UNIVERSITY OF LJUBLJANA
FACULTY OF SOCIAL SCIENCES

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Climate Change and Forced Migration: Addressing the Gap in International Law

Podnebne spremembe in prisilne migracije: obravnava pravne praznine v mednarodnem pravu

Master's Thesis

Ljubljana, 2015

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ABSTRACT

Climate Change Forced Migration: Addressing the Gap in International Law

As early as 1990 the Intergovernmental Panel on Climate Change (IPCC) warned the international community that the greatest single impact of climate change may be on human migration (IPCC 1990, 9). Despite this warning, the issue of cross national border climate change forced migration has received little attention, and constitutes a normative gap in the international legal system. How best to address this gap remains an issue that is sharply contested. So far, many solutions have been proposed, but mainly from a moral perspective. This master's thesis addresses the issue from a legal perspective, examining existing and *de lege ferenda* sources of State obligations and their responsibility, in order to examine potential legal responses to the issue. The final chapter of this thesis examines the various proposed legal approaches against three country case studies - Tuvalu, Somalia and Bangladesh - in order to examine whether the proposed international legal approaches speak to "the local and the particular" circumstances in each (McAdam 2011b, 130).

KEY WORDS: Climate change, migration, international law, State responsibility, refugee law, human rights.

Podnebne spremembe in prisilne migracije: obravnava pravne praznine v mednarodnem pravu

Že leta 1990 je Medvladni odbor za podnebne spremembe (IPCC) mednarodno skupnost opozoril, da bi lahko bila ena izmed največjih posledic podnebnih sprememb njihov vpliv na migracije (IPCC 1990, 9). Kljub opozorilu je bila problematika prisilnih mednarodnih migracij kot posledica podnebnih sprememb deležna malo pozornosti in predstavlja normativno praznino v mednarodnem pravnem sistemu. Kako jo najbolje naslavljati, še naprej ostaja zelo polemično vprašanje. Doslej je bilo predlaganih veliko rešitev - predvsem z moralnega vidika; v magistrskem delu pa se osredotočamo na problematiko s pravne perspektive s tem, ko preučujemo obstoječe in *de lege ferenda* vire obveznosti nacionalnih držav in njihovih odgovornosti, da bi preučili možne pravne odgovore na problematiko. V zadnjem poglavju pa obravnavamo več pravnih pristopov na primeru treh držav - Tuvaluja, Somalije in Bangladeša, s čimer želimo preveriti, ali predlagani mednarodnopravni pristopi upoštevajo lokalne in partikularne okoliščine v vsakem izmed primerov (McAdam 2011b, 130).

KLJUČNE BESEDE: podnebne spremembe, migracije, mednarodno pravo, odgovornost držav, begunska zakonodaja, človekove pravice.

CONTENTS

ACRONYMS AND ABBREVIATIONS

BBC	British Broadcasting Corporation
COP	Conference of the Parties to the United Nations Framework Convention on Climate Change
Convention Against Torture	1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ECHR	1950 European Convention on Human Rights
IACHR	Inter American Commission on Human Rights
ICCPR	1966 International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
IOM	International Organisation for Migration
IPCC	Intergovernmental Panel on Climate Change
NGO	Non Governmental Orgainsation
NRC	Norwegian Refugee Council
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
Refugee Convention	1951 Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees
RRTA	Refugee Review Tribunal Australia
RSAA	Refugee Status Appeals Authority (New Zealand)
UN	United Nations
UNCLOS	1982 United Nations Convention on the Law of the Sea
UNFCCC	1992 United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UPR	Human Rights Universal Periodic Review
VCLT	1969 Vienna Convention on the Law of Treaties

CHAPTER 1: INTRODUCTION

As early as 1990 the Intergovernmental Panel on Climate Change (IPCC) warned the international community that the greatest single impact of climate change may be on human migration (IPCC 1990, 9). The issue of climate change forced migration has gained prominence within the international sphere over recent decades with some stark and alarming examples of how the issue is likely to manifest - in May 2005 the government of Papua New Guinea was forced to evacuate the Cateret Islands in the South Pacific due to rising sea levels and saltwater intrusion in the water supply (Vidal 2005), and between 2008 and 2013, the population of the Kiribati village of Tebunginako has had to relocate for the same reasons (Office of the President of the Republic of Kiribati 2013). By 2008, estimates of the number of people displaced by climate change had already reached 25 million, exceeding the number of people displaced by conflict over the same period (Brown 2008, 11).[1]

It is estimated that by 2050 the total number of people experiencing serious inundation due to sea level rise alone will reach over 162 million worldwide.[2] The majority of these people will come from developing countries which have contributed negligibly to the problem of climate change (Meyers 2002, 611). The issue has proven itself to be one in need of international attention, but to date it has been afforded little. While some discussions on the

[1] Located primarily in Sub-saharan Africa, India, China, Mexico and Central America (Brown 2008, 11).

[2] These estimates vary and depend on definitions amongst other factors, but, none the less, are significant. Estimates also include 26 million displaced in Bangladesh, 12 million in Egypt, 73 million in China, 20 million in India and 31 million in small island States (Myers 2002). Laczko and Aghazarum (2009, 3) suggest that total numbers vary from 25 million to 1 billion people with a figure of 200 million being the most widely cited estimate. The issue to climate change forced migration will disproportionately impact developing countries who have contributed negligibly to the problem of climate change (*ibid.*).

topic of environmental migration[3] have taken place, progress on the matter has been very slow (Regna-Gladin 2013).[4]

The issue of climate change forced migration[5] cuts across many areas of international law - from refugee law to climate change law, human rights law to the law of the sea, and general principles of environmental law. However, it fits specifically within none (McAdam 2011a, 7; Kälin and Schrepfer 2012).[6] Legal protection of people displaced across national borders by climate change currently constitutes a gap in in the international legal system. How best to fill this gaps remains an issue that is sharply contested (Regna-Gladin 2013; McAdam 2009; Hodgkinson *et al.* 2009; Hodgkinson *et al.* 2010; Norwegian Refugee Council (NRC) 2011, 14—15).[7] This master's thesis examines the different legal approaches to addressing the gap

[3] There is no internationally agreed definition of environmental migration. Various authors have defined the term differently (Piguet *et al.* 2011, 18). In 2007 the International Organisation for Migration (IOM) proposed the following working definition: "Environmental migrants are persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad" (IOM 2007, 2). This working definition was intended to encompass forced as well as voluntary migration, internal and international migration, short and long term migration (IOM 2007, 2). Various other authors have used different terms including "environmentally induced population movements" (Kliot 2004), "environmentally displaced persons" (Interdisciplinary Centre of Research on Environmental, Planning and Urban Law (CRIDEAU) and Research Centre on Persons Rights (CRDP) 2008) and "environmental refugees" (Cooper 1998; El-Hinnawi 1985). UN Environment Programme researcher Essam El-Hinnawi defined environmental refugees as "those people who have been forced to leave their traditional habitat, temporarily or permanently, because of marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life" (El-Hinnawi 1985, 4). This thesis deals exclusively with the issue of climate change forced or induced migration, which could be seen as a sub category of environmental migration. The terms "climate change forced", or "climate change induced migration" is discussed in footnote 5 below.

[4] Climate change is projected to lead to increased global temperatures, changed rainfall patterns and sea level rise. In some areas it is expected to influence the duration or frequency of droughts, floods and other extreme events including tropical cyclones, storms and king tides. The impacts of these changes are expected to negatively impact agricultural productivity, water availability, increase the incidence of some diseases, damage coastal and terrestrial ecosystems, and exacerbate poverty and conflict (IPCC 2014). Kälin (2010, 84) outlines that climate change may cause displacement due to "sudden onset disasters" - such as flooding, or mudslides caused by heavy rain, or "slow onset environmental degradation"- caused by rising sea levels, salinisation of ground water, droughts or desertification. Kälin also distinguishes three further types of displacement, singling out small island States who risk "disappearing from the surface of the earth" as a special case, with the last two cases being those displaced indirectly by climate change - due to authorities designating certain areas as uninhabitable, or due to unrest arising as a result of climate change impacts (for example, lack of resources such as water).

[5] Many scholars have discussed and debated definitions and the language used to refer to people displaced as a result of climate change (see for example Piguet *et al.* (2011); Castles (2001) and DaSilva (2009)). This thesis uses the terminology climate change forced migration or climate change induced migration. This language was chosen as it is descriptive rather than prescriptive. As is discussed later in this thesis, those who are forced to move as a result of climate change do not fit the definition of a refugee under the Refugee Convention, and in some cases, those who move do not wish to be referred to as refugees. See chapters 2.1 and 4.1.

[6] International law only recognises a very small class of forced migrants as people whom other countries have an obligation to protect: "refugees", "Stateless persons", and those eligible for complementary protection. This is discussed further in chapter 2.

[7] Bilateral, regional and political (non legal) approaches to addressing the issue have also been suggested and have considerable merit. Due to word limit constraints, these approaches are not the focus on this research.

in the international legal system regarding forced cross-national border migration resulting from climate change.[8] So far many solutions have been proposed, but mainly from a moral perspective. This thesis addresses the question from the legal perspective, including the issues connected with the responsibility of States.

In addition to the introductory chapter and the conclusion, this thesis is composed of three main chapters. Chapter two examines existing legal frameworks and *de lege ferenda* sources of State obligations and their responsibility arising from treaty and customary international law. It analyses refugee law; human rights law; and environmental law including climate change law and the law of the sea.

Chapter three draws upon these sources to analyse the various proposed approaches to filling the gap in the international legal system regarding climate change induced cross-national border migration. Chapter three includes five parts which outline and discuss each of the different potential legal approaches - including protection under the Convention relating to the Status of Refugees and its 1967 Protocol (Refugee Convention); through human rights law and complimentary protection measures; under the United Nations Framework Convention on Climate Change (UNFCCC); through the creation of a new convention addressing specifically the issue of climate change forced migration; and lastly, through other approaches such as the creation of "soft law" guiding principles, or regional and sub-regional approaches.

Lastly, chapter four examines how each of the proposed legal approaches would apply to three solid country cases - Tuvalu, Somalia and Bangladesh. McAdam (2011, 130) has stated that in the case of climate change forced migration "the local and the particular" do not always speak well to international law. Hence, the aim of the last chapter is to ground the fairly abstract legal approaches to solid country cases, and to examine whether these approaches are likely to accommodate the "local and particular" circumstances of these States. Tuvalu, Somalia and Bangladesh are particularly vulnerable to the impacts of climate

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McAdam (2011, 54) argues that legal and policy responses must involve a combination of strategies, rather than an either/or approach. The need for complementarity between theses approaches will be considered briefly in chapter four.

[8] "Climate change" is defined in the UNFCCC 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" (UNFCCC 1992, Art. 1). The bulk of climate change induced displacement is likely to be, at least initially, internal. However, this thesis is focused on protection gaps associated with cross national border migration.

change, and are already experiencing cases of cross border migration linked to climate change.[9]

This thesis is guided by the following research question: What are the possible approaches to filling the current gap in the international legal system related to climate change forced migration? The primary methods used for this thesis are literature reviews, and an analysis of primary and secondary sources including international jurisprudence, applicable treaties and other legal documents related to climate change forced migration. The final method used is three case studies.

[9] The IPCC (2014) has outlined that the areas most vulnerable to the impacts of climate change are low-lying island States, the sub-Saharan African region and coastal and deltic countries. The three chosen cases provide one example of each.

CHAPTER 2: SOURCES OF STATE OBLIGATIONS AND RESPONSIBILITY

This chapter examines existing legal frameworks and *de lege ferenda* sources of State obligations and their responsibility related to climate change forced migration arising from treaty and customary international law. It includes three parts which address the different areas of international law where obligations or responsibility may arise: refugee law; human rights law; and environmental law including climate change law and the law of the sea. The chapter discusses the Refugee Convention; the Universal Declaration of Human Rights as well as some specific human rights treaties; the UNFCCC; the United Nations Convention on the Law of the Sea (UNCLOS), as well as the "no harm rule" which is a well-established principle of customary international environmental law. [10] The chapter considers responsibilities or obligations regarding the rights of both individuals and States as part of each sub-chapter as relevant to the area of law in question. The primary methods used for this chapter is a literature review and analysis of primary and secondary sources including international jurisprudence, applicable treaties and other legal documents.

There are some instances in which treaty law and/or customary law (as it stands, or as it is potentially evolving), may require States to offer protection to certain kinds of climate change forced migrants. There are also instances where there are protection gaps, but where States may be obliged to compensate for damages caused due to climate change. This chapter examines both instances as a basis for chapter three.

The Law of State Responsibility

State responsibility is a fundamental principle of international law. It arises out of the nature of the international legal system and the doctrines of state sovereignty and equality of States (Shaw 2008, 778). In international law, States are responsible for violations of public international law and are obliged to compensate the directly or indirectly affected States for

[10] The no harm rule obliges a State, in a transboundary context, "to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" (International Court of Justice (ICJ) 2010, para. 197). This principle and corresponding legal duty, has been supported in international cases (Verheyen 2005; Voight 2008). The no harm rule is the basis upon which Palau is seeking an advisory opinion from the ICJ. In his September 2011 statement, President Toribiong of Palau had asked the General Assembly, which can refer matters to the Court, to "seek, on an urgent basis […] an advisory opinion from the ICJ on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other States" (United Nations News Centre 2011). Palau have faced a challenge in gaining the support needed from other members of the UN General Assembly, who would need to vote to submit this request for an advisory opinion to the ICJ (Kysar 2013).

the damage caused (Tol and Verheyen 2004, 1111).[11] However, many points of dispute or ambiguity remain and are yet to be tested (Verheyen 2005, 225). In 2001 the International Law Commission (ILC) [12] prepared Draft Articles on the Responsibility of States for Internationally Wrongful Acts (draft Articles). The draft Articles were included as an annex to UN General Assembly resolution 56/83 in December 2001 (UN General Assembly 2001). States are still discussing whether to adopt the draft Articles as an international convention, or to leave them as an annex to a resolution and commend them to the attention of governments (UN General Assembly 2013). Nonetheless, the draft Articles are useful in examining the conditions and consequences of State responsibility for climate change damage, including instances of forced migration (Tol and Verheyen 2004, 1111).

The draft Articles (provided at Annex A) outline that where a "breach of an international obligation by a State" exists (Art. 12)[13] the "responsible State" is under an obligation to "make full reparation for the injury caused" (Art. 31.1) or to "compensate" for damage that can not be "made good by restitution" (Art. 36.1). Article 31 outlines that "injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State" (Art. 31.2).14 A breach must be of an obligation by which the State is bound at the time of the act (Art. 13), and must be "attributable to the State" (Art. 2).[15]

The Articles also account for plurality of responsible States (Art. 47), which is significant in the case of climate change, where there are multiple States who are responsible for damaging activities which could potentially constitute a breach of an international obligation. Article 47 provides that: "Where several States are responsible for the same internationally

[11] See also Permanent Court of International Justice. 1927. *Case Concerning the Factory at Chorzów (Germany v. Poland) (Jurisdiction)* Permanent Court of International Justice Reports Ser. A Nr.7, 30, Para. 21. In this case the Court affirmed that when a State commits an internationally wrongful act against another State international responsibility is established between the two States. For an analysis of the law of State Responsibility see Tomuschat (1999).

[12] The ILC is a UN body entrusted with promoting the codification and development of international law (ILC 2001).

[13] This also includes conduct of organs of a State (Art. 4), or persons or entities exercising elements of governmental authority (Art. 5). See Annex A, Chapter II. Conduct attributable to the State can consist of actions or omissions (ILC 2001, Art. 2 Commentary, para. 4).

[14] Article 36.2 provides that "compensation shall cover any financially assessable damage … insofar as it is established." A breach of an obligation be made up of "a series of actions or omissions defined in aggregate as wrongful" (Art. 15).

[15] The Articles lay down no general rule in regard to attribution. The ILC (2001, Art. 2 Commentary para. 3) outline that in the context of "attribution", standards, "whether they involve some degree of fault, culpability, negligence or want of due diligence", vary from one context to another for "reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation". The Articles also provide that "in the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought" (Art. 39).

wrongful act, the responsibility of each State may be invoked in relation to that act". The Commentary accompanying Article 47 outlines that "responsibility is not diminished or reduced by the fact that [multiple] States are also responsible for the same act" (ILC 2001, Art. 47, Commentary para. 1).[16] Article 48 also outlines that responsibility can be invoked by a state other than an injured state if "the obligation breached is owed to a group of States" (Art. 48.2(a)), or if "the obligation breached is owed to the international community as a whole" (Art. 48.2(b)). This Article could prove significant in the context of damage caused by climate change, in that the most injured States are likely to be those with the least capacity to make a claim (IPCC 2014). Article 48 potentially provides that a State with greater capacity (in terms of financial resources) could make a claim on behalf of multiple States (including developing States or least developed States) for injury caused by climate change. There are several instances outlined below in which this responsibility may arise. It is outlined only in broad terms acknowledging that fulfilling each of the requirements to prove a breach of an international obligation would require detailed and specific technical work.

2.1 REFUGEE LAW

Convention Relating to the Status of Refugees and its 1967 Protocol

The 1951 Untied Nations Convention Relating to the Status of Refugees and its 1967 Protocol are the centre of the international legal framework dealing with the protection of refugees. The Refugee Convention was designed with a specific narrow scope. It endorses a single definition of the term "refugee" emphasising the protection of persons fleeing from political or other forms of persecution. According to the Convention, a "refugee" is someone who is "unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion" (Refugee Convention 1951, Art. 1).[17] Hence, the Refugee Convention does not extend the obligation for protection to people displaced by climate change as it is currently understood.

[16] "Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act." (ILC 2001, Art. 47, Commentary para. 1).

[17] Article 1. Refugees is defined as a person who: "owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (Refugee Convention Art. 1).

Identifying a persecutor is part of the problem. Often when the Refugee Convention is invoked, the government is failing to offer protection to its citizens. In the case of some low-lying island States vulnerable to climate change, such as Tuvalu and Kiribati, the government is willing to protect its citizens, but its ability to do so being hindered (albeit indirectly) by the actions of other high polluting States (McAdam 2011, 116). Ironically, as McAdam (2011, 116) and Weiss (2015, 53) point out, in many cases, climate change induced migrants are "seeking refuge in the very county that has persecuted them". In addition, climate change impacts do not meet current legal understandings of the concept of "persecution", because such persecution implies an element of "motivation for the infliction of harm" (Refugee Review Tribunal Australia (RRTA) 2009, 1168)[18], and must be for reasons of the person's "race, religion, nationality, political opinion or membership in a particular political group" (Estrin and Kenedy 2014, 89). The effects of climate change are indiscriminate, rather than targeting any particular individual for any particular reason (Weiss 2015, 52). The law also requires that the group at risk of persecution must be connected by a "fundamental, immutable characteristic other than the risk of persecution itself" (*ibid.*).

Numerous national courts have supported this narrow definition of a refugee.[19] The High Court of Australia (1997) has stated that the requirement of "persecution" limits the Refugee Convention's "humanitarian scope and does not afford universal protection to asylum seekers". No matter how devastating may be an epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention" (High Court of Australia 1997).[20] Similarly, New Zealand's national court, when dealing with a case of climate change induced migration, expressed sympathy for the case, stating that "refugees" of this type are "worthy objects of assistance and relief by the international community" but expressed that it was not their place to expand the narrow definition of refugee as prescribed in the Refugee Convention (The High Court of New Zealand 2013).[21]

However, so far, there have been some cases in Australia and New Zealand where people from Tuvalu and Kiribati have argued that they should receive refugee protection due to

[18] Refugee Review Tribunal Australia. 0907346 [2009] RRTA, 1168, 10 December.

[19] McAdam (2011, 13) explains that superior courts around the world have reiterated that the Refugee Convention does not cover "individuals in search of better living conditions, and those of victims of natural disasters, even when the home State is unable to provide assistance, although both of these cases might persecution itself. seem deserving of international sanctuary."

[20] High Court of Australia. 1997. *Applicant A v. Minister for Immigration & Ethnic Affairs* [1997] HCA 4; 190 CLR 225, 248.

[21] New Zealand High Court. 2013. *Teitiota vs. The Chief Executive of the Ministry of Business and Innovation and Employment* CIV-2013-404-3528 [2013] NZHC 3125.

climate change impacts, and cases where applicants from Tonga and Bangladesh have sought protection on the basis of natural disasters.[22] Applicants have argued that they faced indirect persecution from human induced climate change (Weiss 2015, 52; RRTA 2009, para.51). In one example, the applicant from Kiribati stated that "the future of [my] country is quite frightening as every year the country sinks further into the sea due to the climate changes. The thought of returning to my country which is facing inevitable disappearance is terrifying" (RRTA 2009)[23]. These cases have all failed.[24] The RRTA (2009, para. 51) found that "there is currently no basis to conclude that countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases, have any element of motivation to have any impact on residents of low-lying countries such as Kiribati, either for their race, religion, nationality, membership of any particular social group or political opinion".

Scholars such as Kälin (2010), however, argue that there are some cases where the Refugee Convention may apply to climate change forced migrants. Recent reports of the IPCC and other scientific papers have emphasised the link between violence, conflict and climate change. For example, the IPCCs most recent fifth assessment report emphasised that "human security will be progressively threatened as the climate changes", and that "climate change is likely to have an influence on some known drivers of conflict" (IPCC 2014b, 755—791). Similarly, Reuveny (2008), de Sherbinin *et al.* (2011) and IPCC (2014, 563) found that climate change could potentially contribute to violent conflicts and hence, spur migration. Kälin (2010) argues that in these cases, if refuge is sought on account of conflict spurred by a climate change induced disaster, and if the government fails to provide assistance, the Refugee Convention would apply.[25] Further, he argues that the same logic may apply to some regional arrangements, such as the 1984 Cartagena Declaration on Refugees (Kälin 2010, 88—89).[26]

[22] See for example: New Zealand cases: *Refugee Appeal No. 72719/2001*, RSAA (17 September 2001) (Tuvalu); *Refugee Appeal No. 72313/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal No. 72314/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal No. 72315/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal No. 72316/2000*, RSAA (19 October 2000) (Tuvalu); *Refugee Appeal Nos 72179–72181/2000*, RSAA (31 August 2000) (Tuvalu); *Refugee Appeal Nos 72189–72195/2000*, RSAA (17 August 2000) (Tuvalu); *Refugee Appeal No. 72185/2000*, RSAA (10 August 2000) (Tuvalu); *Refugee Appeal No. 72186/2000*, RSAA (10 August 2000) (Tuvalu). Australian cases: *1004726* [2010] RRTA 845 (30 September 2010) (Tonga). Further cases in McAdam (2012, 47).

[23] RRTA 0907346 [2009] 1168, 10 December, para. 51.

[24] See note 22 above.

[25] This is the case in Somalia for example - where drought is said to contribute to conflict - leading to displacement, and the government is unable to provide assistance. This is discussed further in chapter 4.2 below.

