

CLIMATE MIGRATION IN THE INTERNATIONAL AND DOMESTIC REGULATION OF MIGRATION

ALYCIA MILLAR*

As the number of climate migrants increase, the gaps in the law for protection of such people become more evident. This paper argues the current legal framework is not equipped to protect climate migrants, as attempts to categorise them into legal definitions of which they do not necessarily fit such as refugee, stateless persons or person eligible for complementary protection, have resulted in unintended consequences and complexity. By using the right to life as an objective criterion, this paper analyses the current regulation of climate migration in both international law and domestic law in Australia and New Zealand, drawing comparisons with the legislative approach of Pacific Island nations. It also considers the current scholarly perspectives in this field, before concluding that the most effective way of regulating climate migration is through binding regional agreements tailored to the needs of climate migrants in those regions.

CONTENTS

I	Introduction	24
II	Who is a Climate Migrant?.....	26
III	Current Regulation of Climate Migration	29
	A The Climate Migrant as a Refugee	29
	B The Climate Migrant as a Stateless Person.....	32
	C Complementary Protection	33
IV	Proposals for Reform.....	34
	A Arguments for a Universal Treaty or International Instrument ..	34
	B Arguments Against a Universal Treaty.....	36
V	Conclusion.....	38

I INTRODUCTION

The climate migrant is unique in domestic and international law because the complexity of the issue of migrating due to adverse effects of climate change makes it difficult to precisely categorise it within the current legal landscape. Climate migrants are not recognised as a cognisable group of people that need

* LLB Student, School of Law, University of South Australia.

protection.¹ Some scholars and commentators have argued for a universal approach to provide fast legal protection, in the form of a new treaty or guidelines/protocol to an existing treaty. However, this paper will argue a new universal treaty is not the most effective way to provide legal recognition and protection for climate migrants. Instead, binding regional agreements to ensure an orderly migration plan recognising a duty to assist people displaced by climate change coupled with assistance to at-risk nations is the ideal method for protecting the interests of climate migrants.

The criteria used to analyse this position will be the right to life, as provided in Article 6 of the *International Covenant on Civil and Political Rights (ICCPR)*.² This will determine which approach best protects the climate migrant's right to life. The Human Rights Commission have recognised the threat climate change poses to the right to life, finding the risks caused by climate change constitute 'some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'.³ Therefore, the protection of this human right offers a clear objective criterion to analyse the international and domestic regulation of climate migration.

To reinforce this proposition, this article will analyse the existing hard law climate migration regulation, using international law and its domestic equivalents in Australia, New Zealand and Pacific Island nations. The effects of climate change are one of the biggest challenges faced by Pacific Island nations in recent years, due to the frequency and gravity of sudden and slow onset events. This has led to reactive and proactive legislative responses, including Fiji's *Climate Change Act 2021*, which has been hailed as a 'significant contribution to the shape of global and regional climate change policies as well as to the promotion of climate justice principles'.⁴ This article will use examples from Australia and New Zealand to compare the approach of the Pacific Island nations to that of other countries in the region.

¹ *RRT Case No. 0907346* [2009] RRTA 1168 [22].

² *International Covenant on Civil and Political Rights*, opened for signature 1996, 999 UNTS 171 (entered into force 23 March 1976) art 6.

³ *Ioane Teitiota v New Zealand (advance unedited version)*, Un Doc CCPR/C/127/D/2728/2016, UN Human Rights Committee (7 January 2020) [9.4].

⁴ Beatrice Ruggieri, 'Moving to higher ground: Planning for relocation as an adaptation strategy to climate change in the Fiji Islands' in Iowu Jola Ajibade, A.R. Siders (ed), *Moving to higher ground: Planning for relocation as an adaptation strategy to climate change in the Fiji Islands* (Routledge, 2021) 114.

The existing migration and refugee regulation for persons displaced due to the adverse effects of climate change is broken into three categories: the climate migrant as a refugee, as a stateless person and as a person eligible for complementary protection. Arguments for and against a universal treaty will then be discussed. This analysis will ultimately lead to the finding that a new universal treaty or protocol regime would not adequately protect the interests of climate migrants.

