

CHALLENGES FOR THE CONTEMPORARY INTERNATIONAL LEGAL FRAMEWORK AND THE RULE OF LAW: IS THE INTERNATIONAL COMMUNITY DOING ITS BEST FOR THE PROTECTION OF CLIMATE MIGRANTS?

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Summary

This paper explores the current level of legal protection of climate migrants in international and EU law and the repercussions that the present approach might have on the rule of law. It first analyses whether the current binding instruments of refugee and climate change law offer any protection for climate migrants and identifies a legal gap in this regard. It then briefly addresses the progress made by recently adopted soft law instruments and the UN Human Rights Committee decision in the Teitiota case, at the same time pointing out that the latter decision has set criteria which might jeopardise the realisation of the non-refoulement right which it aims to guarantee. The paper then analyses the literature on the link of climate change and migration, using the example of the Syrian civil war, the rise of anti-immigration populism which subsequently occurred, as well as the threat that such movements might pose for the rule of law. The authors conclude that the planned and systematic response of the international community to climate migration and continued good regional and bilateral practices are more likely to prevent sudden spikes in mass migration which could lead to anti-immigration populist movements.

Keywords: *climate migration; international refugee law; Teitiota case; rule of law; populism.*

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1 INTRODUCTION

During the past ten years it has become almost impossible to ignore that the climate on Earth is changing. The past decade has been the warmest on record,¹ and populations worldwide have witnessed a series of extreme weather events, ranging from violent storms to record droughts, causing among other things vast wildfires across Australia, Siberia and the US.² These events have had a significant impact on communities living in areas which were the hardest hit, and have led to displacement. According to the latest data, out of 28 million new displacements in 2018, 16.1 million were weather related.³ Given the fact that it is likely that climate change will continue to influence human migration in the future,⁴ a comprehensive global approach to climate migration as the ultimate method of climate change adaptation is required.

The main legal instrument for the international protection of persons fleeing their homes is the Convention Relating to the Status of Refugees of 1951 (hereinafter: RC). However, despite the fact that it most certainly took a huge legal, political and moral stride towards the protection of some of the most vulnerable groups of people, the definition of refugee which it contains⁵ was not intended to encompass those

- 1 *Climate Central*, visited 13 October 2020, <https://www.climatecentral.org/gallery/graphics/top-10-warmest-years-on-record>.
- 2 *Climate Adaptation Platform*, visited 13 October 2020, <https://climateadaptationplatform.com/extreme-climatic-events-in-the-last-decade-whats-in-store-for-2020/>.
- 3 *Internal displacement monitoring centre*, Global report on internal displacement, 2019, at 6-7, visited 13 October 2020, <https://www.internal-displacement.org/global-report/grid2020/>. According to the World Migration Report 2020, large-scale displacement triggered by climate-related hazards occurred in many parts of the world in 2018 and 2019, including in Mozambique, the Philippines, China, India, and the USA. See *International Organization for Migration*, World Migration Report, 2, visited 2 October 2020, https://publications.iom.int/system/files/pdf/wmr_2020.pdf. Barnett and Webber suggest that the number of people who cannot migrate may be far in excess of those who do, and so they could pose a far larger humanitarian problem. Reproduced in Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford: Oxford University Press, 2012), 37.
- 4 Juan M. Pulhin *et al.*, “Human Security”, in: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, eds. Fields C.B *et al.* (Cambridge, New York: Cambridge University Press, 2014), 758, visited 13 October 2020, https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap12_FINAL.pdf. See also Saber Salem and Armin Rosencranz, “Climate Refugees in the Pacific”, *Environmental Law Reporter* 50, N° 7 (2020): 10540.
- 5 Art. 1A.(2) of the RC prescribes that for the purposes of this Convention, the term ‘refugee’ shall apply to any person who: “as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (...).” Art. 1B.(1) prescribes that “the words ‘events occurring before 1 January 1951’ in Article 1, section A, shall be understood to mean either: (a) ‘events occurring in Europe before 1 January 1951’; or (b) ‘events occurring in Europe or elsewhere before 1 January 1951’, and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying

who are forced to leave their homes for reasons not enumerated in the RC, but who undoubtedly need the same, or at least similar, legal protection.

The most prominent of such a category of people are climate refugees, i.e. climate-induced displaced persons who are considered to fall under the broader term of environmental refugees.⁶ Climate refugees can be defined as persons who, due to an extreme climate induced changing environment, are forced to flee their homes temporarily or permanently, in search of protection and better life conditions in other parts of their country, or in neighbouring and other countries. Climate refugees are sometimes also referred to as climate migrants, but the latter term is used to denote a more or less voluntary movement of persons as a result of gradual or sudden negative effects of climate change.⁷ However, it is important to note that climate change migration is often induced by several intertwined factors, thus making it difficult to isolate and accurately define climate migration separately from, for example, economic migration.⁸ Having this in mind, we will use the term climate migration for cases where the consequences of climate change are one of the leading factors leading to displacement. In order to emphasise the scope of climate-change-driven migration and the need for revised and coordinated international action regarding both voluntary and forced migration caused by climate change, this paper will employ the term “climate migrants”.

