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Rouleau-Dick, Michel

Published: 01/01/2018

Åbo Akademi University

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Michel Rouleau-Dick

Institute for Human Rights Working Paper

No. 1/2018

Institute for Human Rights
Åbo Akademi University
Fänriksgatan 3
FI-20500 Åbo
Finland

http://www.abo.fi/humanrights

Why environmentally displaced persons from low-lying island nations are not climate "refugees": a legal analysis*

1. Introduction

Hungry for sensational news, the media tends to jump on any story that might bolster readership. As a result, every once in a while a headline appears, breaking the news that [insert some wild number here] climate refugees are expected to be displaced by a certain date. The use of the term "climate refugee", however, is problematic for a number of reasons, especially when used to discuss displacement due to the rise in sea levels.

Despite seeming harmless at first glance, the choice of this terminology to describe the displaced citizens of low-lying island states (LLIS) bears a heavy burden: it is the vehicle through which both informed readers and the public are introduced to this group of people. It can thereby substantially influence the perception of the different problems with which they have to cope.

An inaccurate denomination, such as "climate refugee" or "environmental refugee" implies the inclusion of environmentally displaced persons (EDP) within the scope of the refugee definition under the framework of international protection, potentially inducing some to think of them as refugees, who would as such would be eligible for this legal status and resulting protection in most countries. This is likely not to be the case, as will be discussed further in this paper. Thus, clarifying this situation is essential to orient the efforts to address the problem in the right direction.

Furthermore, the use of the term "refugee" to designate citizens of low-lying island states threatened by climate change, such as Kiribati or the Maldives, has been very negatively received by the latter, partly because of the perceived victimization it implies.[1]

* Michel Rouleau-Dick, M. Soc. Sci. International Human Rights Law, is doctoral candidate at Åbo Akademi University Institute for Human Rights, mrouleau@abo.fi.

[1] Interview with President Anote Tong, President of Kiribati (Tarawa, Kiribati, 12 May 2009), cited in McAdam, Jane, *Climate Change, Forced Migration, and International Law*, Oxford: Oxford University Press, 2012, p. 41.

The choice of low-lying island nations[2] for this working paper is based on their heightened vulnerability to climate change. Additionally, contrary to other states in similarly precarious position such as Bangladesh for instance, the forecasted migration of citizens from LLIS will be mostly international, forcing migrants to leave their country of origin since the state's whole territory is threatened. This in turn means their situation will fall, at least in terms of jurisdiction, under the scope of the international protection, although it is uncertain if EDP would satisfy the conditions to benefit from this international protection. This article will aim to clarify this situation.

Overall, this paper aims to answer the following question: does the refugee definition set in Article 1A of the 1951 Refugee Convention, and the principle of *non-refoulement* apply to environmentally displaced persons from low-lying island nations once they are forced to leave their country of origin, and if no, why? To answer this, I will first review the refugee definition offered by the 1951 Convention relating to the status of refugees[3]. This definition will then be linked and applied to the situation of environmentally-displaced persons from low-lying island nations. Secondly, the value of the principle of *non-refoulement* will be shortly reviewed, to complete the review of refugee law's added value in the context of climate-induced migration from low-lying island nations.

2. International refugee law: the protection gap

2.1. The refugee definition

The international framework on the protection of refugees is both an essential piece of the puzzle human rights protection represents, and a complex instrument in itself. As for the general movement in favor of human rights that followed World War II and led to the adoption of the 1948 Universal Declaration for Human Rights (UDHR)[4] and eventually to the adoption of the international bill of human rights, the 1951 Convention relating to the status of refugees was intended to palliate important lacunae in the protection of displaced persons.[5] Initially temporary, the reach of the Convention was extended in 1967 via an additional protocol which removed the geographical and time-

[2] Low-lying island nations are small states which territory is particularly vulnerable to the rise in sea levels due a low elevation above sea levels. Examples of such countries are Kiribati, Tuvalu, and the Maldives, to name only those.

[3] Convention Relating to the Status of Refugees, concluded 28 July 1951, entered into force 22 April 1954, United Nations, *Treaty Series*, vol. 189, p. 137.

[4] Universal Declaration of Human Rights (UDHR), Adopted by General Assembly Resolution 217 A(III) of 10 December 1948.

[5] Goodwin-Gill, Guy S. & McAdam, Jane, *The Refugee in International Law; 3rd Edition*, Oxford: Oxford University Press, 2007, pp. 18-20.

bound restrictions to the Convention's scope,[6] making it the principal international legal instrument for the protection of displaced persons.