[26] Two regional refugee instruments define refugees more broadly than the Refugee Convention, potentially offering protection to a larger class of climate change-related migrants. The Organisation of African Unity 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration

United Nations High Commissioner for Refugees

Although climate change forced migration is not explicitly part of the United Nations High Commissioner for Refugees **(**UNHCR) legal mandate (UN General Assembly 1950)[27], the UNHCR has taken an active role in the matter. In 1991, a Working Group on Solutions and Protection within the Executive Committee of the UNHCR reported that there was "a need to provide international protection to persons outside the current international legal definition of refugee [where they were] forced to leave or prevented from returning to their homes because of human-made disasters, natural or ecological disasters" (Schwartz 1993, 355—379). Moreover, the UNHCR has published a series of working papers, policy papers, and guiding principles on the matter.[28] In 2009, the UN High Commissioner for Refugees stated that "climate change could become the biggest driver of displacement" (UNHCR 2009). He noted that he regarded the UNHCR as having a "duty to alert States to these problems and help find answers to the new challenges they represent" (UNHCR 2007b) and outlined that it is a shared responsibility of the international community to ensure that migration and displacement triggered by climate change are systematically considered and addressed. Specifically, the UNHCR has called for the issue to be acknowledged under the UNFCCC and the successor agreement to its Kyoto Protocol (UNHCR 2007b).

2.2 HUMAN RIGHTS LAW

Human Rights Treaties and Human Rights Violations

International Human Right Law is set out in the non-legally-binding Universal Declaration of Human Rights (1948), as well as numerous subsequent legally binding treaties such as the International Covenant on Civil and Political Rights (ICCPR) (1966). Human Rights are also enshrined in various Articles within the UN Charter (Charter of the United Nations 1945, Art. 1, 13(1), 55, 56), and certain human rights may now be regarded as having entered into the category of customary international law in the light of practice (Shaw 2008, 265—341). Although there is widespread acceptance of the importance of human rights, there is some

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on Refugees include in their definition of refugees any individuals fleeing "events seriously disturbing public order" (Cohen and Bradley 2010, 9). Some scholars argue that this may apply to instances where climate change has disturbed public order.

[27] The Statute of the High Commissioner for Refugees and his Office were established in UN General seemly resolution 428 (V) of 14 December 1950. The Statute stipulates that the High Commissioner "acting under the authority of the General Assembly, shall assume the function of providing international protection ... and of seeking permanent solutions for the problem of refugees." However, the Statute is "not the only source of law of the mandate of the High Commissioner and his Office" (UNHCR 2013, 10). Paragraph 9 of the Statute provides for the further evolution of his functions and activities (UN General Assembly 1950).

[28] See for example resources available at: http://www.unhcr.org/4b2910239.html (10 January, 2015).

confusion as to their precise nature and role in international law, for example, over their enforceability (Shaw 2008, 265).

Estrin and Kennedy (2014) of the International Bar Association (IBA) argue that there is little doubt that human rights are affected by climate change. Various human rights, including the right to life, health, shelter, water, food and to be free from hunger, are all clearly and directly affected by climate change (UN Human Rights Council 2009, 15).[29] Moreover, the right to economic and political self-determination, the right to property and culture are all specifically affected by climate change in circumstances where it causes forced migration (Van der Vyer 2000, 73). Internationally, there is growing recognition of the link. The Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, in 1998, explicitly links human rights and the environment and recognises that "adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself". Since then, the UN Human Rights Council has made the link increasingly clear (UN Human Rights Council 2009, 15).[30]

Estrin and Kennedy (2014) argue that the effects of climate change can be considered human rights violations as climate change is a preventable, man made phenomenon. Although not explicitly linked to human migration, there are some recent examples of individuals and States seeking to hold governments to account for action on climate change as a matter of human rights. In 2005, the Inuit of Canada and the United States filed a petition with the Inter American Commission on Human Rights (IACHR), alleging that their respective governments, by failing to mitigate climate change harms, had violated their human rights. The Inuit alleged violations of several specific human rights, including the right to enjoy their culture; the right to enjoy and use the lands they have traditionally

[29] UN Human Rights Council. 2009. *Annual Report of the United Nations High Commissioner for Human Rights and the Office of the High Commissioner and the Secretary General. Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, A/HRC/10/61 15 January. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement (10 January, 2015).

[30] See the UN Human Rights Council. 2009. *Annual Report of the United Nations High Commissioner for Human Rights and the Office of the High Commissioner and the Secretary General. Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, A/HRC/10/61 15 January. paras 55–60. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement (10 January, 2015). See also the submissions made by States, UN organisations, regional intergovernmental organisations, national human rights institutions and non-government organisations: OHCHR. 2008. *OHCHR Study on the Relationship between Climate Change and Human Rights: Submissions and Reference Documents Received* . *A*vailable at: http://www2.ohchr.org/english/issues/climatechange/submissions.htm. (10 January, 2015).

occupied; the right to health; and the right to life. Although the IACHR ultimately rejected the petition, the Inuit's petition "marked the beginning of worldwide attempts to recognise the adverse effects of climate change on human rights" (Stillings 2014, 637). In November 2007, the Alliance of Small Island States issued a statement that declared "climate change has clear and immediate implications for the full enjoyment of human rights" and called upon the international community to take stronger action (Stillings 2014, 637). As a final example of how human rights law may provide a means of redress for harms arising due to climate change, recommendations relating to climate change have featured in a number of Human Rights Universal Periodic Review (UPR) processes. For example, in Australia's most recent UPR, the Maldives recommended that Australia "adopt a rights-based approach to climate change policy at home and abroad" (UN Human Rights Council 2011, para. 86.31).[31] These examples have led some scholars to conclude that human rights law may become a legal avenue through which to pursue legal justice for damages caused by climate change, including circumstances that lead to migration. Noting that at the international level, any means of enforcing human rights, are very limited (Oberleitner 2012).[32] There are however, likely to be some substantial difficulties in the case of climate change litigation - for example, in proving that "violations" are specific enough to make an appeal. In the case of climate change, harm can only be attributed indirectly to identified perpetrators - the perpetrators being countless actors in various locations. It will most likely also be difficult to prove that actions of developed countries have led to specific cases of degradation.[33]

Complimentary Protection and Non-Refoulement

Complementary protection[34] and the principle of *non-refoulement* (or non-return) under international human rights law has also been suggested as a potential source of protection for

[31] The Australian Government responded by accepting the recommendation in part, and stating that "human rights impacts will be considered as part of policy approaches to address all impacts of climate change." UN Human Rights Council. 2011. *Draft report of the Working Group on the Universal Periodic Review, Australia,* Working group on the universal periodic review, Tenth session A/HRC/WG.6/10/L. 8 February, 3.

[32] See also Shaw (2008).

[33] It has also been argued that the second and third pillar of the "Responsibility to Protect" could potentially apply to instances where climate change is leading to human rights violations and the government is unable to protect its population. This position was rejected by the UN Secretary-General who, in his report on implementing the responsibility to protect (UN General Assembly 2009b, para. 10(b)), stated that "the responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility".

[34] Complimentary protection describes human rights based protections that are "complimentary" to those provided by the Refugee Convention (McAdam 2011a, 17). States have an obligation to provide complementary

people displaced by climate change (McAdam 2011a, 55—89).[35] While the principle of *non-refoulement* is also part of refugee law, *non-refoulement* obligations "complementing" obligations under the Refugee Convention have also been established under international human rights law - expanding States' protection obligations beyond the category of "refugees" as defined in the Refugee Convention (UNHCR 2007a, 8). Under human rights law, States are prohibited from returning any person to another country if this would result in serious human rights violations, such as the "arbitrary deprivation of life, torture or other cruel, inhuman or degrading treatment or punishment" (UNHCR 2007a, 8). The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), contains an explicit *non-refoulement* provision in Article 3, which prohibits the return or extradition of a person to another State where "there are substantial grounds for believing" that the person would be "subjected to torture" (Convention Against Torture 1984, Art. 3). The ICCPR also includes an obligation not to "extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm" (UN Human Rights Committee 2004, para. 12). Regional Human Rights Treaties have also established the prohibition of *refoulement* to a risk of serious human rights violations (UNHCR 2007a, 9).[36]

The prohibition of *refoulement* to a risk of cruel, inhuman or degrading treatment or punishment is non-derogable and applies in all circumstances and to all persons within a States jurisdiction (including refugees) (UNHCR 2007a, 10).[37] UNHCR stated in 2007 that it is "in the process of becoming customary international law, at the very least at regional level" (UNHCR 2007a, 11).

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protection under Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Articles 6 and 7 of the ICCPR.

[35]The *non-refoulement* obligation is also a key part of international refugee law. The Refugee Convention provides that "no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion" (Refugee Convention Art. 33(1)). In 2001, States parties to the Refugee Convention recognised that the core principle of *non-refoulement* of refugees is embedded in customary international law, and is hence, applicable to all States (UNHCR 2001, Preamble para. 4; Estrin and Kennedy 2014, 90).

[36] See for example, the European Court of Human Rights, which has held that *non-refoulement* is an inherent obligation under Article 3 of the European Convention on Human Rights (ECHR) in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment.

[37] For States Parties to the ICCPR, this has been made explicit by the UN Human Rights Committee (2004, para 10) in its General Comment No. 31 " ... The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. …"

To date, however, only a handful of human rights have been recognised as giving rise to an obligation to protect individuals based on the principle of *non-refoulement* (McAdam 2011a, 3). The right to life is considered a "supreme right" which is "basic to all human rights". It is non-derogable and is recognised as entailing a *non-refoulement* obligation (UN Human Rights Committee 1982, para. 1).[38] Numerous other rights have been argued to be necessary preconditions to the right to life, such as the right to adequate food and housing, which may be affected by climate change (McAdam 2012, 56). Thus far, decision makers have "demanded a very high threshold" when applying the *non-refoulement* principle to people fleeing violations of their socio-economic rights - which are the rights primarily impacted by climate change (Estrin and Kennedy 2014, 90).[39] Decision makers have been unwilling to find that an individual is entitled to international protection unless a State "deliberately inflicts harm or withholds basic resources" (*ibid*). A lack of basic resources due to climate change alone would therefore not be sufficient to trigger the *non-refoulement* obligation, except in cases where the lack of resources has endangered an individual's survival (*ibid).*

While international law does not explicitly preclude climate impacts from being recognised as a source of "cruel, inhuman or degrading treatment or punishment", it is not currently interpreted as such. This area of law would need to be substantially developed, or a situation would need to become particularly dire, before climate change impacts would fall clearly within the scope of the concept of complimentary protection (McAdam 2012, 54). It is possible that at a future point in time that the obligation of complimentary protection may apply - for instance, when the cumulative impacts[40] of climate change have compromised access to fresh water, food, health, shelter and livelihoods. It is not however, likely to be a useful anticipatory mechanism for climate change forced migration (Estrin and Kennedy 2014, 90).[41]

[38] Also see: UN Human Rights Committee, "General Comment No. 14: Nuclear Weapons ad the Right to Life (Art6)" (9 November 1984) para 1; The right to life in the Universal Declaration of Human Rights (1948, Art. 3), ICCPR (1966, Art. 6) and all regional human rights treaties.

[39] See also European Human Rights Reports. 1997. *D v United Kingdom*, 24 EHRR 423; and United Kingdom House of Lords. 1997. *N v Secretary of State for the Home Department*, 31. in McAdam (2011, 17–18).

[40] Under the Refugee Convention, circumstances can be considered cumulatively.

[41] McAdam (2012) argues that Articles 2 and 3 ECHR, and Articles 6 and 7 ICCPR, may be the strongest sources of protection for climate change-related claims.

Self-determination and Statelessness

Although statelessness forms a separate area of international law,[42] it is also closely linked to the area of human rights law. The right to a nationality is enshrined in Article 15 of the Universal Declaration of Human Rights, and the right to self-determination is considered key to human rights law and a *jus cogens* principle of international law (ILC 2001, 85; Office of the High Commissioner for Human Rights (OHCHR) 2008b, 4). In 2006 the UN Human Rights Council Sub-Commission on the Promotion and Protection of Human Rights at its fifty-eighth session, adopted a resolution on "The legal implications of the disappearance of States and other territories for environmental reasons, including the implications for the human rights of their residents, with particular reference to the rights of indigenous peoples" (OHCHR 2006).[43] While it appears that no such report has been compiled, the implications of statelessness caused by climate change nonetheless raises interesting international legal questions that have yet to be tested (McAdam 2010; Estrin and Kennedy 2014, 43).

In 2009, the UN General Assembly acknowledged the real possibility of the prospect of disappearance of whole nations (UN General Assembly 2008). Jane McAdam (2010, 1) claims that the idea of disappearing or "sinking" island States poses challenges for international law. Although international law considers the disappearance of States, it does so within the context of State succession (McAdam 2010, 5). While the conventions, unsurprisingly, do not foresee situations of the literal disappearance of States and deal with only *de jure* statelessness, McAdam argues that the UNHCR's institutional mandate to prevent and reduce statelessness also encompasses *de facto* statelessness (*ibid.*). For small island countries that are at risk of disappearing due to sea level rise, at the point at which a territory is no longer habitable (because of the inability to obtain fresh water or grow crops for example), "permanent relocation to other countries would be necessary" (Kälin 2010). In the "sinking State" context, the UNHCR has argued that even if the international community continued to acknowledge a State's on-going existence, its population could be regarded as *de facto* stateless (McAdam 2010, 14; UN General Assembly 1996, Res. 50/152). This is

[42] Statelessness is specifically addressed in the Convention relating to the Status of Stateless Persons, 1954 and the Convention on the Reduction of Statelessness 1961.

[43] OHCHR. 2006, *The Legal Implications of the Disappearance of States and Other Territories for Environmental Reasons, Including the Implications for the Human Rights of their Residents, with Particular Reference to the Rights of Indigenous Peoples*, A/HRC/Sub.1/58/L.11 24 August.

because in international law, when a State ceases to exist, "all persons who were nationals of that State, cease to be such" (Weis 1979, 136).[44]

Kälin (2010) and McAdam (2010, 5) argue that the current international law on statelessness provides no protection status for such people. While the law on statelessness may provide a legal category for those displaced, even if they were treated as "stateless", it is far from adequate as a means of addressing specific needs of people potentially displaced from small island States (McAdam 2010, 5). However, McAdam also acknowledges that, as a matter of principle, there is nothing in international law that would prevent the reconstitution of a State such as Kiribati or Tuvalu within a separate existing State, such as Australia (McAdam 2010, 15). In some instances, this is already occurring - in 2014 Kiribati purchased six thousand acres of land on Vanua Levu, one of Fiji's islands for the potential future relocation of people displaced due to climate change (Office of the President Republic of Kiribati 2014). [45] However, this also raises legal and political questions over State sovereignty, the status and nationality of those citizens, and their right to self-determination (McAdam 2010, 19—21).[46]

2.3 ENVIRONMENTAL LAW

United Nations Framework Convention on Climate Change and its Kyoto Protocol

The UNFCCC and its 1997 Kyoto Protocol are at the centre of the international legal framework set up to deal with climate change. It came into being following recognition within the UN General Assembly in 1988 and 1989 that climate change was a global issue of "common concern to mankind", and that necessary and timely action should be taken to deal with the issue (UN General Assembly 1998, Res. 43/53; UN General Assembly 1998, Res. 44/207). [47] The UNFCCC was opened for signature in 1992 at the UN Conference on Environment and Development held in Rio de Janeiro, and entered into force on 21 March 1994 (UN Treaty Collection 2015).

[44] "In the case of universal succession, the predecessor State is extinguished and its nationality ceases to exist. All persons who were nationals of the predecessor State cease to be such" (Weis 1979, 136).
[45] Other examples include the purchase of Rabi island in Fiji by the Banabans (from Kiribati); the purchase of Kioa island in Fiji by the Vaitupu people of Tuvalu (McAdam 2012, 148).
[46] McAdam (2010, 20) suggests that there are a number of ways in which a move away from fully-fledged statehood to a self-governing alternative could be undertaken. There are some examples of parcels of land belonging to a separate State being offered to States due to reasons such as immense environmental degradation - for example, the Australian Curtis Island being offered to the people of Nauru for resettlement. ICJ. 1990. *Case concerning Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections of the Government of Australia) vol 1 (December 1990), para 60.
[47] In 1990, the Intergovernmental Panel on Climate Change (IPCC) and the second World Climate Conference called for the creation of a global treaty on climate change (United Nations Org. 2014).

The ultimate objective of the UNFCCC (Provided in Annex B), as stated in Article 2, is to "achieve… stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system…" (UNFCCC 1992, Art.2). States parties to the UNFCCC agreed[48] at subsequent Conferences of the Parties that this threshold should be "no more than two degrees Celsius" (UNFCCC 2010).[49]

The UNFCCC requires all State parties to undertake, *inter alia*, to develop, update and publish national inventories of anthropogenic emissions of greenhouse gasses (UNFCCC 1992, Art. 4.1(a)). Developed countries agreed to take the lead in modifying longer-term trends in anthropogenic emissions, recognising the common but differentiated responsibilities of parties (UNFCCC 1992, Art.3)[50] and to assist, and provide financial resources to developing countries to help them meet their convention commitments and meet the costs in adapting to the adverse effects of climate change (UNFCCC 1992, Art. 4.1, 4.3, 4,4, 4.8).[51] The UNFCCC provides an elaborate set of rules intended to prevent climate change damage both by reducing greenhouse gas emissions at their source, thereby contributing to the objective to prevent dangerous interference with the global climate system (Article 2), and by providing a framework for adapting to the impacts of climate change.

However, neither the UNFCCC nor its Kyoto Protocol contain any specific requirements to assist those affected by climate change related migration (Estrin and Kenedy 2014, 89). The issue of climate change migration was discussed at the 16th Conference of the Parties (COP) held in Cancun in 2010. Paragraph 14(f) of the Cancun Adaptation Framework "invites" all parties to, *inter alia*, undertake "measures to enhance understanding,

[48] An "agreement" constitutes a decision made by parties to the convention. This decision is contained in UNFCCC. 2010. *Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December*, Decision 1/CP.16 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention. FCCC/CP/2010/7/Add.1ip.

[49] At the 15th Conference of the Parties (COP) to the UNFCCC, held in Copenhagen, 2009, a political commitment was made to limit temperature rise to no more than 2 degrees, and to consider limiting the temperate increase to below 1.5 degrees (UNFCCC 2009, para. 2). This threshold was based on advice from the IPCC that 1.5 to 2 degrees of warming constituted the threshold for "dangerous anthropogenic interference with the climate system", the prevention of which is the ultimate objective of the UNFCCC as outlined in Article 2 (UNFCCC 2009, para. 1). The following year in Cancun at the 16th COP, parties agreed on the commitment made in Copenhagen to hold the increase in the global average temperature below this limit (UNFCCC 2010, para. 4).

[50] The preamble of the UNFCCC paragraph three states, "Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs, The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof." (UNFCCC 1992).

[51] See text of UNFCCC provide at Annex B.

coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels…" (UNFCCC 2010, para 4(f)). From a legal perspective however, the provision is very weak. It is part of a non-binding decision of the States Parties to the UNFCCC and imposes no formal obligations on them. It does not explicitly require States to implement migration programs or to "protect" people displaced by climate change (McAdam 2013, 13). However, it makes clear that the issue of migration may become part of national adaptation plans and therefore be eligible for funding under the UNFCCC adaptation funding provisions and the green climate fund[52] as is discussed in more detail below (McAdam 2013, 13).

Despite its limited acknowledgement of the issue of climate change forced migration, the UNFCCC does provide two potential legal avenues for compensation or the provisions of funding for climate change forced migration - through the law on the responsibility of States and "damages" associated with failure to fulfill Article two of the UNFCCC, and through the adaptation funding provisions contained in the UNFCCC, respectively.

Although the UNFCCC is considered to be a complex document with the range of commitments entered into not wholly clear (Shaw 2008, 880), Verheyen (2005, 135) argues that Article 2 of the UNFCCC provides an important "yardstick" for all countries, since it can be concluded that a specific greenhouse gas concentration targets, which translates to a two degree temperature increase must be the objective of any further action of parties. Verheyen (2005, 144) argues under Article 18 of the Vienna Convention on the Law of Treaties (VCLT), parties must act in accordance with this objective so the target is not "defeated".[53] Moreover, under Article 31 of the VCLT, States have an "obligation of conduct" (as required by Article 2 and Article 4.2 of the UNFCCC) to reverse long term trends of greenhouse gas emissions, which is currently not being done (Verheyen 2005, 135).[54] Verheyen (2005, 335)

[52] At the sixteenth COP to the UNFCCC, held in Cancun, Mexico, from 29 November to 10 December 2010, the Parties decided to establish the Green Climate Fund. The Green Climate Fund was designated as an operating entity of the financial mechanism of the UNFCCC, in accordance with Article 11 of the Convention (Green Climate Fund 2015).

[53] Article 18 of the VCLT states that: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed" (VCLT 1969, Art. 18).

[54] Article 31 reads: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (VCLT 1969, Art. 31 (1)). It is arguably quite likely that the two degree threshold agreed by parties to the UNFCCC will be exceeded (IPCC 2014).

concludes that "agreeing to mitigation targets or policies" (e.g. Kyoto protocol second commitment period) is a compulsory, not a voluntary exercise.[55] Although specific references to State liability or responsibility were avoided in the negotiating texts of the UNFCCC,[56] Verheyen argues that the level of awareness of climate change damage and possible compensation needs is evident in the draft and final text, and also reflected in the declarations made by various countries upon signature of the UNFCCC - the Maldives, Kiribati, Nauru, Papua New Guinea, Fiji, and other small island States when ratifying the Kyoto Protocol and UNFCCC stated that "…signature of the Convention shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change as derogating from the principles of general International Law" (UNFCCC 1992, Declarations of Parties; Kyoto Protocol 1997, Declarations of Parties).[57] Verheyen (2005, 44; 53) and Tol and Verheyen (2004, 1111) argue that this shows how Parties to the UNFCCC perceived the issue at the time, which is critical in when considering the applicability of international law other than the climate change regime to the issue of climate change damage. In particular for determining "foreseeability of injury" resulting from climate change in the context of State responsibility.[58]

More recently, at the 20th Conference of the Parties to the UNFCCC held in Lima in December 2014, countries agreed that each Party's intended nationally determined contribution for the post 2020 period "must represent a progression beyond their current undertaking" (UNFCCC 2014, para. 10) and agreed that the information to be provided by Parties communicating their intended nationally determined contributions, "in order to facilitate clarity, may include, inter alia, quantifiable information … how the Party considers that its intended nationally determined contribution is fair and ambitious … and how it contributes towards achieving the objective of the Convention as set out in its Article 2"

See also the ruling of the Dutch court in *Urgenda Foundation v The State of The Netherlands,* June 2015. The court concluded that the State has a "duty of care to take mitigation measures" and ordered the state to "adopt stronger greenhouse gas mitigation targets" (Rechtbank Den Haag 2015).

[55] The Kyoto obligations are *erga omnes* obligations, i.e. obligations that can be invoked by one State on behalf of all (Tol and Verheyen 2004, 1115).

[56] Compensation schemes for damages caused due to climate change were proposed as part of the draft text, but did not make it into the final version (Verheyen 2005, 52—53).

[57] See States declarations made on ratification of the UNFCCC and the Kyoto Protocol, available at https://unfccc.int/essential_background/convention/items/5410txt.php and: http://unfccc.int/kyoto_protocol/status_of_ratification/items/5424.php (22 July, 2015).

[58] The principle of common but differentiated responsibility, while not providing any new obligations or rights with regard to climate change damage, can be used as a guiding principle for any future regulation of such damage. Furthermore, the principle must be taken into account when allocating responsibility for injury due to climate change under the law of State responsibility (Verheyen 2005, 78).