It is important to clarify terminology used at the outset while noting precise terminology in this area is still being debated by scholars and lawmakers.⁵ Following the language used in the 2022 International Organization for Migration (IOM) World Migration Report 2022, 'migrant' in the climate migrant context encompasses both forced and voluntary migration.⁶ 'Migrant' will also be used to encompass 'refugees', due to the term 'climate refugee' offering an unhelpful simplification of the issue,⁷ noting some climate migrants themselves not wanting to have the negative connotations associated with the term 'refugee'.⁸

II WHO IS A CLIMATE MIGRANT?

Climate migration refers to a specific category of environmentally induced migration where the individual migrates either voluntarily or involuntarily,⁹ from their home due to the adverse effects of climate change making their home unliveable. The phenomenon is not unanimously defined in authoritative

⁵ Jane McAdam, 'Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' (2011) 23(1) *International Journal of Refugee Law* 2, 6.

⁶ International Organization for Migration, *World Migration Report 2022* (Report, 01 December 2021) 236.

⁷ Katrien Steenmans and Aaron Cooper, 'Ioane Teitiota v NZ: a landmark ruling for climate refugees?' *Coventry Law Journal* (2020) 25(2) 23, 30.

⁸ 'Pacific Islanders reject 'climate refugee' status, want to 'migrate with dignity', SIDS conference hears', *ABC News* (online, 5 September 2014) <<https://www.abc.net.au/news/2014-09-05/pacific-islanders-reject-calls-for-27climate-refugee27-status/5723078>>.

⁹ However, some scholars argue climate migration is only involuntary: Giovanna Lairia, 'A Critical Appraisal of the Concept of Climate Migration' (2021) 9(3) *London Review of International Law* 375, 387.

law;¹⁰ however, a working definition has been adapted from the Warsaw International Mechanism Executive Committee by the IOM:

The movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border.¹¹

The number of climate migrants globally is projected to increase as global warming increases, with the number of internal displacements caused by climate disasters rising each year.¹² The Internal Displacement Monitoring Centre found of the 60.9 million internally displaced people in 2022, 53 per cent were displaced by climate disasters.¹³ This is a 45 per cent increase since 2021.¹⁴

Climate migrants' situations are often multicausal,¹⁵ as the effects of climate change usually exacerbate pre-existing factors which may impact the decision to migrate, such as 'resource scarcity, lack of economic opportunity and environmental degradation'.¹⁶ This makes it challenging to determine the precise reason for migration, although it has been argued the effects of climate change is a primary migration driver.¹⁷ As Matthew Scott found, references to climate migration as a relevant factor for migration are historically slim, with most cases referring to environmental factors as 'background'

¹⁰ Thea Philip, 'Climate Change Displacement and Migration: An Analysis of the Current International Regime's Deficiency', Proposed Solutions and A Way Forward For Australia (2018) 19(2) *Melbourne Journal of International Law* 639, 638.

¹¹ International Organization for Migration, *Glossary on Migration* (34ed, 2019) 31.

¹² Internal Displacement Monitoring Centre, *Global Report on Internal Displacement 2023* (Report, 2023) 6.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ International Organization for Migration, *World Migration Report 2022* (Report, 01 December 2021) 236, 237.

¹⁶ Philip (n 10) 639, 641.

¹⁷ Giovanna Lairia (n 17) 387.

considerations.¹⁸ It is also difficult to determine whether a sudden-onset climate event, such as a natural disaster, caused the migration or whether it was the slow-onset effects of climate change. Jane McAdam criticises distinguishing between disasters and climate change, stating ‘drawing sharp distinctions between the two is unhelpful from a human rights and protection-oriented perspective’.¹⁹ However, the 2022 IOM report distinguished between the two to find that slow-onset impacts are more likely to drive climate migration than sudden-onset events.²⁰

Climate migration is further complicated by the fact that most climate migrants are internally displaced within their country of nationality. In 2017/18 more people were internally displaced within their home country from disasters triggered by sudden-onset natural hazards than those displaced by conflict.²¹ There is no universal international treaty for internally displaced persons;²² however, the 1998 United Nations *Guiding Principles on Internal Displacement* offer insight as to how the issue should be managed.²³ The principles expressly include those who ‘have been forced or obliged to flee or to leave their homes ... as a result of or in order to avoid the effects of ... natural or human-made disasters’.²⁴

McAdam has warned the number of cross-border climate migrants will increase if the internal effects of climate change are not adequately managed.²⁵ Climate migrants who do cross borders often do so to enter another developing country.²⁶ Currently, lower socio-economic countries are experiencing the impacts of climate change at a higher proportion as they lack the resources to

¹⁸ Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press, 2020) 46.