Refugees benefitting from international protection numbered 21.3 million in 2015, a fact that highlights the crucial role played by the 1951 Convention into helping displaced persons find protection in countries other than those they have left.[7] However, despite the numbers covered by the Convention, the refugees who fall under the mandate of the UNHCR represent a mere quarter of the global number of forcibly displaced persons worldwide, only. This discrepancy underscores the imperfections in the refugee definition, although it should be noted that from the outset it was never understood that the Convention would cover every displaced person.[8]

By nature, the refugee definition set up in Article 1A(2) of the 1951 Refugee Convention seeks to identify those in need of international protection:

> For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> […]
>
> (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In doing so, and through the evolution of jurisprudence, boundaries have been set which ultimately exclude a number of categories of displaced persons. Such is the case for internally displaced persons, for instance. In the case of environmentally displaced persons from low-lying island nations, due to the novelty of their situation, a number of questions arise when attempting to assess their inclusion within the scope of the refugee definition. Essentially, the central question asked through this section is: will environmentally displaced persons from low-lying island nations be eligible for international protection under the refugee law framework upon cross-border migration?

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[6] McAdam, Jane, *Complementary Protection in International Refugee Law*, Oxford: Oxford University Press, 2007, pp. 28-29.

[7] UNHCR, "Figures at a glance", 2015, available at http://www.unhcr.org/figures-at-a-glance.html (Last visited 17 May 2018).

[8] Goodwin-Gill & McAdam, *op. cit.*, p. 36.

In attempting to respond, the present section will first review the elements of the refugee definition that are relevant to the analysis of the environmentally displaced persons' eligibility to international protection under the 1951 Convention. The second step of this analysis will see the concepts previously defined applied to the EDP' anticipated situation, thus charting the protection gap within which EDP are likely to find themselves. This approach roughly follows the structure and the elements of response proposed by Jane McAdam in her opus *Climate Change, Forced Migration, and International Law.*[9]

2.1.1. Persecution

Persecution is one of the central elements of the refugee definition. Although there is no agreed upon legal definition of what persecution entails for the purpose of the 1951 Convention, it is generally understood as implying a serious violation of human rights, by its nature or repetition. Attempts to define persecution face a number of hurdles, especially in relation to the case-specific nature of the concept. For instance, there is limited use in enumerating all known measures of persecution identified to this day since any assessment of persecution should be individualised, and so what amounts to persecution is very much a facts-based exercise.[10] If a few human rights violations such as threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group are understood as always constituting persecution, based on article 1A of the Convention, other cases are not so clearly defined.[11] The fact that implementation is ultimately in the hands of the determination processes set up by individual states also adds complexity to such an endeavour. As a result, the present attempt to outline the core aspects of persecution makes use of the scholarly work on the topic to isolate the concept's essential elements, especially in view of their relevance to the protection of EDP from low-lying island states. Regional instruments or domestic decisions will also provide guidance to achieve a better understanding of the refugee definition.

Starting with the former, the definition given by the European Union (EU) in the so-called Qualification Directive, albeit not directly legally relevant for countries outside of its original geographical scope, can provide some guidance on the constitutive elements of

[9] McAdam, *op. cit.*, 2012, pp. 42-48.

[10] Goodwin-Gill & McAdam, *op. cit.*, p. 93-94.

[11] UNHCR, *Handbook and Guidelines on procedures and criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva: UNHCR, 2011, par. 51.

persecution, also reinforcing the arguments made by scholars such as Hathaway in relation to the gradation of the human rights violations:

> 1. Acts of persecution within the meaning of article 1 A of the Geneva Convention *must*:
>
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).[12]

Hence, persecution implies a serious harm to the applicant, through a severe violation of his or her human rights. As to which human rights are concerned and to which degree, the work of Professor James Hathaway on the subject can shed some light on what type of violation constitutes persecution. He uses the following definition to outline the meaning of persecution: "the *sustained* or *systematic* violation of basic human rights demonstrative of a failure of state protection" (emphasis added). Moreover, in elaborating on the concept of basic human rights, Hathaway separates rights into different categories, of which a violation goes from always constituting persecution to only in certain circumstances.[13] More precisely, the first category of rights includes the absolute rights guaranteed in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR),[14] of which a violation always constitutes persecution. A second category encompasses rights to which a derogation is possible in certain exceptional cases, such as *habeas corpus* for instance. A violation of any of the rights in the second category might not always amount to persecution if the alleged violation is in fact in accordance with the conditions set in the legal instrument protecting the rights. The third category mentioned by Hathaway concerns the rights not falling within the previous categories, such as economic, social, and cultural rights for example. In the case of third category rights, the threshold for non-realisation or violation needs to be higher in order to constitute persecution. This

[12] (Emphasis added) European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast),* Article 9.