The inability to rely on the protection guaranteed by the RC, since climate migrants do not fall within the scope *ratione personae* set therein, has left climate migrants in a legal lacuna. However, the most recent developments suggest that there have been slow, but positive changes regarding the protection of climate migrants. This paper will thus analyse the progress made in finding solutions for the protection of climate migrants at the international level by studying the relevant provisions of the

which of these meanings it applies for the purpose of its obligations under this Convention.” See Convention Relating to the Status of Refugees, 1951, Geneva, UNTS, vol. 189, 1954.

- 6 The term environmental refugee was first introduced by the researcher El-Hinnawi during his work with the UN Environment Program. See Essam El-Hinnawi, *Environmental Refugees* (Nairobi: UN Environment Program, 1985), 4, reproduced in McAdam, *Climate Change, Forced Migration, and International Law*, 3. The International Organization for Migration uses the term environmental migrant to describe voluntary or forced migrations caused by sudden or progressive changes in the environment which adversely affect people’s lives. See *International Organization for Migration*, visited 1 October 2020, <https://www.iom.int/key-migration-terms>.
- 7 For terminological differences between the terms ‘climate refugee’ and ‘climate migrant’, see Simon Behrman and Avidan Kent, “Overcoming the Legal Impasse? – Setting the Scene”, in: *‘Climate Refugees’ Beyond the Legal Impasse?*, eds. Simon Behrman and Avidan Kent (Abingdon, New York: Routledge, 2018), 11. Some authors introduce several categories of climate refugees, depending on the nature of causes of migration and whether migration is voluntary or forced. See in Beatriz Felipe Pérez, “Beyond the Shortcomings of International Law: A Proposal for the Legal Protection of Climate Migrants”, in: Behrman and Kent, eds., *Climate Refugees’ Beyond the Legal Impasse?*, 215-216.
- 8 Kolmannskog and Trebbi point out that academics criticise the concepts of environmental refugees or climate refugees since climate change, migration and displacement are not phenomena with only one cause. See Vikram Kolmannskog and Lisetta Trebbi, “Climate Change, Natural Disasters and Displacement: A Multi-Track Approach to Filling the Protection Gaps”, *International Review of the Red Cross* 92, N°. 879 (2010): 715.

main legally binding and soft law instruments, as well as the recent decision of the UN Human Rights Committee (hereinafter: UN HRC). The paper will then address the relationship between the existing state of international protection of climate migrants and the rule of law in host countries. The underlying hypothesis of the paper is that the current situation is more likely to lead to mass migrations and to rule of law violations than if there were a planned response of the international community. This is due to the fact that the present situation is characterised by inadequate international protection of the most vulnerable climate migrants and their de facto inability to trigger the non-refoulement principle, as well as by a lack of adequate international support for climate change adaptation and resilience.

2 THE BINDING INTERNATIONAL LEGAL FRAMEWORK RELATING TO CLIMATE CHANGE AND MIGRATION

As mentioned above, the concept of climate refugee cannot be appropriately subsumed under the definition of refugee provided by the RC.⁹ The negative consequences of climate change as driving factors of people's decision to flee their homes cannot be equated with the requirement of a "well-founded fear of being persecuted",¹⁰ nor are there usually any discriminatory factors ("race, religion, nationality, membership of a particular social group or political opinion") at play. The third element of the RC's definition of refugee (being "unable or, owing to such fear, is unwilling to avail himself of the protection of that country") is also not applicable to climate refugees. Hence, there is an evident gap in legal protection under the binding framework of international refugee law.

Surprisingly, an opposite view has recently been presented by the office of the UN High Commissioner for Refugees (hereinafter: UNHCR), according to which a holistic approach can expand the application of the Refugee Convention to climate refugees.¹¹ The argumentation of the UNHCR is, however, in contradiction with the views of the majority of legal scholars who argue that the category of climate refugees does not meet the prerequisites for acquiring refugee status according to the RC.¹² It

9 See Arts. 1A.(2) and 1B.(1) of the RC (1951).

10 According to McAdam, it is difficult to characterise climate change as persecution. Persecution entails human rights violation of particular severity, and although adverse climate impacts such as rising sea levels, salination or extreme weather events are harmful, they do not meet the threshold of persecution as this is currently understood in international and domestic law. McAdam adds that the element of persecution should relate to the element of discrimination, in accordance with the RC. See McAdam, *Climate Change, Forced Migration, and International Law*, 43-44. Similarly, see in Sumudu Atapattu, "A New Category of Refugees? 'Climate Refugees' and a Gaping Hole in International Law", in: Behram and Kent, eds., *'Climate Refugees' Beyond the Legal Impasse?*, 41.

11 UNHCR, *Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters*, 1 October 2020, para. 6, visited 5 October 2020, <https://www.refworld.org/docid/5f75f2734.html>.