¹⁹ Jane McAdam, *Displacement in the Context of Climate Change and Disasters* (Oxford University Press, 2021) 832, 833.

²⁰ International Organization for Migration, *World Migration Report 2022* (Report, 01 December 2021) 236, 238.

²¹ McAdam (n 19) 832, 833.

²² Ishrat Jahan, ‘Climate-induced Displacement: Protection under the Current International Legal Frameworks’ (2020) 37(2) *Environmental and Planning Law Journal* 225, 235.

²³ United Nations Commission on Human Rights, ‘Guiding Principles on Internal Displacement’, UN doc E/CN.4/1998/53/Add.2 (11 February 1998).

²⁴ Ibid; McAdam (n 19) 832, 834.

²⁵ Ibid.

²⁶ Chris Methmann and Angela Oels, ‘From ‘fearing’ to ‘empowering’ Climate Refugees’ (2015) 46(1) *Security Dialogue* 51, 63.

prepare and address adverse climate effects.²⁷ This includes Pacific Island nations, which have been labelled the ‘sinking islands’²⁸ as they have been identified as one of the first regions to experience climate induced migration at a population scale.²⁹

III CURRENT REGULATION OF CLIMATE MIGRATION

A *The Climate Migrant as a Refugee*

While refugee law has historically been analogous to climate migration law and has often been relied on by litigants, no climate migrant claiming refugee status purely on the basis of the effects of climate change has been successful to date.³⁰ However, refugee status is currently an ideal legal status for climate migrants as it grants the duty of non-refoulement: protection from the forced return to their home country. This protection was incorporated in a 2009 United Nations (UN) report, which argued for the granting of legal climate refugee status to ensure protection, including the protections afforded by the right to non-refoulement.³¹ The refugee definition provided by the 1951 *Convention Relating to the Status of Refugees (Refugee Convention)*³² has been criticised for its unsuitability for application in climate migration cases for several reasons, including the lack of an identifiable persecutor and impossibility to link to one of the five grounds of persecution stipulated in article 1(A).³³

²⁷ Jahan (n 22) 227.

²⁸ McAdam (n 5) 13.

²⁹ John Campbell and Olivia Warrick, ‘Climate Change and Migration Issues in the Pacific’ (Report, United Nations Economic and Social Commission for Asia and the Pacific, 2014) 6–7 (‘*Climate Change and Migration Issues*’).

³⁰ McAdam (n 19) 837.

³¹ Chris Methmann and Angela Oels, ‘From ‘fearing’ to ‘empowering’ Climate Refugees’ (2015) 46(1) *Security Dialogue* 51, 57; UN High Commissioner for Refugees, *Conclusions Adopted by the Executive Committee On the International Protection of Refugees 1975 – 2017 (Conclusion No. 1 – 114)*, October 2017, HCR/IP/3/Eng/REV.2017.

³² *Convention and Protocol Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 4 October 1967) art 1.

³³ The five grounds being race, religion, nationality, membership of a particular social group or political opinion: *Convention and Protocol Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 4 October 1967) art 1; Adrienne

While the *Refugee Convention* does not provide a definition for persecution, the concept was explored in the New Zealand Court of Appeal decision *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173 (*Teitiota*).³⁴ The appellant was a national of the Republic of Kiribati, who sought refugee status in New Zealand but was rejected and removed to Kiribati. The appellant claimed the impacts of climate change on Kiribati's Tarawa Island made it uninhabitable, as it led to scarce amounts of food and water, exacerbated by overcrowding and leading to outbreaks of violence within the community.³⁵ In this instance, the appellant tried to argue persecution existed in the effects of climate change in Pacific Island nations, particularly Kiribati. He claimed the international community, especially large emitters of greenhouse gas, constituted a persecutor for the purpose of the refugee definition.³⁶ The court found construing the refugee definition this way is a misapplication of international law in that it 'stands the *Convention* on its head'.³⁷ It is important to note the New Zealand domestic implementation of the *Refugee Convention* requires the applicant to have faced 'serious harm',³⁸ characterising it as a violation of a core human right.³⁹ McAdams agrees with the *Teitiota* decision, stating countries which it could be argued are the persecutors for the purpose of the *Refugee Convention* 'are likely to be the very countries in which people will seek protection'.⁴⁰

Australian Courts have further discussed this concept, specifically in the decision of *RRT Case No. 0907346* [2009] RRTA 1168. The applicant was also a national of Kiribati, who claimed the effects of climate change have made the country uninhabitable, declaring in his application 'the future of the country is quite frightening as every year the country sinks [further] into the sea due to the climate changes'.⁴¹ The applicant attempted to argue Australia's contribution to pollution 'in complete disregard for people on low lying

Anderson et al, 'A Well-Founded Fear of Being Persecuted ... but When?' (2020) 42(2) *Sydney Law Review* 155, 158.