[13] Hathaway, James C., *The Law of Refugee Status*, Toronto: Butterworths, 1991.

[14] International Covenant on Civil and Political Rights (ICCPR), concluded 16 December 1966, entered into force 23 March 1976, United Nations, *Treaty Series*, vol. 999, p. 171.

is defined by Foster as necessitating a discriminatory element,[15] such as preventing the enjoyment of certain rights by a minority group.

The gradation set by Hathaway highlights one of the essential aspects of persecution, which ultimately lies in the degree and proportion of the human rights violations concerned, as well as the individualised danger for the person fleeing his or her country:

> Whether something amounts to "persecution" is assessed according to the nature of the right at risk, the nature and severity of its restriction or impairment, and the likelihood of the restriction or impairment eventuating in the individual case.[16]

Alone however, a serious human rights violation is not sufficient to invoke international protection under the scope of the 1951 Convention, as other elements are also needed to clear the required threshold, such as differential effects of the persecutory acts. This element of "motivation" implies "that people are persecuted because of something perceived about them or attributed to them",[17] this "something" being a ground found in the exhaustive list provided by the refugee definition of the 1951 Convention. Thus, not all human rights violations constitute persecution, and ultimately the decision is in the hands of the countries implementing the Convention. Notably, the domestic implementation of the definition, applied in a case-specific manner, is known to result in varying interpretations depending on the jurisdiction.[18]

2.1.2. Convention grounds

More precisely, the said persecutory acts need to be "for reasons of race, religion, nationality, membership of a particular social group or political opinion". Hence, the applicant must be a victim of a serious human rights violation, directly or indirectly on the basis of at least one of the grounds enumerated in the refugee definition. This differential impact is essential to claim refugee protection; indiscriminate events or disasters are likely not to fall within the scope of the five grounds set by the 1951 Convention.

Additionally, although all grounds have been the subject of extensive discussion and case-law, of particular interest to the present work is the concept of "membership of a particular social group". To qualify, the members of a social group should share an innate

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[15] Foster, Michelle, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge: Cambridge University Press, 2007, p. 88.

[16] Goodwin-Gill & McAdam, *op. cit.*, p. 92.

[17] Goodwin-Gill & McAdam, *op. cit.*, p. 91.

[18] *Ibid.*

characteristic or common background that cannot be changed, or benefit from a distinct identity in the relevant country as it is perceived as being different from the rest of the society.[19] Notably, those two elements are cumulative for the purpose of the EU Qualification Directive, but have not been defined as such under the 1951 Convention. However, it is generally understood that the persecutory acts in themselves cannot create a social group; the risk of being persecuted as a common characteristic is insufficient to qualify as a social group. Even though a group might not be considered as such prior to the persecutory acts, it is essential the persecution be based on a common characteristic:

> [T]he actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.[20]

This interpretation of the convention has also been confirmed by an unchallenged body of case-law from various jurisdictions.[21]

2.1.3. Role of the home state as a protection agent

The role of an applicant's home country is essential in defining the scope of the international protection provided by the 1951 Convention. The protection (or lack thereof) it may provide with regard to safeguarding its citizens' human rights is crucial for an applicant to secure refugee status. The state's protection is particularly related to the "well-founded fear" of persecution at the source of a refugee's flight to a safe haven.

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[19] European Union, "Qualification Directive", *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast),* Article 10 (1)(d).

[20] Australia, *A and Another v Minister for Immigration and Ethnic Affairs and Another*, [1997], Australia: High Court, 24 February 1997 190 CLR 264 (McHugh J), cited in McAdam, 2012, *op. cit.*, p. 46.

[21] See for example Canada *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, 729; Canada *Chan* [1993] 3 FC 675 (Federal Court of Appeal); United Kingdom *Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* [1999] House of Lords, 2 AC 629, per Lord Steyn at 634; Lord Hope at 656, cited in Goodwin-Gill & McAdam, *op. cit.*, p. 80.