12 See, for example, Roger Zetter, "Protecting People Displaced by Climate Change: Some Conceptual Challenges", in: *Climate Change and Displacement: Multidisciplinary Perspectives*, ed. Jane McAdam (Oxford, Portland, Oregon: Hart Publishing, 2010), 141-143; Jane McAdam,

should also be noted that the view that climate refugees are protected by the Refugee Convention has still not found any confirmation in the decisions of the UN HRC nor in the case-law of the States Parties to the Convention. Finally, until recently, the UNHCR itself seems to have held the view that the current definition of refugee under the RC does not include persons fleeing the negative effects of climate change and that they can only be classified as refugees under regional refugee conventions, particularly in situations where these persons are fleeing armed conflicts which have been caused by environmental factors.¹³ UNHCR further explained that the current definition of refugee under the RC cannot be interpreted to include climate refugees because the term climate refugee (or environmental refugee) itself has no basis in international refugee law, and therefore cannot be given legal meaning. In this regard, UNHCR emphasised that while environmental factors can contribute to prompting cross-border movements, they are not the basis for granting refugee status under the RC.¹⁴

Although simply redefining refugee to include persons fleeing their homes as a result of climate change seems a possible solution for bridging the mentioned legal gap, such an amendment to the RC is very likely to face severe political resistance from the Parties to that Convention, especially from those that are most heavily affected by climate change migration. In addition, such an amendment, which would bring a high number of climate refugees under the Convention's scope, would most likely lead to lowering overall protection under the Convention, which would harm those who qualify as refugees under the current definition.¹⁵

Unlike the RC, some international law instruments leave more room for the inclusion of climate migrants within their scope. The Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa adopted in 1969, recognising the need for an essentially humanitarian approach towards solving the problem of refugees, supplements the definition of refugee by expanding the international legal protection even to a person who is compelled to leave his place

"Building International Approaches to Climate Change, Disasters, and Displacement", *Windsor Yearbook of Access to Justice* 33, N° 2 (2016): 4-5. On the other hand, some authors suggest that the gap in the international legal regulation of refugees and migrants could be bridged by adequate solutions provided in the immigration laws of certain states, which could enable disaster-affected persons to obtain a certain legal status and the pertaining rights. See more in David James Cantor, "Environment, Mobility, and International Law: A New Approach in the Americas", *Chicago Journal of International Law* 21, N° 2 (2021): 298-301.

13 UNHCR, *The UN Refugee Agency*, Climate change, natural disasters, and human displacement: a UNHCR perspective, Geneva (2009), 6, 8-9, visited 8 October 2020, <https://www.unhcr.org/4901e81a4.pdf>. For a change in the views of the UNHCR on the application of the international legal framework on climate refugees see UNHCR, *Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters* (2020).

14 UNHCR, *The UN Refugee Agency*, Climate Change, Natural Disasters, and Human Displacement: a UNHCR perspective (2009), 8.

15 Similarly, Kolmannskog and Trebbi, "Climate Change, Natural Disasters and Displacement: A Multi-Track Approach to Filling the Protection Gaps", 720. See also UNHCR, *The UN Refugee Agency*, Climate Change, Natural Disasters, and Human Displacement: a UNHCR Perspective (2009), 9.

of residence due to events seriously disturbing public order.¹⁶ Some scholars are of the view that the phrase “events seriously disturbing public order” is a technical term which refers to social and political unrest caused only by human activities.¹⁷ Others consider that the extended definition of the term refugee might provide the necessary flexibility to include even victims of environmental changes.¹⁸ UNHCR has taken a stance in favour of such an evolutionary approach to interpretation.¹⁹

Let us now turn to the assessment of other legal sources which can be relevant for filling the legal lacunae in traditional refugee law.

The 1992 UN Framework Convention on Climate Change and the 1997 Kyoto Protocol²⁰ were adopted with the aim to prevent dangerous human interference in the climate system. Although they set the foundations for committing industrialised states to limit and reduce greenhouse gas emissions with a heavier burden under the principle of “common but differentiated responsibility and respective capabilities”,²¹ the policies promoted therein were not designed to address the rights of persons primarily affected by climate change.²²

The Paris Agreement²³ that followed in 2015 built upon the UN Framework Convention on Climate Change legal framework by binding for the first time all States into a common cause to undertake efforts to combat climate change and adapt to its effects,²⁴ and, as such, marked a new course in the global struggle against

16 Art. 1(2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, Addis Ababa, UNTS, vol. 1001, 1976. The Cartagena Declaration on Refugees as a regional instrument builds upon this definition, and, bearing in mind the situation of massive flows of refugees in Central America, similarly expands the concept of refugees. See Art. III(3) of the Cartagena Declaration on Refugees, reproduced within the UNHCR, *The UN Refugee Agency, Refworld*, visited 2 October 2020, <https://www.refworld.org/docid/3ae6b36ec.html>.

17 See for example Micah Bond Rankin, “Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years on”, *South African Journal on Human Rights* 21, No. 3 (2005): 423-429. Similarly, Kālin warns that the status of climate-related displaced people remains unclear, leading to a risk of ending up in a legal and operational limbo. See Walter Kālin, “Conceptualising Climate-Induced Displacement”, in: McAdam, ed., *Climate Change and Displacement: Multidisciplinary Perspectives*, 88-89.

18 Medard R. Rwelamira, “Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa”, *International Journal of Refugee Law* 1, No. 4 (1989): 558-559.

19 UNHCR, *Legal considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters* (2020).

20 The UN Framework Convention on Climate Change, 1992, New York, UNTS, vol. 1771, 1994; Kyoto Protocol to the UN Framework Convention on Climate Change, 1997, Kyoto, UNTS, vol. 2303, 2005.