³⁴ *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173.

³⁵ Ibid [2.1].

³⁶ Ibid [30].

³⁷ Ibid [40].

³⁸ Philip (n 10) 639, 646.

³⁹ Ibid.

⁴⁰ McAdam (n 19) 836.

⁴¹ *RRT Case No. 0907346* [2009] RRTA 1168 [19].

islands, constitutes the relevant motivation to characterise climate change as persecution'⁴² and that the *Refugee Convention* should be interpreted broadly 'in the absence of specific legislation'.⁴³ However, the Refugee Review Tribunal found this claim to be baseless, as countries who contribute high emissions were not said to be motivated by any of the *Convention* grounds.⁴⁴ In the UK, persecution has been understood to mean the combination of serious harm and the failure of State protection.⁴⁵ This places some agency upon the State to fail to protect the person claiming refugee status either by act or omission, in line with the *Convention* definition. Scott argues the Australian approach makes this connection even more difficult, as it requires a 'discriminatory motivation in order to establish a well-founded fear of being persecuted for a *Refugee Convention* reason'.⁴⁶ This element of discrimination was explored in *RRT Case No. 0907346*, as the Tribunal echoed reasoning from Brennan CJ in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 to find persecution must include discriminatory conduct towards victims selected by reference to a prescribed category of discrimination outlined by art 1(A)(2) of the *Convention*.⁴⁷

When considering the right to life, categorising the climate migrant as a refugee becomes more complicated. While refugee status for climate migrants provides the protection against being forced to return to their home country threatened by climate change, it does not address the issue at a macro level and could unnecessarily open the floodgates to an ocean of litigants from the same nation. Furthermore, the United Nations Human Rights Commission (UNHRC) found in its *Teitiota* decision that the applicant's right to life was not threatened by his return to Kiribati, as his evidence did not establish that this right was being arbitrarily deprived.⁴⁸ Interestingly, the Commission agreed with the evidence that Kiribati is likely to become uninhabitable due to

⁴² Ibid [45].

⁴³ Ibid [22].

⁴⁴ Ibid [51].

⁴⁵ *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, ex parte Shah* [1999] AC 629, 653 (Lord Hoffmann).

⁴⁶ Matthew Scott (n 18) 52.

⁴⁷ *RRT Case No. 0907346* [2009] RRTA 1168 [48] quoting Brennan CJ in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 [7].

⁴⁸ *Ioane Teitiota v New Zealand* (n 3)[4.5].

climate change in 10 to 15 years,⁴⁹ although found this timeframe allows for intervening acts by Kiribati's government and the international community.⁵⁰ This demonstrates the high threshold for establishing a breach of the right to life in the context of seeking refugee status, particularly as the applicant's evidence also included proof of the effect of climate change on the health of people in Kiribati. These included 'vitamin A deficiencies, malnutrition, fish poisoning, and other ailments reflecting the situation of food insecurity' as well as diminished supply of fresh water.⁵¹ Negative connotations associated with the term 'refugee' and the treatment of refugees also impact its effect on the right to life, as regulation tends to 'commodify people, reducing their relocation to reemployment plans'.⁵²

However, two dissenting judgements in the UNHRC *Teitiota* decision found the applicant's right to life was threatened. These judgements will be examined in section C of this paper.

B *The Climate Migrant as a Stateless Person*

In 2021, the foreign minister of Pacific Island nation Tuvalu addressed the UN Cop26 conference from knee-deep water to highlight concern over the country's statehood if it is submerged completely.⁵³ This concern has led Tuvalu to prepare for mass relocation if it becomes necessary, by saving 'digital archives of Tuvalu's history and cultural practices to create a digital nation'.⁵⁴

Academics have considered whether the climate migrant would be better treated as a stateless person, particularly if their state is completely submerged and the landmass disappears, as is predicted for Tuvalu. As defined under art 1 of the *Convention Relating to the Status of Stateless Persons*, statelessness

⁴⁹ Commentators have disagreed with this proposition, stating 'there are few measures Kiribatian authorities can implement': See Katrien Steenmans and Aaron Cooper (n 7) 28.