Hathaway defines well-founded fear of persecution as a reasonable anticipation that staying within the country might result in persecution, from which one's government is unable or unwilling to protect.[22] Goodwin-Gill and McAdam adopt a sensibly similar definition, similarly highlighting the role of the home country as the original guarantor of protection:

> […] fear based on a real chance of persecution, which is not remote, insubstantial or far-fetched; and be unable or unwilling, because of such fear, to avail him- or herself of the protection of their country of nationality, or if stateless, to return to their country of former habitual residence.[23]

A failure of the home country in safeguarding human rights does not always justify cross-border flight and accession to refugee status, however.[24] It can provide a basis for fear of persecution for the purpose of the Convention but as explained by Goodwin-Gill and McAdam:

> The correlation is coincidental, however, not normative. The central issue remains that of *risk of harm amounting to persecution*; the principles and practice of State responsibility can contribute to that assessment, for example, by confirming the level of protection and judicial or other guarantees that may be due under universal and regional human rights instruments.[25]

Conversely, specific intent from the persecutor is not a required element of persecution, although if present, such an intent can be sufficient to support a claim to refugee status.[26]

The state's role as an agent of protection or persecution can translate into providing (or failing to do so) effective and accessible protection from serious harm, although states do not have an obligation to eliminate all risk of harm.[27] To assess a state's fulfillment of its obligation to provide protection, the implementation of reasonable steps by the country's government to prevent persecution and their accessibility by the applicant

[22] Hathaway, James, "Fear of Persecution and the Law of Human Rights", in *Bulletin of Human Rights*, 91/1, United Nations, (New York, 1992), p. 99.

[23] Goodwin-Gill & McAdam, *op. cit.*, p. 92.

[24] *Ibid*, p. 133.

[25] *Ibid*, p. 100.

[26] *Ibid*, p. 100.

[27] Hathaway, *op. cit.*, p. 105.

have been put forward within the EU system,[28] while others have argued in favor of a due-diligence approach.[29]

2.2. Application of the 1951 Convention's refugee definition to EDP from low-lying island nations

Would EDP from low-lying island nations fall within the scope of the definition of refugee set by the 1951 Refugee Convention or are they likely to fall into a protection gap? Using the definition of the concepts outlined above, this section will attempt to assess the likelihood that EDP' claims to refugee status upon cross-border migration will be successful.[30] Central to this exercise will be the concept of persecution and the refugee grounds listed in the Refugee Convention, with regard to the expected situation of EDP.

As a starting point, there is nothing that explicitly excludes environmentally displaced persons from the scope of the refugee convention, nor is there any mention of their inclusion; thus the need for this section. There have already been a few cases brought before national courts regarding the expected harm caused by climate change in the context of vulnerable low-lying island nations, in the context of refugee status determination,[31] However, since courts have so far consistently rejected the arguments brought before them, it is essential to identify the problems faced (now and especially in the future) by environmentally displaced persons when applying for refugee status on the basis of the effects of climate change.

The first element of this analysis is the relevance of the concept of persecution to the harm caused by the effects of climate change. There is no doubt that as time passes, the

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[28] Qualification Directive, *Directive 2011/95/EU*, "Article 7: 1. Protection against persecution or serious harm can only be provided by: (a) the State; or (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State; provided they are willing and able to offer protection in accordance with paragraph 2. 2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection".

[29] Nykänen, Eeva, *Fragmented State Power and Forced Migration. Study on Non-State Actors in Refugee Law*, Turku: University of Turku, 2011, p. 107-108.

[30] From a general perspective. Since, as mentioned earlier, the implementation of the determination process rests in the hands of the state parties and thus, lacks uniformity.

[31] See for instance Refugee Review Tribunal of Australia (RRTA), 10 December 2009, Case No. *0907346* [2009] RRTA 1168; New Zealand, *Refugee Appeal No 72189/2000,* Refugee Status Appeals Authority (RSAA), 17 August 2000; or *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC 107, New Zealand: Supreme Court, 20 July 2015.

human rights of the citizens from low-lying island nations will go unfulfilled, and eventually even basic rights such as the right to life might be threatened by the conditions that prevail in those countries, thus likely crossing the serious harm threshold understood as constituting persecution. Before reaching such a degree of severity however, other rights such as economic, social and cultural rights will be progressively affected by the effects of climate change, such as the right to health or to an adequate standard of living protected under the International Covenant on Economic, Social, and Cultural Rights.[32] Hence, as time passes the severity of the harm inflicted directly and indirectly by the effects of climate change will increase. The severity of the harm, however, does not in itself suffice in characterizing a human rights violation as persecution that would substantiate a refugee claim.