21 Art. 3(1) of the UN Framework Convention on Climate Change (1992).

22 David B. Hunter, “Human Rights Implications for Climate Change Negotiations”, *Oregon Review of International Law* 11, No. 2 (2009): 334; Bonnie Docherty and Tyler Giannini, “Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees”, *Harvard Environmental Law Review* 33, No. 2 (2009): 358.

23 Paris Agreement, 2015, Paris, UNTS, vol. I-54113, 2016.

24 By committing States to achieve a long-term goal of limiting the temperature increase to 1.5°C above pre-industrial levels. See Art. 2(1)(a) of the Paris Agreement (2015).

the negative effects of climate change.²⁵ The value of the Paris Agreement lies in its acknowledgment that climate change is a common concern of humankind and that the States parties should, in this context, particularly “consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development”.²⁶ The creation of a Task Force on Displacement under the auspices of the Warsaw International Mechanism for Loss and Damage “to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change” was another positive step towards placing climate migrants and climate refugees on the global agenda.²⁷ However, the international climate regime has not provided climate migrants with any tangible legal protection,²⁸ and references to human rights are only contained in the preamble to the Paris Agreement.

Nonetheless, despite the above-mentioned legal lacunae and the lack of consensus on the recognition of climate refugees, small but significant steps have been taken in the soft law domain towards better and more concrete legal protection of migrants and climate refugees.

3 THE MOST RECENT NON-BINDING FRAMEWORK GOVERNING INTERNATIONAL CLIMATE MIGRATION

The Global Compact for Safe, Orderly and Regular Migration of 2018 (hereinafter: GCM) is the first intergovernmentally negotiated agreement concluded with the intention to cover all dimensions of international migration in a holistic and comprehensive manner. Although not legally binding, its significance is undisputable since it is based on the principles of, among other things, being people-centred (with a strong human dimension); international cooperation; national sovereignty with respect for international law; rule of law; sustainable development; respect for human rights.²⁹ This document was preceded by the New York Declaration for Refugees and Migrants, adopted unanimously in the UN General Assembly in 2016.³⁰

The framework of the GCM is composed of 23 objectives and commitments of

25 Although, as McAdam notes, the countries likely to be most severely affected by the impacts of climate change are those which have contributed among the least to global carbon emissions. See in McAdam, *Climate Change, Forced Migration, and International Law*, 38.

26 Preamble of the Paris Agreement (2015).

27 UN Framework Convention on Climate Change, *Report of the Conference of the Parties on its twenty-first session*, 2015, FCCC/CP/2015/10/Add.1, para. 49. For a comment see also McAdam, “Building International Approaches to Climate Change, Disasters, and Displacement”, 13.

28 Lavanya Rajamani, “Integrating Human Rights in the Paris Climate Architecture: Contest, Context and Consequence”, *Climate Law* 9, N° 3 (2019): 200; Sébastien Duyck, “Delivering on the Paris Promises? Review of the Paris Agreement’s Implementing Guidelines from a Human Rights Perspective”, *Climate Law* 9, N° 3 (2019): 222.

29 UN General Assembly, Intergovernmental Conference to Adopt the GCM, Draft Outcome of the Conference, Annex - GCM, para. 15, UN Doc. A/CONF.231/3, 30 July 2018.

30 See UN General Assembly, New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1, 3 October 2016.

States regarding safe, orderly, and regular migration. In the context of recognising that climate change is only one of many adverse factors that compel people to leave their country of origin, the document sets as an objective the minimisation of such factors by implementing the Sustainable Development Goals by States (para. 18 (b)), by strengthening information-sharing in order to better understand, predict and address migration movements, the adverse effects of climate change and environmental degradation, ensuring respect for human rights (para. 18 (h)), and cooperating in finding solutions for migrants (para. 21 (h)).

In general, the objectives set out in the GCM represent a significant step not only towards raising awareness of States' international obligations based in legally binding and non-binding instruments (Preamble, para. 2), but also towards complementary international cooperation regarding the protection of migrants and refugees who are entitled to the same universal human rights and fundamental freedoms (Preamble, para. 4). However, the path for more comprehensive protection of refugees is set in the complementary instrument, the Global Compact on Refugees.³¹

The Global Compact on Refugees is adopted as a basis for predictable and equitable burden- and responsibility-sharing among UN Member States, together with other international and national stakeholders (para. 3). It explicitly declares that it is grounded in the international refugee protection regime, the principle of non-refoulement, human rights instruments, international humanitarian law and the principles of humanity, neutrality, impartiality and independence (para. 5). The objectives of the Global Compact on Refugees reflect the leading idea of the document: the need for cooperation of actions between host countries, countries of origin, third countries and refugees (para. 7). What is important is that the document acknowledges that climate, environmental degradation, and natural disasters increasingly interact with other motives for refugee movement (para. 8), which signifies major progress in comparison to the very limited and strict criteria prescribed in the RC, and further that external forced displacement may result from sudden-onset natural disasters and environmental degradation (para. 12).

The adoption of the two documents undoubtedly indicates valuable progress in acknowledging that the increasing number of migrants worldwide is a concern for the entire international community and that all stakeholders should share responsibility for providing protection for migrants and refugees. The International Organization for Migration qualified the two global compacts providing protection for migrants and refugees of 2018 (see *infra*) as a "historic change at the global level" resulting from decades-long efforts by states, international organisations, civil society as well as the private sector to improve migration management at the international level.³² Unlike refugee law, the framework provided by the two global compacts represents near-universal consensus on the issues that require cooperation to move toward a new phase in searching for the most efficient refugee protection based in international

31 UN General Assembly, Report of the High Commissioner for Refugees, Global Compact on Refugees, UN Doc. A/73/12 (Part II), 2 August 2018.

