, para. 101.

²⁸⁴ *Stoyanova* (N 265) 580, 583.

²⁸⁵ *Flegar* (N 247) 148, 148.

²⁸⁶ *McAdam* (N226) 52, 98.

²⁸⁷ Article 15 (b) Directive 2011/95/EU

²⁸⁸ *Farmer* (N 135) 1, 18-19.

²⁸⁹ Chapter VII Directive 2011/95/EU.

The connection between Article 3 ECHR and Article 15 (b) QD is confirmed by the Commission since in the explanatory memorandum of the QD is already mentioned that the provision in the QD reflects the content of Article 3 ECHR.²⁹⁰ This connection was also confirmed in the Elgafaji case.²⁹¹ Based on Article 52 (3) TFEU, this would result in the fact that the case law on the ECtHR on Article 3 ECHR also determines the scope of Article 15 (b) QD. Would this mean that every person falling within the scope of Article 3 ECHR and the principle of non-refoulement, automatically receives subsidiary protection?

Textually, the only difference with Article 3 ECHR is the phrase ‘in a country of origin’, a phrase that was added in a late stage of the negotiations.²⁹² It might be argued that ‘in the country of origin’ has been added to separate the scope of Article 15 (b) QD from the jurisprudence of the ECtHR under Article 3 concerning socio-economic deprivation.²⁹³ This argument can be based on the reasoning in the explanatory memorandum, where is mentioned that the QD was never meant to include the protection of socio-economic rights.²⁹⁴

4.3.1. CJEU M’Bodj v. Belgium and the scope of Article 15 (b) QD

In the case M’Bodj v. Belgium, the CJEU indeed determined that subsidiary protection cannot be extended to medical cases, which gives a restrictive reading of the QD.²⁹⁵ The case concerns a preliminary ruling request of the Belgian Constitutional Court, based on the interpretation of Article 15 (b) QD in relation to socio-economic harm in his country of origin. Mr. M’Bodj argued that he could not be sent back, since he would risk an imminent death. Therefore, he would fall within the scope of Article 3 ECHR, as was determined by the ECtHR.²⁹⁶ The CJEU decided that the fact that seriously ill migrants can find protection under the principle of non-refoulement based on Article 3 ECHR does not oblige the CJEU to provide these people with subsidiary protection under EU law.²⁹⁷ The CJEU ruled that Article 15 (b) QD should be read in conjunction with Article

²⁹⁰ European Commission, ‘Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection’, (2001) 510.

²⁹¹ Case C-465/07 Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie [2009] ECR I-00921, para. 28.

²⁹² Costello (N 257).

²⁹³ Ibid 1, 50-51.

²⁹⁴ Note from the Presidency of the Council of the European Union to the Strategic Committee on Immigration, Frontiers and Asylum of 25 September 2002 Doc 12148/02 ASILE 43 p. 5-6.

²⁹⁵ Case C-542/13 Mohamed M’Bodj v. Belgium [2014], para. 47.

²⁹⁶ N. v. the United Kingdom.

²⁹⁷ Case C-542/13 Mohamed M’Bodj v. Belgium, para. 45.

6 QD, which includes a list of the actors of serious harm.²⁹⁸ From this reasoning, it can be concluded that the serious harm must come from a third party and therefore cannot be based on the result of ‘a general shortcoming in the health system of the country of origin’.²⁹⁹ Following this argumentation, the CJEU concluded that the risk of harm due to the absence of appropriate health treatment in the country of origin is not sufficient and that Article 15 (b) QD only applies if the country of origin intentionally deprived the person of health care.³⁰⁰ By deciding this, the CJEU distanced Article 15 (b) QD from the case law of the ECHR.³⁰¹

4.3.2. CJEU *Abdida* and the Returns Directive

Another case related to the scope of Article 15 (b) QD is the *Abdida* case. In this case, an alternative protection tool emerges, namely the Returns Directive (RD). The RD establishes standards for people staying in a MS, who do not have the legal right to stay and therefore have to leave.³⁰² Mr. *Abdida*, a Nigerian man suffering from Aids, appealed against the decision of the Belgian authorities who rejected his asylum application.³⁰³ *Abdida* was denied social assistance during his appeal, and the national Court asked the CJEU whether this was lawful or not. Since *Abdida*’s asylum application was rejected, the CJEU reasoned that the RD was applicable.³⁰⁴ In Article 5 RD, the principle of non-refoulement is mentioned, and the CJEU ruled that this Article has to be interpreted in the light of Article 19 (2) EU Charter.³⁰⁵ This means that MS may not be allowed to proceed a removal procedure, where this would infringe the principle of non-refoulement.

Primarily, the CJEU confirmed what was decided in *M’Bodj*: the QD does not apply concerning medical cases, and therefore does not provide the applicant with protection.³⁰⁶ Secondly, the CJEU ruled that in exceptional cases, the removal of a person suffering from a serious illness to a country where he would suffer serious harm because the appropriate treatment is not available, the

²⁹⁸ *Ibid*, para. 35.

²⁹⁹ *Ibid*.

³⁰⁰ *Ibid*, para. 36.

³⁰¹ *Costello* (N 257) 1, 51.

³⁰² Article 1 Directive 2008/115/EC.

³⁰³ Case C-562/13 *Centre public d’action sociale d’Ottignies-Louvain-La-Neuve v. Moussa Abdida* [2014], para. 23.

³⁰⁴ *Ibid*, para. 39.

³⁰⁵ *Ibid*, para. 63.

³⁰⁶ *Ibid*, para. 33.

principle of non-refoulement would be infringed by Article 5 RD.³⁰⁷ The remedy against removal had to be suspensive, otherwise Abdida would be subject to serious harm.³⁰⁸

Persons who do not qualify for subsidiary protection under Article 15 (b) QD could be granted ‘alternative protection’ by the RD, based on what was decided in the Abdida case. Article 19 (2) EU Charter falls within the scope of non-refoulement laid down in the RD, and Mr. Abdida could not be removed as long as his appeal was pending. The suspensive effect is based on Article 9 (1)(b) RD.³⁰⁹ This results in the applicability of Article 14 (1)(b) RD, which safeguards ensuring ‘emergency health care and essential treatment of illness are provided’.³¹⁰ The CJEU reasoned that it is up to the MS how this obligation needs to be safeguarded.³¹¹ It should be noticed that the rights mentioned in Article 14 RD are very basic and the national law will most probably limit benefits as well.³¹²

4.3.3. *CJEU MP v. Secretary of State for the Home Department*

In April 2018, the CJEU ruled again about the scope of subsidiary protection under the QD. The case is about MP, a national of Sri Lanka, who arrived in the UK in 2005 and was given leave to remain as a student until 2008.³¹³ The Court in the UK had already ruled out MP’s removal, so the ‘alternative protection’ based on the RD could not be granted. MP logged an application for asylum because he would risk ill-treatment when returned to Sri Lanka since he had been a member of an opposition alliance.³¹⁴ The CJEU rejected his application on the ground that MP would not be of interest to the authorities anymore and thus would not risk further ill-treatment if he returned to his country of origin.³¹⁵ MP appealed and showed evidence that he was still suffering the after-effects of the torture he suffered in Sri Lanka, namely a severe post-traumatic stress disorder and a severe depression with suicidal tendencies.³¹⁶ MP claims that the CJEU takes a too narrow view

³⁰⁷ Ibid, para. 48.