As developed earlier, a discriminatory impact on one of the grounds enumerated in the Convention is also required to move persecution from a "mere" human rights infringement to one justifying international protection. A number of obstacles arise when one attempts to frame the effects of climate change as grounds for claiming refugee status.

2.2.1. The indiscriminate nature of climate change

The first hindrance lies in the nature of climate change and its consequences: a rise in sea levels or an increase in the frequency of fast-onset natural disasters are both indiscriminate phenomena. The victims of such events will not be discriminated against, especially in the case of low-lying island nations where the entirety of the state's population is threatened simply by their location within their country's territory. This situation has already been highlighted by the New Zealand Refugee Status Appeals Authority (RSAA), as early as the year 2000:

> This is not a case where the appellants can be said to be differentially at risk of harm amounting to persecution due to any of these five grounds. All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluans citizens, of the forces of nature leading to the erosion of the coastland and the family property being partially submerged at high tide. As for the shortage of drinkable water and lack of hygienic sewerage systems, medicines and appropriate access to medical facilities, these are also deficiencies in the social services of Tuvalu that apply indiscriminately to all

[32] Articles 11, 12, International Covenant on Economic, Social and Cultural Rights (ICESCR), concluded 16 December 1966, entered into force 3 January 1976, United Nations, *Treaty Series*, vol. 993, p. 3.

> citizens of Tuvalu and cannot be said to be forms of harm directed at the appellants for reasons of their civil or political status.[33]

Hence, substantiating a claim on the basis of a differential impact of climate change might prove a near impossible endeavor if there is no substantial change in the situation prevailing in most vulnerable low-lying island nations. Examples in which a claim could be substantiated might include cases where a government would discriminate against a particular social group in its efforts to mitigate the effects of climate change or the consequences of a natural disaster.[34] If this were the case and if the harm were sufficiently serious to amount to persecution and relate to at least one of the Convention grounds, a refugee claim would have chances of being successful. However, such a claim would still focus on the harm caused by the state's actions (or lack thereof) rather than the harm attributed to climate change itself.

2.2.2. State responsibility

The second obstacle to environmentally displaced persons falling within the scope of the refugee definition is centered on the role of their home country. As mentioned earlier, within the context of international refugee law a state can be an agent of persecution by directly causing persecution, or indirectly by failing to safeguard its citizens' human rights. To assess the latter, a due diligence approach can be adopted, or, alternatively, the steps taken by the country to ensure effective protection to its citizens can be considered.

In the case of low-lying island nations, both approaches are likely to find very limited ground for EDP to argue in favour of a failure of their government to implement steps to mitigate the effects of climate change. At present, low-lying island nations have been actively fighting against the rise in sea levels, and all evidence shows that they intend to try to protect their citizens' human rights.[35] Hence, framing low-lying island states as agents of persecution might prove challenging, inaccurate, and unjust.

Other options aiming at centering efforts on the role of the international community as persecutor are also unlikely to succeed. Establishing the nexus between the past greenhouse gas (GHG) emissions of a state and specific human rights violations would

[33] New Zealand, *Refugee Appeal No 72189/2000,* Refugee Status Appeals Authority (RSAA), 17 August 2000, cited in McAdam, 2012, *op. cit.*, pp. 44-45.

[34] McAdam, 2012, *op. cit.*, pp. 47-48.

[35] *Ibid*, p. 45.

pose a sizeable challenge,[36] and even if overcome, the element of discrimination would still be lacking. Indeed, a potential claimant would also have to argue that the harm caused by the international community through climate change affected him or her on the basis of at least one of the Convention grounds, a claim facing the same obstacle found in the indiscriminate nature of the effects of climate change. Moreover, this argument has been rejected by the Australian Refugee Review Tribunal (RRT) in a 2009 decision:

> In this case, the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required…. There is simply no basis for concluding 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.[37]

Hence, the prospect of success of such an approach to claiming refugee status appears limited.

2.2.3. A social group?

Another approach to claiming refugee status through characterising EDP as a particular social group also seems unlikely to succeed. As developed in the previous section, membership to a particular social group has to be centered on a specific characteristic, to the exception of persecution itself.[38] Therefore, arguing that environmentally displaced persons form a social group on a basis other than the threat posed by the effects of climate change is likely to prove impossible, since the common characteristic should be fundamental, or immutable. As McAdam explains:

> Although climate change affects some countries more adversely than others by virtue of their geography and resources, the reason it does so is not premised on the nationality or race of their inhabitants.[39]

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[36] See Scott, Matthew, "Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights", in *International Journal of Refugee Law*, Vol. 26, No. 3, 2014, p. 409-411.

