

INTERNATIONAL LAW RULES RELATING TO MIGRATION ARISING FROM RISING SEA-LEVELS

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1 Introduction

Global sea-levels have been on the rise for the past three centuries. Recent trends show that sea-levels rose by at least 20 centimetres (cm) in the 20th century alone.¹ At current global greenhouse-gas emission levels, it is estimated that sea levels will continue to rise by a further 77 cm by 2100. Sea-level rise, a gradual rise in the volume of the ocean, occurs when there is thermal expansion of water levels which is caused by an increase in ocean temperatures, coupled with the gradual melting of glaciers and other frozen water reserves. If global predictions are realised, the rise in water levels will lead to the partial (and at time complete) inundation and depopulation of State territories – specifically low-lying and small island States.² This rise in sea water levels is a direct result of climate change, and has

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1 JA Church *et al* 'Changes in Sea Level' in JT Houghton *et al* (eds.) *Climate Change* (2001) 639-693.

2 N Nakicenovic *et al* 'Special Report on Emissions Scenarios: A Special Report of Working Group III of the Intergovernmental Panel on Climate Change' (2000) *Cambridge University Press* 599; RA Warrick *et al* 'Changes in sea level' in JT Houghton *et al* (eds.) *Climate Change* (1996) 359-405.

presented a number of international law challenges, including to areas of law dealing with the continued statehood of inundated States; the law of the sea; and the protection of persons migrating as a result of sea-level rise. The paper will draw focus from this latter issue.

The rise in sea-levels has a direct impact on global migration and the enjoyment of human rights in this context.³ In 2015 the Internal Displacement Monitoring Centre (IDMC) estimated that in 2014 alone, some 19 million people were newly displaced on account of disasters linked to the climate change or environmental hazard.⁴ Of this total, 17.5 million were displaced by natural disasters linked to weather-related or climate-related hazards, specifically floods and storms⁵ - accounting for 92% of the 2014 global total of those displaced.⁶ 87% of those displaced in 2014 were located in Asia – with China, India and the Philippines experiencing the highest levels of displacement.⁷ The IDMC further reported that since 2008, natural disasters and environmental hazards have displaced an average of 26.4 million people per year across the globe, with weather-related hazards accounting for the vast majority of these displacements.⁸

The result, then, is that there is a 'new' category of migrants, who have been displaced on account of adverse consequences related to climate change, and not for reasons linked to political persecution.⁹ While the phrases 'climate refugees' and 'environmental refugees' are increasingly used to refer to this category of migrants, these phrases do not have a meaning under international law.¹⁰ The definition of a 'refugee' as currently provided for in the 1951 Refugee Convention¹¹ extends only to political refugees who flee persecution.

3 For purposes of this report, 'sea level rise' means 'the sole or combined and cumulative impacts of the effects of climate change and subsidence or land uplift on the change of the sea level in a given location.'

4 Internal Displacement Monitoring Centre (IDMC), *Global Estimates 2015: People Displaced by Disasters* (July 2015) 8, (hereafter '2015 IDMC Global Estimates') <http://www.internal-displacement.org/assets/library>.

5 1.7 million were displaced by geophysical hazards.

6 2015 IDMC Global Estimates (n 4 above).

7 2015 IDMC Global Estimates (n 4 above) 8 - 9.

8 As above.

9 There is no universally accepted definition of migrant under international law, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has defined an international migrant as 'any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence'. In this way, the word migrant is employed as a neutral term to describe a person with a lack of citizenship attachment to their host country.

10 S Atapattu 'Climate Refugees' and the Role of International Law' (2018), Available at <https://www.oxfordresearchgroup.org.uk/blog/climate-refugees-and-the-role-of-international-law>.

11 Convention Relating to the Status of Refugees 1951, (hereafter 'Refugee Convention'); United Nations Human Rights: Office of the High Commissioner 'Differentiation between migrants and refugees' <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf>.

This definition does not avail itself to migrants who are displaced on account of environmental or climate-related factors. Of course, rising sea levels and the migration it triggers could not have been forecasted by the drafters of the Convention,¹² thus leaving fundamental gaps in the regulation of migration induced by rising sea-levels. Nevertheless, international law rules relating to migration do provide a useful starting point for a more comprehensive international response to this imminent challenge.

The paper begins by providing context to the discussion, specifically, drawing connections between the gradual rise in water levels, and migration. This first section will show that the further the habitability of low-lying and coastal areas is negatively impacted by rising water table, the human rights implications, too, ascend to greater levels of severity and urgency. Next, the paper will provide an overview of existing rules of international law that bear relevance to migration induced by rising sea-levels, while the last section proposes, as starting point, a number of general rules and principles of international law to inform the development of a joint and separate international response to the challenges presented by migration in the context of rising sea levels. Finally, the paper will offer some concluding remarks.

2 Possible consequences of sea-level rise for migration

While there are no global estimates for migration arising out of more gradual environmental changes caused by sea-level rise, it is reported that migration and displacement is progressively linked with gradual or slower environmental changes such as sea-level rise, and that this trend is expected to increase in future, since people are less likely to wait for a crisis situation to develop before they migrate from the risk area.¹³ The International Law Association's 2016 Interim Report into international law and sea-level rise provides that rates of migration and displacement on account of factors linked to sea-level rise are

12 Refugee Convention (n <XREF> above) 10.

13 Outcome Report, Nansen Initiative Pacific Regional Consultation 'Human Mobility, Natural Disasters and Climate Change in the Pacific' Rarotonga, Cook Islands (21-24 May 2013); Background Paper, Nansen Initiative Southeast Asia Regional Consultation 'Human Mobility in the Context of Disasters and Climate Change in Southeast Asia' Manila, Philippines (15-17 October 2014) 1-5, 16; Background Paper, Nansen Initiative Greater Horn of Africa Regional Consultation 'Natural Hazards, Climate Change, and Cross-Border Displacement in the Greater Horn of Africa: Protecting People on the Move' Nairobi, Kenya (21-23 May 2014) 4-6, 16-22, all available at <http://www.nanseninitiative.org>.

expected to increase even when land is not yet inundated or subsumed.¹⁴ This may be because of associated factors such as the land becoming uninhabitable for human beings due to salt-water deposits into fresh groundwater, the contamination of fresh water sources, the diminishing fertility of agricultural and pastoral land, or food insecurity.¹⁵

As with many global challenges, developing countries are the most affected, accounting for 95% of the global total of displaced persons.¹⁶ Small island developing States are consistently the worst hit given that their geographic location makes them particularly vulnerable to earthquakes, floods and storms. In fact, it is reported that relative to their population size, these small island developing States account for three times the global average for displaced persons in the years between 2008 and 2014.¹⁷

Further, the 2015 Intergovernmental Panel on Climate Change (IPCC) report supports the claim that although estimated to occur over a number of decades or centuries, gradually rising sea-levels will have more immediate impacts.¹⁸ The IPCC's scientific analysis evidence that the already incurred 20 centimetre increase in sea-levels beginning in the middle of the 19th century means that 'there is now much more water riding on a storm surge, which makes flooding, storms and earthquakes more extensive and severe.'¹⁹

The facts of the 2020 *Ioane Teitiota v New Zealand* case heard by the Human Rights Committee most clearly illustrate these more immediate impacts of rising sea levels on the inhabitants of low lying territories. The Complainant, Ioane Teitiota, claimed that the more immediate effects of climate change and sea level rise forced him and his family to migrate from the island of Tarawa in the Republic of Kiribati to New Zealand where they were later deported. The Complainant claimed that the situation in Tarawa has become increasingly unstable and precarious due to sea-level rise caused by global warming – coastal land had become eroded, arable land and fresh water sources had become contaminated and scarce because of

14 An overview of the IPCC assessment Report is found in ILA, *Interim Report of the Committee on International Law and Sea level Rise*, presented at the 77th ILA Conference, Johannesburg, August 2016 (Hereafter '2016 ILA Interim Report').