³⁰⁸ Ibid, para. 53.

³⁰⁹ Ibid, para. 62.

³¹⁰ Article 14 (1)(b) Directive 2008/115/EC.

³¹¹ Case C-562/13 *Centre public d’action sociale d’Ottignies-Louvain-La-Neuve v. Moussa Abdida*, para. 60.

³¹² S. Peers, ‘Could EU law save Paddington Bear? The CJEU develops a new type of protection.’ [2014] EU Law Analysis. <<http://eulawanalysis.blogspot.com/2014/12/could-eu-law-save-paddington-bear-cjeu.html>> assessed 10 June 2018.

³¹³ Case C-353/16 *MP v. Secretary of State for the Home Department* [2018], para. 16.

³¹⁴ Ibid, para. 17.

³¹⁵ Ibid, para. 18.

³¹⁶ Ibid, para. 19.

of the scope of the QD, based on the fact that his mental illness is not naturally occurring since torture of the Sri Lankan authorities caused it. Additionally, there would be lack of medical facilities in Sri Lanka.³¹⁷

The CJEU ruled that the fact that MK has been tortured by the Sri Lankan authorities before is not a sufficient justification for granting subsidiary protection.³¹⁸ The fact that the mental illness is not naturally occurring and is caused by the Sri Lankan authorities does not affect the level of severity that must be met if the receiving state does not intentionally deprive the applicant of medical treatment.³¹⁹ Additionally, the CJEU ruled that Article 15 (b) QD must be interpreted consistent with Article 4 EU Charter, and based on Article 52 (3) EU Charter, these rights should correspond with the meaning and scope of rights guaranteed by Article 3 ECHR.³²⁰ The CJEU reasons in line with the ECtHR's case *Paposhvili v. Belgium* and considers that a MS is prohibited from expelling MP if this would result in a serious and permanent deterioration of his health disorders, especially when such deterioration would endanger his life.³²¹ The deterioration is a result of the absence of appropriate treatment or lack of access to the treatment in the receiving state.³²² Article 4 and Article 19 (2) EU Charter are interpreted in the light of Article 3 ECHR, and protect MK on the ground of the principle of non-refoulement.³²³

Nevertheless, the CJEU confirmed again that people protected by the principle of non-refoulement do not automatically receive subsidiary protection under Article 15 (b) QD. This is only the case when the person is deprived of health care intentionally.³²⁴ AG Bot confirmed the ruling of the CJEU and states that it does not make a difference that the illness MK is suffering from is not a naturally occurring.³²⁵

4.4. Conclusion

Climate-induced migrants often build their claims on the fact that they face socio-economic deprivation when returned to the country of origin. Although these rights should be interdependent,

³¹⁷ Ibid, para. 24.

³¹⁸ Ibid, para. 30.

³¹⁹ Ibid, para. 39. and *S.H.H. v. the United Kingdom*.

³²⁰ Ibid, para. 37.

³²¹ Ibid, para. 40.

³²² Ibid, para. 57.

³²³ Ibid, para. 43.

³²⁴ Ibid, para. 51.

³²⁵ Case C-353/16 *MP v. Secretary of State for the Home Department* [2018], Opinion of AG Bot, para. 35.

interrelated, and indivisible, human rights treaties fail to grant the same weight to socio-economic rights as they do to political and cultural rights. However, socio-economic rights are often necessary to fulfil civil and political rights. Therefore, civil and political rights treaties can directly or indirectly protect socio-economic rights. Accordingly, climate-induced migrants should build their protection claim on Article 3 ECHR. Article 3 ECHR is an absolute right, which means that insufficient resources can never justify a breach of this Article. In this way, although climate-induced migrants build their claim on socio-economic rights violations, they could be protected by an absolute right. Additionally, positive obligations for states reach further under Article 3 ECHR than under Article 2 ECHR. A claim based on a breach of a positive obligation will be less challenging based on Article 3 than on Article 2 ECHR.

The jurisprudence research focuses on the potential of Article 3 ECHR and Article 15 (b) QD to protect climate-induced migrants from being sent back to their country of origin, where they would fear torture or inhuman and degrading treatment based on socio-economic deprivation. Since both the CJEU and the ECtHR have never dealt with cases concerning this question, cases where applicants have the same characteristics as climate-induced migrants, are studied. Ill applicants deprived of their medication when returned also build their claim for protection of being refouled on the deprivation of socio-economic rights. The reasoning of both the CJEU and the ECtHR is studied and the scope of Article 3 ECHR and Article 15 (b) QD can be illustrated. Consequently, it can be concluded whether climate-induced migrants have a chance to be protected by human rights obligations of the MS since the violation of these Articles results in the Court's case law being able to impose limitations on the rights of the MS to turn someone away from their borders.³²⁶

The jurisprudence research demonstrates some interesting developments in the reasoning of the ECtHR. Firstly, the ECtHR developed two different thresholds when determining if Article 3 ECHR could be breached based on socio-economic deprivation. The high threshold was set in *N. v. UK* and subsequently confirmed in *D. v. UK* and *S.S.H. v. UK*. In these cases, the ECtHR found that the real risk of suffering serious harm could not be attributed directly to the receiving state. The ill-treatment was not an intentional act by the state, but could predominantly be attributed to the lack of resources to deal with a naturally occurring illness. Also, the degree of harm feared would be speculative. To establish a breach of Article 3 ECHR, 'exceptional circumstances' have

³²⁶ *Saadi v. Italy* [2008] – 37201/06.