32 World Migration Report (2020), 1-2.

law.³³

However, there is still reluctance to reach consensus in defining climate refugees who equally and, we dare say, desperately need legal protection. In this context, the political will of States expressed in the two global compacts might therefore serve as an important starting point for present and future cooperation among different stakeholders³⁴ focused on finding a durable solution for protracted refugee situations.³⁵

In the meantime, one of the potential pathways for the protection of climate refugees has been explored through international human rights law. In this context, we shall now turn to the analysis of the UN HRC decision in the *Teitiota* case.

4 THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS – THE IMPACT OF THE UN HRC DECISION IN TEITIOTA

The relationship between climate change and human rights is increasingly recognised not only in international law literature, but also by UN human rights bodies, particularly the UN HRC.³⁶ Its decision in the *Teitiota*³⁷ case adopted in 2019 represents a significant step forward in recognising that climate migrants can, under specific circumstances, seek legal protection under human rights law.

As a citizen of the Republic of Kiribati, a Central Pacific Ocean state facing life-threatening conditions due to rising sea levels, Ioane Teitiota sought asylum in New Zealand, but his asylum application was denied by all judicial instances.³⁸ Eventually,

33 Kevin Appleby, “Strengthening the Global Refugee Protection System: Recommendations for the Global Compact on Refugees”, *Journal on Migration and Human Security* 5, N° 4 (2017): 780 *et seq.*

34 For a more detailed analysis of the meaning of the principle of international cooperation between States and the principle of solidarity to develop and implement cooperative responses to refugee movement, see Volker Turk and Madeline Garlick, “From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees”, *International Journal of Refugee Law* 28, N° 4 (2016): 656 *et seq.*

35 Global Compact on Refugees (2018), para. 85. Similar progress has also been made through the Swiss-Norwegian led Nansen initiative which seeks to improve States’ preparedness and response capacity to address cross-border disaster displacement. See *The Nansen Initiative*, visited 8 October 2020, <https://www.nanseninitiative.org/>. See also Atapattu, “A New Category of Refugees? ‘Climate Refugees’ and a Gaping Hole in International Law”, in: Behram and Kent, eds., *‘Climate Refugees’ Beyond the Legal Impasse? A New Category of Refugees?*, 47.

36 Human Rights Committee is the body of independent experts whose task is to monitor the implementation of the International Covenant on Civil and Political Rights by its States Parties. It was established by the Covenant in 1966. For more on the work of the HRC, see *United Nations Human Rights Office of the High Commissioner*, visited 5 October 2020, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>. See also the International Covenant on Civil and Political Rights, 1966, New York, UNTS, vol. 999, I-14668, 1976.

37 *Ioane Teitiota v. New Zealand* (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020. Available at *Refworld*, visited 5 October 2020, <https://www.refworld.org/cases,HRC,5e26f7134.html>.

38 Kelly Buchanan, “New Zealand: “Climate Change Refugee” Case Overview”, *The Law Library of Congress, Global Legal Research Center* (2015), <https://www.loc.gov/law/help/climate->

Teitiota addressed the UN HRC, asserting that under Article 6 of the International Covenant on Civil and Political Rights New Zealand had violated his right to life by sending him back to Kiribati. Although the final decision of the Committee was not in Teitiota's favour, it contains important assertions in regard to the connection between the human rights obligations of States and climate migration.

The Committee established "that environmental degradation can compromise effective enjoyment of the right to life and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life".³⁹ Furthermore, the Committee made a reference to the obligation of non-refoulement in the context of international refugee law and human rights law, saying that it "may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status. Thus, States parties must allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against refoulement".⁴⁰

The decision is considered a global precedent as it represents an important contribution to the capacity of international human rights law to deal with climate change migration, achieved through the expansion of the scope of application of the right to life guaranteed by the International Covenant on Civil and Political Rights, and of the obligation of States to carefully comply with the principle of non-refoulement in accordance with international law. However, the criteria for the activation of the non-refoulement principle for the protection of the right to life set therein are so high and are almost impossible to satisfy so that it seems that the Committee upheld the right for the protection of climate refugees only in the most exceptional cases which, in our opinion, could mean that protection for the vast majority of climate refugees would be unattainable.⁴¹

5 LEGAL PROTECTION OF CLIMATE MIGRANTS IN THE EU

The aforementioned legal gap regarding the protection of climate migrants in binding international law has also not been adequately filled at the EU level. EU policy documents first recognised the correlation between environmental degradation

[change-refugee/new-zealand-climate-change-refugee-case.pdf](#).

39 *Ioane Teitiota v. New Zealand* (2020), paras. 9.4.-9.5.

40 *Ioane Teitiota v. New Zealand* (2020), para. 9.3. The right not to be subject to torture, cruel, inhuman, or degrading treatment or punishment, along with the right to life, are the two rights protected under international law which give rise to an obligation of non-refoulement. See more in McAdam, *Climate Change, Forced Migration, and International Law*, 52-98. For a critical assessment of the requirement of imminence of harm, see Adrienne Anderson *et al.*, "Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection", *International and Comparative Law Quarterly* 68, N° 1 (2019): 139-140.