15 Climate Council Briefing Statement 'Damage from Cyclone Pam was Exacerbated by Climate Change' (2015) 3 <http://www.climatecouncil.org.au/uploads/417d45f46cc04249d55d59be3da6281c.pdf>.

16 IDMC Global Estimates (n 4 above) 8-9.

17 As above.

18 As above.

19 RK Pachauri & LA Meyer 'Climate Change 2014: Synthesis Report' (2014) Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Geneva (2015) (hereinafter 'AR5 - Synthesis') 151; JA Church *et al* 'Sea Level Change' in *Climate Change 2013: The Physical Science Basis*, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013) *Cambridge University Press* 1142.

saltwater contamination and overcrowding on Tarawa. In deciding the case, the Human Rights Committee accepted that climate change-induced harm may well arise both through sudden-onset events and slow-onset processes. The Committee explained that sudden-onset events (including intense storms and flooding) are discrete occurrences that have an immediate and obvious impact over a period of hours or days, while slow-onset effects (such as the gradual inundation caused by rising sea levels, salinisation, and land degradation) may have a gradual, adverse impact on livelihoods and resources over a period of months to years. The Committee accepted that both sudden-onset events and slow-onset processes can trigger migration from persons seeking protection from climate change-related harm.²⁰

In 2007 the Republic of Kiribati filed its National Adaptation Programme of Action under the United Nations Framework Convention on Climate Change (UNFCCC).²¹ The National Adaptation Programme of Action evidenced that a large majority of the population had subsistence livelihoods which were greatly dependent on environmental resources, that coastal erosion and accretion were most likely to affect housing, land and property, which has led to often violent land disputes. Although 60 sea walls were erected by 2005 already, storm surges and high spring tides continued to cause flooding of residential areas, forcing inhabitants to migrate. The population's health is generally deteriorating – characterised by vitamin A deficiencies, malnutrition, fish poisoning, and other ailments reflecting the situation of food insecurity.²²

Thus, present and future migration and displacement patterns ‘may be triggered by “interim” extreme weather and sea-level events such as storm surges, astronomical tides, and flooding, and not so much for reasons of territorial loss due to sea-level rise’.²³ Some of the more gradual effects of rising water tables include consequences such as erosion of land, saltwater contamination of groundwater sources, and general environmental degradation which will progressively impair that living conditions, livelihood, and human rights of persons inhabiting affected areas – eventually leading to progressive movements out of those areas.

20 Communication No. 2728/2016, *Ioane Teitiota v New Zealand*, Human Rights Committee 7 January 2020 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/127/D/2728/2016&Lang=en (hereafter ‘*Ioane Teitiota v New Zealand*’) para 2.2; Global Compact for Safe, Orderly and Regular Migration (A/RES/73/195) para 18(h), (i), (l).

21 United Nations Framework Convention on Climate Change (UNFCCC), 1994.

22 Republic of Kiribati National Adaptation Program of Action (NAPA) ‘Environment and Conservation Division, Ministry of Environment, Land, and Agricultural Development Government of Kiribati’ 10 January 2007 <https://unfccc.int/resource/docs/napa/kir01.pdf>; *Ioane Teitiota v New Zealand* (n 20 above) para 2.3; 2.4.

23 IDMC Global Estimates (n 4 above).

The ILA Committee on International Law and Sea-level Rise notes that ‘the overall relationship between the impacts of climate change, including sea-level rise, and human mobility is complex and non-linear, and depends on a range of intersecting factors.’²⁴ Indeed, displacement and migration relating to climate change has multiple causes, and sea-level rise and climate change intersect directly with political, social and economic factors that are themselves sufficient to trigger migration²⁵ – often to the extent that it becomes impossible to distinguish the impacts of sea-level rise from other impacts of climate change when it comes to decision to migrate.

What is clear is that sea-level rise and its associated risks poses an almost certain threat to the habitability low-lying and coastal areas, and threatens to negatively affect the life and living conditions of those populations living in these areas. It is inevitable that these persons will move, migrate and may be displaced from their homes in search for refuge, protection and assistance. This is true considering that historically, migration away from the negative environmental and climate-change impacts has long been the natural human adaptation strategy.²⁶ However, migration involving international borders in these circumstances may face considerable challenges from immigration formalities under international law.²⁷ The following section provides an overview of the current international law framework regulating migration *vis-à-vis* challenges faced by this category of migrants.

3 An overview of existing rules of International Law applicable to migration arising from sea-level rise

3.1 The 1951 Refugee Convention and its 1967 Protocol

Any discussion on migration under international law must have the centrepiece of international refugee protection as its point of departure – that is the 1951 Refugee Convention and its 1967 Protocol.²⁸ Immediately following the first World War, millions of

24 LA Nurse *et al* ‘Small Islands’ in *Climate Change 2014: Impacts, Adaptation, and Vulnerability*, Part B: Regional Aspects, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, (2014) *Cambridge University Press* 80 - 81 http://ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap29_FINAL.pdf (Hereafter ‘Fifth Assessment Report of the IPCC’); J McAdam *Climate Change and Displacement: Multidisciplinary Perspectives* (2012) 84.

25 Fifth Assessment Report of the IPCC (n 24 above).

26 Church *et al* (n 19 above) 1142.

27 Church *et al* (n 19 above) 1142; Fifth Assessment Report of the IPCC (n 24 above).

28 Refugee Convention (n 11 above); see Protocol Relating to the Status of Refugees, 1967.

people, mostly from Europe, were displaced from their homes and in search of refuge often across State borders. The sum of people displaced increased substantially after the second World War, which saw millions of people forcibly deported, resettled and/or displaced. At this point, it became clear that there was a need for a more formal framework for the protection of refugees under international law.²⁹

Accordingly, in 1951, the Convention relating to the Status of Refugees (Refugee Convention) was adopted. Departing from the previous, more fragmented approach, the Refugee Convention fused previous international mechanisms and arrangements relating to refugees, and provided an inclusive codification of the rights owed to refugees at an international level.³⁰ The Convention was subsequently amended by its 1967 Protocol which broadened the Convention's scope of application by removing the geographical and temporal limits imposed by the text of the Convention – making the Convention applicable to situations beyond Europe.³¹

The main purpose of the 1951 Convention is to define subjects who qualifies for the full scope of protection; to detail all the rights and obligations to which refugees are entitled, and to imposes legal obligations on States to protect, respect and fulfil the human rights owed to refugees.³² In addition, the Refugee Convention imposes a non-refoulment obligation on States through its prohibition of expulsion or forcible return of refugees to a State or territory where their life or freedoms would be threatened.³³ Both the Convention and its Protocol have provided a blue print for other useful regional instruments such as the 1969 OAU Refugee Convention,³⁴ the 1984 Cartagena Declaration,³⁵ and the growth of a common asylum system in the European Union (EU).³⁶

29 UN High Commissioner for Refugees (UNHCR) *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary* by Dr. Paul Weis (1990) 10 <https://www.refworld.org/docid/53e1dd114.html>.