to be met.³²⁷ The high threshold makes that climate-induced migrants seem to have little prospects to be protected by this principle. A lower threshold was set in cases *M.S.S. v. Belgium and Greece* and *Sufi and Elmi v. UK*. In both cases, the real risk of suffering serious harm in the country of origin could predominantly be attributed to direct or indirect actions of the state.³²⁸ The reasoning of the ECtHR shows that the source of the future harm in the receiving state determines which threshold is applied. The ECtHR does this to protect the fair balance between the interests of the individual and the community interest, out of fear for opening the ‘floodgates’ for medical migrants.³²⁹ In the *Paposhvili* case, the ECtHR rejected for the first time the balancing between the physical integrity of the applicant and the economic interest of the host state, since this inflicts with the absolute character of Article 3 ECHR.³³⁰ The *N. v. UK* threshold was lowered. A development from the focus on the source of the feared harm towards the nature of the potential harm can be identified. This is also exposed in the fact that the ECtHR has started to recognise asylum-seekers as a vulnerable group of people.³³¹ This means that asylum-seekers do not have to show ‘special distinguishing features’ to establish the real risk of being subject to torture and inhuman or degrading treatment. The ECtHR shifts the focus from the individual circumstances of the applicants towards the situation in the receiving country. This broadens the scope for climate-induced migrants to rely on a breach of Article 3 ECHR since it is often problematic for climate-induced migrants to demonstrate that they fear a worse position than the other habitant of the country of origin.³³² It remains to be seen how broad the scope can be interpreted and what exactly qualifies someone as vulnerable. The reasoning of the ECtHR is an essential step towards the recognition of climate-induced migration claims under Article 3 ECHR. The focus on the nature of the potential harm deviates from the causality problem, which is particularly relevant for climate-induced migrants fleeing from slow-onset environmental hazards.

The second part of this chapter studied whether, under EU law, climate-induced migrants could fall within the scope of Article 15 (b) QD, based on socio-economic harm feared in the country of origin. In case *M’Bodj*, the CJEU defines a restrictive reading of the QD and determines that

³²⁷ *N. v. the United Kingdom, D. v. the United Kingdom, and S.S.H. v. the United Kingdom.*

³²⁸ *M.S.S. v. Belgium and Greece and Sufi and Elmi v. the United Kingdom.*

³²⁹ For example in case *N. v. the United Kingdom*, para. 8.

³³⁰ *Paposhvili v. Belgium*, para. 170.

³³¹ *Salah Sakehk v. the Netherlands, M.S.S. v. Belgium and Greece, Tarakhel v. Switzerland, and Paposhvili v. Belgium.*

³³² *Vilvarajah and Others v. the United Kingdom.*

subsidiary protection cannot be extended to medical cases.³³³ The CJEU reasoned that Article 15 (b) QD must be read in the light of Article 6 QD, which requires that someone is responsible for the infliction of the serious harm. This cannot be established by a general shortcoming in the health system of the country of origin. However, it can be argued that harm caused by environmental hazards comes from a third party. The causality problem however makes it unlikely that the CJEU would accept this line of reasoning.³³⁴ The CJEU further decided that when a serious ill migrant can find protection under Article 3 ECHR, this does not mean that these people fall within the subsidiary protection regime of the EU automatically.³³⁵ From the reasoning of the CJEU, it can be concluded that non-medical cases will be treated the same. This excludes climate-induced migrants from the possibility of being granted subsidiary protection under Article 15 (b) QD.

The *Abdida* case creates a new opportunity. The CJEU granted ‘alternative protection’ to a person facing serious harm in his country of origin because of inadequate medical treatment. The CJEU confirmed that the QD does not apply in relation to medical cases. However, the CJEU ruled that Article 5 RD should be interpreted in the light of Article 19 (2) EU Charter and that the removal procedure may not be continued if this would infringe the principle of non-refoulement. The CJEU decided that *Abdida* would suffer serious harm because of the absence of appropriate medical treatment in his country of origin and therefore received protection based on the principle of non-refoulement. It is not clear what the scope of this ‘alternative protection’ would be. It contains medical cases and therefore goes further than subsidiary protection under Article 15 (b) QD, but does it also covers environmental cases? *Abdida* covers ‘at least medical cases’ and therefore it would be reasonable to argue that environmental cases fall within the scope of the ‘alternative protection’.³³⁶

In *MP v. SSHD*, the CJEU ruled again about the scope of Article 15 (b) QD in relation to victims of torture and the principle of non-refoulement. Here, the CJEU reasoned in line with the ECtHR case *Paposhvili v. Belgium*.³³⁷ The CJEU ruled that expelling the applicant would result in serious and permanent deterioration of his health disorders, as a result of the absence of appropriate treatment in his country of origin. Based on Article 4 and Article 19 (2) EU Charter, which should

³³³ Case C-542/13 *Mohamed M’Bodj v. Belgium* [2014], para. 47.

³³⁴ Peers (N 312).

³³⁵ *Ibid*, para. 35.

³³⁶ Peers (N 312).

³³⁷ Case C-353/16 *MP v. Secretary of State for the Home Department* [2018], para. 40.

be interpreted in the light of Article 3 ECHR following from Article 52 (3) EU Charter, the UK is prohibited from expelling the applicant back to Sri Lanka.³³⁸ However, the prohibition from removal does not mean that the person should be granted subsidiary protection under Article 15 (b) QD.³³⁹ The CJEU thereby confirmed M'Bodj: the applicant can only be granted subsidiary protection under Article 15 (b) QD, if he would be intentionally deprived of health care.³⁴⁰ In environmental cases, it is not likely that climate-induced migrants would be intentionally deprived of their right to health, water, and food. Climate-induced migrants are still not able to receive subsidiary protection based on Article 15 (b) QD.

³³⁸ Ibid, para. 43.

³³⁹ Ibid, para. 46.

³⁴⁰ Ibid, para. 51.

Conclusion

The objective of this thesis is to examine whether the EU legal framework imposes obligations on the EU to fill the protection gap faced by climate-induced migrants. Climate-induced migrants find themselves in a difficult position since there often will be a causality problem between the environmental hazards and the migration. Environmental hazards can be divided into rapid-onset environmental hazards (such as a hurricane) and slow-onset environmental hazards (such as sea-level rise). The causality issues exist especially regarding the latter.³⁴¹ This thesis focuses on forced and internationally climate-induced migrants who are permanently displaced.

The EU is a leader in addressing the avert effects of climate change. To reach the ambitious targets set by the EU, action is taken at international level and European level. The main international climate change treaty the EU is party to is the UNFCCC. The UNFCCC does not address climate-induced migrants directly, but the Treaty can be seen as the foundation for relevant future agreements.³⁴² Due to extensive research, the issue of climate-induced migration became a topic of discussion among the UNFCCC Parties and in 2010, they agreed upon the Cancun Adaptation Framework. The Framework included Paragraph 14 (f), which placed climate-induced migration officially on the climate change agenda.³⁴³ The WIM, established in 2013, addresses loss and damages associated with the impacts of climate change.³⁴⁴ The Paris Agreement includes Article 8, which emphasises the importance of ‘averting, minimizing and addressing loss and damages associated with the adverse effects of climate change’. The Paris Agreement also calls for the development of the Task Force under the WIM, to deal with this objective.³⁴⁵ However, none of these agreements were able to include binding norms. The Nansen Initiative, build on paragraph 14 (f) of the Cancun Adaptation Framework, made development in knowledge about the impact of climate change and human mobility due to strategic efforts.³⁴⁶

The wording used in the agreements changed from focussing on attaining information in the Cancun Adaptation Framework and the WIM, towards establishing action under the Paris

³⁴¹ Kraler, Cernei, and Noack (n 4) 1-29.