41 A similar view has been expressed in the Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), point 5.e "It would indeed be counterintuitive to the protection of life, to wait for deaths to be very frequent and considerable, in order to consider the threshold of risk as met." See *Ioane Teitiota v. New Zealand* (2020), Annex 2.

and migration in 1999 and characterised them as pressure on EU's immigration and justice policies.⁴² Further in-depth analysis of the link between climate change and migration was provided in the Commission staff working document of 2013, which emphasised the need for further research, data collection, cooperation and action through EU development and humanitarian aid policies.⁴³ The European Parliament has so far commissioned two studies on the topic which provide a critical assessment of the existing global and EU-wide mechanism for addressing climate migration.⁴⁴ In its 2017 Resolution, the European Parliament called on the EU to "take a leading role in recognising the impact of climate change on mass displacement" and pointed out the need for a "special international protection status" which should be given to persons displaced by climate change.⁴⁵

Despite these developments, the EU legislative framework has not yet been amended to adequately address the issue of climate migration.⁴⁶ Several existing legislative options have been analysed as a potential means for the legal protection of climate migrants. The Qualification Directive (Directive 2011/95/EU), which sets the conditions for a person to qualify for refugee status or subsidiary protection, *de facto* contains the same definition of refugee as the RC and therefore in principle does not apply to climate migrants, nor does it leave much scope for granting subsidiary protection as currently interpreted by the Court of Justice of the EU.⁴⁷ The Temporary Protection Directive (Council Directive 2001/55/EC) has been identified as a potential entry point in the case of rapid onset disasters, but has never been triggered in practice. The Return Directive (Directive 2008/115/EC) might be used to ensure that return does not violate the principle of non-refoulement, but there are no EU harmonised rules to trigger this obligation in the case of environmental disasters. As another option, the granting of humanitarian visas on the basis of the Visa Code might be approved, but

42 European Parliament Resolution on the Environment, Security, and Foreign Policy A4-0005/99, OJ L28, 28 January 1999.

43 European Commission, Commission staff working document on Climate change, environmental degradation, and migration, SWD(2013) 138 final, 35.

44 Albert Kraler, Caitlin Katsiaficas and Martin Wagner, "Climate Change and Migration - Legal and Policy Challenges and Responses to Environmentally Induced Migration", Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament (2020). Visited 2 October 2020. [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU\(2020\)655591_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU(2020)655591_EN.pdf).

45 European Parliament Resolution of 5 April 2017 on addressing refugee and migrant movements: the role of EU External Action (2015/2342(INI)), OJ C 298, 23 August 2018, point 31.

46 It should be noted though that the legislation of some Member States, such as Italy, Finland and Sweden, offers protection grounds which can apply to environmental migrants. Kraler, Katsiaficas and Wagner, "Climate Change and Migration - Legal and Policy Challenges and Responses to Environmentally Induced Migration", 77.

47 Kraler, Katsiaficas and Wagner, "Climate Change and Migration - Legal and Policy Challenges and Responses to Environmentally Induced Migration", 71-72. See also Eugénie Delval, *From the U.N. Human Rights Committee to European Courts: Which Protection for Climate-Induced Displaced Persons under European Law?*, 8 April 2020, visited 12 October 2020, <https://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/>.

this would not solve the issue of the residence status of a climate migrant.⁴⁸

As identified in the 2020 Parliament Study, neither the Court of Justice of the EU nor the European Court of Human Rights have yet heard a case concerning the legal protection of a climate migrant.⁴⁹

6 LACK OF LEGAL PROTECTION FOR CLIMATE MIGRANTS AND ITS POTENTIAL CONSEQUENCES ON THE RULE OF LAW

The aforementioned lack of legal certainty and protection at the international level which climate migrants could rely on cannot be disregarded when examining the phenomenon of climate migration. With this in mind, the paper will now examine the relationship between climate change, climate migration, and the rule of law.

Extreme weather events and droughts caused by climate change can jeopardise water and food supplies and thereby endanger the livelihoods of local communities,⁵⁰ which can lead to migration. The scarcity of resources can, in interaction with other factors, lead to conflict.⁵¹ The most widely researched example of such a development can be found in the Syrian civil war. A well-known study closely linked the extreme droughts caused by climate change which took place between 2007 and 2010 to the loss of livelihood and mass migrations into urban areas, where mass protests led to the civil war that followed.⁵² Other studies were more cautious to establish the link: they confirmed the likelihood that the droughts induced mass internal displacements, but emphasise other political factors which played an important role in the initiation of the conflict.⁵³ Naturally, complex social developments can hardly be traced to a single cause. However, in the abstract, the plausibility that the scarcity of basic human needs, such as food, water and shelter, can lead to mass dissatisfaction with the regime which is unable or unwilling to provide relief to the most affected parts of the population can hardly be denied. A potential violent conflict, which would result in damage to the infrastructure and would disrupt public services, is likely to make the country even

48 Kraler, Katsiaficas and Wagner, “Climate Change and Migration - Legal and Policy Challenges and Responses to Environmentally Induced Migration”, 73-74.