30 UN General Assembly, *Draft Convention relating to the Status of Refugees, 1950, A/RES/429* <https://www.refworld.org/docid/3b00f08a27.html>.

31 These limits initially restricted the Convention to persons who became refugees due to events occurring in Europe before 1 January 1951. The 1967 Protocol expanded the Convention's scope of application as the problem of displacement spread around the world; see <https://www.unhcr.org/afr/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>.

32 *The Refugee Convention, 1951: The Travaux préparatoires* (n 29 above) 11.

33 United Nations Department of Economic and Social Affairs, *International Migration Report* (2013) <https://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Chapter3.pdf>.

34 *Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969* (hereafter 'OAU Convention').

35 *Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 1984* (hereafter 'Cartagena Declaration').

36 A Guterres 'The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: The legal framework for protecting refugees' *UN High Commissioner for Refugees* September 2011 <https://www.unhcr.org/afr/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>.

Accordingly, in order for any displaced person to qualify for recognition and protection under the Refugee Convention, such person must meet the narrow definition of ‘refugee’ at Article 1A(2) of the Convention, which provides that a ‘refugee’ is any person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.³⁷

This definition entails three key requirements: firstly, a refugee is a person who has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Secondly, this person must be outside their country of nationality, and finally, the person must, owing to such fear, be unable or, be unwilling to avail himself of the protection of that country or, owing to such fear, is unwilling to return to it.³⁸

From the definition, it becomes clear that a person displaced owing to environmental or climate change-related reasons would fail to meet this definition owing to the absence of persecution on either of the listed bases – except in the narrow circumstances of environmental degradation resulting from an armed conflict.³⁹ The Convention only avails itself to political refugees who flee persecution and does not extend to migrants who are displaced on account of environmental or climate-related factors. This narrow definition of who is a refugee is of course a product of its time. This is particularly true considering that the world is only recently facing increasing levels of climate change-induced sea-level rise which in turn leads to displacement.⁴⁰ The Convention was negotiated and drafted in the aftermath of World War II, with a war-ravaged Europe in mind, at a time where there was no global warming or threats of sea level rise. Rising sea-levels and the migration it triggers could not have been anticipated or forecasted by the drafters of the Convention.⁴¹

37 Refugee Convention (n 11 above) Article 1A(2).

38 As above.

39 M Stavropoulout ‘Indigenous Peoples Displaced from Their Environment: Is There Adequate Protection?’ (1994) 5 (1) *Colorado Journal of International Environmental Law and Policy* 105-126.

40 IPCC ‘Summary for Policymakers’ in *Climate Change 2013: The Physical Science Basis, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2013).

41 Refugee Convention (n 11 above).

3.2 Non-Refoulement

Another important feature of the Convention is the principle of *non-refoulement* – a fundamental, customary⁴² and non-derogable⁴³ gearwheel to the international mechanism of refugee protection⁴⁴ embodied at Article 33(1) of the Refugee Convention, which 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.⁴⁵

The Article 33 *non-refoulement* obligation is owed not only to migrants who are refugees as defined by Article 1A(2) of the Refugee Convention, but to all migrants presenting at a State’s frontier, regardless of their status under international law. A person is entitled to *non-refoulement* protections not because they have been declared a refugee by the host State, but rather because objectively they meet the definitional requirements for a refugee under international law. This means that the refugee status determination is declaratory in nature, not constitutive.⁴⁶

The fundamental and non-derogable nature of the rule is perhaps best illustrated by the reluctance from the drafters to introduce an exception to this rule such as that contained at Article 33(2).⁴⁷ It is perhaps further evident from the restrictive language employed in drafting the exception at paragraph 2 of the Article. Thus, it would be problematic to conclude that the first paragraph of the Article applies only to refugees present in the territory of a State party, and excludes refugees who present themselves at the border, even when their rejection would force them to return to a country where their life or liberty would be endangered.⁴⁸

It therefore follows that States have a *non-refoulement* obligation towards all migrants, not only those already recognised as refugees.

42 UNHCR ‘*Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*’ 7 <http://www.unhcr.org/home/RSDLEGAL.45fi7al a4.pdf>.

43 Article 42(1) of the Refugee Convention and Article VII(1) of the 1967 Protocol, providing that Article 33 is one of the provisions to which no reservations are permitted.

44 UN Ad Hoc Committee on Refugees and Stateless Persons, *Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva* (14-25 August 1950) E/AC.32/8;E/1850 <https://www.refworld.org/docid/3ae68c248.html>.

45 Refugee Convention (n 11 above), Article 33(1).

46 UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979), (Reedited in Geneva, 1992) 28.

47 The Refugee Convention (n 11 above) Article 33.

48 As above.

This has been reaffirmed by the Executive Committee of UNHCR, for instance, when it noted ‘the fundamental importance of the principle of *non-refoulement* ... of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.’⁴⁹ The use of the phrase ‘in any manner whatsoever’ at Article 33(1) of the Refugee Convention is indicative that States’ *non-refoulement* obligation extends to ‘any form of forcible removal, including deportation, expulsion, extradition, informal transfer or ‘renditions’, and non-admission at the border control’.⁵⁰ When interpreting this provision, the UNHCR in its Advisory Opinion on the *Extraterritorial Application of Non-Refoulement Obligations* noted that this obligation is not limited to instances of forced return to the territory of origin or the territory of former habitual residence. Rather, the obligation applied to ‘return or expulsion to *any other place* where a person has legitimate reason to fear for his life or freedom or return or expulsion to where they may be sent to such a risk.’⁵¹

The cornerstone principle of *non-refoulement* is reiterated in regional treaties as well, especially the 1969 OAU Convention,⁵² and the American Convention on Human Rights.⁵³ The United Nations Human Rights Council (UNHCR) also highlighted that the fact that the *non-refoulement* principle has also been a salient feature in the Cartagena Declaration on Refugees and other non-binding international instruments, including the United Nations General Assembly’s 1967 Declaration on Territorial Asylum.⁵⁴ In the same vein, Articles 6 and 7 of the ICCPR create a broader non-refoulement obligation, where the persecution element is replaced by a threat of

49 Executive Committee of UNHCR, Conclusion No. 6 (XXVIII) ‘*Non-refoulement*’ (1977) para (c).

50 UNHCR Advisory Opinion (n 42 above) 9.

51 UNHCR *Note on Non-Refoulement* (EC/SCP/2) 1977 para 4; The Refugee Convention, 1951: The Travaux préparatoires (n 29 above) 341.