³⁴² United Nations Climate Change, ‘*What is the United Nations Framework Convention on Climate Change?*’ <<https://unfccc.int/process/the-convention/what-is-the-united-nations-framework-convention-on-climate-change>> assessed 13 June 2018.

³⁴³ Warner (N 62) 1, 12.

³⁴⁴ Durand and Huq (N. 71).

³⁴⁵ Article 8 Paris Agreement and Decision 1/CP. 21, paragraph 49

³⁴⁶ McAdam (N 84) 1518, 1527.

Agreement. However, the scope of the policies following from these decisions remains unclear. The focus shifted from adaptation towards loss and damages, which contains a broader scope. Where the objective of the WIM is to ‘address loss and damages’, the Paris Agreements calls for ‘averting, minimizing and addressing loss and damages’. Adding the words ‘averting and minimizing’ shifted the focus from questions of liability and allowed for all Parties to agree. This shows that the climate-induced migration discussion is part of a highly political debate, which makes it problematic to develop international agreements establishing obligations with clear wording and binding effect. The only obligation that might be resulting from the EU’s climate change policy would be a moral obligation, despite the EU’s claim to be the pioneer in the field of climate change.

Climate-induced migrants find themselves in a difficult legal position. Under the Refugee Convention, climate-induced migrants cannot find international protection, because environmental hazards cannot be considered as reasons for persecution.³⁴⁷ The TPD might offer protection, but this Directive is only applicable in times of mass influx and as a result, cannot be applied individually.³⁴⁸ Therefore, the TPD most likely does not apply to migrants fleeing from slow-onset environmental hazards. Additionally, a qualified majority of the Council has to define the situation of a ‘mass influx’, which makes it subject to a high political threshold.³⁴⁹ The TPD also does not contain a clear protection mechanism and offers only temporary protection.³⁵⁰ Although the TPD would be the most appropriate legal framework to address climate-induced migration, in reality, the TPD does not seem to be the most effective one. Article 15 QD initiates subsidiary protection and subsection (b) might provide opportunities regarding the protection of climate-induced migrants. Therefore, it has to be determined if the migrant faces serious harm consisting of torture or inhuman or degrading treatment or punishment in the country of origin.³⁵¹ There is indeed a legal protection gap regarding climate-induced migrants, and Article 15 (b) QD seems the most appropriate legal mechanism to address this.

Climate-induced migration risks many violations of their human rights. These are mostly socio-economic rights, which are relevant components to fulfil the civil and political right to life.³⁵² All

³⁴⁷ Article 1 (a)(2) Convention Relating to the Status of Refugees.

³⁴⁸ Article 1 Directive 2001/55/EC.

³⁴⁹ Kolmannskog and Myrstad (N 138) 313, 317.

³⁵⁰ Kraler, Cernej, and Noack (N 4) 1, 54.

³⁵¹ Article 15 (b) Directive 2011/95/EU.

³⁵² McAdam (N 167) 1, 19.

EU MS are party to the ‘core’ human right treaties and based on Article 52 (3) EU Charter, the ECtHR is indirectly able to affect the judgements of the CJEU.³⁵³ To determine whether climate-induced migrants can be protected from being removed to their country of origin where they would fear torture and inhuman or degrading treatment based on socio-economic deprivation, case law from both the CJEU and the ECtHR is studied.

In the case law of the ECtHR, two thresholds are established. When the ill-treatment can be attributed predominantly to direct or indirect action of the receiving state, the lower threshold applies.³⁵⁴ Socio-economic harm can only establish a breach of Article 3 ECHR in ‘exceptional circumstances’, if the ill-treatment could predominantly be attributed to the lack of resources to deal with a natural occurring.³⁵⁵ The ECtHR’s reasoning is based on the source of the future harm in the receiving state, which can be explained by political considerations. This is inflicting on the absolute nature of Article 3 ECHR. In *Paposhvili v. Belgium*, the ECtHR rejected the balancing between the interest of the applicant and the interest of the host state for the first time.³⁵⁶ Additionally, there seems to be a transformation towards a situation where more attention will be paid to the circumstances in the receiving country instead of individual circumstances of the applicant. The vulnerable position of the asylum-seeker is recognised, and the focus from the source of the harm is slowly shifting towards a focus on the nature of the potential harm.³⁵⁷ This is a positive development regarding the protection of climate-induced migration based on Article 3 ECHR since it will reduce the relevance of the causality problem.

The EU has codified a subsidiary protection mechanism under Article 15 (b) QD, based on the principle of non-refoulement. When a climate-induced migrant finds protection under Article 3 ECHR, this does not automatically mean that they receive subsidiary protection under Article 15 (b) QD, as is decided by the CJEU.³⁵⁸ In *M’Bodj*, the CJEU excluded medical cases from falling under Article 15 (b) QD. Non-medical cases will most probably be treated the same, which excludes climate-induced migrants from being granted subsidiary protection. In *Abdida*, the CJEU decided to apply the RD as a protection mechanism, since Article 19 (2) EU Charter would fall

³⁵³ Article 52 (3) Charter of Fundamental Rights of the European Union.

³⁵⁴ *M.S.S. v. Belgium and Greece* and *Sufi and Elmi v. the United Kingdom*.

³⁵⁵ *D. v. the United Kingdom*, *N. v. the United Kingdom*, and *S.H.H. v. the United Kingdom*.

³⁵⁶ *Paposhvili v. Belgium*.

³⁵⁷ *Flegar* (N 247) 148, 148.

³⁵⁸ Case C-542/13 *Mohamed M’Bodj v. Belgium* and Case C-353/16 *MP v. Secretary of State for the Home Department*.

within the scope of non-refoulement preserved by this Directive.³⁵⁹ The scope of the ‘alternative protection’ ruling from the *Abdida* case is not clear, but it is not inconceivable to argue that environmental cases would fall within this scope. In *MP v. SSDH*, the CJEU reasons in line with *Paposhvili v. Belgium* and concludes that the applicant can be protected by the principle of non-refoulement, since the expelling would result in serious deterioration of his health.³⁶⁰ Additionally, the CJEU confirmed that applicants requesting subsidiary protection based on socio-economic harm faced in the country of origin can only be granted this status when the person is deprived of these rights intentionally.³⁶¹ Climate-induced migrants are not capable of receiving subsidiary protection based on Article 15 (b) QD.