49 Kraler, Katsiaficas and Wagner, “Climate Change and Migration - Legal and Policy Challenges and Responses to Environmentally Induced Migration”, 88. For an analysis of the case-law which might be applicable to such a situation, see 79-82.

50 Intergovernmental Panel on Climate Change (2014), 761.

51 Daniel Abrahams and Edward R. Carr, “Understanding the Connections Between Climate Change and Conflict: Contributions from Geography and Political Ecology”, *Current Climate Change Reports*, Vol. 3, N° 4 (2017): 239.

52 Colin P. Kelley *et al.* “Climate Change in the Fertile Crescent and Implications of the Recent Syrian Drought”, *Proceedings of the National Academy of Sciences* 112, N° 11 (2015): 3241-3246; Abrahm Lustgarten, “The Great Climate Migration”, *The New York Times*, visited 1 March 2021, <https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html>.

53 Tobias Ide, “Climate War in the Middle East? Drought, the Syrian Civil War and the State of Climate-Conflict Research”, *Current Climate Change Reports*, N° 4 (2018): 6; Konstantin Ash and Nick Obradovich, “Climatic Stress, Internal Migration, and Syrian Civil War Onset”, *Journal of Conflict Resolution* 64, Vol. 4, N° 4 (2020): 22-23.

more exposed to the negative effects of climate change.⁵⁴ This, in turn, puts additional pressure on scarce domestic resources and makes further migration flows more likely.

The current global governance of climate migration offers no guarantees that climate migrants will enjoy legal and other types of adequate support and protection in their home or host country. For most people, migration is the last resort and they are generally unwilling to move, especially abroad, unless they are forced to. When a person in these circumstances decides to move, migration takes place regardless of the legal protection offered to such migrants. However, the current system where climate migrants face a high level of legal uncertainty is more likely to lead to the postponement of migration until it is unavoidable, and therefore to sudden spikes in mass migration. Host countries, if unprepared for the sudden intake of a higher number of migrants, might face a lack of domestic support for migration-friendly policies. During the past decade, a rise in populism directed against immigration, among other issues, has occurred across the world, and what is most concerning is that this has taken place in the US and the EU,⁵⁵ which have traditionally served as global promoters of the rule of law and human rights.⁵⁶ The fact that migrants come from regions affected by violent conflicts where a rise in extremism has taken place has only helped the spread of fear-mongering in host states and has led to the fuelling of the populist movement.

Populist movements with strong anti-immigration views have had different outcomes for the rule of law. Their positions are reflected in the anti-immigration policies of some EU Member States, such as Hungary and Poland, which, together with Austria, Bulgaria, and the Czech Republic, withdrew from the negotiations of the Global Compact on Migration,⁵⁷ just like the US, which also opposed the Global Compact on Refugees.⁵⁸ In other EU Member States, such as the UK at the time, Germany, Italy and France, these movements strongly influenced political agenda-

54 Intergovernmental Panel on Climate Change (2014), 758.

55 Martin Eiermann, Yascha Mounk and Limor Gultchin, "European Populism, Trends, Threats and Future Prospects", Tony Blair Institute for Global Change, visited 13 October 2020, <https://institute.global/sites/default/files/articles/European-Populism-Trends-Threats-and-Future-Prospects.pdf>; Jon Henley and Francesca Bignami, "Introduction", in: *EU Law in Populist Times Crises and Prospects*, ed. Francesca Bignami (Cambridge: Cambridge University Press, 2019), <https://doi.org/10.1017/9781108755641.001>; "What is the current state of the migration crisis in Europe?", *The Guardian*, 21 November 2018, visited 13 October 2020, <https://www.theguardian.com/world/2018/jun/15/what-current-scale-migration-crisis-europe-future-outlook>, The Migrant Crisis and the rise of Populism in Europe, visited 13 October 2020. <https://www.arcgis.com/apps/Cascade/index.html?appid=d63ba0dce8c346ba133ca055180e455>.

56 Gerald L. Neuman, "Populist Threats to the International Human Rights System", in: *Populist Threats to the International Human Rights System in Human Rights in a Time of Populism – Challenges and Responses*, ed. Gerald L. Neuman, (Cambridge: Cambridge University Press, 2020), 10.

57 Pauline Melin, "The Global Compact for Migration: Lessons for the Unity of EU Representation", *European Journal of Migration and Law* 21, N° 2 (2019): 195.

58 Neuman, "Populist Threats to the International Human Rights System", in: Neuman, ed., *Populist Threats to the International Human Rights System in Human Rights in a Time of Populism – Challenges and Responses*, 14.

setting.⁵⁹ As pointed out by Lacey, populist movements can have a negative impact on the rule of law by threatening some of its main premises, such as by openly attacking the independent judiciary and questioning equality before the law and respect of human rights.⁶⁰ Furthermore, as summarised by Neuman, “populists often try to entrench themselves in power, dismantling legal guarantees of fair electoral competition, and disrespecting the political rights of everyone, including their own constituency. They also express impatience with institutional checks and balances, and may seek to take over, replace or abolish independent components of government, such as the judiciary and other watchdog agencies”. All of these values are present in the UN’s definition of the rule of law and they therefore represent common values of the international community.⁶¹ Populist movements across the globe have struck at the foundations of these values. One factor which all of them have in common is a strong anti-immigration stance. A more systematic global approach to climate migration might alleviate sudden spikes in cross-border migration that are particularly prone to contribute to the rise of populism.