52 Article II(3) provides that ‘[n]o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paras 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order].’

53 American Convention on Human Rights, 1969 (hereinafter ‘American Convention’), Article 22(8) which provides that ‘[i]n no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.’

54 Conclusion III(5) provides that ‘[t]o reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees ...’.

‘cruel, inhuman or degrading treatment.’⁵⁵ The scope of the *non-refoulement* obligation under international human rights law is materially broader than under Article 33.⁵⁶ *Non-refoulement* entails a complete prohibition on expelling and returning a migrant to a State where ‘they are at risk of torture or cruel, inhuman and degrading treatment or punishment or other serious human rights violations such as enforced disappearance, risks to life in the absence of necessary medical care and violations of the rights of the child.’⁵⁷

Understood in this way, the principle of *non-refoulement* becomes of particular relevance to migrants fleeing on account of sea-level rise. While such persons may, in certain circumstance, not be considered refugees, international refugee law demands that they not be expelled or returned pending a final determination of their status.⁵⁸ This of course does not mean that a migrant has the right to asylum in a particular country.⁵⁹ Instead, it means that even in circumstances where the host State is not prepared to recognise a migrant as a refugee, it ‘must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger.’⁶⁰ For States to meet their international law obligations here, States are required to provide access to their territory, and to fair asylum procedures to all persons seeking international protection at their borders or on their territory.

In situations of a mass influx of migrants, State practice supports the view that migrants must at the very least be offered temporary protection.⁶¹ To illustrate, Papua New Guinea justified its admission of Irian Jayans pursuant to the obligation to provide temporary protection,⁶² and the UNHCR subsequently welcomed this practice as an extension of the principle of *non-refoulement*.⁶³ In order to effectively discharge either one of these *non-refoulement* obligations,

55 See Article 6 & 7 of The International Covenant on Civil and Political Rights (16 December 1966) United Nations Treaty Series (999) 171 (ICCPR); UN Doc CCPR/CO/79/RUS.

56 UNHCR *Advisory Opinion* (n 42 above).

57 United Nations Office of the High Commissioner for Human Rights (OHCHR) ‘*Mapping Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus Report on Human Rights and Climate Change*’ June 2014 <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.asp>.

58 UNHCR *Advisory Opinion* (n 42 above).

59 The Refugee Convention, 1951: The Travaux préparatoires (n 29 above).

60 E Lauterpacht & D Bethlehem ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ 2003 *Cambridge University Press* <https://www.refworld.org/docid/470a33af0.html> (accessed 27 August 2020) para 76.

61 UNHCR *Report on the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx*, UN Doc. EC/SCP/16/Add.1 (July 1981); D Perluss *et al* ‘Temporary Refuge: Emergence of a Customary Norm’ (1981) (26) *Virginia Journal of International Law* 551.

62 Perluss *et al* (n 61 above) 578.

63 UNHCR *Report of the 30th Session of the Executive Committee*, UN doc. A/AC.96/572 para 72(2)(k) (1979) 72, U.N.Doc. A/AC.96/572.

member States cannot return migrants, even those intercepted at sea, without first assessing their individual protection claim for refugee status.⁶⁴ Specifically, member States are under an obligation to ensure that *all* migrants have access to fair and effective procedures for the determination of their status as refugees.⁶⁵

3.3 1969 OAU Refugee Convention

The Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)⁶⁶ was adopted in 1969 in response to the Refugee Convention's narrow and limited definition of 'refugee' which excludes categories of migrants who otherwise would not be eligible to international law protection. The OAU Convention aims to strengthen African regional responses to novel elements of mass migration and displacements of migrants in need of international protection and assistance. Specifically, Article VIII of the Convention makes clear that the Convention is the 'effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees'.⁶⁷ The OAU Convention essentially reflects the collective undertakings of OAU Member States to accept and protect migrants in terms of each member States' internal laws. Member States to this Convention have an obligation to confer on all categories of refugees the rights and benefits of the 1951 Refugee Convention without distinction as to race, religion, nationality, membership of a particular social group of political opinions.⁶⁸

The OAU Convention achieves its purpose by broaden the definition of refugee provided for in the Refugee Convention, to include 'every person who owing to ... events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'⁶⁹ In theory, this approach operates to afford

64 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* (December 2011) 192 HCR/1P/4/ENG/REV. 3 <https://www.refworld.org/docid/4f33c8d92.html>; Inter-American Court of Human Rights, *Case 10.675 v US* (1997) 155; M Pallis 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 *International Journal of Refugee Law* 329, 347.

65 Executive Committee 55th session, Contained in UN Doc A/AC.96/1003, see General Conclusion on International Protection No 99 (2004) 1 <https://www.unhcr.org/excom/exconc/41750ef74/general-conclusion-international-protection.html> (accessed 27 August 2020); UNHCR, General Conclusion on International Protection No 85 (1998) (q) <http://www.unhcr.org/refworld/docid/3ae68c6e30.html> (accessed 05 October 2019); HRC General Comment No 20 (1992) UN Doc HRI/GEN/1/Rev.6, 151 para 9.

66 OAU Convention (n 34 above).

67 Article VIII of the OAU Convention (n 34 above).

68 Article IV of the OAU Convention (n 34 above).

69 Article I(2) of the OAU Convention (n 34 above).

‘environmental refugees’ protections owed to refugees under the 1961 Refugee Convention.

Identical wording is used in the definition of refugee under the Cartagena Declaration,⁷⁰ effectively providing for legal protections for migrants who are forced to leave their place of habitual residence, to seek protection and refuge in another territory outside the country of origin or nationality for reasons including those related to climate change. Authors have argued that this broadened definition of ‘refugee’ has acquired a regional customary international law in the Central American Region.⁷¹

3.4 The 1984 Cartagena Declaration in Latin America

Inspired by the 1969 OAU Convention, the Cartagena Declaration likewise contributed to the international protection of refugees by broadening the concept of refugee in the region, while incorporating the definitional elements at Article 1 of the 1951 Refugee Convention. Specifically, the Declaration provides that:

the definition of the concept of refugees recommended for use in the region is that which, besides containing the provisions of the 1951 Convention and the 1967 Protocol, considers to be refugees persons who have fled their country because their lives, security or liberty have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights and other circumstances which have seriously disturbed public order.⁷²

In theory, this broadened definition engages a range of situations including migrants displaced on account of sea-level rise, as these would, in theory, reasonably be able to ascend to the threshold of ‘other circumstances leading to a serious disturbance of public order.’⁷³

3.5 Definition of Refugee under customary international law⁷⁴

Owing to the fact that the international treaty regime providing for the protection of refugees does not extend to ‘environmental refugees’ or ‘climate refugees’ due to the absence of persecution, recourse must be had to customary international law. There is growing evidence pointing to the existence of a broader definition of

70 Cartagena Declaration (n 35 above).

71 GS Goodwin-Gill & J McAdam *The Refugee in International Law* (2007) 38; E Arboleda ‘Refugee Definition in Africa and Latin America: The lessons of Pragmatism’ (1991) 3 *International Journal on Refugee Law* 185, 187.