Political concerns not only paralyze the European process to fill the protection gap faced by climate-induced migrants on an international negotiation level, but also EU’s overlapping transnational legal jurisdictions seem to have difficulties with ignoring these concerns. This results in the conclusion that protection offered to climate-induced migrants is almost non-existent. At the same time, one can detect modest developments in the case law. The rejection of the ‘fair balance’ test of the ECtHR in *Paposhvili v. Belgium* is a promising development as regards the protection of climate-induced migration. The focus is shifting from the source of the harm towards the nature of the potential harm. Although the EU is not a party to the ECHR, *MP. v. SSDH* showed once more that the CJEU reasons in line with the ECtHR. Hopefully, in combination with the moral obligation of the EU to offer climate-induced migrants protection, the CJEU will follow the direction of the ECtHR by reconsidering the restrictive reading of the QD. In the meantime, climate-induced migrants crossing European borders can try to claim ‘alternative protection’ based on the RD.

Human rights are able to extend protection and guarantee rights within both the receiving state as the state of origin. However, it should be kept in mind that human rights law applies individually and is designed to protect persons facing exceptional circumstances.³⁶² Therefore, human rights law treaties are ignoring the more complex and unformulated effects of climate change. A shift from the source of the harm towards the nature of the potential harm will eliminate the issues arising from the causality problem between the environmental hazards and the migration, and

³⁵⁹ Case C-562/13 *Centre public d’action sociale d’Ottignies-Louvain-La-Neuve v. Moussa Abdida*

³⁶⁰ *Paposhvili v. Belgium*.

³⁶¹ *Ibid*, para. 51.

³⁶² *Moeckli, Shah, and Sivakumaran (N 160)*.

climate-induced migrants moving due to slow-onset environmental hazards and rapid-onset environmental hazards will be the addressees of future regulations. The TPD offers opportunities, but needs further analysis and political commitment by the EU institutions and its MS to become effective. Future regulations have to go beyond the rights for climate-induced migrants to stay in the receiving country. The need to develop such regulations is certainly an urgent one.

Bibliography

Legal instruments

International instruments

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, in force 26 June 1987) 1465 UNTS 113.

International Covenant on Civil and Political Rights (adopted 16 December 1966, in force 3 January 1976) 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, in force 23 March 1976) 993 UNTS 3.

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1.

Universal Declaration on Human Rights, Paris 10 December 1948. General Assembly Resolution (A/RES/3/217)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, in force 27 January 1980) 1155 UNTS 331.

Convention on the Rights of the Child (adopted 20 November 1989, in force 2 September 1990) 1577 UNTS 3.

Protocol Relating to the Status of Refugees (adopted 16 December 1966, in force 4 October 1967) 606 UNTS 267.

Convention Relating to the Status of Refugees (adopted 28 July 1951, in force 22 April 1954) 189 UNTS 137.

Regional instruments

Charter of Fundamental Rights of the European Union [2000] OJ C 364/01.

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, in force 3 September 1953) CETS 005.

Council Directive 2001/55/EC 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 consequences thereof [2001] OJ L212 0012/0023.

Council Directive 2004/83/EC 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.

Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

Directive 2011/95/EU of the European Parliament and of the Council 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 (recast) [2011] OJ L 337/9.

Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection [2001] OJ 051 E/ 0325-0334.

Regulation 604/2013 of the European Parliament and of the Council establishing the criteria and mechanism 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 [2013] OJ L180 31-59.

Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community (adopted 13 December 2007, in force 1 December 2009) OJ 2007 C 306/01)

Treaty on European Union (OJ 2012/C 326/01)

Treaty on the Functioning of the European Union (OJ 2012/C 326/01).

European Court of Human Rights

Bensaid v. the United Kingdom (2001) – 44599/98.

Budayeva v. Russia (2008) 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

D. v. the United Kingdom (1997) – 30240/96.

Guerra and others v. Italy (1998) 116/1996/735/932.

Lopez Ostra v. Spain (1994) 16798/90.

M.S.S. v. Belgium and Greece (2011) – 30696/09.

N. v. the United Kingdom (2008) – 26565/05.

Öneryildiz v. Turkey (2005) 48939/99.

Paposhvili v. Belgium (2016) – 41738/10.

Powell and Rayner v. the United Kingdom (1990) – 9310/81.

S.H.H. v. the United Kingdom (2013) – 60367/10.

Saadi v. Italy (2008) – 37201/06.

Salah Skeekh v. The Netherlands, (2007) – 1948/04.

Soering v. the United Kingdom (1989) – 14038/88.

Sufi and Elmi v. the United Kingdom (2011) – 8319/07 and 11449/07.

Tarakhel v. Switzerland, (2014) – 29217/12.

Taskin and Others v. Turkey (2005) 46117/99.

Vilvarajah and Others v. the United Kingdom (1991) – 13163/87; 13164/87; 13165/87; 1344/87; 13448/87.

Court of Justice European Union

Case C-176/03 Commission v. Council Judgment [2005].

Case C-22/10 Commission of the European Communities v Council of the European Communities [1970].

Case C-260/89 Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas [1991] ECR I-2925.

Case C-31/09 Nawras Bohol v Bevandorlasi es Allampolgarsagi Hivatal [2010].

Case C-31/09 Nawras Bohol v Bevandorlasi es Allampolgarsagi Hivatal [2010].

Case C-353/16 MP v. Secretary of State for the Home Department [2018]. Case C-353/16 MP v. Secretary of State for the Home Department [2018], Opinion of AG Bot.

Case C-366/10 Air Transport Association of America [2011] ECR I-13755.

Case C-465/07 Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie [2009] ECR I-00921.

Case C-540/03, Parliament v Council [2006] ECR I-5769.

Case C-542/13 Mohamed M’Bodj v. Belgium [2014].

Case C-562/13 Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida [2014].

Joint Cases C-71/99 and C-99 Y and Z [2012].

United Nations documents

Cancun adaptation framework

Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health (Art. 12).

Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) on the Right to Water (Arts. 11 and 12 of the Covenant).

Initial two-year Workplan of the Executive Committee.

IPCC Fifth Assessment Report adopted on 26-29 October 2009. <<https://www.ipcc.ch/pdf/ar5/ar5-outline-Compilation.pdf>> assessed 13 June 2018.

Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) I-54113.