7 CONCLUSION

It is without doubt that climate change is contributing to the migration of communities hit by extreme weather events, such as droughts, floods, and rising sea levels to name a few, and that these migrations are likely to keep occurring in the future. The rapid pace of climate change which is in strong contrast to the slow pace of the global governance of climate migration and the difficult position of climate migrants, as well as the inadequacy of the international framework regulating their legal protection, can no longer be ignored by the international community. However, as pointed out by McAdam, it seems that the adoption of a new legally binding international instrument is not realistic.⁶² Existing soft law mechanisms, such as the global compacts mentioned, and regional initiatives provide a good starting point for addressing this issue, but further efforts on their implementation are crucial. The Nansen Initiative, which has led to the adoption of the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, the Global Platform for Disaster Risk Reduction, the 2030 Agenda for Sustainable Development, along with various regional initiatives in Europe, the Pacific and South

59 Nicola Lacey, “Populism and the Rule of Law”, *Annual Review of Law and Social Science* 15 (2019): 86-87.

60 Lacey, “Populism and the Rule of Law”, 89-92.

61 *United Nations and the Rule of Law*, visited 2 October 2020, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>. However, for a critique of the limits of a list-based definition of the rule of law, see Martin Krygier, “What’s the Point of the Rule of Law”, *Buffalo Law Review* 67, N° 3 (2019):743-792.

62 Jane McAdam. “Climate Change-Related Displacement of Persons”, in: *The Oxford Handbook of International Climate Change Law*, eds. Kevin R. Gray, Richard Tarasofsky and Cinnamon Carlarne (Oxford: Oxford University Press 2016), 531-534; Kraler, Katsiaficas and Wagner, *Climate Change and Migration - Legal and Policy Challenges and Responses to Environmentally Induced Migration*, 64.

America, have so far provided assistance in raising global awareness about climate migration, resilience building, and exchange of best practices.

Nevertheless, adequate support for all categories of climate migrants is still lacking, especially for the most vulnerable who did not choose to abandon their homeland but were compelled to do so due to the life-threatening consequences of climate change. The recent decision of the UN HRC provides the first important step in this regard. However, it should be emphasised that even though judicial decisions can ease the international deadlock with regard to the better legal protection of climate migrants, they cannot substitute a large-scale coherent and systematic approach towards climate migration which is needed between the members of the international community. Climate migration should not be observed only as a problem which needs to be remedied, but also as an opportunity for host states to welcome new labour capacities.⁶³ A good example of such practice can be found in seasonal worker schemes, which enable temporary climate migrants to enter the workforce of a host country for a limited period in order to gain resources which can be invested in ensuring their livelihoods in their home countries.⁶⁴

A comprehensive international approach to the protection of climate migrants, together with continued and increasing good practices established through the abovementioned regional and bilateral cooperation, would help the global community to respond in a planned and systematic way to the challenges which climate change will bring in the coming decades. Such a response of the global community could also alleviate the threat to the rule of law, since the current system of *ad hoc* responses to climate migrants which constitute shocks on national political agendas is more likely to fuel a rise in anti-immigration populist movements.

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63 Kraler, Katsiaficas and Wagner, "Climate Change and Migration - Legal and Policy Challenges and Responses to Environmentally Induced Migration", 87.

64 Kraler, Katsiaficas and Wagner, "Climate Change and Migration - Legal and Policy Challenges and Responses to Environmentally Induced Migration", 75-76.

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Sažetak

IZAZOVI ZA POSTOJEĆI MEĐUNARODNI OKVIR I VLADAVINU PRAVA: ČINI LI MEĐUNARODNA ZAJEDNICA DOVOLJNO ZA ZAŠTITU KLIMATSKIH MIGRANATA?

U ovom radu istražuje se postojeća razina pravne zaštite klimatskih migranata u međunarodnom pravu i pravu EU, kao i posljedice koje bi sadašnji pristup mogao imati na vladavinu prava. Najprije se analizira pružaju li postojeći pravno obvezujući instrumenti izbjegličkog i klimatskog prava klimatskim migrantima zaštitu i u tom pogledu se primjećuje pravna praznina. Zatim se istražuje napredak koji je postignut nedavno usvojenim *soft law* instrumentima i odlukom Odbora UN-a za prava čovjeka u slučaju *Teitiota*, koja, iako štiti pravo na *non-refoulement*, istovremeno postavlja stroge uvjete za njegovo ostvarenje, koji mogu ugroziti njegovu primjenu. Naredni dio rada analizira postojeću literaturu o vezi između klimatskih promjena i migracija na primjeru građanskog rata u Siriji, jačanje antiimigracijskog populizma koji je uslijedio te prijetnju koju takvi pokreti mogu nanijeti vladavini prava. Autorice zaključuju da bi planski i sustavni pristup međunarodne zajednice klimatskim migracijama te nastavak dobrih bilateralnih i regionalnih praksi razini mogli doprinijeti sprječavanju naglih porasta masovnih migracija, koji mogu dovesti do širenja antiimigracijskih populističkih pokreta.

Ključne riječi: klimatske migracije; međunarodno izbjegličko pravo; slučaj Teitiota; vladavina prava; populizam.

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