72 Cartagena Declaration, III(3) (n 35 above).

73 As above.

74 Parts of this section are derived in part from an unpublished examination essay authored by myself, and submitted in June 2019, in fulfillment of the module AIL 802 S1 2019, University of Pretoria, Faculty of Law.

‘refugee’ under customary international law, alternatively, there may well exist a broader definition of ‘refugee’ emerging as a result of the operation of the principle of subsidiary protection for migrants who do not satisfy this formal criterion of ‘refugee.’⁷⁵

Under international law, a rule of custom is established when the two constitutive elements of State practice are present. The International Court of Justice (ICJ) in its *North Sea Continental Shelf* cases reiterated that Customary International Law (CIL) is the product of the existence of a combination of established, widespread and consistent State practice on the one hand, coupled with the legal conviction that this practice is sufficient to create legal obligations.⁷⁶ This is the dominant understanding of CIL which, once established, binds all States with the exception of persistent objectors.⁷⁷

Notably, the Statute of the ICJ does not define what is State practice.⁷⁸ However, it has clarified that State practice need not be universal, but must amount to consistent participation of States in a particular conduct, over a sustained period of time.⁷⁹ In the same breath, the Court noted that while no definitive period of time is required, the practice of States must be virtually uniform to satisfy the first requirement for the establishment of CIL.⁸⁰ The Court in *Nicaragua* underlines, however, that is it not necessary that the practice in question had to be ‘in absolutely rigorous conformity’ with the purported CIL rule. The Court noted that:

[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.⁸¹

Michael Akehurst further notes that ‘state practice covers any act or statements by a state from which views about customary law may be inferred’.⁸² Thus, State practice can be gleaned from both positive acts as well as omissions by organs of a State.⁸³ He notes that it is how States behave in practice that forms the basis of CIL, including from

75 Subsidiary protection under customary international law offers this category of migrants the same level of protection as that provided for in the Refugee Convention.

76 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ Reports (1969) 3.

77 *Anglo-Norwegian Fisheries Case (United Kingdom v Norway)* (1951) ICJ Rep 116 (hereafter ‘Fisheries’) 131; D Armstrong *et al International Law and International Relations* (2012) 180.

78 Statute of the International Court of Justice, 1946.

79 *Asylum Case (Colombia v Peru)* ICJ Reports (1950) 276-7.

80 *Fisheries* paras 116, 131 and 138 (n 77 above).

81 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits ICJ Reports (1986)98.

82 M Akerhurst ‘Custom as a Source of International Law’ (1975) *British Yearbook of International Law* 1.

83 MN Shaw *International Law* (2017) 82 (hereafter ‘Shaw’).

administrative acts, legislation, decisions of courts and activities on the international stage.⁸⁴ Once it has been established that a particular practice among States rises to the required level, the enquiry for the formation of CIL turns to *opinion iuris*. In Nicaragua the ICJ noted that:

for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.⁸⁵

In addition, the Court in *Continental Shelf* notes that conduct of States 'must be evidence of a belief that this practice is rendered obligatory by existence of a rule of law requiring it.'⁸⁶ Thus, *opinio iuris* therefore is perhaps the least tangible requirement, which is more difficult to establish given its inherently subjective nature. Accordingly, this element can be gleaned from a range of sources including diplomatic correspondence, press releases, government policy statements, official manuals, domestic legislation, national jurisprudence, international jurisprudence, legal briefs endorsed by the state, historical sources, voting patterns in international forums.⁸⁷

There is a view that a definition of refugee exists only in terms of the 1951 Refugee Convention, and that it does not exist under customary international law.⁸⁸ The American Society of International Law has contended that there is no customary international law obligation to offer protection to migrants who do not fall with the narrow definition of refugee at Article 1A(2) of the Refugee Convention.⁸⁹ While the author Guy Goodwin-Gill has argued that:

[P]ractice reveals a significant level of general agreement not to return to danger those fleeing severe internal upheavals or armed conflict in their own countries ... nearly four decades of practice contain ample recognition of a humanitarian response to refugees falling outside the

84 *Congo v Belgium* ICJ Reports (2002) 3, 23-4.

85 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) Merits*, International Court of Justice (ICJ) (27 June 1986) 349 <https://www.refworld.org/cases,ICJ,4023a44d2.html> (accessed 26 August 2020) at 349.

86 *North Sea Continental Shelf* (n 76 above).

87 Lecture by Prof S Hobe to LLM Class University of Pretoria, February 2019.

88 Memorandum from the UN Secretariat on Expulsion of Aliens, UN Doc. A/CN.4/565 (2006), citing LB Sohn & T Buergenthal 'The Movement of Persons Across Borders (Studies in Transnational Legal Policy No. 23)' *The American Society of International Law* (1992); R Plender *International Migration Law* (1988) 393.

89 Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law, Thursday, April 18: Morning, American Society of International Law Proceedings (17-20 April 1991) 90.

1951 Convention. Whether practice has been sufficiently consistent over time and accompanied by the *opinio juris* essential to the emergence of a customary rule of refuge, is possibly less certain, even at the regional level.⁹⁰

However, there is evidence suggestive of a broader definition of refugee under customary international law supported both by State practice and *by opinio juris*. Immediately after adopting the 1951 Refugee Convention, the adopting conference adopted a recommendation urging States to extend protection to persons who do not satisfy the narrow definition of refugee under the Convention.

The 1969 OAU Convention broadened the concept of refugee in the Refugee Convention to cover persons fleeing 'external aggression, occupation, foreign domination or events seriously disturbing public order.'⁹¹ The Convention is ratified by countries that are among the largest recipients of refugees globally, including Tanzania, Zambia, Democratic Republic of Congo, Kenya, Cameroon, Chad, Uganda, Sudan, Egypt, Algeria, Ethiopia, and Rwanda. Some States including Tanzania, Uganda and South Africa have gone further and domesticated the OAU Convention's definition of refugee into their national legislations.⁹² Mexico, too, has incorporated the OAU Convention's definition of refugee into its national law.⁹³ Even though it is binding only to member States, and owing to its highly representative character, the OAU Convention has contributed to the growing formation of a broader definition of refugee under customary international law. The 1984 Cartagena Declaration drew inspiration from the OAU Convention and fashioned its definition of refugee after that of the OAU Convention.⁹⁴

Similarly, the Asian-African Legal Consultative Organization adopted the 'Bangkok Principles' which defines refugee by

90 GS Goodwin-Gill *The Refugee in International Law* 171 (1996).

91 OAU Convention (n 34 above).

92 The Refugee Act 2006 (Uganda), 24 May 2006 (although apparently the status determination procedures are not yet implemented), <http://www.unhcr.org/refworld/docid/4b7baba52.html>; United States Committee for Refugees and Immigrants 'World Refugee Survey 2009 – Uganda' 17 June 2009 <http://www.unhcr.org/refworld/docid/4a40d2b5c.html>.