Report of the Secretary-General on Climate Change and its possible security implications, above note 6, para. 70. <<http://www.unhcr.org/protection/environment/543e73f69/climate-change-its-possible-security-implications-report-secretary-general.html>> assessed 11 June 2018.

UN Commission on Human Rights, 'Human Rights and Extreme Poverty', [2005] Human Rights 1 (b).

UN Human Rights Committee, General Comment No. 6 (1982) on the Right to Life (Article 6).

UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1992)

United Nations Framework Convention on Climate Change (adopted June 1992, entered into force 21 March 1994).

Vienna Declaration and Programme and Action, World Conference on Human Rights (adopted June 1993).

Council of Europe documents

Note from the Presidency of the Council of the European Union to the Strategic Committee on Immigration, Frontiers and Asylum of 25 September 2002 Doc 12148/02 ASILE 43 p. 5-6.

Literature

Ataputta S., '*Climate Change, Human Rights and Forced Migration: Implications for International Law*', [2009] 27 Wisconsin International Law Journal 607.

Bartels L., '*The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects*', (2014) 25 (4) European Journal of International Law 1071.

Behram S. and Kent A., '*Climate refugees, beyond the legal impasse?*' [2018] Routledge 1.

Bierman F. and Boas I., '*Protecting Climate Refugees: The Case of a Global Protocol*', [2008] 50 Environmental 8.

Boeles P. and others, '*European Migration Law*', (Ius Communitatis III 2014).

Boyle A., '*Human Rights and the Environment, Where Next?*', (2012) 23 (3) Oxford University Press 613.

Bretherton C. and Vogler J., '*The European Union as a Global Actor*', (Routledge 2006) 80.

Brown, O. '*Climate change and forced migration: Observations, projections and implications*', [2007] Human Development Report 1.

Cernea M.M., '*Impoverishment Risks, Risk Management, and Reconstruction: A Model of Population Displacement and Resettlement*', [2000] George Washington University.

Cooper M.D., '*Migration and Disaster-Induced Displacement: European Policy, Practice, and Perspective*', [2012] Center for Global Development, Working Paper 308 1.

Costello C., '*The Human Rights of Migrants in European Law*', [2016] Oxford University Press.

Cutter, S.L. '*American Hazardscapes: The Regionalization of Hazards and Disasters*', (Joseph Hendry Press 2001), 2.

Doussa J. von, Corkery A. and Chartres R., '*Human Rights and Climate Change*', (2007) 14 Australian International Law Journal 161.

Dupont A. and Pearman G., '*Heating up the Planet: climate change and security*', [2006] Lowy Institute Paper.

Durand A. and Huq S., '*A Simple Guide to the Warsaw International Mechanism on Loss and Damage*', International Centre for Climate Change and Development, Independent University Bangladesh.

Farmer A., '*Non-refoulement and Jus Cogens: Limiting anti-terror measures that threaten refugee protection*', (2009) 23 (1) Georgetown Immigration Law Journal 1.

Ferris E. and Bergmann J., '*Soft law, migration and climate change governance*', (2017) 8 (1) Journal of Human Rights and Environment 6.

Flautre H. and others, *'Climate Change, Refugees and Migration, Position Paper'*, [2013] EFA in the European Parliament 1.

Flegar V., *'Vulnerability and the Principle of Non-refoulement in the European Court of Human Rights'*, *Contemporary Readings in Law and Social Justice*, [2016] *Law and Social Justice* 148.

Foresight, *'Migration and Global Environmental Change, future challenges and opportunities'*, [2011], Government Office for Science 1.

Gromilova M., *'Legal protection of the people at risk of climate induced cross-border displacement: application of the 1951 Refugee Convention'*, [2011] Tilburg University.

Gromilova M., *'Revisiting Planned Relocation as a Climate Change Adaptation Strategy: The Added Value of a Human Rights-Based Approach'*, (2014) 10 (1) *Utrecht Law Review* 76.

Hathaway J.C. and Foster M., *'The Law of Refugee Status'*, (Cambridge University Press 2014).

Hodgkinson D. and others, *'The Hour when the Ship comes in: a Convention for Persons Displaced by Climate Change'*, (2010) 36 (1) *Monash University Law Review*.

Hunter, L.M., *'Migration and Environmental Hazards'*, (2005) 26, Institute of Behavioral Science, Program on Environment and Behavior, Department of Sociology, University of Colorado at Boulder 273.

Kälin W., *'Conceptualising Climate- Induced Displacement'* in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* [2010] Hart Publishing 85.

Kälin, W. Schrepfer, N., *'Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches'*, [2012] University of Bern 1.

Knox J. H., *'Human Rights Principles and Climate Change'*, [2015] *Oxford Handbook of International Climate Change Law*, Wake Forest University.

Koch I.E., *'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective'*, (2006) 10 (14) *The International Journal of Human Rights* 405.

Kolmannskog V. and Myrstad F., *'Environmental Displacement in European Asylum Law'*, (2009) 11 *European Journal of Migration and Law* 313.

Kolmannskog V. and Trebbi L., *'Climate Change, Displacement and Protection: A Multi-Track Approach'* (2010) 92 *International Review of the Red Cross* 713.

Kraler, A., Cernei T. and Noack M., *'Directorate-General for Internal Policies: "Climate refugees", legal and policy responses to environmentally induced migration'*, [2011] European Parliament 1.

Labuhn B., *'The Role of the European Union in International Climate Policies, from the leader to a watcher?'*, [2011] Universiteit van Twente 1.

- Lafontaine E., *'The need for a new instrument to deal with 'Environment Refugees'*, [2017], University of Oslo.
- McAdam J., *'Climate Change Displacement and International Law, Complementary Protection Standard'*, [2011] United Nations High Commissioner for Refugees 1.
- McAdam J., *'Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection'*, [2012] Oxford University Press 52.
- McAdam J., *'From the Nansen Initiative to the Platform on Disaster Displacement: shaping international approaches to climate change, disasters and displacement'*, (2017) 39 (4) UNSW Law Journal 1518.
- McLeman R., *'Climate Change, Migration and Critical International Security Considerations'*, [2011] IOM Migration Research Series no. 42, 1.
- Moeckli D., Shah S. and Sivakumaran S., *'International Human Rights Law'*, (Oxford University Press 2010).
- Muraviov V. and Sviatun O., *'Protection of Human Rights in the European Union'*, [2016] in *'The Convergence of the Fundamental Rights Protection in Europe, Ius Gentium: Comparative Perspectives on Law and Justice'* 185.
- Naser M.M. and Afroz T., *'Human Rights Implications of Climate Change Induced Displacement'*, (2009) 21 (3) Bond Law Review 139.
- Noll G., *'Seeking Asylum at Embassies: A Right to Entry under International Law?'*, (2005) 17 (3) International Journal of Refugee Law 542.
- Ostberg M., *'The role of the European Court of Human Right in enforcing environmental norms and principles'*, [2006] University of Lund.
- Pace P. and Shapiro S., *'Migration and the Right to Health in Europe'*, [2009] IOM International Migration Law and Legal Affairs Department.
- Phuong C., *'Identifying States' Responsibilities towards Refugees and Asylum Seekers'*, [2005], Paper presented at the ESIL Research Forum on International Law.
- Rayner T. and Jordan A., *'Climate Change Policy in the European Union'*, [2016] Oxford Research Encyclopedia of Climate Science.
- Röhl K., *'Fleeing violence and poverty: non-refoulement obligations under the European Convention on Human Rights'*, [2005] United Nations High Commissioner for Refugees, Oxford University, Working Paper No. 111.
- Scott D. and Lock T., *'The ECJ and the ECtHR: The Future Relationship between the Two European Courts'*, (2009) 8 The Law and Practice of International Courts and Tribunals, 380.