(UNFCCC 2014, para.14; The Climate Institute 2014). These commitments towards the new, legally binding protocol for climate change post 2020, represent significant and positive progress in that countries are encouraged to justify their emission reduction commitments in relation to the agreed two degree target. This improved transparency may be useful in future discussions relating to issue of due diligence, as is discussed later in this chapter (The Climate Institute 2014).

The UNFCCC also provides developing countries with a legal basis to claim funds from Annex II[59] parties for the purposes defined in the UNFCCC, and in particular for dealing with climate change damage (Verheyen 2005, 98).[60] Article 4.8 provides that, in implementing the UNFCCC, Parties shall "give full consideration to what actions are necessary under the UNFCCC, including actions related to funding, insurance and the transfer of technology, to meet the *specific needs* and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures..." (italics added) (UNFCCC 1992, Art. 4.8). Article 4.4 stipulates that Annex II Parties "shall also assist developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects" (UNFCCC 1992, Art 4.4). Forced migration, arising from damage could be classified as a "specific need" and an adaptation action, and hence fit within the remit of the UNFCCC. Even though the UNFCCC does not require a specific level of financial resources, it should be noted that the financial obligations enshrined in Articles 4.3 and 4.4 are mandatory and therefore differ substantially from Official Development Assistance (Verheyen 2005, 92).

However, the financial commitments in Articles 4.3 and 4.4 are riddled with unclear terms, which makes it difficult for potential claimant countries to enforce them. In claiming damages, challenges remain around the difficulty of attributing specific events to climate change (Verheyen 2005, 98—99).[61] While financial support is offered, in practice this financial assistance is not directed at satisfying the needs that are arising now and those that

[59] Annex II Parties consist of the Organisation for Economic Co-operation and Development (OECD) members of Annex I, but not the Economies in Transition Parties. Annex I Parties include the industrialised countries that were members of the OECD in 1992, plus countries with economies in transition, including the Russian Federation, the Baltic States, and several Central and Eastern European States (UNFCCC 2015).

[60] The UNFCCC provides developing countries, the main victims of potential climate change damage, with a legal basis to claim support for damage prevention measures (both mitigation and adaptation). Through the UNFCCC, the principle of common but differentiated responsibility structures commitments and rights (UNFCCC 1992, provided at Annex B).

[61] Verheyen (2005) claims that such financial support will "never cover or repair residual damage" and may be limited to "catalytic" investments, building on the concept of incremental costs and the fact that "adaptation needs" are difficult to quantify and are linked to "development in general".

will arise in the future. The level of contributions and burden sharing must be addressed by the Parties to ensure compliance with the letter of the UNFCCC (Verheyen 2005, 223). Verheyen (2005, 107) concludes that overall, the prevention duties in Articles 2 and 4, as well as the adaptation duties and financial obligations, seem inadequate in the face of the likely damage that will occur due to climate change.

General principles of Environmental Law - the no harm rule and due diligence

One of the basic rules of international law is that States shall not inflict damage on or violate the rights of other States. In environmental law, this principle is captured in the "no harm rule" (Tol and Verheyen 2004, 1110).[62] Principle 2 of the 1992 Rio Declaration on Environment and Development, which echoes Principle 21 of the 1972 Stockholm Declaration, reiterates this rule outlawing transboundary environmental injury: "States have … the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction" (UN General Assembly 1992, Principle 2). The "no-harm rule", is also enshrined in the UNFCCC and the UNCLOS[63], and has become part of the "corpus of customary international law" (International Court of Justice (ICJ) 1996, 241). Hence, unlike the provisions of treaty law, the no harm rule is a binding customary legal obligation upon all States.[64]

The obligation of prevention of harm obliges a State "to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" (ICJ 2010, para. 101[65]; International Law Association (ILA) 2014). It imposes a primary obligation on States to

[62] An analysis of the "self-contained regime theory" as well as the principle of *lex specialis* conducted by Verheyen (2005, 143) revealed that the existence of the international climate regime "does not bar the application of other international law, be it in the form of separate primary rules aimed at the prevention, reduction or restoration of climate change damage, or as benchmarks for the implementation of the climate regime."

[63] See Preamble " ... States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (UNCLOS 1982, para. 8).

[64] "The general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (ICJ 1996, 241).

[65] ICJ. 2010. *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), 2010. para. 101.

prevent damage with "due diligence" (Voight 2008).[66] This rule also contains an obligation to minimise risk, or to prevent harm when it is "foreseeable" (Tol and Verheyen 2004, 1110). Failure by a State to fulfill this obligation would give rise to State responsibility for any damage to the environment of other States or of areas beyond their national borders that can be attributed to the action or inaction of the State, including serious or irreversible damage due to the impacts of climate change (ILC 2014, Art.7a).[67] It can be argued that in determining the degree of diligence required, the latitude of risk involved should be considered. It could then be argued that the risk posed to low-lying island States due to climate change (for example, the risk inundation of the entire territory of a State) is so great that States could reasonably be required to reduce emissions much more quickly than is currently occurring (Voight 2008; Yale Center for International Law and Policy 2014).

The no harm rule provides the basis upon which the Republic of Palau have sought from the UN General Assembly to ask for an advisory opinion from the ICJ on damage caused by climate change (UN News Centre 2011). It also provides the basis upon which Tuvalu threatened to sue Australia in 2002 (Australian Broadcasting Corporation News 2002). Although neither of these events have come to fruition, they raise questions regarding the no harm rule and State responsibility or liability regarding climate change damages, including issues linked with forced migration.[68]

The Law of the Sea

Research conducted by the Yale Center for Environmental Law and Policy (2013), argues that there is currently potential means of recourse to the ICJ or an arbitration tribunal for

[66] Verheyen (2005, 223) argues that it is possible to define a standard of due diligence in the case of climate change damage. She argues that some common elements such as "(i) the opportunity to act or prevent, (ii) foreseeability or knowledge that a certain activity could lead to trans-boundary damage and (iii) proportionality in the choice of measures to prevent harm or minimise risk" can be applied and exercised for instances concerning climate change damage (Verheyen 2005 176).
She claims that the obligation to exercise due diligence to prevent harm caused by climate change "applies to all States equally and obliges them to take action to mitigate human activities contributing to climate change" (Verheyen 2005, 223).

[67] This forms the basis of International Law Association (ILA) draft Articles on legal principles relating to climate change, outlined in Draft Article 7A, Obligation of prevention, that "States have an obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction, including damage through climate change." The ILA further outlines that "States shall exercise due diligence to avoid, minimise and reduce environmental and other damage through climate change…"

[68] Tol and Verheyen (2004) have done specific work partitioning compensation payments or damages for climate change from OECD countries to developing counties by percentage of GDP on the basis of the "no harm rule".

specific issues associated with climate change through the UNCLOS, provided the States concerned are bound by the convention. The UNCLOS specifically states: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment" (UNCLOS 1982, Art.194). Article 235 provides for State responsibility to be triggered through a breach of any environmental duties under UNCLOS: "States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law."[69]

According to Article 193 of UNLCOS, States have the "obligation to protect and preserve the marine environment". Under Article 212.1, States also have the obligation to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere … taking into account internationally agreed rules, standards and recommended practices."[70] Moreover, maritime zones are generally determined by drawing a line around a State's territory according to a set method. It is likely that sea level rise will affect the positioning or size of State's maritime zones (Soons 1990; Freestone 1991; Tol and Verheyen 2004, 1116). Acknowledging the inter-relationship between climate change and the law of the sea, Article 10 of the ILA's Legal Principles Related to Climate Change (2014, 32) "requires States and competent international organisations to apply, interpret, implement and enforce their rights and obligations under the existing and evolving law of the sea related instruments in such a manner as to effectively address climate change." It should be noted that any claims under UNCLOS would only cover damage due to maritime pollution or changes in maritime zones, or fishing rights. Recoverable damage under UNCLOS would not include damage to agriculture or health for example, but would include all coastal territory and adaptation or protection costs (Tol and Verheyen 2004, 1118).

To comply with UNCLOS obligations, a State must act with appropriate care (Tol and Verheyen 2004, 1117). Foreseeability is also a frequently used concept. An action of a State is considered negligent if it could have or has foreseen potential damage, which, as outlined earlier, could be established through examination of UNFCCC negotiation processes and reports of the IPCC since 1990 (Tol and Verheyen 2004, 1117). Another way of determining

[69] United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, and entered into force 16 November 1994.

[70] UNCLOS Article 207.1 also specifies that "States shall adopt law and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account internationally agreed rules, standards and recommended practices and procedures."

negligence is to examine the risk involved. If the risk is obvious, States must prove that they have taken all necessary measures to prevent the risk from turning into actual damage. If such damage would occur due to climate change, Article 194.2 of the UNCLOS would apply as a general prohibition against such damage "by pollution" to other States (Tol and Verheyen 2004, 1116).

2.4 SUMMARY

This chapter has analysed various customary international law, and international treaty law rules that pertain to climate change forced migration. The examination of refugee law and human rights law has shown that specific types of climate change forced migrants may already qualify for protection under the Refugee Convention, or complimentary protection measures under human rights law. However, there remain significant protection gaps for this class of climate change forced migrants.

Aside from this small subset of people who may already be eligible for protection under international refugee or human rights law, there are several legal bases within human rights law and environmental law upon which States (in particular, developed, high polluting States) have an obligation to continue to minimise the extent of climate change, and compensate for damages caused. Although yet to be tested, treaty law, in particular provisions contained within the UNFCCC and the "no harm rule" - which is contained in the UNFCCC and UNCLOS as well as part of the body of customary international law - provide a basis upon which, in principle, States that incur damage resulting from climate change could claim reparation or compensation from States that have contributed to climate change as an anthropogenic phenomenon. However, many legal difficulties remain, for example, in establishing a causal chain between particular impacts and injury and the contribution of a particular State to climate change (with the burden of proof resting *prima facie* on the claimant State) (Verheyen 2005, 335).

Despite these hurdles, international law remains the key basis upon which international action on climate change currently occurs,[71] and should from the basis upon which States

[71] Including action on climate change mitigation and adaptation, under the UNFCCC. The ruling of a Dutch court in June 2015 that the State "must do more to avert the imminent danger caused by climate change" shows that national law is also a key basis upon which action on climate change will occur. In a case instituted by the Urgenda Foundation, a citizens' platform, the court also stated that "the State should not hide behind the argument that the solution to the global climate problem does not depend solely on Dutch efforts" (Rechtbank Den Haag 2015). The court found that the State has a "duty of care" to take mitigation measures (Rechtbank Den Haag 2015, para. 4.83). The court concluded that "a legal obligation of the State towards Urgenda cannot

address issues regarding climate change damages and consequent migration.[72] As was discussed in chapter 2.3, anticipatory migration - if necessitated due to anticipated or experienced climate change impacts - could be considered a "specific need" and an "adaptation measure" and hence qualify for compulsory compensatory funding under Article 4 of the UNFCCC. Reactionary migration necessitated by climate change "damage" could in principle invoke a responsibility upon high polluting States to make reparation or compensate for damage under Article 2 and 4 of the UNFCCC and principles of customary international law - including the no harm rule.

be derived from Article 21 of the Dutch Constitution, the "no harm" principle, the UNFCCC Climate Change Convention, with associated protocols…" but stated that these "regulations still hold meaning, in particular in determin[ing] the minimum degree of care the State is expected to observe" (Rechtbank Den Haag 2015, para. 4.52). The court concluded that the State has a duty of care to take mitigation measures (Rechtbank Den Haag 2015, para. 4.83).

[72] In her legal analysis of climate change prevention duties under international law, Verheyen (2005, 365) argues that a "negotiated, just and comprehensive solution to the issue of climate change damage is technically possible" (Verheyen 2005, 365). This solution could also address migration arising as a result of damages.

CHAPTER 3: APPROACHES TO FILLING THE LEGAL GAP

The aim of this chapter is to investigate potential approaches to filling the gap in the international legal system regarding climate change induced cross-national border migration. This chapter includes five parts which outline and discuss each of the different potential legal approaches. The first sub-chapter looks at protection under the Refugee Convention by expanding the legal definition of refugee; the second sub-chapter discusses the option of strengthening protection obligations under human rights law through complimentary protection measures or extending the model of the Responsibility to Protect (R2P); the third sub-chapter discusses the possibility of expanding the scope of the UNFCCC to include climate change induced migration under the adaptation objectives of the UNFCCC, via a separate protocol, or via regional agreements under a UNFCCC umbrella framework; the fourth sub-chapter looks at the creation of a new convention addressing specifically the issue of climate change forced migration; and the fifth sub-chapter examines other approaches such as the creation of "soft law" guiding principles, or national and regional approaches.[73] Numerous variations on these approaches have been suggested by academics, policy makers, Non Governmental Organisations (NGO) and UN agencies. Only the key proposals are discussed here.

The primary methods used for this chapter is a literature review and analysis of primary and secondary sources including academic literature, UN reports, international jurisprudence, applicable treaties and other legal documents. In each sub-chapter, the advantages and shortcomings, and the legal basis for each approach (drawing on the conclusions of chapter 2) are briefly discussed.

3.1 EXPANDING THE SCOPE OF THE REFUGEE CONVENTION

Broadening the Refugee Convention

People who are forced to migrate due to climate change impacts generally fall outside the scope of the Refugee Convention[74] (McAdam 2012). The adoption of a new additional

[73] These varying approaches have been suggested by scholars including Hodgkinson *et al.* (2010), Voight (2008), and Biermann and Boas (2010). Bilateral, regional and political (non legal) approaches to address the issue have also been suggested in the Pacific region, Africa and South America. These approaches have considerable merit. Due to word limit constraints, these approaches are not the focus on this research and are discussed only briefly. McAdam (2011a, 54) argues that legal and policy responses must involve a combination of strategies, rather than an either/or approach. The need for complementarity between theses approaches will be considered briefly in chapter four.

[74] Except potentially in a small number of cases, as was discussed in chapter two.

protocol to the Refugee Convention or the extension of its Article 1(A) has been raised as a possible way to extend protection to climate change forced migrants.

This potential legal solution was proposed at a symposia for academics in France in 2005, at a meeting in the Maldives[75] in 2006 (Cournil 2011, 365), and by numerous academics and NGOs (see for example Cooper (1998), Boana *et. al.* (2008), Cournil (2011), and Gibb and Ford (2012)). With the endorsement of the governments of the Maldives, Tuvalu and other small island developing States, an NGO, the Living Space for Environmental Refugees, has expressed interest in expanding the definition of a refugee within the Refugee Convention to include "persons displaced by impacts on the environment, which include, but are not limited to, climate change, *force majeure,* pollution, and conditions that are forced upon the environment by State, commercial enterprises or a combination of state and commercial entities" (Boana *et. al.* 2008, 25).

Jessie Cooper (1998, 480–488) analysed the potential for protection of environmental refugees under the Refugee Convention by reinterpreting Article 25[76] of the Universal Declaration of Human Rights (UDHR). She considers that the definition of a refugee could be extended by adding to Article I (A) of the Refugee Convention the "degraded environmental conditions that endanger life, health, livelihoods and the use of natural resources", which would entail no more than expanding the definition along human rights lines (Cooper 1998).[77]

Conisbee and Simms (2003, 500) contend that extension of the Refugee Convention to climate change force migrants could also be achieved by broadening the term "well-founded fear of persecution".

Advantages and shortcomings

The main advantage of this approach is that the administrative and operational procedures are already in place. McAdam (2012, 51) argues that certain aspects of refugee law - its standard of proof ("well-founded fear"), its protective rights based framework, the durable

[75] Delegates at the Maldives meeting in 2006 proposed an amendment to the Refugee Convention that would extend the mandate of the UN refugee regime to include climate refugees. Republic of the Maldives Ministry of Environment, Energy and Water. 2006. Report on the First Meeting on Protocol on Environmental Refugees: Recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees (Male, Maldives, 14–15 August), in Bierman and Boas (2008).

[76] Article 25(1): "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (Universal Declaration of Human Rights 1948).

[77] Cooper (1998), cited in Cournil (2011, 365).

solutions it envisages, the status it creates, and its institutional oversight (of the UNHCR) may be helpful in developing responses to climate change related movement. Similarly, Srgo (2008) argues that a protocol to the Refugee Convention would provide the benefit of the experience of the Refugee Convention to date, and of host authorities (Srgo 2008). Cournil (2011) also points out that this option would provide a "hard law" solution to the problem.

Despite these advantages, Boana *et. al.* (2008), Cournil (2011) and McAdam (2012) predict that this proposal would be difficult to implement in practice, primarily for political reasons. States are wary of any attempt to expand the Refugee Convention, and hence, this proposal is likely to meet significant resistance. Biermann and Boas (2008) argue that the UN refugee regime is already under significant pressure from countries (in particular, industrialised countries) who seek restrictive interpretations of its provisions. It is unlikely these governments will agree to extend the same level of protection to a new group of migrants larger than those currently under UN oversight (Myers and Kent 1995, 151–153; McGregor 1994, 128).

In addition to these potential political difficulties in its implementation, opponents of extending the Refugee Convention believe that such an extension may present serious risk of eroding the current international refugee protection system. Neuteleers (2011, 233) argues that countries might use the extension of the Refugee Convention as an excuse to introduce stricter refugee policies. Kolmannskog and Trebbi (2010, 720) have warned that "any initiative to amend the refugee definition, as agreed in the 1951 Convention, would involve the risk of a full renegotiation of the Convention". The UNHCR has opposed this option largely for the same reason (Cohen and Bradley 2010, 25).[78]

Moreover, extending the current UN refugee regime to include climate refugees would raise difficult moral issues. It could create unnecessary tensions and tradeoffs between the new additional streams of climate refugees, and persons already protected under the Refugee Convention, as well as tensions between climate refugees and other non-convention "refugees", including potentially, environmental or economic migrants (McGregor 1994, 128; Kibreb 1997, 21; Bierman and Boas 2008).[79]

In addition to these political and moral challenges, such a simple amendment does not promise to effectively resolve the emerging climate refugee crisis. The Refugee Convention is generally applied to individuals, and in some cases, climate change may cause whole

[78] The UNHCR has also expressed concern regarding this option due to anticipated funding limitations (See Regna-Gladin 2012, 267).
[79] See also discussion in Kibreab (1997).

populations to be displaced and in need of international protection (Gibb and Ford 2012, 5). In situations of mass influx, States and the UNHCR can adopt a group determination approach (UNHCR 2011; Docherty and Giannini 2009, 374),[80] however, many States consider this only a temporary measure for emergency situations. Another key shortcoming is that refugee status can only be applied for once a foreign national has arrived in the territory of another State (McAdam 2011b, 117). As such, it is apparent that such a simple amendment to the Refugee Convention, while it would offer a useful administrative and operational framework, would not suffice on its own, in particular for addressing instances of preemptive, planned migration of communities, for example, in response to sea level rise.

Moreover, many scholars have argued that financing arrangements under refugee law is not appropriate in the context of climate change migration. The UNHCR is almost entirely funded by direct, voluntary (not compulsory) contributions - the bulk of it from "donor nations" (UNHCR 2015). Scholars including Docherty and Giannini (2009, 387) and Muller (2002) have argued that, while the voluntary system is appropriate for the traditional refugee problem, it is not appropriate for the "climate refugee" problem. Since the international community contributed to climate change, they should be obligated to contribute to the solution. The interpretation of obligations in the UNFCCC, combined with other sources of international law, as outlined in chapter two imply that compensatory funding, or funding assistance for adaptation, including migration, is compulsory. Furthermore, most Refugee Convention Member States accept only a set quota of refugees each year. Simply expanding the definition of a refugee may not improve protection, but may simply leave a larger number of people in limbo. The UNHCR's position has been to encourage other paths of dealing with the issues, including explicit acknowledgement of climate change forced migrants in UNFCCC processes, as is discussed below.[81]

[80] Dohrty and Giannini (2009) refer to UNHCR. 2006 (reissued 2011). HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, 1992, U.N. Doc. HCR/IP/4/Eng/REV.1, 189. Available at http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf. UNHCR (2011) writes: "In the context of a mass influx, individual refugee status determination is usually not practicable, while the need to provide protection and assistance is often extremely urgent. In such situations, many States as well as UNHCR have applied group-based recognition of refugee status on a prima facie basis. This means that each individual member of a particular group is presumed to qualify for refugee status. This presumption is based on objective information on the circumstances causing their flight. Prima facie recognition is appropriate where there are grounds for considering that the large majority of those in the group would meet the eligibility criteria set out in the applicable refugee definition."

[81] UNHCR have made several submissions to the UNFCCC to encourage recognition of climate change induced migration within the UNFCCC adaptation program. See for example IOM *et al.* (2014b) *Joint submission to the UNFCCC on the Nairobi Work program,* ; and IOM *et al.* (2014), *Joint submission to the UNFCCC on National adaptation plans.* Available at: http://unfccc.int/resource/docs/2014/smsn/igo/149.pdf (22 July, 2015).

3.2 STRENGTHENING PROTECTION OBLIGATIONS UNDER HUMAN RIGHTS LAW

Expanding the scope of complimentary protection and non-refoulement

Some scholars and UN agencies have suggested that complimentary protection under human rights principles, in particular the principle of *non-refoulement*, may prove particularly significant in addressing the protection gap for climate change forced migrations. These protection standards could potentially be construed to provide protection for those falling outside the international refugee protection framework (NRC 2011, 19; Kälin and Schrepfer 2012, 25).[82] McAdam and Saul (2009, 25) argue that there is considerable potential for the progressive development of human rights law principles to address the needs of those displaced by climate change.

Acketoft (2008); Cohen and Bradley (2010, 26) argue that the ban on return (*refoulement*) could be extended to environmentally, or climate change displaced persons who have crossed international borders via a wider interpretation and application of the principle.[83] Kälin (2010, 97–98) argues for the application of what he describes as the "returnability test", which emphasises the "prognosis" (whether it is safe to return) rather than the underlying motivations for movement. In line with his official proposal as the Representative of the Secretary General on the Human Rights of Internally Displaced People (2008, 7),[84] Kälin states that such a test should be based on the "permissibility, feasibility and reasonableness of return" (Kälin 2010, 97–98). The "permissibility" criteria would prohibit the return or expulsion of people to situations where "life or limb is at risk" (UN Human Rights Council 2008, 2). Building on this framework, Cohen and Bradley argue that returns would be factually impossible if States were entirely submerged for example, or in instances where there are serious technical or administrative problems, such as the destruction of roads, loss of documents, or lack of drinking water (Cohen and Bradley 2010, 27).

This approach to complimentary[85] (or in some cases temporary) protection is already applied in several countries. For example, the United States Immigration and Nationality Act

[82] See Nansen Conference, Chairperson's Summary.

[83] Another suggestion made at the UN Human Rights Council's Advisory Committee, first session, was that the Human Rights Council and the Secretary General use their "good offices" to extend the principle of *non–refoulement* to "hunger refugees" (UN Human Rights Council's Advisory Committee 2008, Recommendation 1/6).

[84] Kälin, the Representative of the Secretary General on the Human Rights of Internally Displaced People (UN Human Rights Council 2008, 7) has proposed that the appropriateness of return may be determined on the basis of three elements: permissibility, factual possibility, and the reasonableness of return.

[85] See footnote 34.

provides for the possibility of granting temporary protection for people who are already in the United States if "there has been an environmental disaster in the foreign State resulting in a substantial, but temporary, disruption of living conditions" (Immigration and Nationality Act 1952, 8 USC, 244).[86] Finland's Aliens Act also provides temporary protection in situations of mass displacement as a result of an environmental disaster. The law also provides for a residence permit where a person cannot return to his or her home country or country of permanent residence because of an "environmental disaster" (Aliens Act 2004 (Finland), s. 109; s. 88).[87] There is a possibility that this approach, already adopted by some States, could be expanded upon (Kälin 2010, 100).