93 Ley General de Población [General Law of Population], Diario Oficial de la Federación, 7 de Enero de 1974, as amended Diario Oficial de la Federación [DO], 8 de Noviembre de 1996 (Mex.); Reglamento de la Ley General de Población [Regulations of the General Law of Population] Diario Oficial de la Federación [DO], 31 de Agosto de 1992 (Mex.); Manual de Trámites Migratorios del Instituto Nacional de Migración [Immigration Procedures Manual], Diario Oficial de la Federación [DO], 21 de Septiembre de 2000 (Mex.) TMN-I-07 REFUGIADO (Fracción VI del artículo 42 de la LGP y 166 del RLGP): El extranjero que huyendo de su país de origen, paraproteger su vida, seguridad o libertad, cuando haya sido amenazado por violencia generalizada, agresión extranjera, conflictos internos, violación masiva de derechos humanos u otras circunstancias que hayan perturbado el orden público, y que ingrese a territorio nacional ... [TMN-I-07 REFUGEE].

94 E Arboleda 'Refugee Definition in Africa and Latin America: The lessons of Pragmatism' (1991) 3 *International Journal on refugee Law* 185.

incorporating the definitional elements of the Refugee Convention, but further expands the definition to include

[E]very person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁹⁵

The Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons expressed the hope that the Refugee Convention will have value as an example exceeding its contractual scope, and that all nations will be guided by it in the granting of protections for which it provides – both to Refugees and to persons who may not have been covered by the Convention.⁹⁶ However, since the Refugee Convention excludes from its scope of protection environmental or climate migrants, customary international law may, albeit with more development, offer a useful alternative for protection of irregular refugees under international law.

4 A starting point to developing an international response challenges of migration induced by sea-level rise

As highlighted in the previous sections, there are fundamental gaps in the regulation of migration induced by rising sea levels. Of course, there is scope to employ existing mechanisms under international law more effectively to respond to this imminent challenge of irregular migration,⁹⁷ however, there are limits to the extent to which current frameworks can be employed to protect migrants in the specific context of rising sea-levels. International law must respond appropriately to the current and anticipated challenges – in the form of standardised and universal legal and policy frameworks, and operational measures to facilitate migration in this context. These initiatives must be aimed at helping affected populations or persons to either remain *in situ* where this is a viable option, or migrate elsewhere ahead of the crisis point of loss of territory due to the rise of water levels. There is further a need to protect and assist displaced

95 Asian-African Legal Consultative Organisation *Principles Concerning Treatment of Refugees*, 40th Session (31 December 1966).

96 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at IV, Recommendation E, reprinted at UNHCR, Convention and Protocol Relating to the Status of Refugees (2007) <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>; The Conference on Territorial Asylum's view is that the definition of Refugee should be broadened.

97 Nansen Principles 'the recommendations stemming from the Nansen Conference on Climate Change and Displacement in the 21st Century, held in Oslo' 5 - 7 June 2011 https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/nansen_prinsipper.pdf. Principle 1 specifically references human dignity.

persons both in circumstances where they migrate internally or across international borders.⁹⁸

Even when global temperatures can be stabilised through preventative strategies aimed at delaying the progression of rising sea-levels, it is reported that sea-levels will nonetheless continue to rise.⁹⁹ States globally will be faced with increasing pressure over the coming centuries, with the projected decrease in habitable territory and an increase in the percentages of affected populations.¹⁰⁰ International law relating to migration does offer some tools for a response to these challenges. Seen as a starting point for a more comprehensive international approach, these tools undoubtedly need to be further broadened and developed to respond to these challenges presented by this multi-causal phenomenon.¹⁰¹ This section proposes as starting points a number of general rules of international law to inform the development of a common and efficient response to the challenges presented by migration in the context of rising sea levels.

4.1 Human Rights Law

The proposal here is that international human rights law must inspire the manner in which States respond to challenges of migration induced by rising sea-levels rise. To achieve this, there is a need for more detailed investigation into the ways in which the paradigm of international human rights law can function as a broader framework through which international strategies can be developed. The Universal Declaration of Human Rights is clear that all persons are entitled to human rights by the simple fact of being human beings.¹⁰² These human rights are guaranteed by a series of international human rights treaties, with an appreciation of the indivisible and inter-related nature of those human rights,¹⁰³ and their location in the

98 The Government Office for Science 'Migration and Global Environmental Change: Future Challenges and Opportunities Final Project Report' *Foresight* (2011) 37; Asian Development Bank 'Addressing Climate Change and Migration in Asia and the Pacific: Final Report' *Asian Development Bank* (2012) 4; W Kälin & N Schrepfer 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches' *UNHCR Legal and Protection Policy Research Series*, (Geneva, 2012), 32-34 <http://www.refworld.org/docid/4f38a9422.html>.

99 L Rajamani 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments Under the Climate Regime' *Review of European Community & International Environmental Law* (2002) 9 (2) 120, 121.

100 As above.

101 IDMC Global Estimates (n 4 above).

102 Universal Declaration of Human Rights, 1948.

103 RG Bertrand 'Universality of Human Rights: The Review' *International Commission of Jurists* (1997) 105-117; UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, UN Doc A/CONF.157/23 <https://www.refworld.org/docid/3ae6b39ec.html>; Amnesty International *What is the*

fundamental and inalienable principle of a person's human dignity.¹⁰⁴

Recent scholarship from UN treaty bodies and the European Court of Human Rights (ECtHR) articulate more clearly States' obligations to respect, protect and fulfil certain human rights in the context of responding to natural disasters.¹⁰⁵ The author Walter Kälin argues that survivors of natural disasters may make a claim for humanitarian assistance within the framework on international human rights law; that there are certain State obligations inherent in international human rights law that demand that States respond appropriately to the impacts of climate change.¹⁰⁶

In addition, Article 11 of the Convention on the Rights of Persons with Disabilities¹⁰⁷ as well as Articles 23 and 25 of the African Charter on the Rights and Welfare of the Child¹⁰⁸ speak to the need for disaster relief responses, and implicitly call for the an all-encompassing right to a healthy environment.¹⁰⁹ Jane McAdam *et al* argues persuasively that to some extent the Guiding Principles on