Scott M., *'Natural Disasters, Climate Change and Non-refoulement: What Scope of Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?'*, (2014) 26 (3) International Journal of Refugee Law 404.

Serdeczny, O. *'What does it mean to 'Address Displacement' under the UNFCCC? An Analysis of the Negotiations Process and the Role of Research'*, [2017] German Development Institute.

Smith K. *'Environmental Hazards, Assessing Risk and Reducing Disaster'*, (Routledge 2001).

Southard N., *'The Socio-Political and Economic Causes of Natural Disasters'*, [2017] CMC Senior Thesis.

Stern N., *The Economics of Climate change: the Stern review'*, (Cambridge University Press 2007) 3.

Stoyanova V., *'How Exceptional Must 'Very Exceptional' Be? Non-Refoulement, Socio-Economic Deprivation and Paposhvili v. Belgium'*, (2017) 29 (4) International Journal of Refugee Law 580.

Wallenberg L., *'Return to Socio-Economic Deprivation, A critical Analysis of the Scope of Complementary Protection under European law'*, [2016] Faculty of Law, Lund University.

Warner K., *'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations'*, [2011] United Nations High Commissioner for Refugees 1.

Wilkinson E. and others, *'Climate-induced migration and displacement: closing the policy gap'*, [2016] Overseas Development Institute 1.

Williams A., *'Turning the Tide: Recognizing Climate Change Refugees in International Law'*, (2008) 30 (4) Law & Policy 502.

Yonetani M., *'Global Estimates 2014, people displaced by disasters'*, [2014] Internal Displacement Monitoring Centre, Norwegian Refugee Council.

Online sources

Anderson A., *'Comment on Paposhvili v. Belgium and the Temporal Scope of Risk Assessment'*, (2017) Blog of European Journal of International Law. <<https://www.ejiltalk.org/comment-on-paposhvili-v-belgium-and-the-temporal-scope-of-risk-assessment/>> assessed 10 June 2018.

European Commission, *'Global growth in CO2 emissions stagnates'*, (EU Science Hub, 25 November 2015) <<https://ec.europa.eu/jrc/en/news/global-growth-co2-emissions-stagnates>> assessed 20 June 2018.

European Commission, *'Paris Agreement'*, <https://ec.europa.eu/clima/policies/international/negotiations/paris_en> assessed 10 June 2018.

European Environment Agency, ‘*Background information – International climate commitments in Europe*’, (European Environment Agency, Climate Change Mitigation, 8 November 2016) <<https://www.eea.europa.eu/themes/climate/trends-and-projections-in-europe/trends-and-projections-in-europe-2016/international-climate-commitments-in-europe>> assessed 12 June 2018.

European Parliament, DG for Internal Policies, ‘*The influence of ECJ and ECtHR case law on asylum and immigration*’, (2012) 8 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462438/IPOL-LIBE_ET\(2012\)462438\(SUM01\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462438/IPOL-LIBE_ET(2012)462438(SUM01)_EN.pdf)> assessed 12 June 2018.

European Union, ‘*2030 climate & energy framework*’, <https://ec.europa.eu/clima/policies/strategies/2030_en> assessed 10 June 2018.

European Union, ‘*Climate Action*’, (European Union Explained, November 2014) <https://europa.eu/european-union/topics/climate-action_en> accessed 10 June 2018.

Fleming M., ‘*Climate change could become the biggest driver of displacement: UNHCR Chief*’, (2009) UNHCR, <http://www.unhcr.org/news/latest/2009/12/4b2910239/climate-change-become-biggest-driver-displacement-unhcr-chief.html> assessed 10 June 2018.

Gerards J. and Glas L., ‘*De verhouding tussen het EHRM en het HvJ EU na toetreding van EU tot het EVRM*’, [2012] *Ars Aequi* 520 - 530. <<http://repository.ubn.ru.nl/bitstream/handle/2066/106153/106153.pdf>> assessed June 10 2018.

Hodgkinson D. and Young L., ‘*In the Face of Looming Catastrophe: A Convention for Climate Change Displaced persons*’, (2012) <[http://www.ccdpconvention.com/documents/A%20Convention%20for%20Climate%20Change%20Displaced%20Persons%20\(January%202012\).pdf](http://www.ccdpconvention.com/documents/A%20Convention%20for%20Climate%20Change%20Displaced%20Persons%20(January%202012).pdf)>

Intergovernmental Panel on Climate Change, ‘*Climate Change 2007: Synthesis Report*’ [2007] 1, 53. <https://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_full_report.pdf> assessed 19 June 2018.

IPCC, ‘*Summary for Policymakers*’, (Climate Change 2007: Impacts, Adaptation and Vulnerability, 2007) <https://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_summary-for-policymakers.pdf> assessed 10 June 2018.

Kang. K., ‘*Climate Change, Migration and Human Rights*’, (Conference of Climate Change and Migration: Addressing Vulnerabilities and Harnessing Opportunities, 19 February 2008) <https://www.iom.int/jahia/webdav/shared/shared/mainsite/events/docs/hsn/hsn_address_kang.pdf> assessed 13 June 2018.

Lambert K., ‘*The Paris Agreement: Spotlight on Climate Migrants*’ (2015) Yale school of Forestry & Environmental Studies Blog < <https://environment.yale.edu/blog/2015/12/the-paris-agreement-spotlight-on-climate-migrants/>> assessed 10 June 2018.

Parliamentary Assembly of the Council of Europe: *'Environmentally-Induced Migration and Displacement: a 21st Century Challenge'*, (Parliamentary Assembly Council of Europe, 23 December 2008) <<http://www.refworld.org/pdfid/49997bbb0.pdf>> assessed 11 June 2018.