Responsibility to Protect as a means of addressing climate change forced migration

Van der Vliet (2014) suggests that establishing principles similar to the Responsibility to Protect (R2P) regime could offer a solution for the lack of protection of environmental refugees. R2P involves three pillars which stipulate that the State carries the primary responsibility for protecting its own populations from "genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement"; under R2P, the international community has a secondary responsibility to encourage and assist States in fulfilling this responsibility; and thirdly, the responsibility shifts to the international community to "take collective action" and "use appropriate … means" to protect populations if a State is manifestly failing to do so (UN General Assembly 2009b). Van der Vliet (2014, 71) argues that within R2P there is a system to distribute the responsibility to prevent large scale suffering amongst the national, State, and international community. The pillars of R2P can also be invoked side by side. She argues that a similar approach could both create an "obligation" for the international community to help States that are unable to prevent large scale suffering as a result of climate change, and could lend the international community a broad range of tools and instruments (such as diplomatic, humanitarian and other means - currently in place under R2P) that could be employed to protect climate change forced migrants. This broad array of tools could allow for custom made solutions (van der Vliet 2014, 71). Moreover, she argues that this approach could involve offering protection for

[86] It is also required that: "the foreign State is unable, temporarily, to handle adequately the return of its own nationals; and the foreign State officially has requested such designation" (Immigration and Nationality Act, 8 USC, 244).

[87] Also see Sweden's Aliens Act (Aliens Act 2005 (Sweden) c 4, s 2) for a similar approach to that of Finland, and Swiss asylum law dealing with subsidiary as well as temporary protection may be interpreted to cover climate related scenarios, although not explicitly mentioned (Kälin 2010, 100).

people while awaiting possible return, and where return is not possible, the responsibility could extend to resettling or rebuilding a community in a different place (van der Vliet 2014, 76).

Advantages and shortcomings

Regarding the complimentary protection approach, Kälin acknowledges that human rights protection, while important, is a minimalist protection system. It does not regulate admission into a foreign State and does not provide a clear answer regarding the status of people who migrate. The Universal Declaration of Human Rights (which is not legally binding) provides in Article 14 for the right to seek and enjoy asylum, but not the right to receive it. This remains a sovereign decision of the State (Kälin and Schrepfer 2012, 25). Cohen and Bradley argue that the challenge for this approach is to "concretise" the entitlements and obligations under the system, with a view to "transforming temporary protection from an ad hoc response into a reliable, rights-based protection tool" (Cohen and Bradley 2010, 27).

Both Kälin (2010) and McAdam (2011a, 4) also acknowledge that complementary protection is an inadequate mechanism to respond to pre-emptive movement where conditions are set to become dire in the future, such as the case of low-lying island States. Complimentary protection can only be applied for once a foreign national has arrived in the territory of another State (McAdam 2010, 117). For this reason, Cohen and Bradley argue that current complementary protection regimes do not provide strong models. They argue that removing these limitations would go a long way towards creating viable temporary protection models that could help shape the development of a protection system for those who have crossed international borders and cannot return. They also argue that in order to build local support for temporary protection, particularly in poorer States or communities, it will be important to ensure that host communities are compensated, and their needs taken into account (Cohen and Bradley 2010, 27).

Although legal precedence for this solution are currently limited, McAdam (2011b, 127) argues distinctions and gradations of treatment are not rigid, but evolve over time with increased protection of fundamental rights (see also Inter-American Court of Human Rights 2008).[88] Courts over time, have reclassified certain acts, for example, from "inhuman or

[88] See *Cantoral –Benavides v Peru,* Series C No. 69, Judgment of 18 August 2000 in McAdam (2011b, 127).

degrading" to higher thresholds of "torture".[89] She hence argues that over time, movement from places such as Kiribati and Tuvalu could eventually "stimulate a dynamic interpretation of human rights law so as to provide a remedy for people whose homes have become uninhabitable". This may create a precedent for accepting people from other affected States with larger populations (McAdam 2011b, 128).

Regarding the approach through R2P, while it may provide some practical tools to address the issues, and a model for burden sharing arrangements, to date its application has been troubled and limited. It applies only to the serious crimes of "genocide, war crimes, crimes against humanity and ethnic cleansing" - where a clear violation of fundamental rights has occurred, and there is a clear violation of *jus cogens.* It hence, does not currently apply to cases of climate change forced migration.[90] R2P is largely a political (rather than legal) tool and its link to legal issues of State responsibility arising from the UNFCCC and customary international law (as discussed in chapter 2) are limited. Van der Vliet (2014, 75) points out that the system of R2P does not enter in legal discussions of accountability or wrongfulness.

3.3 EXPANDING THE SCOPE OF THE FRAMEWORK CONVENTION ON CLIMATE CHANGE

Addressing migration as an adaptation activity under the UNFCCC

Another option for addressing the gap in the international legal system regarding climate change forced migrants is through the UNFCCC. Several scholars and the UNHCR have proposed this option (see for example Biermann and Boas (2007; 2008), Williams (2008) and Gibb and Ford (2012)).

Gibb and Ford (2012, 3) argue that there is a "good fit" between the UNFCCCs adaptation objectives and climate change forced migration. They argue that the UNFCCC can and should recognise climate migrants, and is the most relevant international framework for doing so (Gibbs and Ford 2012, 1). Several scholars argue that the acknowledgment of climate change migration issues by the UNFCCC Ad Hoc Working Group on long term cooperative action in June 2009,[91] as well as the "invitation" to States to undertake "measures" related to

[89] See for example *Selmouni v France* (1999) 29 EHRR 403; *Henaf v France*, App. No. 65436/01 (European Court of Human Rights, 27 November 2003) para. 55: "it follows that certain acts previously falling outside the scope of Article 3 might in future attain the required level of severity" in McAdam (2011b, 127).

[90] However, Cohen (2010, 53) argues that the UN's exclusion of all disaster survivors from the umbrella of R2P should be revisited. She argues that flexibility in the application of R2P is essential.

[91] "Activities related to national and international migration/planned relocation of climate [refugees] [migrants] [displaced persons by extreme climate events …" (UNFCCC 2009, 45).

climate change induced migration contained in the Cancun Adaptation Framework in 2010 (UNFCCC 2010, para. 4(f)),[92] although not legally binding, are significant. These situate the UNFCCC as an appropriate forum for pursuing climate change displacement, migration and relocation issues (Gibb and Ford 2012, 2 –3), and indicate that the international community is receptive to addressing climate migration as an adaptation issue within the UNFCCC (Kälin and Schrepfer 2012, 50). The UNHCR has been active in advocating that that issues of climate change induced displacement or statelessness be recognised under the UNFCCC (Cournil 2011, 368; International Organisation for Migration (IOM) *et al*. 2014a; 2014b).[93] In a 2009 paper on climate change, natural disasters and human displacement, the UNHCR stated that "migration is often the survival strategy employed by populations whose human security is threatened" (UNHCR 2009a, 10), and committed to "assist Governments, where possible, with the implementation of their National Adaptation Programmes of Action", which are a key element of adaptation measures under the UNFCCC (UNHCR 2009a, 11). In a study, the UNHCR (2009c, 12) suggests that "ideally" multilateral agreements would be made that allow populations at risk to settle elsewhere with a legal status (potentially with dual citizenship or maintaining citizenship of their original State in a new location, respect for culture, right of residence, social benefits and so on).[94] The UNHCR sets out a number of conditions for concluding these agreements including the participation of the populations and governments concerned in the negotiations and clearly states that recognition of issues of displacement and statelessness as a result of climate change "would be required *inter alia* in the UNFCCC" (UNHCR 2009c, 12 –13).

An additional protocol to the UNFCCC

Bearmann and Boas (2008; 2007) propose a separate, independent, legal regime created under a Protocol of the UNFCCC. Such a protocol would offer *sui generis* protection specifically (and only) for climate migrants. They argue that such a proposal would build on

[92] As was outlined in chapter 2, discussions at recent UNFCCC meetings have included the issue of forced migration. Paragraph 14 f "invites" parties to undertake "Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation".

[93] UNHCR have made several submissions to the UNFCCC to encourage recognition of climate change induced migration within the UNFCCC adaptation program. See for example IOM *et al.* (2014b) *Joint submission to the UNFCCC on the Nairobi Work program,* ; and IOM *et al.* (2014), *Joint submission to the UNFCCC on National adaptation plans.*

[94] The UNHCR(2009, 12) argues that "To prevent statelessness in the context of low-lying island States, one option would be that territory elsewhere would be ceded to the affected State to ensure its continued existence. If other States agreed that this was the same State, statelessness would not arise. Union with another State would be another option."

the political support from countries as parties to the UNFCCC, and could draw upon important principles already enshrined within the UNFCCC such as common but differentiated responsibilities and respective capabilities, and the reimbursement of full incremental costs (Bearmann and Boas 2008; 2007).

Five principles underlie their proposal:

- planned and voluntary resettlement over long periods;[95]
- treatment of "climate refugees" as permanent (as opposed to temporary) immigrants;
- recognition of collective or groups rights (in some cases, of entire populations of small island States) as opposed to individual rights as is the case with the Refugee Convention;
- international assistance for domestic resettlement of internally displaced people;[96] and
- recognition that "climate refugees" are a global problem and global responsibility.

They argue for support and financing measures and international burden sharing in accordance with Article 3 of the UNFCCC.[97] They acknowledge that this does not imply transnational migration of all climate refugees to the developed world, or high polluting States, but that it does imply the responsibility of industrialised countries and high polluting states to "do their share in financing, supporting, and facilitating the protection and resettlement of climate refugees" (Biermann and Boas 2008).

Their proposal includes the creation of an executive committee and a separate fund (Biermann and Boas 2007, 29), with implementation facilitated through various existing UN agencies such as the UN Development Programme and the World Bank, with a smaller role for the UN Environment Program and UNHCR (Biermann and Boas 2008). In line with principles of State sovereignty and non-intervention, assistance would rely on a formal proposal, or request from an affected State (Biermann and Boas 2008).

Gibb and Ford (2012, 4) who argue for a similar approach, say that the mandate for the UNFCCC with regard to climate migration should be articulated in a COP Decision,[98] and the

[95] They argue for this approach as opposed to emergency response and disaster relief (Biermann and Boas 2008).

[96] Biermann and Boas' (2008) fourth principle deals with domestic protection of internally displaced persons. This principle could also be applied internationally displaced persons and international support for third countries to assist in resettling populations from affected countries. For example - in provide support to pacific island States to resettle populations from Kiribati. this refers to both governance and financial support.

[97] Biermann and Boas (2008) argue that "in most cases, climate refugees will be poor, and their own responsibility for the past accumulation of greenhouse gases will be small. By a large measure, the wealthy industrialised countries have caused most past and present greenhouse gas emissions, and it is thus these countries that have the greatest moral, if not legal, responsibility for the victims of global warming."

[98] Gibb and Ford (2012, 4) argue that "Recognition should come in the form of a Decision that builds on Decision 14(f)/CP.16 that calls upon parties to implement the Nansen Principles and is led by an Ad Hoc Working Group on Climate Migration within the UNFCCC."

specific objectives developed by an Ad Hoc Working Group on Climate Migration (*ibid.* 1*).* They argue that some technical issues could be addressed through the work of the IPCC which already addresses climate change forced migration in its scientific synthesis reports (Gibb and Ford 2012, 3).

A regional approach under UNFCCC

Williams (2008, 502) proposes a "regionally oriented regime" operating under the auspices of the UNFCCC as the "international umbrella framework". In the proposal outlined above, Gibb and Ford (2012), acknowledge the importance of regionally based solutions and enabling countries to choose policies that best suit their particular circumstances. They argue that the framework set out in the UNFCCC is well placed to facilitate this, as it encourages States Parties to take action within their borders, and to negotiate and act with other States at the global level (see UNFCCC Articles 3, 4, 5, 7, 15, provided at Annex B) without impinging on State sovereignty (Gibbs and Ford 2012, 3). Kälin and Schrepfer (2012, 68) acknowledge that "adaptive migration and cross-border displacement will essentially take place between neighbouring countries or at a (sub-) regional level". Williams (2008, 502) argues that the use of regional international initiatives is already commonplace in the international legal system.

Advantages and shortcomings

A key strength of such a proposal (as outlined by Biermann and Boas (2008) and Gibb and Ford (2012)) is that it could be implemented in line with important legal principles already enshrined within the UNFCCC, such as the principle of "common but differentiated responsibility", and could maintain close ties with linked and complimentary legal frameworks or policies addressing climate change adaptation and climate change mitigation, both of which have the capacity to reduce the scale of climate change induced migration significantly.[99] In addition, the proposal potentially addresses one of the key shortcoming of the proposal outlined above (Chapter 3.1 Expanding the Scope of the Refugee Convention) as it could be tailored to entire groups of people (such as populations of small island States), and is well suited to deal with preemptive, planned movement as part of the adaptation elements

[99] Research conducted by Nicholls (2011) attempts to estimate reduction in migration as a result of effective climate change adaptation. They argue that with no adaptation investment, with a half metre sea level rise by 2100, 0.877 million square kilometres would be lost and 72 million people would be displaced. They then argue that if governments undertook adaptation investments in all costs, very low levels of people would be displaced (less than one quarter of the original estimate).

of the UNFCCC. A key advantage of both the adaptation and, in particular, the regional approach under the UNFCCC, is that it would allow for flexible, regional or sub-regional approaches, and resettlement in potentially more culturally appropriate locations. It could also be implemented in line with the issues of international responsibility - at least in terms of assistance and financing - for damage caused due to climate change and consequent migration (see discussion in chapter two) (Gibbs and Ford 2012, 3).

While several elements of this approach seem appealing, other academics have criticised it. Docherty and Giannini (2009, 359) argue that the UNFCCC primarily deals with State-to State relations, and is not well suited to deal with duties that States have towards individuals or communities. Moreover, while the UNFCCC seems well placed to deal with preemptive, planned migration, Docherty and Giannini (2009, 358) argue that its existing institutions are ill-suited to take on the climate change "refugee" problem, highlighting its institutional insufficiencies in dealing with instances of "sudden flight" migration. Kolmannskog and Trebbi (2010, 721) argue that the UNFCCC has historically had little focus on remedies and state that while acknowledgement under the UNFCCC is important to "recognise migration and displacement and to ensure funding and co-operation", it is unlikely that it will offer a full solution.

3.4 A NEW CLIMATE CHANGE MIGRATION CONVENTION

A new "climate change refugee" convention

Another more ambitious option that has been proposed by scholars, is to negotiate a completely new, *sui generis* convention to guarantee specific rights and protections to climate change induced migrants. The authors Docherty and Giannini (2009, 350) propose a new legal instrument to address the issue of "climate change refugees".[100] Their definition of "climate change refugee" encompasses both slow and sudden-onset disasters, and would allow the determination of refugee status on a group or individual basis (Kolmannskog and Trebbi 2010, 722).

Their proposed instrument creates obligations upon State parties to deal with both prevention and remediation. It contains nine elements, which are grouped into three areas:

[100] Note, this is the language chosen by the authors. They set six elements to be met for a refugee to be considered a victim of climate change under their proposed convention: "forced migration; temporary or permanent relocation; movement across national borders; disruption consistent with climate change; sudden or gradual environmental disruption; and a "more likely than not" standard for human contribution to the disruption" (Docherty and Giannini 2009, 372). This language is used in this thesis only where it is explicitly the language chosen by the authors being discussed.

1. "Guarantees of assistance" - which includes consolidating standards for climate change refugee status determination; human rights protections; and humanitarian aid.
2. "Shared responsibility" - which includes "host" State responsibility; "home" State responsibility; and international cooperation and assistance.[101]
3. "Administration of the instrument" - through a compulsory global fund; a coordinating agency based on the model of the UNHCR (Docherty and Giannini 2009, 388); and a body of scientific experts (Docherty and Giannini 2009, 373).

Regarding the legal basis for their proposal, they argue that the international legal principle of "international cooperation and assistance", and international human rights law - including the Refugee Convention preamble which States that "a satisfactory solution . . . cannot be achieved without international co-operation" (Refugee Convention, preamble, para. 4) - should serve as the legal basis for shared responsibility (Docherty and Giannini 2009, 383). Building on earlier work of Muller, they argue that in the case of "climate change refugees" (as distinct to the approach of the Refugee Convention), the international community should be obligated to contribute to a fund - which would be set up under the precedent of the UNFCCC (Docherty and Giannini 2009, 385) - since States contributed to the problem. They suggest allocating international contributions according to the legal principle of States' "common but differentiated responsibilities" (2009, 387).

A new international convention for "persons displaced by climate change"

Burton and Hodgkinson (2009) (see also Hodgkinson *et al.* 2008; 2009) agree with the adoption of a multilateral independent (stand alone) convention for "persons displaced by climate change". Their proposed convention is based on the principles of equity, and common but differentiated responsibility, humanitarian law, refugee law and human rights law. To enable the collective and regional recognition of populations at risk, they develop a "flexible definition" of displaced persons.[102]

Burton and Hodgkinson (2009) set out a number of elements for the regime, including protection and assistance for internally and internationally displaced persons; compulsory

[101] They argue that the climate change refugee instrument should spread responsibility for protecting human rights and providing humanitarian aid across the international community (Docherty and Giannini 2009, 382).
[102] Burton and Hodgkinson (2009, 13–14): temporary displacement, permanent local displacement, permanent internal displacement, permanent regional displacement, permanent intercontinental displacement, temporary regional and international displacement.

financing according to States common but differentiated responsibilities (with reference to emissions levels); and a "very likely" standard of proof for causation.

Their Convention proposal provides specifically for the populations of small island States which may become uninhabitable due to the effects of climate change. They suggest that certain principles such as proximity and the preservation of intangible culture be applied to "bilateral displacement agreements" to be made between small island States and host States (Hodgkinson et. al. 2009, 12). It sets out proposed Convention governance and organisational structure, including a coordinating agency, a permanent secretariat, a compulsory fund (again based on existing precedent under international law), and a scientific body (Hodgkinson et. al. 2009, 12).

A new treaty on "environmentally displaced" persons

Numerous other scholars have suggested *sui genreris* protection in the form of a new international convention for "environmentally displaced persons" (see for example Lopez (2007) and McCue (1993–1994)). McCue (1993–1994) has proposed a new convention based on the principles of international refugee law and environmental law, such as the obligation to prevent, assist and provide information about the environmental situation. He suggested setting up a compensation fund to be managed by the secretariat of the new convention.

Similarly, the rapporteur on environmentally induced migration and displacement for the Council of Europe's Committee on Migration, Refugees and Population, Tina Acketoft in her 2008 report, called for eventual elaboration of a specific framework for the protection of environmental migrants (Ackeroft 2008).

Finally, the draft convention on the international status of environmentally displaced persons (Interdisciplinary Centre of Research on Environmental, Planning and Urban Law (CRIDEAU) 2010)[103] is another protection proposal package. It combines protection (Art. 6), the right to assistance (Art. 11), reparation (Art. 4), and responsibility (Art. 5) for both permanently and temporarily displaced persons (s. 2.3). It covers fundamental rights of persons facing displacement such as the right to food, shelter, civil and political rights (Art. 8–10). The draft provides that the State parties create a national procedure to claim the status

[103] Second version of the Draft Convention on the international status of environmentally-displaced persons elaborated by the CRIDEAU and the CRDP, thematic teams from the OMIJ (Observatoire des mutations institutionnelles et juridiques), Law faculty of the University of Limoges (PRES Limousin Poitou - Charente), with the help of the CIDCE (International Centre of Comparative Environmental Law) (second version - May 2010) published in Revue européenne du droit de l'environnement, 2008, 381–93 drafted by environmental law specialists at the University of Limoges (OMIJ/CRIDEAU) is another protection proposal package.

of an environmentally displaced person, and proposes a "world agency", a "science council", a secretariat and a world fund. Cournil (2011, 376) argues that although the convention has its flaws, it is a "practical starting point".

Advantages and shortcomings

All of these proposals provide a holistic approach in order to address the complexities of climate change forced migration- they generally combine the issues of prevention, protection, relief, responsibility, new institutions, and financing arrangements. These solutions (in particular the first two) build on the obligation and responsibilities of States for climate change damages and consequent migration as outlined in chapter two, in particular through their proposed compulsory financing arrangements. However, as Cournil (2011, 376) argues, such "hard law" solutions remain a long term option as currently, States do not appear ready for such a solution. In building their case for the creation of a new, stand alone instrument, Docherty and Giannini (2009) point to the apparent "lack of willingness" of States to expand the scope of the Refugee Convention or the UNFCCC. Cohen and Bradley argue, the reluctance of many States to extend any new rights to foreign migrants and the reluctance of governments to even mention migration in the 2009 Copenhagen Accord (UNFCCC 2009), suggests that the creation of a new convention will be even more so, an "uphill and long-term struggle" (Cohen and Bradley 2010, 25–26). Naser (2013, 525) suggests that the idea of creating a new convention would create panic for some States. This would likely mean that its ratification (by States) would be limited. There is also the apparent issue that the proposals create some overlap or duplication with other institutions already in place - such as adaptation and funding arrangements under the UNFCCC, and refugee procedures under the UNHCR.

Moreover, McAdam (2011a) argues that while an overarching framework is helpful for identifying the range of climate change impacts, the commonality of climate change as a driver is "insufficient rationale for grouping together a disparate array of displacement scenarios and proceeding to discuss policy responses in generic terms". Both Kälin (2010, 85) and McAdam (2011a, 5) have pointed out that it is "extremely difficult" to identify and distinguish displacement because of climate change - in particular in cases of slow onset disasters (such as drought). It is similarly difficult to distinguish between "climate disasters" and "natural disasters". McAdam points out the moral difficulties in prioritising those who migrate due to climate change over those who migrate for other reasons not covered in the Refugee Convention.

3.5 OTHER APPROACHES

A "soft law" approach through the establishment of guiding principles

Estrin and Kenedy (2014, 180) of the IBA argue that one of the more promising developments in migration protection over recent years has been the wide endorsement and approval of the UN Guiding Principles on Internal Displacement (1998).[104] Several scholars, such as Kälin (2001), Kolmannskog and Trebbi (2010)[105] Naser (2013), as well as the OHCHR[106] advocate for the development of "soft law guidelines" based on existing norms and principles of international law, to address the issue of climate change forced migration.

This method would seek to create a non-binding, but universally agreed set of principles that could protect "environmentally displaced persons" or "persons displaced by climate change" through a synthesis of existing international legal mechanisms and principles.

Advantages of this approach include that it is more time sensitive and forthcoming as it would build on the model provided by the development of the UN Guiding Principles on International Displacement. Cohen and Bradley (2010, 20) argue that drafting and building international support for a set of guidelines might be the most promising, and politically feasible route to strengthening international consensus on the issue of climate change forced migration (Valencia-Ospina, 2008).

Of course, there are also limitations to this approach. Internally displaced persons already have a clear claim to protection (as citizens) from their own State. Ensuring protection of those who cross borders may involve creating new rights, which would necessitate the direct involvement of States and potentially be difficult to negotiate (Cohen and Bradley 2010, 26). Another disadvantage is that these guiding principles would not be legally binding. However, the principles may over time, become part of customary intentional law. Kälin (2001) has argued that "one should not overestimate this weakness as it is always possible to invoke the hard law that lies behind the Guiding Principles where necessary". He argues further that "there are some indications that the Guiding Principles are emerging as customary law, providing a binding interpretation of the international legal norms upon which they are based" (UN Human Rights Council 2010, para. 11). In the meantime, he argues that the non–binding character of the Guiding Principles has been an advantage, arguing that in his

[104] UN. 1998. Guiding Principles on Internal Displacement, Doc UN E/CN.4/1998?53?Add.2.