⁵⁰ *Ioane Teitiota v New Zealand* (n 3) [9.12].

⁵¹ *Ibid* [2.3] – [2.4].

⁵² Katrien Steenmans and Aaron Cooper (n 7) 31.

⁵³ Foreign Minister of Tuvalu Simon Kofe, 'Minister Kofe's video statement: COP26' (Speech, The COP26 UN Climate Change Conference, 9 November 2021).

⁵⁴ Government of Tuvalu Department of Foreign Affairs, *Future Now Project* (Web Page) <<https://dfa.gov.tv/index.php/future-now-project/>>.

applies to persons not considered nationals by any state.⁵⁵ However, characterising climate refugees as stateless persons is usually dismissed as being unhelpful, with McAdam describing it as a ‘highly speculative and convoluted’ idea that is ‘unlikely to offer much protection in reality’.⁵⁶ Landmass submersion and physical disappearance of a state are not considered under the statelessness criteria,⁵⁷ as ‘the international community will generally presume the continued existence of a state’.⁵⁸ McAdam has argued statelessness will only apply to climate migrants if their state rescinds their nationality.⁵⁹

This may also be inconsistent with the right to life. It may pose a threat to the population’s right to life as it ‘will become uninhabitable well before it is submerged by rising seas’, due to impacts on food security and freshwater access.⁶⁰

C Complementary Protection

Complementary protection is granted to individuals who fail to meet the refugee definition but are owed protection under a broader international obligation, such as the right to life.⁶¹ For climate migration, the UNHCR has emphasised the need to consider climate change within the broader context of the rights it effects when assessing protection claims.⁶² The NZ Tribunal also considered human rights in finding the *Refugee Convention* ‘should not be automatically ruled out’ but that ‘human rights law seems to offer the most scope for protection in such circumstances’.⁶³

⁵⁵ *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1(1).

⁵⁶ McAdam (n 19) 832, 843.

⁵⁷ *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December [1936] LNTSer 9; 1933, 165 LNTS 19 (entered into force 26 December 1934) art 1.

⁵⁸ Philip (n 10) 639, 650.

⁵⁹ Jane McAdam, ‘Building International Approaches to Climate Change, Disasters, and Displacement’ (2016) 33(2) *Windsor Yearbook of Access to Justice* 1, 8.

⁶⁰ Philip (n 10) 639, 650.

⁶¹ *Ibid.*

⁶² McAdam (n 19) 832, 836.

⁶³ *Ibid.* 832, 837; *AF (Kiribati)* [2013] NZIPT 800413, New Zealand: Immigration and Protection Tribunal, 25 June 2013 [56] – [70].

It may provide the means to entitle climate migrants to the right to non-refoulement; however, it is uncertain whether returning a climate migrant to their state of nationality impacted by climate change could 'amount to a breach of human rights sufficient to warrant a subsequent grant of complementary protection'.⁶⁴ It has also been criticised for its ad hoc, discretionary application.⁶⁵ McAdam found complementary protection in what the European Court of Human Rights has expressed as a 'very exceptional case where the humanitarian grounds against removal are compelling'⁶⁶ constitutes an 'extremely high threshold' for its discretionary application, resulting in 'convoluted and sometimes inconsistent jurisprudence'.⁶⁷

Duncan Laki Muhumuza's dissent in the UNHCR *Teitiota* decision emphasised taking a 'human-sensitive approach to human rights issues'.⁶⁸ He found the applicant faced a 'real, personal and reasonably foreseeable threat to his right to life as a result of the conditions in Kiribati', which was inconsistent with the standards of dignity.⁶⁹ He did not state whether complementary protection should be afforded to the applicant, but focused on the threat to the right to life, stating 'New Zealand's action is more like forcing a drowning person back into a sinking vessel with the "justification" that after all there are other voyagers on board'.⁷⁰

IV PROPOSALS FOR REFORM

A *Arguments for a Universal Treaty or International Instrument*

This paper has argued the current approach for regulating climate migration is lacking in its consideration of the right to life. This sentiment is echoed by academics calling for reform in this area, some arguing a treaty offers the best mechanism for effective, proactive, and universally consistent migration. This could be in the form of a new universal treaty or a protocol to the existing *Refugee Convention*, or to the United Nations Framework Convention on Climate Change (UNFCCC). Some academics have argued this could be

⁶⁴ Philip (n 10) 639, 650.