- 103 *Universal Declaration of Human Rights and why was it created?* (2018) <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/>; Report of the Committee of Experts on the Application of Conventions and Recommendations; International Labour Conference, 63rd Session (1977) para 31; South Asian Judiciary Task Force Appeal signed by Justice MNBhagwati (Former Chief Justice of the Supreme Court of India), Chairperson of the Task Force, Justice Dorab Patel (Former Justice of the Supreme Court of Pakistan) and Justice KM Subhan (Former Justice, Appellate Division of the Supreme Court of Bangladesh), in Bangkok on 29 March 1993; UN Sub-Commission on the Promotion and Protection of Human Rights, Report of the Sub-Commission on the Promotion and Protection of Human Rights on its Fifty-First Session Geneva (2-27 August 1999) Rapporteur: Mr. Paulo S Pinheiro (10 November 1999) E/CN.4/2000/2 E/CN.2/1999/54 <https://www.refworld.org/docid/3b00f4ac4.html>; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* Order on provisional measures ICJ Reports 353 ICJ 348 (2008) 70, 109.
- 104 J McAdam 'Human Rights and Forced Migration' in E. Fiddian Qasmiyeh *et al* *The Oxford Handbook of Refugee and Forced Migration Studies* (2014) 203.
- 105 W Kälin 'The Human Rights Dimension of Natural or Human-Made Disasters' (2012) 55 *German Yearbook of International Law* 119-147, 128-29.
- 106 Kälin (n 106 above) 141-147; J McAdam & M Limon *Policy Report on Human Rights, Climate Change and Cross-Border Displacement: the role of the international human rights community in contributing to effective and just solutions* (2015) 6-20; JH Knox *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Compilation of Good Practices*, UNGA, UN Doc. A/HRC/28/61, 3 February 2015 <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/GoodPractices.aspx>.
- 107 Article 11 of The Convention on the Rights of Persons with Disabilities, 2008.
- 108 Article 22 and 25 of The African Charter on the Rights and Welfare of the Child, 1999.
- 109 JH Knox *Report of the Independent Expert on Issues of Human Rights Obligations relating to the Enjoyment of a Safe, Clean Healthy and Sustainable Environment: Preliminary Report*, United Nations Human Rights Council (HRC), UN Doc. A/HRC/22/43 (24 December 2012) 18, 19 and 34 http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43_en.pdf; JH Knox *Report of the Independent Expert on Issues of Human Rights Obligations relating to the Enjoyment of a Safe, Clean Healthy and Sustainable Environment: Mapping Report*, HRC, UN Doc. A/HRC/25/53 (30 December 2013) para 17 <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/PagesMappingReport.as>.

Internal Displacement as well as the work of the UNFCCC proceeds from this framework of responsibilities for States as primary duty bearers in terms of international human rights law.¹¹⁰

The work of the UNFCCC is premised on the recognition that the international community has the collective responsibility to respond to this global challenge of its own making.¹¹¹ In this context, the Office of the High Commissioner for Human Rights noted that '[i]nternational human rights law complements the UNFCCC by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights.'¹¹²

The 2020 *Ioane Teitiota v New Zealand* case heard by the Human Rights Committee is a prime example of how the human rights paradigm might prove useful. The matter concerned a challenge to New Zealand's decision to deport the complainant back to the Republic of Kiribati. The complainant claimed that the effects of climate change and sea level rise forced him to migrate from the island of Tarawa in the Republic of Kiribati to seek asylum in New Zealand.¹¹³ While both local courts and the Human Rights Committee accepted that the complainant was not a refugee for purposes of the Refugee Convention, they did not rule out the possibility that environmental degradation resulting from climate change or other natural disasters could 'create a pathway into the Refugee Convention or other protected person jurisdiction.'¹¹⁴

The complainant's claim under the Refugee Convention had failed before the New Zealand Supreme Court because the court had found no evidence that the environmental conditions in Kiribati that the complainant would face upon return were so hazardous that his life would be threatened, and on that score, the complainant did not meet the definitional requirement of 'refugee'.¹¹⁵ Before the Human Rights Committee, however, the matter turned on whether the complainant's deportation to conditions in Kiribati was a violation to his right to life in terms of Article 6 of the International Covenant on

110 IDMC Global Compact (n 4 above) 43 - 44.

111 *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*, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011 (hereinafter 'Cancun Agreements'); *Decision 3/CP.18, Approaches to Address Loss and Damage Associated with Climate Change Impacts in Developing Countries that are Particularly Vulnerable to the Adverse Effects of Climate Change to Enhance Adaptive Capacity*, UN Doc. FCCC/CP/2012/8/Add.1, 28 February 2013.

112 United Nations Office of the High Commissioner for Human Rights (OHCHR), *Mapping Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus Report on Human Rights and Climate Change* (June 2014) 99 <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.asp>.

113 *Ioane Teitiota v New Zealand* (n 20 above) para 2.1.

114 *Ioane Teitiota v New Zealand* (n 20 above) para 2.10.

115 *Ioane Teitiota v New Zealand* (n 20 above) para 4.3.

Civil and political Rights (ICCPR). The complainant claimed that sea level rise in Kiribati had resulted in the scarcity of habitable land and space, which has in turn caused violent land disputes that threaten the complainant's life. The conditions were further reported to include environmental degradation and saltwater contamination of the freshwater supply.¹¹⁶

In its decision, the Human Rights Committee correctly highlighted the link that exist between the environment and the enjoyment of human rights. In its general comment No. 36, the Committee established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death.¹¹⁷ The Committee confirmed that the scope of States parties' obligations to respect and ensure the right to life extends also to reasonably foreseeable threats and life-threatening situations that can result in loss of life, such as the conditions that exist in Kiribati and other affected areas.¹¹⁸ As a result, States may be still in violation of the Article 6 right to life even where such threats to life do not result in the loss of life.¹¹⁹ This position is further consistent with the jurisprudence of regional human rights tribunals who have reinforced the link between the right to life and the right to a healthy environment (and other socio-economic rights).¹²⁰ Seen in this light, severe environmental degradation caused by rising sea levels can lead to a violation of the right to life.¹²¹

116 *Ioane Teitiota v New Zealand* at para 2.7.

117 General comment No. 36 (CCPR/C/GC/36) para 3; see *Portillo Cáceres et al v Paraguay* (CCPR/C/126/D/2751/2016) para 7.3.

118 *Portillo Cáceres et al v Paraguay* (CCPR/C/126/D/2751/2016) para 7.5 (hereafter '*Portillo Cáceres et al v Paraguay*'); *Toussaint v Canada* (CCPR/C/123/D/2348/2014) para 11.3.

119 *Portillo Cáceres et al v Paraguay* (n 119 above) para 7.3.

120 *Portillo Cáceres et al v Paraguay* (n 119 above) para 7.4; Inter-American Court of Human Rights *Advisory opinion OC-23/17* of 15 November 2017 on the environment and human rights, Series A No. 23 para 47; *Kawas Fernández v Honduras*, judgment of 3 April 2009, Series C No. 196 para 148; African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) para 3 (States' responsibilities to protect life 'extend to preventive steps to preserve and protect the natural environment, and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies.');

European Court of Human Rights, application Nos. 54414/13 and 54264/15, *Cordella and Others v Italy*, 24 January 2019 para 157 (serious environmental harm may affect individuals' well-being and deprive them of the enjoyment of their domicile, so as to compromise their right to private life).

121 *M Özel v Turkey* ECtHR(17 November 2015) paras 170, 171 and 200; *Budayeva v Russia* (20 March 2008) paras 128-130, 133 and 159; *Öneryıldız v Turkey* (30 November 2004) paras 71, 89, 90 and 118.