[105] Kolmannskog and Trebbi (2010) have argued for consideration of a "soft law approach" similar to that taken in the case of internally displaced persons: that is, to investigate the protection gaps more closely and create a synthesis of existing international law in the form of principles.

[106] The OHCHR has made concerted efforts to seek broad international consensus on the creation of a new, non-binding guiding framework covering climate change and other environmental migrants (McAdam 2013).

experience as Representative of the Secretary General on the human rights of internally displaced persons, it is "much easier to negotiate with governments" if the question of "legal violations" does not "loom in the background" but if negotiation can focus instead on how problems can be addressed and what guidance can be provided by the international community (Kälin 2001, 7).

Apportioning responsibility for migrants according to historical emissions

Byravan and Rajan (2006) suggest that people living in areas which are likely to become uninhabitable due to climate change should have the option of migrating to other countries in numbers roughly proportionate to the host countries' cumulative greenhouse gas emissions. This would mean that, per year, the United States of America (as the highest emitter) would take approximately 30 per cent of all forced migrants, the European Union, as the second biggest emitter, would take around 20 percent, equivalent to their historical share of greenhouse gas emissions, and so on (Byravan and Rajan, 2006, 250). In a similar vein, Moberg (2009, 1135–1136) suggests creating an environmentally based immigration visa programme where the number of immigrant visas issued by each country would depend on their share of greenhouse gas emissions, with the biggest producer issuing the most visas.[107] While seemingly neat solutions, they do not account for social or cultural considerations, the complexity of contributory causes in any given displacement situation, and overlook the role of other factors, which contribute to migration. Such blunt approaches are also unlikely to garner genuine political support (McAdam and Saul 2009, 15). However, a similar technical approach could potentially be used to allocate financing responsibilities.

Regional or sub-regional approaches

The Estrin and Kenedy of the IBA (2014), the NRC (2011, 17), the UNHCR and numerous affected States have highlighted that on the issue of climate change forced migration, regional collaboration is key. In a recent comprehensive report, the IBA (2014, 182) recommended that the international community "promote the adoption of bilateral and regional agreements and programs … such as reconsideration of domestic immigration laws, to assist with climate change related migration". The UNHCR and NRC (2009) claim that in

[107] There are similarities between these approaches and the "distribution scheme" introduced by the European Commission in May 2015. Under the distribution scheme, persons in clear need of international protection were distributed to Member Sates based on criteria (a "distribution key") which reflect the capacity of Member States to absorb and integrate refugees (European Commission 2015b, 2).

comparison to hard law approaches, it would be "easier and faster" to develop national or regional protection arrangements in order to be able to anticipate cross border or inter-state climate migration. At the UNHCR (2010, 5) Dialogue of the High Commissioner on Protection Challenges, participants favoured "regional arrangements and regional preparedness, particularly with regard to sudden onset disasters" (see also Kälin and Schrepfer 2012, 53).

Several States, in particular in the pacific, have already used bilateral programmes to facilitate migration to nearby or neighbouring States in the face of environmental disasters (IBA 2014, 182).[108] These regional or national programs may provide useful starting points or models for climate change related migration agreements or programs (IBA 2014, 182). However, while these regional or national approaches have significant benefits, they risk creating a patchwork of approaches that differ across regions and countries (Regna-Gladin 2012, 268), do not provide an obligatory international legal framework, and do not draw upon the obligations of States that are discussed in chapter two. Cournell (2011, 381) argues that while voluntary, regional distribution is feasible when applied to people from small island countries, it will be difficult to replicate in other contexts, such as in Africa, where neighbouring States are less wilLing or able to accept migrants, and where the numbers of people moving are far greater. Ideally these approaches should fit within, and be supported by an international legal framework.

3.6 SUMMARY

There are advantages and shortcomings of each of the solutions explored above. Expanding protection obligations under the Refugee Convention, while it is seemingly the most straight forward solution, and provides useful and ready-made administrative and operational procedures, poses the serious risk of eroding the current international refugee protection system. It also falls short of addressing the issue of pre-emptive, or planned migration due to slow onset climate change impacts (for example, in response to gradual sea level rise).

Regarding the approach through international Human Rights law - the suggestion of expanding the application of complimentary protection measures, in particular the principle of *non-refoulement*, may be particularly significant in addressing the protection gap for

[108] For example, when Cyclone Heta destroyed infrastructure on the Pacific island of Niue in 2003, New Zealand offered to resettle the island's population (over 1,000 people). While some relocated, many chose to remain on the island and rebuild with the help of aid (Estrin and Kennedy 2014, 182).

climate change forced migrations. However, similar to the case with the Refugee Convention, both Kälin (2010) and McAdam (2011c, 4) acknowledge that complementary protection measures are likely to be an inadequate mechanism to respond to pre-emptive movement due to slow onset climate impacts - where conditions are set to become dire in the future (such as the case of low-lying island States). While it is a novel approach, and provides some potentially useful tools to address the problem, the application of the principles of R2P to the case of climate change forced migration seems unlikely to provide a comprehensive legal solution. Moreover, Kälin acknowledges that human rights protection, while important, is currently a minimalist protection system.

The option of addressing the problem via an additional protocol to the UNFCCC, or a regional approach under the umbrella framework the UNFCCC, has the advantage of building on recent political support for the acknowledgement of migration as an adaptation issue within the UNFCCC. It also has the significant advantage of drawing upon important legal principles already enshrined within the UNFCCC, such as the principle of "common but differentiated responsibility" and burden sharing arrangements (both financial and other forms of assistance). It could link closely with other complimentary policy or legal objectives addressing climate change adaptation and climate change mitigation, both of which have the capability to reduce the problem of climate change forced migration significantly (Nichols *et al.* 2011).[109] A key shortcoming of his approach however, is that is unlikely to provide a full solution, in particular for those who are forced to move due to sudden onset disasters.

The most ambitious option of negotiating a completely new, *sui generis* convention to guarantee specific rights and protections to climate change induced migrants, seems to provide a holistic approach in order to address the complexities of climate change forced migration. The various proposals generally combine the issues of prevention, protection, relief, responsibility, new institutions, and financing arrangements. These solutions build on the obligations and responsibilities of States for climate change damages and consequent migration as outlined in chapter two, in particular through their proposed compulsory financing arrangements. However, key shortcomings are that these proposals are likely the most resource intensive and difficult to negotiate. They also risk duplicating the work or objectives of other UN bodies such as the UNHCR and UNFCCC. Some commentators have argued that negotiation of such a treaty is likely to create panic, and that States do not appear ready for such a solution.

[109] See footnote 99 above.

Finally, regarding other approaches - the proposed “soft law” approach through the creation of guiding principles, provides a potentially more time sensitive and easy to negotiate solution, which, as Kälin and Schrepfer (2012, 5) argues, may in time become part of customary international law. However, there are limitations of this approach. The negotiation of guiding principles to deal with international displacement may be significantly more convoluted than the cited previous experience of the development of the guiding principles on internally displaced persons. In addition, guiding principles will not, (at least in the short term) provide a hard law solution to the issue. The proposal for national and regional approaches, while not discussed in detail, forms an important aspect of addressing the issue of climate change forced migration. However, on their own, regional and national approaches do not provide an obligatory international legal framework or draw upon the obligations of States that are discussed in chapter two. Ideally these approaches could fit within, and be supported by an international legal framework.

Overall, each of the various approaches have significant strengths, and also some shortcomings. Choosing a combination of the approaches outlined above, may prove the most effective way of filling the protection gaps. This possibility is discussed further in the concluding chapter.

CHAPTER 4: EXAMINING THE APPLICABILITY OF THE PROPOSED LEGAL APPROACHES TO THREE COUNTRY CASES

This chapter examines how the proposed legal approaches outlined in chapter three would apply to three solid country cases - Tuvalu, Somalia and Bangladesh. McAdam (2011b, 130) has stated that in the case of climate change forced migration "the local and the particular" do not always speak well to international law or governance. Hence, the aim of this chapter is to ground the so far fairly "top down" and abstract legal approaches to solid country cases, and to examine whether these approaches are likely to accommodate the "local and particular" circumstances of these States.

The cases of Tuvalu, Somalia and Bangladesh were chosen for several reasons. Firstly, the IPCC (2014) has outlined that the areas most vulnerable to the impacts of climate change are low-lying island States, the sub-Saharan African region and coastal and deltic countries. The three chosen cases provide one example of each. In all three cases it is highly likely that people will be forced to migrate across national borders as a result of climate change. Secondly, together these cases provide a cross section of regions and issues - both in terms of the nature of climate change impacts (both slow and sudden onset), and social issues. Thirdly, these three particular States were chosen because community and official views on the issue of climate change forced migration are relatively well documented. Resources are hence available to enable this research. A cross section of cases was chosen because a broad, international legal approach should seek to be applicable and appropriate for the broadest possible range of cases.[110]

Chapter four is composed of four parts. The first sub-chapter introduces the case of Tuvalu, providing some background and outlining the potential impacts of climate change on population displacement in the State. It then briefly examines how each of the proposed legal approaches (as outlined in chapter 3) apply to the specific case, drawing on literature from interviews, official public statements and previous case studies to ascertain the views and wishes of Tuvalu and Tuvaluans regarding the issue. This exercise is then repeated for the

[110] Numerous developed countries also face challenges associated with climate change forced migration. For example, a number of coastal villages in Alaska have been impacted by sea level rise and coastal erosion to the point where resettlement is the only viable adaptation (Bronen 2010; Oliver-Smith 2011; Marino 2012). Five indigenous communities in Alaska are already planning their own relocation (Bronen, 2010). River deltas around the globe are vulnerable to the effects of sea level rise. Wealthier cities like London, New Orleans and Venice also face uncertain futures (IPCC 2014, 1293). However, developed countries generally have the resources and finances to adapt and accommodate displaced people internally (Oliver-Smith 2011). The bulk of climate change induced displacement from the three cases chosen is likely to be, at least initially, internal. However, as outlined in the introductory chapter, this thesis is focussed on cases and protection gaps associated with cross national border migration.

cases of Somalia and Bangladesh in the second and third sub-chapters, respectively. The fourth sub-chapter provides a summary.

Information on the wishes and desires of populations in each of the cases is drawn from public statements of officials, as well as responses to interviews conducted by previous studies.[111] The method used in this chapter is three brief case studies and a hypothetical application of the legal approaches outlined above in chapter three. The chapter does not examine each of the cases in detail, but provides a broad overview and analysis of how the proposed legal approaches are likely to accommodate, or not, the specific circumstances in each country case.

4.1 THE CASE OF TUVALU

Country context and climate change migration

Tuvalu is a small, South Pacific island State made up of an archipelago of 9 small, low-lying atolls.[112] It has a population of just under 11 thousand[113] of which 96 percent are Polynesian and 4 percent are Micronesian (Index Mundi 2015a). Tuvalu has been identified by scientists as a State that will be significantly affected by the impacts of climate change. Tuvalu's average elevation is little less than two metres above sea level, and hence, sea level rise, coastal erosion and inundation threaten its very survival (McAdam 2011b, 109). Salt water intrusion into the water table and changed rainfall patterns threaten already scarce drinking water supplies, and are likely to reduce agricultural productivity.[114] Other effects of climate change include extreme events, such as king tides, storms, ocean acidification, pest infestations, and an increase in communicable diseases (Lazrus 2009, 242; Oliver-Smith 2011, 177; Gemenne and Shen 2009, 9). Climate change impacts exacerbate and are exacerbated by existing development problems.[115] Tuvalu faces problems of unemployment, pollution and a general lack of resources. Population pressure is moderate, but there is

[111] Numerous studies have been conducted on the wishes of Tuvaluan's regarding the issue of climate change forced migration. See for example Mortreux and Barnett (2008). Forty semi structured interviews were used for this study.
[112] Tuvalu was known as the Ellis Isalns until 1974, when citizens voted for separate British dependency status, separating from the Gilbert Islands (now Kiribati). Tuvalu became fully independent within the Commonwealth in 1978 (British Broadcasting Corporation (BBC) 2015c).
[113] As at July 2014 (Index Mundi 2015a).
[114] Agriculture is already extremely difficult because of the salinity of the soil, which is now considerably increasing, making the cultivation of taro, the main crop, ever more difficult (Gemenne and Shen 2009).
[115] Mortreux and Barnett (2009, 110) note that Tuvaluans confront many problems as citizens of a "least developed country", among them "poor housing, inadequate sewerage and waste disposal, unemployment, nutrition-related health problems and under-resourced health services".

considerable reliance on employed family members to provide for their relatives (McAdam 2011b, 109).

Tuvalu has come to be known for issues linking climate change, forced migration, and loss of territory and sovereignty (Stratford *et al.* 2013, 76).[116] It is the first sovereign State faced with becoming entirely uninhabitable within the next 50 years - necessitating the relocation of the entire population (Alofa Tuvalu 2008). In the case of Tuvalu and other South Pacific island States, movement as a result of climate change is likely to be pre-emptive and planned in response to slow onset disasters such as sea level rise, rather than sudden (McAdam 2011b, 103).

While migration as a result of climate change may be relatively new, migration for other reasons is common in the Pacific region (McAdam 2011b, 126). There are historical examples of entire communities relocating to other areas of the Pacific - such as the purchase of land and relocation of a community from Vaitupu in the Ellis Islands (now Tuvalu) to Kioa in Fiji in 1946 (Kock 1978; Stratford *et al*. 2013, 78—79).[117] There are also substantial populations of Tuvaluans and other Pacific Islanders who have migrated to Australia or New Zealand for employment opportunities or due to family connections (Mortreux and Barnett 2009; Campbell 2014).

Given the precedent for voluntary migration across the region, it is not surprising that many academics and pacific islanders themselves express a preference that migration, if it must occur, take place within the region. Some Pacific Island States are already making arrangement to purchase parcels of land or whole islands from other States within the region. In 2014 Tuvalu's neighbour, Kiribati, purchased six thousand acres of land on Vanua Levu, one of Fiji's islands for the potential future relocation of people displaced due to climate change (Office of the President Republic of Kiribati 2014). Members of the Tuvaluan Vaitupu community have suggested Kioa Island in Fiji as a possible relocation site for

[116] Tuvaluan Prime Minister Apisai Ielemia in 2009 said that climate change threatens Tuvalu's very survival (European Parliament 2009). As early as 1992 the South Pacific Forum "reaffirmed that global warming and sea level rise are the most serious threats to the Pacific region and the survival of some island States" (South Pacific Forum, 1992). The official statement delivered by the representative of the Government of Tuvalu at the Conference of the Parties to the UNFCCC in 2012 stated: "Tuvalu is sinking. The people are in great danger for our Sovereignty and Nationhood will be lost forever. My people will soon drown if this Conference is not able to reach impressive conclusions" (Government of Tuvalu 2012).

[117] Vaitupu community collectively agreed to purchase Kioa at auction. A subsection of the population of Vaitupuans moved there and descendants remain today. Although Kioa is within Fiji's national territory and has no formal support from the Tuvaluan national government, its inhabitants maintain strong political, economic and kinship links with community on both Funafuti and Vaitupu (Stratford *et al.* 2013, 78—79). Another example is movement from Banaba in the Gilbert Islands to Rabi in Fiji (Teaiwa 2005) and from Vaitupu in the Ellis Islands to Kioa in Fiji (Koch 1978).

Tuvaluans in the event of that Tuvalu becomes uninhabitable (Stratford *et al*. 2013, 78—79).[118] Campbell (2014, 18) argues that following Pacific island locations, the next most appropriate destinations are New Zealand and Australia. Stratford *et al*. (2013, 78—79) suggest that some Tuvaluans may in fact see relocation to New Zealand as preferable to relocation to other small Pacific island States since social networks, employment and education opportunities are likely to be greater (Stratford *et al.* 2013, 78—79). It is interesting to note that New Zealand is also part of Polynesia, with its indigenous Maori population practising Eastern Polynesian culture (Polynesian Cultural Centre 2015). However, these regional migration opportunities are not always easy to access. Some Pacific island States have access to international migration opportunities through colonial linkages or through free associations status.[119] However, other pacific island States including Tuvalu have very limited international migration access (Campbell 2014, 19—20).

There are many other factors that may complicate migration within the Pacific region. Much of the land in Pacific island States (including Tuvalu and Fiji) is governed by indigenous or traditional customs, with only a small percentage freehold or public (Australian Agency for International Development 2008, 4).[120] Therefore, relocation to other areas even within the pacific is likely to be fraught with problems of land tenure. In addition, many pacific islanders including Tuvaluans view land as possessing a sacred and spiritual quality (Mason 1987, 4). This profound attachment to land and to Funafuti and Tuvalu suggest that full scale migration - even within the region - would be "a tragedy" for many Tuvaluans (Mortreux and Barnett 2009, 110). Many interviewed by Mortreux and Barnett (2009, 110—111) rejected the idea of "full scale" migration or relocation, and saw it as a last resort.[121] Many feared for the loss of sovereign rights and identity, stating that "you cannot make another Tuvalu" (Mortreux and Barnett 2009, 111). These issues of land tenure and attachment to land potentially represent significant challenges in moving whole communities

[118] Elevations in Kioa are substantially higher than that on all the islands in the Tuvalu archipelago (Stratford *et al.* 2013, 78—79). This was suggested during discussions held as part of a UN climate change consultation process.
[119] For example, in France, New Zealand or the United States of America.
[120] "The most highly codified system is in Fiji, where lands have been surveyed, boundaries established and the land registered according to *mataqali* (clan) membership, which for most children is registered at birth. In many other countries no such arrangements exist; boundaries may be flexible or fuzzy, and knowledge regarding them is transmitted orally" (Campbell 2010, 62).
[121] This sentiment is also expressed by government officials. The government of Tuvalu has rejected the idea of relocation, and resisted the inclusion of "relocation" in international agreements for fear that it would reduce the focus on climate change mitigation, which should come first (McAdam 2011b, 111).

across national borders where laws of the new country may clash with traditional laws or where community support and a sense of culture may be lacking (Campbell 2014, 15).

Examining the applicability of the legal approaches

Applying an expanded Refugee Convention and its 1967 Protocol

As was discussed above, Tuvaluan's have rejected the idea of being classified as "climate refugees" both at the official and individual level (Stratford *et al.* 2013, 77; McAdam 2011b, 116). McAdam (2011b, 116) argues that this is largely because the idea is seen as invoking a "sense of helplessness and a lack of dignity" which contradicts the important sense of Pacific pride.[122] They feel that refugees are seen as "passive victims" who are left to wait in camps rather than active members of a community. McAdam (2011b, 116) claims that in part, their discomfort is due to the fact that refugees generally flee from their own government, in the case of Tuvalu however, people have no desire to flee their own countries but are being forced to (albeit indirectly) by the actions of industrialised States (*ibid.*). At an official level, the government has also rejected the idea of full scale migration out of fear that it would reduce the international focus on climate change mitigation, which would reduce the scale of migration necessary (McAdam 2011b, 111).

Aside from conflicting with community wishes, the approach to protection under the Refugee Convention also has numerous shortcomings in the case of Tuvalu. A key shortcoming is that protection under refugee law can only be applied for once a person has arrived on the territory of another State. It hence does not accommodate the likely planned, and slow nature of emigration from Pacific islands States such as Tuvalu. McAdam (2011b, 118) argues that an approach through the refugee convention may "encourage spontaneous arrivals rather than planned, gradual movement", which would likely be "far more traumatic and uncertain" than slow, facilitated migration. Moreover, McAdam (2011a; 2011b) and Mortreux and Barnett (2009) argue that a protection like response, such as an amendment to the Refugee Convention, is unlikely to accommodate broader issues such as human rights concerns, including the right to culture and self-determination.[123]

[122] See also the comment by the Maldives President: "We do not want to leave the Maldives, but we also do not want to be climate refugees living in tents for decades" (CNN 2008). See also the comments of Kiribati's Foreign Secretary, Tessie Lambourne: "We are proud people. We would like to relocate on merit and with dignity" (Goering 2009).

[123] McAdam (2011b, 129) argues that the fear expressed by Tuvaluan's of "languishing in camps" is a real one, given the current international situation where millions of asylum seekers who would likely classify as traditional convention refugees are left in camps with little hope of permanent resettlement.

There are however, several cases where Tuvaluans as well as other Pacific Islanders, have sought to claim asylum in Australia or New Zealand on the grounds of climate change or related environmental concerns.[124] These cases have not been successful but highlight that, contrary to the findings of McAdam (2011b) and Mortreux and Barnett (2009), there is some desire to expand the scope of the Refugee Convention. It could be said however, that these claims are made as a matter of last resort, in the absence of other opportunities for migration.

Applying expanded human rights and complimentary protection obligations

Many Human Rights principles are highly relevant to climate change forced migration in Tuvalu. Oliver-Smith (2011, 177) highlights that forced, involuntary migration from Pacific Island States involves "far more than just physical movement". He claims that it is critical to consider broader human rights - such as the right to practice culture and the right to self-determination - in order to fully understand what "needs to be recovered" in addition to the physical relocation of people or communities. Both McAdam (2012, 201) and Oliver-Smith (2011) argue that planned migration in the case of Tuvalu and other small island States, must occur within a human rights framework, focusing not only on protection but on adequate resettlement. Oliver-Smith (2011, 177) argues that inadequate resettlement can be considered a "secondary disaster" which can "make permanent many of the losses in displacement".

However, the scope for human rights law to independently offer specific protection or resettlement options is limited. Similar to the case of the Refugee Convention, there are some instances where people from Tuvalu may seek to remain in other countries on the basis of complimentary protection and the principle of *non-refoulement* offered by human rights law. As with the refugee convention, expanding the scope of complimentary protection - for example, along the lines suggested by Kälin in chapter 3.2 above - may offer protection solutions for some individuals who are able to flee Tuvalu, reach the shores of another State and prove that return would be "unreasonable". It is unlikely however, to provide a full solution in particular to accommodate the slow, planned relocation of whole communities as may be necessary in the case of Tuvalu.

Applying the expanded UN Framework Convention on Climate Change

An approach to address the issue of climate change forced migration through the UNFCCC fits well with the focus of the Tuvaluan government on minimising the need for

[124] For cases see footnote 22 above. For further cases in McAdam (2012, 47).

migration through strong international climate change mitigation and adaptation strategies. Migration is considered an option of last resort.[125] In the case of necessary migration however, staged, skills based, regional migration seems preferable for Tuvaluans as well as other pacific islanders. This type of migration fits well with an approach to migration as an adaptation strategy within the remit of the UNFCCC (Stratford *et al.* 2013, 77). An additional protocol to the UNFCCC, or a regional approach under the umbrella of the UNFCCC could provide a strong framework and set of principles that appear to suit the locally led approach preferred by Tuvalu, while also providing the legal framework for international assistance and financial burden sharing through adaptation funding under the UNFCCC (Campbell 2014, 22).