[37] Australia, Refugee Review Tribunal (RRTA), 10 December 2009, Case No. *0907346* [2009] RRTA 1168, par. 51. Cited in McAdam, 2012, *op. cit.*, p. 46.

[38] Goodwin-Gill & McAdam, *op. cit.*, p. 80.

[39] McAdam, 2012, *op. cit.*, p. 46.

2.3 Climate "refugees"?

The last problem facing claims for refugee status by environmentally displaced persons is the general understanding that the refugee definition simply does not include those displaced by natural disasters. The 1951 Refugee Convention was drafted decades before climate change could be envisioned as a source of migration, and as a result, it is not so surprising that environmentally displaced persons do not fall within its scope.[40] This interpretation is also supported by the interpretation of the Convention found in the UNHCR Handbook on determining refugee status.[41]

Overall, if the 1951 Refugee Convention remains unchanged there are substantial arguments to support the claim that environmentally displaced persons from low-lying island fall outside of the scope of the refugee definition, thus removing the possibility to of availing themselves of the international protection provided by that instrument. The difficulties in characterising the harm caused by climate change as persecution for a Convention ground and the role of the EDP' home country are essential factors in creating the protection gap within which EDP will most likely find themselves upon relocation outside of their home country.

3. The principle of non-refoulement

Despite the environmentally displaced persons from low-lying island nations likely not falling within the scope in international protection, this does not mean that the 1951 Refugee Convention does not have any relevance for their situation in a post-migration context. Other provisions included in the convention transcend the scope of the convention itself, particularly in the case of *non-refoulement*. While an in-depth analysis of the principle of *non-refoulement* is beyond the scope of this paper, its role in protecting environmentally displaced persons is nevertheless necessary to identify the role of the international framework on the protection of stateless persons.

Shortly summarised, the principle of *non-refoulement* protects individuals from being returned to persecution, torture or other relevant harm.[42] It is enshrined in a number of international human rights instruments, *inter alia* Article 33 of the 1951 Refugee

[40] Glahn, Benjamin, "'Climate Refugees'? Addressing the International Legal Gaps", in *International Bar News*, Vol. 63, No. 3, 2009, p. 18.

[41] UNHCR Handbook, par. 39.

[42] McAdam, *op. cit.*, 2007, p. 1.

Convention, Article 3 of the Convention Against Torture (CAT),[43] and Article 22(8) of the American Convention on Human Rights (ACHR).[44] Other articles such as Article 3 of the European Convention on Human Rights (ECHR) have been interpreted as giving rise to obligations under the *non-refoulement* principle for state parties,[45] as is also the case for Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

Although the scope and nature of the prohibition of *refoulement* may vary from one instrument to the other, the principle of *non-refoulement* is generally understood as being part of international customary law.[46] Some authors go as far as to consider it as a peremptory norm[47], an opinion supported by the UNHCR[48] which underscores its position is at the core of international human rights law, and international law itself.[49] Overall, there is substantial evidence to support the position that most, if not all, countries are bound by the principle of *non-refoulement*. Its content in international customary law has been outlined as follows:

> No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.[50]

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[43] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), concluded 10 December 1984, entered into force 26 June 1987, United Nations, *Treaty Series*, vol. 1465, p. 85.

[44] American Convention on Human Rights, "Pact of San Jose", concluded 22 November 1969, entered into force 18 July 1978.

[45] *Soering v. United Kingdom*, ECtHR, App. no. 14038/88, Judgment of 7 July 1989.

[46] See, for instance Westra, Laura, *Environmental Justice and the Rights of Ecological Refugees*, London: Earthscan, 2009, p.97.

[47] Peremptory norms, or *Jus cogens* are of the highest binding statute in international law, applying to all members of the international community, regardless of their treaty obligations.

[48] UNHCR, "Conclusions adopted by the executive committee on the international protection of refugees 1975 - 2009 (Conclusion No. 1 – 109)", *Division of International Protection Services*, December 2009, Executive Committee Conclusion No. 25 (1982) and No. 79 (1996).

[49] This has however been disputed by scholars such as Hathaway, in Hathaway, James C., *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press, 2005, p. 365.