The paradigm of international human rights law promises to provide a useful starting point in that it offers a set of minimum standard for the treatment of migrants subject to a State's jurisdiction or effective control.¹²² International human rights law is further useful in that it can function as a mechanism for the identification and assessment of which rights and freedoms are negatively impacted by the rising sea-levels, it provides a legal basis from which international protection may be granted, and it demands that host States observe a number of minimum standards of treatment towards migrants.

4.2 The obligation to cooperate

The obligation to cooperate is a primary principle under international law.¹²³ The International Law Commission (ILC) in its commentary to the Draft Articles on the Protection of Persons in the Event of Disasters characterises this obligation as 'indispensable' in protecting victims of disasters.¹²⁴ The Principle's foundational character is demonstrated by its inclusion in the UN Charter as a key objective of the UN,¹²⁵ and has been reiterated in a range of human rights¹²⁶ and environmental law treaties alike.¹²⁷

While there is a need for greater clarity regarding the material content of this obligation particularly in the context of the international community engaged in joint and separate actions to protect, respect and fulfil international human rights in the specific context of migration induced by rising sea-levels, this principle, expressed through the human rights paradigm, can function as the organising factor on which international strategies can be premised. The obligation to cooperate can be used as the basis for determining the specific role of the international community of States.

122 *Bankovic and Others v Belgium and 16 other Contracting States* (Admissibility Decision) App. no. 52207/99 ECtHR (12 December 2001) para 73 (hereafter '*Bankovic*'); *Hirsi Jamaa and Others v Italy* (Judgment) App. no. 27765/09 (ECtHR, 23 February 2012) paras 76-82; *Loizidou v Turkey* (Preliminary Objections) App. no. 15318/89 ECtHR (13 March 1995) para 62; *Georgia v Russia (I)* (Judgment) App. no. 13255/07 ECtHR (3 July 2014) paras 159, 163; *Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) ICJ Reports 163 (9 July 2004) 108-112; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment (19 December 2005) para 216.

123 R Wolfrum 'International Law of Cooperation' in Wolfrum (eds) *The Max Planck Encyclopedia of Public International Law* (2010).

124 ILC *Report of the International Law Commission* 66th Session, UN Doc. A/69/10 (2014) 105 <http://legal.un.org/ilc/reports/2014/>.

125 Articles, 1(3), 55, 56, United Nations, Charter of the United Nations, entered into force 24 October 1945, 1 UNTS XVI.

126 For example, Articles 2(1), 11, 15, 22 and 23 of The International Covenant on Economic, Social and Cultural Rights, 1966.

127 For a complete list see J McAdam 'Climate Change, Forced Migration, and International Law' *Oxford University Press* (2012) 257 at fn 132.

4.3 Common but differentiated responsibilities

The principle of common but differentiated responsibilities can also function as a useful prism through which the international community could organise its joint and separate responses to the challenge of migration in this context. Article 3.1 of the UNFCCC demands that:

[t]he parties should protect the climate system for the benefit of present and future generations of human kind 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.

Article 4 adds to this. It requires that member States ‘take into account their common but differentiated responsibilities in fulfilling commitments under the UNFCCC.’¹²⁸

The International Law Association Committee on Sea-Level Rise has described this principle as the ‘bedrock of burden sharing arrangements crafted in the new generation of environmental treaties,’ and as having ‘considerable legal gravitas.’¹²⁹ The Committee notes that this principle is ‘arguably an overarching principle guiding the development of the international climate change regime.’¹³⁰ The principle established the shared and common responsibility of the international community while recognising that all States have, to varying degrees, contributed to the creation of the problem, and that different States have varying capacities to respond to it.¹³¹

The distribution of the impacts of rising sea-levels will be unevenly distributed. States that have contributed the least to greenhouse gas emission will be the worst affected due to their geographic location, and limited capacity to respond effectively to these challenges due to limited resources and support. In addition, this is likely to be further compounded by the existence of additional challenges, including the expansion of their population and weak human rights protections.

States that are directly affected by rising sea-levels will require financial, technical and institutional support to discharge their obligations to respect, protect and fulfil the human rights of those affected. These concerns have already been highlighted in the UNFCCC. For instance, the 2010 Cancun Adaptation Framework

128 UNFCCC (n 21 above).

129 See Report of the International Law Association’s Committee on Legal Principles Relating to Climate Change (Washington, 2014) 13 <http://www.ila-hq.org/en/committees/index.cfm/cid/1029>; see also IDMC Global Estimates (n 4 above).

130 As above.

131 IDMC Global Compact (n 4 above) 47.

highlights the immediate need for international cooperation on adaptation measures.¹³² With respect to migration, the Framework encourages States to develop measures to improve international cooperation and coordination on climate change-induced displacement, migration and planned relocation at the national, regional and international levels.¹³³ To this end, the principle of common but differentiated responsibilities can function as a beneficial prism through which States can develop these measures.

5 Conclusion

Although sea-levels will rise only gradually over decades and centuries, this gradual rise has immediate and hazardous impacts on the low-lying territories, and the inhabitants of those vulnerable coastal areas. These immediate impacts of rising water tables result in the creation of mass migration, as inhabitants of these areas are not likely to stay until crisis point of inundation. Currently, international law rules do not recognise this form of irregular migration – leaving a gap in the international regulation of migration. The definition of refugee in the Refugee Convention does not include environmental or climate refugees. In response, some regional efforts have been made to mend the deficit in protections by expanding the definition of a refugee, potentially to include environmental or climate refugees. However, if we are to realise the current predictions on the gradual rise of sea water levels, then regional efforts will be far from sufficient.

While not completely unhelpful, the current rules and mechanisms under international law have very clear limits regarding the extent to which they can be leveraged to protect these migrants. What is becomes clear then, is that the international community needs develop uniform and universal legal and policy frameworks, and operational measures to facilitate migration in the specific context of rising sea levels. Of course, we are a long way from seeing international rules specifically regulating migration in the context of rising sea-levels. In fact, it was only in May 2019 at its 3467th meeting that the ILC include the topic ‘Sea- level rise in relation to international law’ in its programme of work, and established an open-ended Study Group on the topic.¹³⁴ Over the next two years, the Study Group will work on issues related to the protection of persons affected by sea-level rise as a sub-topic identified in the syllabus prepared in 2018.¹³⁵

132 Cancun Adaptation Framework 14(f) 60, 63 and 68 Doc. FCCC/CP/2010/7/Add.1.

133 As above.

134 *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, para 369.

135 As above.

As the international community considers and develops a response to these challenges, this contribution recommends some useful starting points for the organisation of the global response. First, the paradigm of international human rights law, which can function as a broader framework through which international strategies can be developed. Closely linked to this is the international law obligation to cooperate which, seen through the human rights paradigm, can function as the organising factor on which international strategies can be based. Finally, the principle of common but differentiated responsibilities, which establishes shared and common responsibility, while recognising that all States have, to varying degrees, contributed to the creation of the problem, and that different States have varying capacities to respond to it.