Applying a new convention

The proposal for a new international "convention for persons displaced by climate change" developed by Hodgkinson *et. al*. (2009)[126] claims to cater specifically for the needs of small island developing States. It includes principles and rights considerations such as proximity, protection of intangible culture and the right to self-determination. In this respect the proposal appears to offer a relatively comprehensive solution which accounts for many of the wishes of Tuvaluans. However, this does not overshadow the broader issues with this approach as were discussed in chapter 3. The cumbersome nature of a new treaty, the potential for limited ratification and the potential for overlap with other institutions and areas of international law and governance remain key shortcomings of this approach. In addition, McAdam (2011b, 103) claims that field research suggests that even in the case of disappearing island States, it is difficult to describe human movement as exclusively "climate-induced". Moreover, none of the proposed conventions discussed in chapter 3 deal specifically with the unique issues of statelessness or territory transfer. Even the proposal of Hodkinson *et al.* (2009) refers to the relationship between migrants and "host States", who would afford rights to communities who migrate.

[125] Some officials have described migration as being "an option at the back of the government's mind, with adaptation at the forefront" (Saloa in McAdam 2011, 116). Both climate change mitigation (led by large emitters) and climate change adaptation have the potential to reduce the scale of necessary migration significantly, and hence, advocating for strong international action on both remains the primary focus of the Tuvaluan government.

[126] See also Hodgkinson *et al.* (2008) and Burton and Hodgkinson (2009).

Applying other approaches

The approach of developing "soft law" guidelines has some merit in the case of Tuvalu. As has been discussed above, multiple areas of international law including human rights law, environmental law, the law of the sea and the law on statelessness, as well as international development objectives are relevant to climate change induced migration in Tuvalu. In addition, as the risks faced by Tuvalu are relativity imminent, the expedient nature of this approach could be an advantage. However, this soft law approach may lack the authority to compel states to manage the issue.

It is evident that crude approaches to divide the number of climate change migrants equally between industrialised States will not work in the case of Tuvalu. Communities would prefer (at the very least) to migrate collectively. However, a similar approach to gather support and financial assistance may be beneficial.[127]

It is clear that regional approaches are key in the case of Tuvalu and in the broader Pacific region. Bilateral or regional approaches to labour, education and family migration are in step with the wishes expressed by people in Tuvalu to migrate with dignity. They also fit well with historical patterns of migration and are suitable to accommodate the likely gradual nature of migration due to slow onset climate events (McAdam 2011b, 120). Through a series of interviews Mortreux and Barnett (2009, 108) found that for many Tuvaluans planning to migrate, New Zealand or Australia were preferred destinations due to family connections, proximity, and comparable climates. Both Australia and New Zealand have some regional arrangements in place to facilitate skilled labour migration from Pacific island States. However, these programs are currently tailored to a much smaller number of migrants than is expected due to climate change.[128]

4.2 THE CASE OF SOMALIA

Country context and climate change migration

Besides low-lying island States, sub-Saharan Africa is one of the regions of the world that is most likely to be particularly affected by the impacts of climate change (Gemenne 2011; IPCC 2014, 1239). Somalia is a sub-Saharan African State, with a population of approximately 10.5 million (Index Mundi 2015b). Somalia already faces a complex

[127] This technical approach could form part of an approach through the UNFCCC.

[128] See for example Australia's three-year Pacific Seasonal Workers Pilot Scheme (2009) - this program concluded in 2012 (Australian Government Department of Employment 2015) - and New Zealand's Recognised Seasonal Employer scheme (Immigration New Zealand 2015).

humanitarian situation. NRC (2014, 1) reported in 2014 that about 2.9 million Somalis are already in humanitarian crisis, and over 800 thousand people (most of them displaced) are already in need of emergency assistance. Somalia faces issues of acute malnutrition, water shortages and serious food security issues due to the occurrence of drought, poor rainy season and in some cases floods (NRC 2014, 1; BBC 2015b).[129] Persistent insecurity and decades of fighting[130] further hamper agricultural activity,[131] and has left the country poorly equipped to deal with environmental disasters in the recent past. Around half a million people died in the Somali famines of 1992 and 2010—12 (BBC 2015b). Recent floods also caused numerous deaths, displaced thousands of people (Davies 2013), contaminated drinking water and increased the risk of malaria and waterborne diseases (UNOCHA 2011, 3).

In its most recent report, the IPCC (2014, 1202) outlined with high confidence that climate change will amplify existing stress on water availability in Africa. Droughts are projected to intensify over the coming century[132] and increased temperatures and changes in precipitation are very likely to reduce crop productivity (Williams and Funk, 2011; IPCC 2014, 1202). In East Africa there is high confidence in a projected increase in heavy precipitation events and extreme wet days by mid-century. These events can cause flooding (Seneviratne *et al.* 2012; IPCC 2014, 1211). Climate change and climate variability have the potential to exacerbate or multiply existing threats to human security in Africa, including food, health, and economic insecurity. Many of these threats are known drivers of conflict (IPCC 2014, 1204).

Human migration in Somalia, and in the Sub-Saharan African region more generally, is complex. It has social, political, demographic, economic, and environmental drivers, which may operate independently or in combination (Perch-Nielsen *et al.* 2008; Piguet 2010). However, it is clear that many of these drivers are climate sensitive (IPCC 2014, 1239). Many Somali asylum seekers interviewed by Kolmannskog and Afifi (2014, 51) reported that the drought and conflict go hand in hand. Some interviewees believed that drought

[129] The UN Office for the Coordination of Humanitarian Affairs (UNOCHA) (2011, 2–3) estimated there were 4 million food insecure people in Somalia, 450 thousand of them malnourished children, and at least 3.3 million in need of access to safe water and sanitation.

[130] In 1991 the Somali President (Barre) was overthrown by opposing clans. Following this, the country fell into lawlessness and clan warfare. Somalia had no effective government in place for over two decades after 1991, until a government was installed with international backing in 2012 (BBC 2015b). There were UN and African Peacekeeping efforts during the 1990s and 2000s (BBC 2015b).

[131] Due to the restriction of supply routes and disrupted trade flows (NRC 2014, 1).

[132] This is expected in some seasons due to reduced precipitation and increased evapotranspiration. IPCC report this with medium confidence.

exacerbates conflict by increasing competition over land and resources (Kolmannskog 2009, 6).[133]

Examining the applicability of the legal approaches

Applying expanded Refugee Convention and its 1967 Protocol

As experience over the past few years has shown, in cases where conflict and climate related factors coincide, many people qualify for formal refugees status under the Refugee Convention (Kolmannskog 2009, 9—10). Currently, many people fleeing Somalia go to nearby States including Kenya, Egypt and Yemen. The sufficiency of the Refugee Convention in dealing with climate related displacement in these States depends on the particular approach of each country in implementing the convention.[134] In Yemen, the majority of Somalis seek refuge upon arrival and are granted refugee status on a *prima facie* basis. The Government issues official documents, which must be renewed every two years (Kolmannskog and Afifi 2014). Similarly, Somalis who flee to Kenya are generally able to undergo group determination.[135] While this prima facie status is in place, it continues to provide protection to people who flee drought and disasters in addition to conflict and persecution. A senior UNHCR staff interviewed by Kolmannskog and Afifi (2014, 9) in Kenya said "if drought and conflict coincide, we will not split hairs".[136] However, those who flee to Egypt[137] (in contrast to Kenya and Yemen) have to undergo individual refugee status determinations rather than prima facie group determination, meaning that each individual has to show a clearer link to persecution or conflict, and must meet all criteria in the refugee definitions, including proving that the reason for the displacement is persecution, generalised violence or another reason recognised in international law (Kolmannskog and Afifi 2014, 51). In these cases, narratives were sometimes adjusted in order to meet definitional

[133] In the Yemen, Kenya and Egypt case studies conducted by Kolmannskog and Afifi (2014), several Somalis interviewed mentioned (lack of) livelihood options and the interaction of armed conflict and drought as main reasons for leaving Somalia. Some said they had come mainly because of drought or floods.
[134] All three of these States are Parties to the Refugee Convention.
[135] The Kenyan government refers asylum seekers who apply under the Refugees Act to UNHCR for refugee status determination (Kolmannskog and Afifi 2014, 65).
[136] Kolmannskog and Afifi (2014, 66) argue that this highlights how international regimes are not "fixed and static entities" but are rather "dynamic and adaptive, and vary in their local and national manifestations". Sometimes, norms (i.e. international refugee law) and organisation (i.e. the UNHCR) may stretch to address unforeseen circumstances.
[137] Egypt is a party to the 1951 Refugee Convention and its 1967 Protocol as well as the 1969 African Union Convention. Registration, documentation and refugee status determination are carried out by UNHCR (UNHCR Egypt, 2012).

requirements, and many risked not being recognised as refugees and falling through the gap in the formal legal protection system (Kolmannskog and Afifi 2014, 53).[138]

There are numerous other shortcomings of this approach in the case of Somalia. Even in cases where prima facie status is granted, this status may be questioned or even withdrawn if it is perceived that people are fleeing due to drought and for reasons other than those recognised in the Refugee Convention (Kolmannskog and Afifi 2014, 58).[139] Despite sometimes relatively flexible interpretations of the requirement of the Refugee Convention, these continuing cases where people fleeing due to drought or other climate related factors are falling through the gap, or are having their status reneged, provide some impetus to argue that the scope of the Refugee Convention should be expanded to provide protection to these people. Importantly, those fleeing from other areas in the Horn of Africa (e.g. Ethiopia) are not able to claim asylum on a group basis, and have had to apply for individual asylum (Kolmannskog and Afifi 2014). In contrast to the case of Tuvalu, many of the Somalis interviewed in Kenya, Egypt and Yemen wished to permanently resettle and were hoping to somehow reach Europe or other developed countries (Kolmannskog and Afifi 2014, 53).

As was discussed in chapter three, there are some political difficulties, and risks associated with expanding the scope of the Refugee Convention. According to UNHCR (2015), at least 3,500 irregular migrants or asylum seekers drowned or went missing while attempting to cross the Mediterranean Sea in 2014. In addition, multiple factors influence developed countries" willingness to accept refugees, and currently this willingness appears to be limited. While many European countries have elaborate legislation protecting refugees, in practice, many limit the number of refugees who are able to reach their countries through visa regulations, interceptions and other measures (Kolmannskog and Afifi 2014, 53).[140]

[138] In an interview conducted by Kolmannskog and Afifi (2014, 51), they found that often people change or adjust part of their narrative. One UNHCR interviewee stated that "people would not come to the office and say that they came due to drought", but this also depended on education and ability communication skills. A UNHCR official also noted that some "talk about the drought a lot and say that they should not be returned on humanitarian grounds. Originally they said they were from South Central Somalia (where conflict is rife). When officials found out that this was not correct, they admitted that they were from Somaliland and could not go home due to the drought and lack of economic opportunities." UNHCR officials had to say that if Egypt does not allow them in, they would have to go home (Kolmannskog and Afifi 2014, 51).

[139] Kolmannskog and Afifi (2014, 58) argue that in the case of Somali refugees in Kenya, it could be argued that drought was interacting with conflict and persecution and that people should still be considered Convention refugees.

[140] "Many countries, such as Kenya, Saudi Arabia and the European countries, are increasingly putting obstacles in the way for asylum seekers with a right to seek asylum as well as for others who may not have these rights" (Kolmannskog and Afifi 2014, 66).

Aside from political difficulties, there are also some insufficiencies related to this approach. Even if a broader group of climate change forced migrants were able to gain asylum, there are still issues in terms of a lack of services (such as education, health and mental health services), adequate living conditions (such as housing) and livelihood opportunities (such as access to work permits and permanent residency), as well as significant ethnic, cultural and linguistic differences in destination countries (Kolmannskog and Afifi 2014, 52). In Yemen, the government has made access to the formal labour market extremely difficult for refugees. Many resort to informal work such as car washing, begging or domestic work (Kolmannskog and Afifi 2014 2014, 62). Only about a quarter of the refugee population receives some financial assistance from the UNHCR, and some receive access to healthcare through the UNHCR (Lindley 2011; Kolmannskog and Afifi 2014, 52). In this particular case, it is evident that an expansion of the Refugee Convention to include climate change refugees, may provide wanted protection for some who are not able to gain protection under the current Refugee Convention, but does not provide a full or adequate solution.

Applying expanded human rights and complimentary protection obligations

As with the case of Tuvalu, many human rights principles are applicable to migration and resettlement in the case of climate change forced migration in Somalia, however, they provide limited avenues for protection. In many cases where people flee Somalia there is a clear threat to life, and hence, the human right principle of *non-refoulement* is applicable. As with the case with the Refugees Convention above, there is still risk that some may fall through the gap. This could be addressed via a broader interpretation of this principle. However, there are also shortcomings with this approach. It does not address resettlement issues, and currently, many migrants are still forced to return to areas where their lives or security may be at risk, in violation of this principle (Kolmannskog and Afifi 2014, 65; World Refugee Survey 2009). Hence, this approach does not represent a comprehensive protection system (Kolmannskog 2009, 9—10).

Applying expanded Framework Convention on Climate Change

In most cases in Somalia, and other areas of sub-Saharan Africa, many social and developmental problems interacted with drought and floods, forcing people to leave their homes. In terms of preventing displacement and facilitating return, this implies that climate change adaptation is also necessary. As in the case to Tuvalu, the option of addressing

climate change migration through the UNFCCC provides a valuable link to adaptation measures that if well implemented, may at least partially address some of the livelihood issues that precede migration. Again, it also provides the legal basis for international burden sharing, and could potentially provide a broader approach to address some of the in-country issues of services and support for those displaced due to climate change.

Applying a new convention

The case of Somalia in particular, highlights the difficulty in distinguishing climate refugees from other forms of refugees - including political and environmental refugees (for those environmental reasons not linked to climate change). The case also poses a moral question regarding the usefulness of this distinction. People migrating for other reasons may be equally in need. In the case of Somalia, where the UNHCR is already very active, the potential for a new "climate change refugee convention" to cause confusion and overlap with institutions and processes already in place is also very apparent. Having two, very similar determination processes, bureaucratic agencies and funding sources for two different classes of people who are forced to migrate, in particular when these factors occur in tandem, seems somewhat confusing and unnecessary.

Applying other approaches

As with the case of Tuvalu, there appears to be some merit in regional approaches. One high-level Yemeni Government official suggested "bilateral solutions guided by principles of good neighbourhood and humanitarianism might be a way forward in cases that fall outside current refugee law" (Kolmannskog and Afifi 2014, 67). Exploring labour migration channels and potentially expanding these in the wider region might also be a way forward as many of the people emigrating from the Horn of Africa are in search of better livelihoods (*ibid.*). Contrary to the case of Tuvalu however, many Somalis have expressed wishes to migrate beyond the region to Europe or other industrialised countries. However, many areas where Somali migrants wish to move are limiting numbers. A crude approach to divide the number of climate change migrants according to historical emissions may have some merit in the case of Somalia, and could potentially provide a legal basis for European countries for example to accept a fairer number of migrants, in line with their historical responsibility. This could function in a similar way to the "distribution scheme" introduced by the European

Commission in May 2015. Under the scheme, persons in clear need of international protection were distributed to Member Sates based on criteria (a "distribution key")[141] which reflects the capacity of Member States to absorb and integrate refugees (European Commission 2015b, 2). Responses from member States to this scheme however, highlight that this approach does not necessarily guarantee the rights of those who are resettled.[142]

4.3 THE CASE OF BANGLADESH

Country context and climate change migration

Bangladesh is a low-lying deltic country in South Asia. It is one of the World's most densely populated areas with the majority of its 166 million[143] inhabitants squeezed along the coastline and into the delta of rivers that run into the Bay of Bengal (Index Mundi 2015c). Bangladesh also has many low-lying remote islands (Shamsuddoha and Chowdhury 2009, 4). Bangladesh is one of the world's least developed countries. Poverty is deep and widespread and, although it is a democratic country, it is politically volatile (BBC 2015c).

Bangladesh is already extremely vulnerable to natural and climate related hazards. Severe tropical cyclones hit Bangladesh on average every three years leading to property and infrastructure damage, loss of livestock and crops and high loss of life (Biswas and Chowdhury 2012, 160). Bangladesh also experiences frequent floods that have caused thousands of deaths (Biswas and Chowdhury 2012, 159—160).[144] Bangladesh is hence, one of the countries most vulnerable to the impacts of climate change (Naser 2013, 525; Biswas and Chowdhury 2012). Over the coming century, it is projected that many natural hazards will be exacerbated by climate change - such as floods, tropical cyclones, storm surges, salt water intrusion, river bank and coastal erosion and sea level rise (Biswas and Chowdhury 2012, 162). These factors are expected to have a significant negative impact on crop yields, food security, and livelihoods (IPCC 2014, 1439). They could lead to a 40 percent decrease in food grain production, an increase in transmission of infectious diseases (such as cholera)

[141] These criteria are: a) size of the population, as it reflect the capacity of a Member States to absorb certain numbers of refugees; b) total Gross Domestic Product; c) past number of asylum seekers and resettled refugees; and d) unemployment rate (European Commission 2015b, 2). For example, Germany were allocated 5,258 of the total 24000 applications to be relocated from Italy and 3 505 of the 16,000 applicants in Greece. While Cyprus was allocated 104 and 69 from Italy and Greece respectively (European Commission 2015a, 2–4). The scheme was set up for emergency relocation of 40,000 people located in Greece and Italy, and the European Commission also adopted a Recommendation asking Member States to resettle 20,000 people from outside the EU over two years (European Commission 2015b)

[142] For example, several countries rejected the proposal (Rappler 2015), and Poland agreed to accept Christians only (Premier.gov.pl 2015).

[143] As at July 2014 (Index Mundi 2015c).

[144] In the last 25 years, Bangladesh has experienced six severe floods (Biswas and Chowdhury 2012, 159).

and further property and infrastructure losses (IPCC 2014, 1348). Overall, climate change could lead to a 15 percent increase in poverty in Bangladesh by 2030 (IPCC 2014, 1349; Hertel *et al*. 2010).

Bangladesh is often cited as the country that will produce the largest number of climate change related migrants (Zetter 2011, 27).[145] Bangladesh's existing vulnerability to natural hazards already causes widespread, forced displacement of individuals as well as whole communities. Many of the key current drivers of displacement in Bangladesh are expected to increase in both frequency and intensity due to climate change. In fact, various reports have confirmed that a large number of people have already been displaced as a direct result of anthropogenic climate change (Naser 2013, 487).[146] It is highly likely that the number of climate change induced displaced people will continue to increase in the future (Biswas and Chowdhury 2012, 163).

Estimates have shown that a one or two degree increase in temperature would force displacement of over 35 million people in Bangladesh. Erratic rainfall and more severe landslides in the hill regions of Bangladesh are likely to trigger human exodus; riverbank erosion may lead to mass displacement in mainland areas and sea level rise may inundate up to 18 percent of Bangladesh's total land area, directly impacting 11 percent of the country's population (Biswas and Chowdhury 2012). This climate related displacement is likely to occur in response to both "sudden onset" events such as floods or cyclones as well as "slow onset" changes such sea level rise, erosion, salt water intrusion and drought (Biswas and Chowdhury 2012, 159).

As with the cases of Tuavlu and Somalia, migration is already commonplace in Bangladesh.[147] Siddiqui (2003, 1) explains that that migration is a common livelihood strategy of the poor in Bangladesh. A survey conducted in 2011 shows that, contrary to the case of Tuvalu where migration is seen as an option of last resort, 35 per cent of Bangladeshis aged between 15 and 24 want to move permanently abroad (Khatiwada 2013). Bangladeshi migrants cite a broad range of preferred destinations - amongst the preferred countries are United Arab Emirates, the United Kingdom, the United States of America, Australia, Canada, Germany, France, Italy, Spain and Japan (Siddiqui 2003, 3). In 2003 the

[145] Displacement is likely to be primarily internal, but also international (Displacement Solutions 2012).
[146] It is estimated that six million people have already been displaced by the effects of climate hazards in Bangladesh (Displacement Solutions 2012, 5).
[147] Bangladeshis have always had to cope with temporary or permanent displacement due to environmental hazards (Zetter 2011, 30).

most common long term or permanent emigration was to the United Kingdom and the United States of America (Siddiqui 2003, 1). Migrations in Bangladesh also have multiple causes. Even in cases where climate change is a primary driver of migration it is usually compounded by economic, social and political factors. The density of the population further magnifies migration challenges posed by climate change (Biswas and Chowdhury 2012; Naser 2013).

The Bangladeshi Government has in place climate change adaptation and natural disaster plans, and has been active in advocating for international efforts to recognise and protect people displaced by climate change (Ministry of Environment and Forests Government of the People's Republic of Bangladesh 2008; Hasan 2012, 2).[148]

Examining the applicability of the legal approaches

Applying expanded Refugee Convention and its 1967 Protocol

In the lead up to the 2009 UNFCCC Conference of the Parties in Copenhagen, a media report stated that Bangladeshi Government Official Abdul Muhith suggested that "the convention on refugees could be revised to protect people. It's been through other revisions, so this should be possible." He called on developed counties to respect the "natural right of persons to migrate" and accept climate change refugees from Bangladesh (Grant *et al.* 2009).[149]

However, the functioning of international refugee law the South East Asian region is fragile and unpredictable. It is hampered by the fact that very few States are parties to the Refugee Convention and only one State has signed the 1954 Statelessness Convention (UNHCR Bangladesh 2015). [150] Hence, movement from Bangladesh to areas where official protection under the Refugee Convention can be sought needs to be further afield. Many Bangladeshis lack the resources to leave the country in order to claim asylum. Nasser (2013, 518) argues that if the Refugee Convention is expanded, in the case of Bangladesh it is likely that the "most powerful" or those who are educated will take the opportunities to migrate, while the most vulnerable will not be able to migrate. In fact, in the case of Bangladesh, regional movement will be extremely difficult, as India has planned to erect a fence along the border with Bangladesh to prevent the entry of terrorists and illegal immigrants, including

[148] See discussion regarding the poison of Bangladesh at Conferences of the Parties below.
[149] It is worth mentioning that Bangladesh is not a party to the 1951 Refugee Convention, nor the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention relating to the Reduction of Statelessness (Zetter 2011, 30).
[150] Bangladesh is also not a party to these conventions. See note above.

"climate refugees" (Banerjee 2010; Naser 2013, 515). The approach suggested by the Bangladeshi Government at meetings of the Conference of the Parties to the UNFCCC, has been much broader than a simple amendment to the Refugee Convention. In the case of Bangladesh, expansion of the Refugee Convention would provide only a partial, and in many ways inadequate solution.

Applying expanded human rights and complimentary protection obligations

Similar to the cases of Tuvalu and Somalia, human rights principles are highly applicable to cases of climate change forced migration in Bangladesh, but again provide limited scope for protection. Under certain circumstances, people who cross international borders in response to climate related hazards in Bangladesh could receive a complementary and temporary form of protection in accordance with human rights law (Wouters 2009; Naser 2013, 511). Expanding the scope of complimentary protection along the lines suggested by Kälin (2008) may again have some merit for protecting those who may currently fall through the protection gap and are sent home. However, existing human rights law, including the *non-refoulement* principle, generally provides only temporary protection to individuals, not a right of stay. Nasser (2013, 513) argues that climate refugees should be treated as permanent immigrants to the regions or countries that accept them and should be provided protection as a group of people. As with the other case studies, an expansion of complimentary protection measures under human rights law would provide only a partial solution to the issue of climate change forced migration.

Applying expanded Framework Convention on Climate Change

At the 2009 Conference of the Parties to the UNFCCC in Copenhagen, the Bangladeshi Government advocated for the recognition of climate displaced persons in the UNFCCC (Hassan 2009). The representative, Dr Hasan (2009), said that "the climate deal must include the issue of displacement of people because of climate events and adequate financial support for developing countries for adaptation".