[50] Lauterpacht, Sir Elihu & Betlehem, Daniel, "The Scope and Content of the Principle of Non-Refoulement: Opinion" in Feller, Erika, Türk, Volker & Nicholson, Frances (eds.), *Refugee Protection in International Law*, UNHCR's Global Consultations on International Protection, p. 163. Cited in Granlund, Sara, "Environmentally Displaced Persons - a Study of their Current Position in International law", Master's thesis, University of Turku, 2012, p. 59.

However, since there is only limited case-law linked with Article 7 of the ICCPR in the context of *non-refoulement*, the ECHR provides a more substantial body of jurisprudence to find answers on the interpretation of the *non-refoulement* principle in relation to the risk of cruel, inhuman or degrading treatment.[51]

Through a number of cases, the European Court on Human Rights (ECtHR) has expanded the scope of certain rights to imply extraterritorial obligations for the state parties to the Convention, mainly through Article 3. Article 3 provides that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" and is absolute in nature, allowing for no exceptions or restrictions.[52]

Thus, the Court has interpreted Article 3 as prohibiting state parties from extraditing individuals who would be at real and imminent risk of being exposed to torture, inhuman or degrading treatment under Article 3 of the Convention upon their return to the country of destination. This interpretation of Article 3, effectively a wide and absolute implementation of the *non-refoulement* principle, was first confirmed by the Court in the case *Soering v. United Kingdom* and has since been reaffirmed in a number of cases.[53]

In order for Article 3 to be triggered, the Court has defined a minimum threshold of severity, which needs to be met for the potential harm to qualify as "torture" or "inhuman or degrading treatment". It deserves to be mentioned that the obligations for state parties are the same, regardless of the type of treatment; the distinction being one of severity and intent.[54]

As for the severity threshold, it is not a static concept but rather a context-sensitive analysis, which takes into account the plaintiff's situation, age, as well as the duration and effects of the past or expected treatment.[55] The extraterritorial application of Article

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[51] As explained by McAdam, elaborating on the prominent place of the ECHR in the analysis on *non-refoulement* obligations stemming from its Article 3: "Article 7 [of the ICCPR] contains a *non-refoulement* obligation, although a violation of this provision from a proposed removal has been substantiated on the facts only once. By contrast, Article 3 of the ECHR – which protects against torture and inhuman or degrading treatment or punishment – is a frequently utilized provision which has significantly developed the human rights-based *non-refoulement* jurisprudence in the European Court of Human Rights. It is for this reason that decisions from that jurisdiction form the bulk of the discussion." McAdam, 2012, *op. cit.*, p. 63-64.

[52] Rainy, Bernadette, Wicks, Elizabeth and Ovey, Clare, *The European Convention on Human Rights, 6th Edition* Oxford: Oxford University Press, 2014, pp. 176-177.

[53] See for instance *Soering v. United Kingdom*, ECtHR, App. no. 14038/88, Judgment of 7 July 1989 or *Chahal v. United Kingdom*, ECtHR, App. no. 22414/93, Judgment of 15 November 1996.

[54] Rainy, Wicks and Ovey, *op. cit.*, p. 175.

[55] *Ibid*, p. 173.

3 has been found to apply in a number of situations, including healthcare[56] and distress from not knowing the whereabouts of a child or a parent.[57] Article 2 (right to life) has also been found to give rise to *non-refoulement* obligations under the ECHR framework but to a lesser extent than Article 3.[58]

3.1. Non-refoulement and climate-induced migration

The relevance of the *non-refoulement* principle for environmentally displaced persons from low-lying island nations resides mainly in its reactiveness and extended scope of immediate protection, despite the absence of a related legal status or substantive protection. As the living conditions on low-lying island states will deteriorate, eventually forcing the migration of their population, the principle of *non-refoulement* might become the last barrier available to prevent the deportation of EDP to their former home country.

As an important proportion of the populations of both Kiribati and Tuvalu already resides abroad,[59] the principle of *non-refoulement* could become crucial to avoiding the infliction of inhumane or degrading treatment upon citizens from those countries, following their possible deportation. A central questions thus revolves around the minimum threshold of severity required to trigger the principle of *non-refoulement* under Article 3.

One the most relevant cases in this context would likely be *MSS v. Belgium and Greece,*[60] in which the Court found a violation of Article 3 based on the deportation of the plaintiff to Greece, where the plaintiff's living conditions were found to constitute treatment prohibited under Article 3 of the Convention.[61] Additionally, as the Court has already found that feelings of fear and anguish could amount to inhuman or degrading

[56] *D. v. United Kingdom*, ECtHR, 146/1996/767/964, Judgment of 2 May 1997.