Peers S., *'Could EU law save Paddington Bear? The CJEU develops a new type of protection.'* (2014) EU Law Analysis. < <http://eulawanalysis.blogspot.com/2014/12/could-eu-law-save-paddington-bear-cjeu.html>> assessed 10 June 2018.

Recommendations from the Advisory Group on Climate Change and Human Mobility, *'Human mobility in the context of climate change UNFCCC – Paris COP21'*, (November 2015) <https://environmentalmigration.iom.int/sites/default/files/Research%20Database/Paris_COP21-Human_Mobility-AdvisoryGroup.pdf> assessed 19 June 2018.

Sy S., *'Fact Sheets on the European Union: The Charter of Fundamental Rights'*, (March 2018) <http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.1.2.pdf> assessed June 10 2018.

The European Union and International Human Rights Law (United Nations Human Rights Office of the High Commissioner, Europe, Regional Office) 8 <http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf> assessed 10 June 2018.

The Nansen Initiative Secretariat, 'Frequently Asked Questions' <https://www.eda.admin.ch/dam/eda/en/documents/publications/MenschenrechtehumanitaerePolitikundMigration/20150521-nansen-initiative-faqs_EN.pdf> assessed 19 June 2018.

The Nansen Initiative, *'Towards a Protection Agenda for People Displaced across Borders in the Context of Disasters and the Effects of Climate Change, the challenge'*, <<https://www.nanseninitiative.org/secretariat/>> assessed June 10 2018.

The Nansen Initiative, Agenda for the protection of cross-border displaced persons in the context of disasters and climate change, Volume I, < <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>> assessed 13 June 2018.

Thomas A., *'Paris Climate Deal: it's time to get real'*, (Refugee International, 20 April 2016) <<https://www.refugeesinternational.org/blog/2016/4/20/its-time-to-get-real-about-addressing-climate-displacement>> assessed 10 June 2018.

UN Habitat, *'The Right to Adequate Housing'*, (Office of the United Nations High Commissioner for Human Rights, 2009) <http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf> assessed 10 June 2018

UNHCR, *'Protecting Refugees, questions and answers'*, (2002) <<http://www.unhcr.org/afr/publications/brochures/3b779dfe2/protecting-refugees-questions-answers.html>> assessed 10 June 2018.

UNHCR, *'What is a Refugee'*, <<https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>> assessed 10 June 2018.

United Nations Climate Change, *'Approaches to address loss and damage associated with climate change impacts in developing countries'*, (2018) <<https://unfccc.int/topics/adaptation-and-resilience/workstreams/approaches-to-address-loss-and-damage-associated-with-climate-change-impacts-in-developing-countries>> assessed June 10 2018

United Nations Climate Change, *'KP Introduction'*, (2018) <<https://unfccc.int/process/the-kyoto-protocol>> assessed 10 June 2018.

United Nations Climate Change, *'Task Force on Displacement'*
<<https://unfccc.int/index.php/wim-excom/sub-groups/TFD>> assessed 10 June 2018.

United Nations Climate Change, *'The Paris Agreement'*, (2018) <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> assessed 10 June 2018.

United Nations Climate Change, *'What is the United Nations Framework Convention on Climate Change?'* <<https://unfccc.int/process/the-convention/what-is-the-united-nations-framework-convention-on-climate-change>> assessed 11 June 2018.

United Nations Development Programme, *'Supporting Least Developed Countries to Address Climate Change'*, (Sustainable Development Knowledge Platform, May 2011)
<https://sustainabledevelopment.un.org/content/documents/952014_Supporting%20Least%20Developed%20Countries%20to%20Address%20Climate%20Change_Flyer.pdf> assessed 10 June 2018.

United Nations Framework Convention on Climate Change, *'Climate change: impacts, vulnerabilities and adaptation in developing countries'*, [2007]
<<https://unfccc.int/resource/docs/publications/impacts.pdf>> assessed 19 June 2018.

United Nations High Commissioner for Refugees, *'The 1951 Convention relating to the Status of Refugees: Its relevance in the Contemporary Context'*,
<<http://www.refworld.org/pdfid/3ae6b3388.pdf>> assessed 19 June 2018.

United Nations University – Institute for Environment and Human Security, International Conference on 'Environment, Forced Migration and Social Vulnerability (EFMSV)', 9-11 October 2008, Bonn, Germany.
<https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/env_keynote_speech.pdf> assessed 13 June 2018.

United Nations, *'The Paris Agreement: Frequently Asked Questions'*, (2016)
<<https://www.un.org/sustainabledevelopment/blog/2016/09/the-paris-agreement-faqs/>> assessed 10 June 2018.

Vandamme L. and Dibben F., *'Klimaatvluchtelingen bestaan niet, toch zijn miljoenen mensen op de vlucht voor het klimaat'*, (Briefingpaper 11-11-11, 22 February 2016)

<<https://www.11.be/artikels/item/briefing-paper-klimaatvluchtelingen-bestaan-niet>> assessed 10 June 2018.

Wihbey J., ‘*Nuancing Climate Refugee Language and Images*’, (Yale Climate Connection, Wilson Center Staff, 18 December 2015) <<https://www.newsecuritybeat.org/2015/12/nuancing-climate-refugee-language-images/>> assessed 10 June 2018.

Zamfir I., ‘*Refugee status under international law*’, (European Parliament Research Service Blog, 27 October 2015) <<https://epthinktank.eu/2015/10/27/refugee-status-under-international-law/>> assessed 10 June 2018.

Conference of the Parties of the UNFCCC

Conference of the Parties, Report of the Conference of the Parties on its sixteenth session, Held in Cancun from 29 November to 10 December 2010, United Nations Framework Convention on Climate Change, <<https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>> assessed 13 June 2018.

Conference of the Parties, Report of the Conference of the Parties on its nineteenth session, Held in Warsaw from 11 to 23 November 2013, United Nations Framework Convention on Climate Change, <<https://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf>> assessed 13 June 2018.

Conference of the Parties, Report of the Conference of the Parties on its twenty-first session, Held in Paris from 30 November to 13 December 2015, United Nations Framework Convention on Climate Change, <<https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>> assessed 13 June 2018.

Other

Comments by EU delegation in The Nansen Initiative, ‘*Global Consultation Conference Report: Geneva, 12-13 October 2015*’, (Report December 2015) 155 (Global Consultation Conference Report).

The Nansen Conference, ‘*Climate Change and Displacement in the 21st Century*’, Oslo, 5-7 June 2011, Chairperson’s summary.