At the 2012 Conference of the Parties in Cancun, the Bangladeshi Government again urged world leaders to take "immediate actions" with regard to "climate change induced displacement, migration and planned relocation, at the national and international levels" as part of the Cancun Adaptation Framework (Hasan 2012, 2). Hence, the Government has been clearly advocating for an approach to climate change forced migration through the UNFCCC, and closely linked to adaptation objectives. The Government has also lobbied for a separate

International Mechanism to address loss and damage.[151] The Prime Minister Sheikh Hasina has also importantly stated that all support to developing countries for climate change should be in addition to existing Official Development Assistance so that regular development is not hindered (Hasan 2009).[152]

Academics have also supported this approach. McAdam and Saul (2009, 267) argue that international financial and technical assistance for climate change adaptation "could play a critical role" in preventing further displacement in in countries such as Bangladesh. "Such assistance could help to build community resilience by providing alternative livelihoods, supplying technical solutions and encouraging disaster risk reduction". In examining two hazard prone areas of Bangladesh, Penning-Rowsell *et al.* (2011) concluded that a favourable approach to deal with migration is within a development framework and through climate change adaptation strategies. Shamsuddoha and Chowdhury (2009, 9) similarly conclude their analysis of climate change migration in Bangladesh by arguing that a new legal instrument should be crated under the UNFCCC.

Applying a new convention

In the case of Bangladesh, where the current application of refugee law is inconsistent and unpredictable - hampered by the fact that very few States within the region are parties to the Refugee Convention (UNHCR Bangladesh 2015) - and where movement is primarily driven by climate related factors, there appears to be merit in creating a new convention to specifically deal with the issue. A new convention may also address rights based issues, such as access to labour market for those who migrate. However, once again, the likelihood that very few States would ratify the new convention is a significant shortcoming of this approach. This may, in particular, be the case for neighbouring South East Asian States given that they are not parties to existing conventions and have limited resources to deal with current migrant flows. In the case of Bangladesh, there is also the risk that a new convention would create some overlap or duplication, as the UNHCR is already active in the region (UNHCR Bangladesh 2015).[153]

[151] Statement by Dr. Hasan Mahmud (2012). "The Bangladeshi Prime Minister stated that about 20 million people of Bangladesh will be displaced by 2050 due to climate induced extreme events. Bangladesh is unable to bear the burden of the horrible natural and social disorders."

[152] In September 2010, Bangladeshi Prime Minister Sheikh Hasina proposed a joint South Asian initiative to mobilise international support under a UNFCCC Protocol to ensure the social, cultural and economic rehabilitation of climate change induced displaced people (Nasser 2013, 518).

[153] The UNHCR has a $14 million program in Bangladesh (UNHCR Bangladesh 2015).

Applying other approaches

A "soft law" framework in the case of Bangladesh has some advantages in that it would not need to be ratified, and that implementation does not entirely depend on the ratification of States. Such an approach may be favourable given the current reluctance of some of Bangladesh's neighbouring States to ratify existing hard law conventions (Naser 2013, 525). However, a soft law approach is unlikely to be able to compel States to protect migrants on the scale that is expected in the case of climate change forced migrants from Bangladesh.

An approach to dividing the number of climate change forced migrants between industrialised countries according to greenhouse gas emissions may have some merit in the case of Bangladesh, as the countries where Bangladeshis wish to migrate include a broad range of primarily industrialised countries.

Regional approaches appear to have limited merit in the case of Bangladesh, as neighbouring countries face similar development issues and currently show minimal willingness to open their borders to migrants. Moreover, research conducted by Siddiqui (2003, 1) highlights that Bangladeshi migrants wish to travel to various locations inside and outside of the region. The IOM (2009; 2010) has suggested that cross border labour migration further afield may be an effective strategy to address the humanitarian crises of environmental displacement.

4.4 SUMMARY

There are numerous points of difference, and also some commonalities between the three cases. In the case of Tuvalu, migration is likely to be planned and gradual, in response to slow onset disasters. However, it is also likely to involve full scale relocation of entire communities. In the case of Tuvalu, connection to land is a key cultural consideration, and migration within the immediate region, or to nearby industrialised States of Australia or New Zealand is preferable. Regional approaches, in step with important human rights principles, and linked to locally or regionally led climate change adaptation could be accommodated under an umbrella framework of the UNFCCC. An approach under the UNFCCC could also accommodate international burden sharing and funding arrangements. There are also some instances where people fleeing climate change related factors in Tuvalu have been unable to gain protection under current refugee law. Hence, there is some basis to say that an expansion of refugee law or complimentary protection measures may be beneficial in addition to the approach under the UNFCCC, in particular, to accommodate situations where people are forced to move quickly due to sudden onset climate events such as floods. Examples of

community relocation from the past, as well as a recent agreements between Fiji and Kiribati, Tuvalu's neighbouring State, show that regional approaches, potentially under a UNFCCC umbrella framework, may be the best way to deal with the unique risk faced by Tuvalu and other low-lying island States - of statelessness.

In the case of Somalia, people generally flee due to many interlinked factors of which climate related hazards are just one. In the cases where conflict and climate change interact, people are generally able to qualify for formal protection under the Refugee Convention. However, in cases where environmental factors are the primary driver, some who flee still fall through the protection gap. In this particular case, it is evident that an expansion of the Refugee Convention to include climate change displaced people may provide wanted protection for some who are not currently able to qualify as Convention refugees. However, this approach through the Refugee Convention does not provide a full or adequate solution. As in the case to Tuvalu, the option of addressing climate change migration through the UNFCCC provides a valuable link to adaptation measures that, if well implemented, may at least partially address some of the livelihood issues that precede migration. Again, an approach through the UNFCCC also provides the legal basis for international burden sharing, and could potentially provide a broader approach to address some of the resettlement shortcomings such as service provision and support for those displaced due to climate change.

Bangladesh is particularly vulnerable to the impacts of climate change. Refugee law faces significant hurdles within the region, as very few countries, including Bangladesh, are parties to the Refugee Convention. Therefore, in this case, an expansion of the application of refugee law is likely to be of limited use. In the case of Bangladesh, similar to the case of Somalia, but as opposed to the case of Tuvalu, people wish to move to various locations well beyond the region. For these reasons, it could be argued that a new, stand alone international convention to specifically address the issue of climate change forced migration may provide a comprehensive solution in the case of Bangladesh. However, the likely lack of ratification and issues of duplication and overlap remain serious shortcomings of this approach. As with the other two cases, an approach through the UNFCCC - combined with Human Rights principles, and providing some obligation on States to accept greater numbers of climate change forced migrants - appears to be a viable solution.

CHAPTER 5: CONCLUSION

The issue of climate change forced migration poses a pressing challenge to the international community - with estimates of the number of people likely to be displaced by climate change exceeding (manifold according to some estimates) the number of people currently displaced due to conflict. Legal protection for this class of migrants currently constitutes a gap in the international legal system. This thesis has examined possible approaches to filling this gap.

The examination of existing sources of state obligations and their responsibilities regarding climate change forced migration, shows that specific types of climate change forced migrants may already qualify for formal protection under the Refugee Convention or complimentary protection measures under human rights law. However, there remain significant protection gaps. There are several legal bases within human rights law and international environmental law upon which States (in particular, developed, high polluting states) have an obligation to minimise the extent of climate change, to fund climate change adaptation and to compensate for damages caused due to climate change. Although yet to be tested, Articles 2 and 4 of the UNFCCC, as well as principles of customary international law - including the "no harm rule" (which is also contained in the UNFCCC and UNCLOS) - provide a basis upon which, in principle, States that incur damage resulting from climate change could claim reparation from States that have contributed to (and are continuing to contribute to) climate change as an anthropogenic phenomenon. Planned, preemptive migration, if necessitated due to anticipated or experienced climate change impacts, could be considered a "specific need" and an "adaptation measure" and hence qualify for compulsory compensatory funding under Article 4 of the UNFCCC. International law provides a basis upon which States could and should address issues related to climate change forced migration.

Numerous approaches have been proposed to address gap in the international legal system regarding climate change migration. Expanding protection obligations under the Refugee Convention, or complimentary protection measures under human rights law, are seemingly the most straightforward solutions, but fall short of addressing planned, pre-emptive movement due to slow onset climate impacts (Kälin 2010; McAdam 2011c, 4). These approaches also involve a risk of undermining current protection regimes, and leave many human rights issues, such as the right to self-determination, unaddressed.

The option of addressing the problem as an adaptation measure, or via a regional approach under the umbrella framework the UNFCCC, has significant advantages, such as building on the strong legal precedent outlined above in chapter two, as well as important legal principles already enshrined within the UNFCCC. This approach has also garnered some recent political support, and could provide a solution that is closely linked with complimentary policy or legal objectives addressing climate change adaptation and climate change mitigation (Nichols *et al.* 2011). A shortcoming of his approach however, is that it is unlikely to provide a solution for those who are forced to move in response to sudden onset disasters, as the institutions of the UNFCCC are ill-suited for this.

The most ambitious option of negotiating a new, *sui generis* convention to address specifically the issue of climate change forced migration provides a holistic approach but is likely to be resource intensive, difficult to negotiate, and duplicative of the work or objectives of other UN treaties or administrative bodies such as the UNFCCC and UNHCR. The possibility of creating "soft law" guiding principles based on existing international law may be a more time sensitive and easy to negotiate solution (Kälin and Schrepfer 2012, 5) , but may be significantly more convoluted than previous experiences of developing guiding principles on internally displacement, and will not (at least in the short term) provide a hard law solution to the issue.

Testing each of the approaches against the three country case studies - Tuvalu, Somalia and Bangladesh – shows that a combination of the proposed legal approaches outlined above, may provide the best solution. In the case of Tuvalu, a locally led regional approach under the UNFCCC appeared to be the most appropriate approach to deal with the (most likely) planned, pre-emptive nature of migration and preferences for local solutions. There is also some basis to say that an expansion of refugee law or complimentary protection measures under human rights law may be beneficial in addition to the approach under the UNFCCC, in particular, to accommodate situations where people are forced to move quickly due to sudden onset climate events.

In the case of Somalia, people generally flee due to many interlinked factors of which climate related hazards are just one. In the cases where conflict and climate change interact, people are generally already able to qualify for formal protection under the Refugee Convention. However, some still fall through the protection gap. In the case of Somalia, it is evident that an expansion of the Refugee Convention or complimentary protection measures under human rights law to include climate change displaced people may provide wanted

protection for those who are not able to qualify as Convention refugees. However, this approach does not provide a full solution - in particular for planned relocation. As in the case to Tuvalu, the option of addressing climate change migration through the UNFCCC provides a valuable link to adaptation measures that, if well implemented, may at least partially address some of the livelihood issues that precede migration. This approach may also provide more avenues for planned migration, to reduce the number likely to flee suddenly.

In the case of Bangladesh, international refugee law faces significant hurdles as very few countries within the region are parties to the Refugee Convention. In the case of Bangladesh , as with Somalia, people wish to move to various locations well beyond the region. It could be argued that a new, stand alone international convention to specifically address the issue of climate change forced migration may provide a comprehensive solution in the case of Bangladesh. However, the likely lack of ratification and issues of duplication and overlap remain serious shortcomings of this approach. As with the other two cases, an approach through the UNFCCC - combined with human rights principles, and providing some obligation on states to accept greater numbers of climate change forced migrants - appears to be the best solution.

Overall, each of the various approaches to addressing the gap in international law regarding climate change forced migration, have significant strengths, and also some shortcomings. The three country cases show that choosing a combination of the approaches outlined in chapter three, may prove the most effective way of filling the protection gaps. The strongest legal basis to accommodate preemptive and planned migration is through the framework of the UNFCCC. This approach fits broadly with the priorities, circumstances and preferred approach in the three case studies, and provides some flexibility to accommodate regional differences. However, it is apparent that some additional international protection is needed to accommodate cases where people flee due to sudden onset events. This could be accommodated through an expansion of the application of the Refugee Convention, or complimentary protection measures under human rights law.

As was demonstrated in chapters two and four, in the case that no action is taken to address the normative gap in the international legal system regarding climate change forced migration, international law may evolve, or be reinterpreted over time to offer protection to those who are displaced. As McAdam (2011b, 128) and Kolmannskog and Afifi (2014, 66) argue, international regimes are not fixed or rigid, but evolve over time. Throughout history,

courts have reclassified certain terms or acts. Sometimes norms (i.e. international refugee law) and organisations (i.e. the UNHCR) may stretch to address unforeseen circumstances (*ibid)*. Hence, a "wait and see" approach may eventually "stimulate a dynamic interpretation of human rights law" so as to provide a remedy for people whose homes have become uninhabitable (McAdam 2011b, 128). Moreover, "a wait and see" approach to preemptive migration may lead to a series of expensive claims for reparation and damages as entire territories are inundated, and people are forced to flee. In this light, adapting a holistic approach to filling the gap in the international legal system regarding climate change forced migration seems to be in the interest of all States.

OBNOVA V SLOVENŠČINI

Že leta 1990 je Medvladna skupina za podnebne spremembe (IPCC) mednarodno skupnost opozorila, da bi lahko bila ena izmed največjih posledic podnebnih sprememb njihov vpliv na migracije (IPCC 1990, 9). Kljub opozorilu je bila problematika prisilnih mednarodnih migracij kot posledica podnebnih sprememb deležna malo pozornosti in predstavlja normativno praznino v mednarodnem pravnem sistemu. Kako jo najbolje naslavljati, še naprej ostaja zelo polemično vprašanje. Doslej je bilo predlaganih veliko rešitev - predvsem z moralnega vidika; v magistrskem delu pa se osredotočamo na problematiko s pravne perspektive s tem, ko preučujemo obstoječe in *de lege ferenda* vire obveznosti držav in njihovih odgovornosti, da bi preučili možne pravne odgovore na problematiko. Raziskovalno vprašanje naloge je: kateri pristopi pridejo v poštev pri zapolnjevanju pravne praznine v mednarodnem pravnem sistemu, povezane s podnebnimi spremembami in prisilnimi migracijami. Osrednja metoda raziskovanja je analiza in interpretacija primarnih in sekundarnih virov - vključno z mednarodno sodno prakso, relevantnimi pogodbami in drugimi pravnimi dokumenti, ki se nanašajo na prisilne migracije kot posledico podnebnih sprememb. V magistrski naloga je uporabljena tudi študija treh primerov.

Poleg uvodnega dela in zaključka je magistrska naloga sestavljena iz treh osrednjih delov. V drugem poglavju je pozornost namenjena preučevanju obstoječih pravnih okvirjev in *de lege ferenda* vire državnih obveznosti in njihove odgovornosti, kot jih določajo pogodbe in obče običajno mednarodno pravo. Med drugim poglavje obravnava begunsko zakonodajo, pravo človekovih pravic in okoljsko pravo. Zadnje obsega tudi zakonodajo, povezano s podnebnimi spremembami, in pomorsko pravo.

Tretje poglavje je namenjeno analizi različnih predlaganih pristopov za zapolnitev pravne praznine v mednarodnem pravnem redu, ki se nanaša na podnebne spremembe in mednarodne migracije. Poglavje obsega pet delov, ki izpostavljajo in analizirajo posamezne pristope - vključno s Konvencijo o beguncih in protokolom iz leta 1967; varstvom skozi zakonodajo, povezano s človekovimi pravicami in podobnimi ukrepi; zaščito pod Okvirno konvencijo Združenih narodov o podnebnih spremembah (*United Nations Framework Convention on Climate Change* - UNFCCC); zaščito skozi oblikovanje novih konvencij, ki naslavljajo problematiko prisilnih migracij kot posledico podnebnih sprememb; zaščito skozi druge pristope - kot na primer oblikovanje pravno nezavezujučih smernic oziroma regionalnih in subregionalnih pristopov.

V zadnjem poglavju pa obravnavamo več pravnih pristopov na primeru treh specifičnih držav, in sicer - Tuvaluja, Somalije in Bangladeša. S tem želimo preveriti, ali predlagani mednarodnopravni pristopi upoštevajo »lokalne in partikularne okoliščine« v vsakem izmed primerov (McAdam 2011b, 130).

V nalogi ugotavljamo, da v okoljskem pravu in pravu človekovih pravic obstaja več podlag, ki nacionalne države (še posebej razvite države in največje onesnaževalke) obvezujejo k zmanjševanju negativnega vplivanja na podnebne spremembe, financiranju okoljskih alternativ in kompenziranju povzročene škode zaradi podnebnih sprememb - vključno s škodo, ki se izraža v prisilnih migracijah. Vsak izmed predlaganih pristopov za zapolnitev pravne praznine ima svoje prednosti in slabosti. Pregled pristopov in tri študije primerov so pokazale, da bi se kombinacija različnih pristopov, predlaganih v tretjem poglavju, izkazala za najučinkovitejšo pri iskanju rešitev za zapolnitev praznine v zaščiti razseljenih oseb. Pristop prek konvencije UNFCCC se zdi kot najboljši način za reševanje postopno načrtovanih - gradualnih migracij, za nenadne prisilne migracije pa je po naših ugotovitvah najbolj učinkovit način naslavljanja komplementarni mehanizem za zaščito, povezan s pravom človekovih pravic.

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ANNEX A: DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

Extract from the Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chp.IV.E.1

November 2001

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I General principles Article 1 Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2 Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

(b) Constitutes a breach of an international obligation of the State.

Article 3 Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II Attribution of conduct to a State Article

4 Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5 Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6 Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7 Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8 Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9 Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10 Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however

related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11 Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III Breach of an international obligation

Article 12 Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13 International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14 Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15 Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV Responsibility of a State in connection with the act of another State

Article 16 Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 17 Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 18 Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) The coercing State does so with knowledge of the circumstances of the act.

Article 19 Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V Circumstances precluding wrongfulness

Article 20 Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21 Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22 Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Article 23 *Force majeure*

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) The situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The State has assumed the risk of that situation occurring.

Article 24 Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the authorís life or the lives of other persons entrusted to the authorís care.

2. Paragraph 1 does not apply if:

(a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The act in question is likely to create a comparable or greater peril.

Article 25 Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and

imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

Article 26 Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27 Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) The question of compensation for any material loss caused by the act in question.

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I General principles

Article 28 Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Article 29 Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30 Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31 Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32 Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Article 33 Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II Reparation for injury

Article 34 Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35 Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36 Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37 Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38 Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39 Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III

Serious breaches of obligations under peremptory norms of general international law

Article 40 Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41 Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I Invocation of the responsibility of a State

Article 42 Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) That State individually; or

(b) A group of States including that State, or the international community as a

whole, and the breach of the obligation:

(i) Specially affects that State; or

(ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43 Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(b) What form reparation should take in accordance with the provisions of Part Two.

Article 44 Admissibility of claims

The responsibility of a State may not be invoked if:

(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45 Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(a) The injured State has validly waived the claim;

(b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46 Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47 Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) Is without prejudice to any right of recourse against the other responsible States.

Article 48 Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II Countermeasures

Article 49 Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50 Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) Obligations for the protection of fundamental human rights; (c) Obligations of a humanitarian character prohibiting reprisals; (d) Other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(a) Under any dispute settlement procedure applicable between it and the responsible State;

(b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51 Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52 Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;

(b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) The internationally wrongful act has ceased; and

(b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53 Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Article 54 Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR

GENERAL PROVISIONS

Article 55 *Lex specialis*

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56 Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57 Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58 Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59 Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

ANNEX B: UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

FCCC/INFORMAL/84 GE.05-62220 (E) 200705

UNITED NATIONS 1992

The Parties to this Convention,

Acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind,

Concerned that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind,

Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs,

Aware of the role and importance in terrestrial and marine ecosystems of sinks and reservoirs of greenhouse gases,

Noting that there are many uncertainties in predictions of climate change, particularly with regard to the timing, magnitude and regional patterns thereof,

Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions,

Recalling the pertinent provisions of the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972,

Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,

Reaffirming the principle of sovereignty of States in international cooperation to address climate change,

Recognizing that States should enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries,

Recalling the provisions of General Assembly resolution 44/228 of 22 December 1989 on the United Nations Conference on Environment and Development, and resolutions 43/53 of 6 December 1988, 44/207 of 22 December 1989, 45/212 of 21 December 1990 and 46/169 of 19 December 1991 on protection of global climate for present and future generations of mankind,

Recalling also the provisions of General Assembly resolution 44/206 of 22 December 1989 on the possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas and the pertinent provisions of General Assembly resolution 44/172 of 19 December 1989 on the implementation of the Plan of Action to Combat Desertification,

Recalling further the Vienna Convention for the Protection of the Ozone Layer, 1985, and the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, as adjusted and amended on 29 June 1990,

Noting the Ministerial Declaration of the Second World Climate Conference adopted on 7 November 1990,

Conscious of the valuable analytical work being conducted by many States on climate change and of the important contributions of the World Meteorological Organization, the United Nations Environment Programme and other organs, organizations and bodies of the United Nations system, as well as other international and intergovernmental bodies, to the exchange of results of scientific research and the coordination of research,

Recognizing that steps required to understand and address climate change will be environmentally, socially and economically most effective if they are based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings in these areas,

Recognizing that various actions to address climate change can be justified economically in

their own right and can also help in solving other environmental problems,

Recognizing also the need for developed countries to take immediate action in a flexible manner on the basis of clear priorities, as a first step towards comprehensive response strategies at the global, national and, where agreed, regional levels that take into account all greenhouse gases, with due consideration of their relative contributions to the enhancement of the greenhouse effect,

Recognizing further that low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change,

Recognizing the special difficulties of those countries, especially developing countries, whose economies are particularly dependent on fossil fuel production, use and exportation, as a consequence of action taken on limiting greenhouse gas emissions,

Affirming that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty,

Recognizing that all countries, especially developing countries, need access to resources required to achieve sustainable social and economic development and that, in order for developing countries to progress towards that goal, their energy consumption will need to grow taking into account the possibilities for achieving greater energy efficiency and for controlling greenhouse gas emissions in general, including through the application of new technologies on terms which make such an application economically and socially beneficial,

Determined to protect the climate system for present and future generations, *Have agreed* as follows:

Article 1

DEFINITIONS*

For the purposes of this Convention:

1. “Adverse effects of climate change” means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-

economic systems or on human health and welfare.

2. “Climate change” means 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.

3. “Climate system” means the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.

4. “Emissions” means the release of greenhouse gases and/or their precursors into the atmosphere over a specified area and period of time.

5. “Greenhouse gases” means those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.

6. “Regional economic integration organization” means an organization constituted by sovereign States of a given region which has competence in respect of matters governed by this Convention or its protocols and has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to the instruments concerned.

7. “Reservoir” means a component or components of the climate system where a greenhouse gas or a precursor of a greenhouse gas is stored.

8. “Sink” means any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere.

9. “Source” means any process or activity which releases a greenhouse gas, an aerosol or a precursor of a greenhouse gas into the atmosphere.

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* Titles of articles are included solely to assist the reader.

Article 2

OBJECTIVE

The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic

development to proceed in a sustainable manner.

Article 3

PRINCIPLES

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.

3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this,

such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.

4. The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of

climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Article 4

COMMITMENTS

1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

(a) Develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed upon by the Conference of the Parties;

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;

(c) Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors;

(d) Promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems;

(e) Cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods;

(f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to

minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;

(g) Promote and cooperate in scientific, technological, technical, socio-economic and other research, systematic observation and development of data archives related to the climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effects, magnitude and timing of climate change and the economic and social consequences of various response strategies;

(h) Promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies;

(i) Promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations; and

(j) Communicate to the Conference of the Parties information related to implementation, in accordance with Article 12.