[57] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. no. 13178/03, Judgment of 12 October 2006.

[58] Article 2 was found to give rise to *non-refoulement* obligations in a 2005 case in conjunction with Article 3 (*Bader and Kanbor v. Sweden*, ECtHR, App. no. 13284/04, Judgment of 8 November 2005. A reason for this is the fact that if a violation of Art. 3 is also found in relation with possible deportation, the analysis of Art. 2 "typically falls away". McAdam, 2012, *op. cit.*, p. 58.

[59] Approximately one third of Tuvalu's population resides abroad (when including those born outside of the country), Government of Tuvalu, "Tuvalu National Labour Migration Policy", 2014, pp. 3-4.

[60] *M.S.S. v. Belgium and Greece*, ECtHR, App. no. 30696/09, Judgment of 21 January 2011.

[61] *Ibid*, para. 263.

treatment in *Jalloh v. Germany,*[62] it is possible that EDP would fall within the scope of Article 3 and its correlated *non-refoulement* obligation for state parties.

Thus, in a situation where fresh water resources were scarce or almost inexistent, and in a country ravaged by the increasingly devastating effects of the rise in sea levels, one could assume that the Court would adopt a progressively intolerant attitude towards returning persons to so-called "sinking islands". Furthermore, based on its context-sensitive approach and "living instrument" doctrine, the Court would also likely lower the minimum threshold of severity for vulnerable individuals such as children or elderly people, possibly building a line of case-law which might eventually apply to all EDP present within the jurisdiction of state parties to the ECHR.

Generally, as part of the effort to outline the protection gap within which environmentally displaced persons are likely to fall, the lack of legal status related to *non-refoulement* obligations proves particularly noteworthy, however. Despite its relevance to prevent potential human rights violations caused by deportations, the principle of *non-refoulement* is a negative duty: it does not entail the attribution of a legal status or related protection.[63]

4. Conclusion

Despite the 1951 Refugee convention being a relatively old document, it holds a crucial place in the protection of refugees in need of international protection. Considering the increasingly pressing need to prepare and adapt to climate change before people start being displaced *en masse* by its effect, the legal status of those often portrayed as climate "refugees" by the media matters in terms of how we frame both the problem and proposed solutions. As the analysis above highlights, it is quite unlikely that environmentally displaced person from low-lying island nations would fall within the scope of the refugee definition used in the context of international protection. The 1951 Refugee convention was never intended to address the problems created by rising seas and states in danger of being wiped off the map. As a result, it should not come as a surprise that the refugee definition it provides will most likely prove inadequate to protect those having to leave their home country due to climate change.

[62] *Jalloh v. Germany*, ECtHR, App. No. 58410/00, GC, Judgment of 11 July 2006, para. 68.

[63] Even though a few countries have added a positive dimension to *non-refoulement* obligation by providing access to temporary residence permits in this case. See Decree No 616/2010 Official Bulletin No 31.898 (6 May 2010) (regulating immigration law 25.871) Art. 24(h), cited in McAdam, 2012, *op. cit.*, p. 105.

More precisely, the nature of persecution, which implies discrimination on a number of defined grounds, is not applicable to the indiscriminate harm caused by climate change. This is particularly true in low-lying island nations, where the entirety of the population is in danger of being displaced. Since persecution is at the core of the refugee definition used by the Convention, it is unlikely that environmentally displaced persons from low-lying island nations could successfully claim international protection under the Refugee convention.

However, this does not mean that the international framework as a whole does not have any relevance for these vulnerable populations. In fact, as highlighted in this paper, the principle of *non-refoulement* could play an important role in preventing the return of migrants to low-lying island nations, once the conditions there become unsuitable for human living. While *non-refoulement* is an international principle, some of the most relevant jurisprudence related to its application emanates from the European framework, whether it is in the context of the ECHR or of the EU. Using this jurisprudence as a tool to interpret the principle, it is possible to say that at some point, the harm caused by climate change would be sufficient to trigger an obligation for states not to return persons to low-lying island nations.

In conclusion, the inadequacy of the current international framework of protection in the context of climate change further highlights the pressing need for pre-emptive solutions. Forced migration is not inevitable, particularly since we know and have known about this problem for a while now. Highlighting the problems with the factual and legal reality should be a major incentive to work on both contingency plans and the adaptation of the current legal framework. In the meanwhile, the use of terms such as climate “refugees” will only contribute to mislead the public into thinking that climate-induced migration is just another possible “refugee crisis”. The reality is likely to be more problematic if nothing changes.

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