2. The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following:

(a) Each of these Parties shall adopt national[154] policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by

[154] This includes policies and measures adopted by regional economic integration organizations.

each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph;

(b) In order to promote progress to this end, each of these Parties shall communicate, within six months of the entry into force of the Convention for it and periodically thereafter, and in accordance with Article 12, detailed information on its policies and measures referred to in subparagraph (a) above, as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for the period referred to in subparagraph (a), with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol. This information will be reviewed by the Conference of the Parties, at its first session and periodically thereafter, in accordance with Article 7;

(c) Calculations of emissions by sources and removals by sinks of greenhouse gases for the purposes of subparagraph (b) above should take into account the best available scientific knowledge, including of the effective capacity of sinks and the respective contributions of such gases to climate change. The Conference of the Parties shall consider and agree on methodologies for these calculations at its first session and review them regularly thereafter;

(d) The Conference of the Parties shall, at its first session, review the adequacy of subparagraphs (a) and (b) above. Such review shall be carried out in the light of the best available scientific information and assessment on climate change and its impacts, as well as relevant technical, social and economic information. Based on this review, the Conference of the Parties shall take appropriate action, which may include the adoption of amendments to the commitments in subparagraphs (a) and (b) above. The Conference of the Parties, at its first session, shall also take decisions regarding criteria for joint implementation as indicated in subparagraph (a) above. A second review of subparagraphs (a) and (b) shall take place not later than 31 December 1998, and thereafter at regular intervals determined by the Conference of the Parties, until the objective of the Convention is met;

(e) Each of these Parties shall:

(i) coordinate as appropriate with other such Parties, relevant economic and administrative instruments developed to achieve the objective of the Convention; and

(ii) identify and periodically review its own policies and practices which encourage activities that lead to greater levels of anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol than would otherwise occur;

(f) The Conference of the Parties shall review, not later than 31 December 1998, available information with a view to taking decisions regarding such amendments to the lists in Annexes I and II as may be appropriate, with the approval of the Party concerned;

(g) Any Party not included in Annex I may, in its instrument of ratification, acceptance, approval or accession, or at any time thereafter, notify the Depositary that it intends to be bound by subparagraphs (a) and (b) above. The Depositary shall inform the other signatories and Parties of any such notification.

3. The developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1. They shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11, in accordance with that Article. The implementation of these commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties.

4. The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.

5. The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties. Other Parties and organizations in a position to do so may also assist in facilitating the transfer of such technologies.

6. In the implementation of their commitments under paragraph 2 above, a certain degree of

flexibility shall be allowed by the Conference of the Parties to the Parties included in Annex I undergoing the process of transition to a market economy, in order to enhance the ability of these Parties to address climate change, including with regard to the historical level of anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol chosen as a reference.

7. The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.

8. In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on:

(a) Small island countries;

(b) Countries with low-lying coastal areas;

(c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay;

(d) Countries with areas prone to natural disasters;

(e) Countries with areas liable to drought and desertification;

(f) Countries with areas of high urban atmospheric pollution;

(g) Countries with areas with fragile ecosystems, including mountainous ecosystems;

(h) Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products; and

(i) Landlocked and transit countries.

Further, the Conference of the Parties may take actions, as appropriate, with respect to this paragraph.

9. The Parties shall take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology.

10. The Parties shall, in accordance with Article 10, take into consideration in the implementation of the commitments of the Convention the situation of Parties, particularly developing country Parties, with economies that are vulnerable to the adverse effects of the implementation of measures to respond to climate change. This applies notably to Parties with economies that are highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products and/or the use of fossil fuels for which such Parties have serious difficulties in switching to alternatives.

Article 5

RESEARCH AND SYSTEMATIC OBSERVATION

In carrying out their commitments under Article 4, paragraph 1 (g), the Parties shall:

(a) Support and further develop, as appropriate, international and intergovernmental programmes and networks or organizations aimed at defining, conducting, assessing and financing research, data collection and systematic observation, taking into account the need to minimize duplication of effort;

(b) Support international and intergovernmental efforts to strengthen systematic observation and national scientific and technical research capacities and capabilities, particularly in developing countries, and to promote access to, and the exchange of, data and analyses thereof obtained from areas beyond national jurisdiction; and

(c) Take into account the particular concerns and needs of developing countries and cooperate in improving their endogenous capacities and capabilities to participate in the efforts referred to in subparagraphs (a) and (b) above.

Article 6

EDUCATION, TRAINING AND PUBLIC AWARENESS

In carrying out their commitments under Article 4, paragraph 1 (i), the Parties shall:

(a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:

(i) the development and implementation of educational and public awareness

programmes on climate change and its effects;

(ii) public access to information on climate change and its effects;

(iii) public participation in addressing climate change and its effects and developing adequate responses; and

(iv) training of scientific, technical and managerial personnel;

(b) Cooperate in and promote, at the international level, and, where appropriate, using existing bodies:

(i) the development and exchange of educational and public awareness material on climate change and its effects; and

(ii) the development and implementation of education and training programmes, including the strengthening of national institutions and the exchange or secondment of personnel to train experts in this field, in particular for developing countries.

Article 7

CONFERENCE OF THE PARTIES

1. A Conference of the Parties is hereby established.

2. The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention. To this end, it shall:

(a) Periodically examine the obligations of the Parties and the institutional arrangements under the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge;

Cooperate in and promote, at the international level, and, where appropriate, using

(b) Promote and facilitate the exchange of information on measures adopted by the Parties to address climate change and its effects, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under the Convention;

(c) Facilitate, at the request of two or more Parties, the coordination of measures adopted by them to address climate change and its effects, taking into account the differing

circumstances, responsibilities and capabilities of the Parties and their respective commitments under the Convention;

(d) Promote and guide, in accordance with the objective and provisions of the Convention, the development and periodic refinement of comparable methodologies, to be agreed on by the Conference of the Parties, inter alia, for preparing inventories of greenhouse gas emissions by sources and removals by sinks, and for evaluating the effectiveness of measures to limit the emissions and enhance the removals of these gases;

(e) Assess, on the basis of all information made available to it in accordance with the provisions of the Convention, the implementation of the Convention by the Parties, the overall effects of the measures taken pursuant to the Convention, in particular environmental, economic and social effects as well as their cumulative impacts and the extent to which progress towards the objective of the Convention is being achieved;

(f) Consider and adopt regular reports on the implementation of the Convention and ensure their publication;

(g) Make recommendations on any matters necessary for the implementation of the Convention;

(h) Seek to mobilize financial resources in accordance with Article 4, paragraphs 3, 4 and 5, and Article 11;

(i) Establish such subsidiary bodies as are deemed necessary for the implementation of the Convention;

(j) Review reports submitted by its subsidiary bodies and provide guidance to them;

(k) Agree upon and adopt, by consensus, rules of procedure and financial rules for itself and for any subsidiary bodies;

(l) Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies; and

(m) Exercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention.

3. The Conference of the Parties shall, at its first session, adopt its own rules of procedure as well as those of the subsidiary bodies established by the Convention, which shall include

decision-making procedures for matters not already covered by decision-making procedures stipulated in the Convention. Such procedures may include specified majorities required for the adoption of particular decisions.

4. The first session of the Conference of the Parties shall be convened by the interim secretariat referred to in Article 21 and shall take place not later than one year after the date of entry into force of the Convention. Thereafter, ordinary sessions of the Conference of the Parties shall be held every year unless otherwise decided by the Conference of the Parties.

5. Extraordinary sessions of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at the written request of any Party, provided that, within six months of the request being communicated to the Parties by the secretariat, it is supported by at least one third of the Parties.

6. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not Party to the Convention, may be represented at sessions of the Conference of the Parties as observers. Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.

Article 8

SECRETARIAT

1. A secretariat is hereby established.

2. The functions of the secretariat shall be:

(a) To make arrangements for sessions of the Conference of the Parties and its subsidiary bodies established under the Convention and to provide them with services as required;

(b) To compile and transmit reports submitted to it;

(c) To facilitate assistance to the Parties, particularly developing country Parties, on request, in the compilation and communication of information required in accordance with the provisions of the Convention;

(d) To prepare reports on its activities and present them to the Conference of the Parties;

(e) To ensure the necessary coordination with the secretariats of other relevant international bodies;

(f) To enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions; and

(g) To perform the other secretariat functions specified in the Convention and in any of its protocols and such other functions as may be determined by the Conference of the Parties.

3. The Conference of the Parties, at its first session, shall designate a permanent secretariat and make arrangements for its functioning.

Article 9

SUBSIDIARY BODY FOR SCIENTIFIC AND TECHNOLOGICAL ADVICE

1. A subsidiary body for scientific and technological advice is hereby established to provide the Conference of the Parties and, as appropriate, its other subsidiary bodies with timely information and advice on scientific and technological matters relating to the Convention. This body shall be open to participation by all Parties and shall be multidisciplinary. It shall comprise government representatives competent in the relevant field of expertise. It shall report regularly to the Conference of the Parties on all aspects of its work.

2. Under the guidance of the Conference of the Parties, and drawing upon existing competent international bodies, this body shall:

(a) Provide assessments of the state of scientific knowledge relating to climate change and its effects;

(b) Prepare scientific assessments on the effects of measures taken in the implementation of the Convention;

(c) Identify innovative, efficient and state-of-the-art technologies and know-how and advise on the ways and means of promoting development and/or transferring such technologies;

(d) Provide advice on scientific programmes, international cooperation in research and development related to climate change, as well as on ways and means of supporting endogenous capacity-building in developing countries; and

(e) Respond to scientific, technological and methodological questions that the Conference of the Parties and its subsidiary bodies may put to the body.

3. The functions and terms of reference of this body may be further elaborated by the Conference of the Parties.

Article 10

SUBSIDIARY BODY FOR IMPLEMENTATION

1. A subsidiary body for implementation is hereby established to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention. This body shall be open to participation by all Parties and comprise government representatives who are experts on matters related to climate change. It shall report regularly to the Conference of the Parties on all aspects of its work.

2. Under the guidance of the Conference of the Parties, this body shall:

(a) Consider the information communicated in accordance with Article 12, paragraph 1, to assess the overall aggregated effect of the steps taken by the Parties in the light of the latest scientific assessments concerning climate change;

(b) Consider the information communicated in accordance with Article 12, paragraph 2, in order to assist the Conference of the Parties in carrying out the reviews required by Article 4, paragraph 2 (d); and

(c) Assist the Conference of the Parties, as appropriate, in the preparation and implementation of its decisions.

Article 11

FINANCIAL MECHANISM

1. A mechanism for the provision of financial resources on a grant or concessional basis, including for the transfer of technology, is hereby defined. It shall function under the guidance of and be accountable to the Conference of the Parties, which shall decide on its policies, programme priorities and eligibility criteria related to this Convention. Its operation shall be entrusted to one or more existing international entities.

2. The financial mechanism shall have an equitable and balanced representation of all Parties within a transparent system of governance.

3. The Conference of the Parties and the entity or entities entrusted with the operation of the financial mechanism shall agree upon arrangements to give effect to the above paragraphs, which shall include the following:

(a) Modalities to ensure that the funded projects to address climate change are in conformity with the policies, programme priorities and eligibility criteria established by the Conference of the Parties;

(b) Modalities by which a particular funding decision may be reconsidered in light of these policies, programme priorities and eligibility criteria;

(c) Provision by the entity or entities of regular reports to the Conference of the Parties on its funding operations, which is consistent with the requirement for accountability set out in paragraph 1 above; and

(d) Determination in a predictable and identifiable manner of the amount of funding necessary and available for the implementation of this Convention and the conditions under which that amount shall be periodically reviewed.

4. The Conference of the Parties shall make arrangements to implement the above-mentioned provisions at its first session, reviewing and taking into account the interim arrangements referred to in Article 21, paragraph 3, and shall decide whether these interim arrangements shall be maintained. Within four years thereafter, the Conference of the Parties shall review the financial mechanism and take appropriate measures.

5. The developed country Parties may also provide and developing country Parties avail themselves of, financial resources related to the implementation of the Convention through bilateral, regional and other multilateral channels.

Article 12

COMMUNICATION OF INFORMATION RELATED TO IMPLEMENTATION

1. In accordance with Article 4, paragraph 1, each Party shall communicate to the Conference of the Parties, through the secretariat, the following elements of information:

(a) A national inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, to the extent its capacities permit, using comparable methodologies to be promoted and agreed upon by the Conference of the Parties;

(b) A general description of steps taken or envisaged by the Party to implement the Convention; and

(c) Any other information that the Party considers relevant to the achievement of the

objective of the Convention and suitable for inclusion in its communication, including, if feasible, material relevant for calculations of global emission trends.

2. Each developed country Party and each other Party included in Annex I shall incorporate in its communication the following elements of information:

(a) A detailed description of the policies and measures that it has adopted to implement its commitment under Article 4, paragraphs 2 (a) and 2 (b); and

(b) A specific estimate of the effects that the policies and measures referred to in subparagraph (a) immediately above will have on anthropogenic emissions by its sources and removals by its sinks of greenhouse gases during the period referred to in Article 4, paragraph 2 (a).

3. In addition, each developed country Party and each other developed Party included in Annex II shall incorporate details of measures taken in accordance with Article 4, paragraphs 3, 4 and 5.

4. Developing country Parties may, on a voluntary basis, propose projects for financing, including specific technologies, materials, equipment, techniques or practices that would be needed to implement such projects, along with, if possible, an estimate of all incremental costs, of the reductions of emissions and increments of removals of greenhouse gases, as well as an estimate of the consequent benefits.

5. Each developed country Party and each other Party included in Annex I shall make its initial communication within six months of the entry into force of the Convention for that Party. Each Party not so listed shall make its initial communication within three years of the entry into force of the Convention for that Party, or of the availability of financial resources in accordance with Article 4, paragraph 3. Parties that are least developed countries may make their initial communication at their discretion. The frequency of subsequent communications by all Parties shall be determined by the Conference of the Parties, taking into account the differentiated timetable set by this paragraph.

6. Information communicated by Parties under this Article shall be transmitted by the secretariat as soon as possible to the Conference of the Parties and to any subsidiary bodies concerned. If necessary, the procedures for the communication of information may be further considered by the Conference of the Parties.

7. From its first session, the Conference of the Parties shall arrange for the provision to

developing country Parties of technical and financial support, on request, in compiling and communicating information under this Article, as well as in identifying the technical and financial needs associated with proposed projects and response measures under Article 4. Such support may be provided by other Parties, by competent international organizations and by the secretariat, as appropriate.

8. Any group of Parties may, subject to guidelines adopted by the Conference of the Parties, and to prior notification to the Conference of the Parties, make a joint communication in fulfilment of their obligations under this Article, provided that such a communication includes information on the fulfilment by each of these Parties of its individual obligations under the Convention.

9. Information received by the secretariat that is designated by a Party as confidential, in accordance with criteria to be established by the Conference of the Parties, shall be aggregated by the secretariat to protect its confidentiality before being made available to any of the bodies involved in the communication and review of information.

10. Subject to paragraph 9 above, and without prejudice to the ability of any Party to make public its communication at any time, the secretariat shall make communications by Parties under this Article publicly available at the time they are submitted to the Conference of the Parties.

Article 13

RESOLUTION OF QUESTIONS REGARDING IMPLEMENTATION

The Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention.

Article 14

SETTLEMENT OF DISPUTES

1. In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

2. When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the

interpretation or application of the Convention, it recognizes as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice; and/or

(b) Arbitration in accordance with procedures to be adopted by the Conference of the

Parties as soon as practicable, in an annex on arbitration.

A Party which is a regional economic integration organization may make a declaration with like effect in relation to arbitration in accordance with the procedures referred to in subparagraph (b) above.

3. A declaration made under paragraph 2 above shall remain in force until it expires in accordance with its terms or until three months after written notice of its revocation has been deposited with the Depositary.

4. A new declaration, a notice of revocation or the expiry of a declaration shall not in any way affect proceedings pending before the International Court of Justice or the arbitral tribunal, unless the parties to the dispute otherwise agree.

5. Subject to the operation of paragraph 2 above, if after twelve months following notification by one Party to another that a dispute exists between them, the Parties concerned have not been able to settle their dispute through the means mentioned in paragraph 1 above, the dispute shall be submitted, at the request of any of the parties to the dispute, to conciliation.

6. A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall be composed of an equal number of members appointed by each party concerned and a chairman chosen jointly by the members appointed by each party. The commission shall render a recommendatory award, which the parties shall consider in good faith.

7. Additional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an annex on conciliation.

8. The provisions of this Article shall apply to any related legal instrument which the Conference of the Parties may adopt, unless the instrument provides otherwise.

Article 15

AMENDMENTS TO THE CONVENTION

1. Any Party may propose amendments to the Convention.

2. Amendments to the Convention shall be adopted at an ordinary session of the Conference of the Parties. The text of any proposed amendment to the Convention shall be communicated to the Parties by the secretariat at least six months before the meeting at which it is proposed for adoption. The secretariat shall also communicate proposed amendments to the signatories to the Convention and, for information, to the Depositary.

3. The Parties shall make every effort to reach agreement on any proposed amendment to the Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. The adopted amendment shall be communicated by the secretariat to the Depositary, who shall circulate it to all Parties for their acceptance.

4. Instruments of acceptance in respect of an amendment shall be deposited with the Depositary. An amendment adopted in accordance with paragraph 3 above shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three fourths of the Parties to the Convention.

5. The amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits with the Depositary its instrument of acceptance of the said amendment.

6. For the purposes of this Article, “Parties present and voting” means Parties present and casting an affirmative or negative vote.

Article 16

ADOPTION AND AMENDMENT OF ANNEXES TO THE CONVENTION

1. Annexes to the Convention shall form an integral part thereof and, unless otherwise expressly provided, a reference to the Convention constitutes at the same time a reference to any annexes thereto. Without prejudice to the provisions of Article 14, paragraphs 2 (b) and 7, such annexes shall be restricted to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character.

2. Annexes to the Convention shall be proposed and adopted in accordance with the procedure set forth in Article 15, paragraphs 2, 3 and 4.

3. An annex that has been adopted in accordance with paragraph 2 above shall enter into

force for all Parties to the Convention six months after the date of the communication by the Depositary to such Parties of the adoption of the annex, except for those Parties that have notified the Depositary, in writing, within that period of their non-acceptance of the annex. The annex shall enter into force for Parties which withdraw their notification of non-acceptance on the ninetieth day after the date on which withdrawal of such notification has been received by the Depositary.

4. The proposal, adoption and entry into force of amendments to annexes to the Convention shall be subject to the same procedure as that for the proposal, adoption and entry into force of annexes to the Convention in accordance with paragraphs 2 and 3 above.

5. If the adoption of an annex or an amendment to an annex involves an amendment to the Convention, that annex or amendment to an annex shall not enter into force until such time as the amendment to the Convention enters into force.

Article 17

PROTOCOLS

1. The Conference of the Parties may, at any ordinary session, adopt protocols to the Convention.

2. The text of any proposed protocol shall be communicated to the Parties by the secretariat at least six months before such a session.

3. The requirements for the entry into force of any protocol shall be established by that instrument.

4. Only Parties to the Convention may be Parties to a protocol.

5. Decisions under any protocol shall be taken only by the Parties to the protocol concerned.

Article 18

RIGHT TO VOTE

1. Each Party to the Convention shall have one vote, except as provided for in paragraph 2 below.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States that are Parties to the Convention. Such an organization shall not exercise its right to vote if

any of its member States exercises its right, and vice versa.

Article 19

DEPOSITARY

The Secretary-General of the United Nations shall be the Depositary of the Convention and of protocols adopted in accordance with Article 17.

Article 20

SIGNATURE

This Convention shall be open for signature by States Members of the United Nations or of any of its specialized agencies or that are Parties to the Statute of the International Court of Justice and by regional economic integration organizations at Rio de Janeiro, during the United Nations Conference on Environment and Development, and thereafter at United Nations Headquarters in New York from 20 June 1992 to 19 June 1993.

Article 21

INTERIM ARRANGEMENTS

1. The secretariat functions referred to in Article 8 will be carried out on an interim basis by the secretariat established by the General Assembly of the United Nations in its resolution 45/212 of 21 December 1990, until the completion of the first session of the Conference of the Parties.

2. The head of the interim secretariat referred to in paragraph 1 above will cooperate closely with the Intergovernmental Panel on Climate Change to ensure that the Panel can respond to the need for objective scientific and technical advice. Other relevant scientific bodies could also be consulted.

3. The Global Environment Facility of the United Nations Development Programme, the United Nations Environment Programme and the International Bank for Reconstruction and Development shall be the international entity entrusted with the operation of the financial mechanism referred to in Article 11 on an interim basis. In this connection, the Global Environment Facility should be appropriately restructured and its membership made universal to enable it to fulfil the requirements of Article 11.

Article 22

RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

1. The Convention shall be subject to ratification, acceptance, approval or accession by States and by regional economic integration organizations. It shall be open for accession from the day after the date on which the Convention is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

2. Any regional economic integration organization which becomes a Party to the Convention without any of its member States being a Party shall be bound by all the obligations under the Convention. In the case of such organizations, one or more of whose member States is a Party to the Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention concurrently.

3. In their instruments of ratification, acceptance, approval or accession, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by the Convention. These organizations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification in the extent of their competence.

Article 23

ENTRY INTO FORCE

1. The Convention shall enter into force on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession.

2. For each State or regional economic integration organization that ratifies, accepts or approves the Convention or accedes thereto after the deposit of the fiftieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or regional economic integration organization of its instrument of ratification, acceptance, approval or accession.

3. For the purposes of paragraphs 1 and 2 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of the organization.

Article 24

RESERVATIONS

No reservations may be made to the Convention.

Article 25

WITHDRAWAL

1. At any time after three years from the date on which the Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the Depositary.

2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.

3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from any protocol to which it is a Party.

Article 26

AUTHENTIC TEXTS

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

DONE at New York this ninth day of May one thousand nine hundred and ninety-two.

Annex I

Australia

Austria

Belarus^

Belgium

Bulgaria ^

Canada

Croatia ^*

Czech Republic ^*

Denmark

European Economic Community

Estonia ^

Finland

France

Germany

Greece

Hungary ^

Iceland

Ireland

Italy

Japan

Latvia ^

Liechtenstein*****

Lithuania ^

Luxembourg

Monaco*****

Netherlands

New Zealand

Norway

Poland ^

Portugal

Romania ^

Russian Federation

Slovakia ^*

Slovenia ^*

Spain

Sweden

Switzerland

Turkey

Ukraine ^

United Kingdom of Great Britain and Northern Ireland

United States of America

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^ Countries that are undergoing the process of transition to a market economy.

* *Publisher' s note*: Countries added to Annex I by an amendment that entered into force on 13 August 1998, pursuant to decision 4/CP.3 adopted at COP.3.

Annex II

Australia

Austria

Belgium

Canada

Denmark

European Economic Community

Finland

France

Germany

Greece

Iceland

Ireland

Italy

Japan

Luxembourg

Netherlands

New Zealand

Norway

Portugal

Spain

Sweden

Switzerland

United Kingdom of Great Britain and Northern Ireland

United States of America

Publisher' s note: Turkey was deleted from Annex II by an amendment that entered into force 28 June 2002, pursuant to decision 26/CP.7 adopted at COP.7.