⁶⁵ Ibid

⁶⁶ *SHH v United Kingdom* (2013) 57 EHRR 18, 59.

⁶⁷ McAdam (n 19) 832, 840.

⁶⁸ *Ioane Teitiota v New Zealand* (n 3) [1], Muhumuza dissent.

⁶⁹ Ibid [5] – [6], Muhumuza dissent.

⁷⁰ Ibid [6], Muhumuza dissent.

achieved by extending the refugee definition to include environmental persecution.⁷¹ This treaty would need to ‘reimagine’ the principle of non-refoulement to ensure a climate migrant could not be sent back to the state where they face environmental persecution, or a threat to their right to life.⁷² Philip argues the proposed instruments need to be ‘legally binding and enforceable on state parties’ to emphasise the need for protected persons to be ‘guaranteed domestic legal status’.⁷³ Some academics have argued the instrument should focus on provisions to allow states to grant climate migrants humanitarian aid, focusing on human rights such as the right to life, while ensuring the burden of aid is spread among states.⁷⁴ Philip proposed this could be achieved through a ‘polluter pays’ approach, where states contributing the most emissions take on a larger burden of the cost to assist climate migrants and take in a larger number of displaced persons.⁷⁵ Docherty and Giannini proposed the instrument ‘complements existing law while providing a flexible forum for addressing an emerging problem’.⁷⁶ They argue a stand-alone instrument would provide the best protection for climate migrants, as both the *Refugee Convention* and the UNFCCC ‘have limitations as for a possible climate change refugee protocol’; however, they note the instrument could borrow from these frameworks while ‘tailoring them to the needs of a climate change refugee situation’.⁷⁷

However, proposals to amend the *Refugee Convention* to include climate migration, which have generally been made by at-risk states, have not resulted in reform. In 2006, a proposal was made by the Maldives to broaden the refugee definition to include ‘climate refugees’.⁷⁸ In 2009, the Bangladeshi

⁷¹ Chris Methmann and Angela Oels, ‘From ‘fearing’ to ‘empowering’ Climate Refugees’ (2015) 46(1) *Security Dialogue* 51, 57.

⁷² Bonnie Docherty and Tyler Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ (2009) 33 *Harvard Environmental Law Review* 349, 377.

⁷³ Philip (n 10) 651.

⁷⁴ Docherty and Giannini (n 72) 350.

⁷⁵ Philip (n 10) 652.

⁷⁶ Docherty and Giannini (n 72) 350.

⁷⁷ Ibid 402.

⁷⁸ Republic of the Maldives Ministry of Environment, Energy and Water, ‘Report on the First Meeting on Protocol on Environmental Refugees: Recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees’ (Report, Republic of the Maldives Ministry of Environment, Energy and Water, 14–15 August 2006).

Finance Minister argued ‘the convention on refugees could be revised to protect people. It’s been through other revisions, so this should be possible’.⁷⁹

The consistency of a new universal instrument with the right to life would vary depending on the content of the convention. Docherty and Giannini’s humanitarian focus would be centred around the protection of human rights and would therefore protect the right to life. However, this approach may not be the most effective, as explored in the following paragraphs. As previously mentioned, ‘at-risk’ populations, such as those in Pacific Island nations, have rejected the label of climate refugee in favour of migration with dignity,⁸⁰ thus highlighting their right to life with dignity. This also reflects a modern framing of climate migration focused on ‘resilience’ or empowering at-risk nations to ‘take care of themselves’.⁸¹

However, as Methmann and Oels note, the danger with this reframing is ‘naturalising and depoliticising’ the argument by shifting the responsibility away from large emitters, no longer painting climate change as ‘a social problem that can still be tackled by significant emission reductions and lifestyle changes by residents in the major economies’.⁸²

B Arguments Against a Universal Treaty

Academics have proposed alternative options to a universal treaty, such as regional agreements⁸³, pre-emptive resettlement⁸⁴ and soft law regimes⁸⁵.

A new universal treaty or a protocol to the *Refugee Convention* or UNFCCC has been criticised as an unlikely solution, as the present system is ill-equipped and it is ‘improbable that these often static legal regimes can be adequately

⁷⁹ Harriet Grant, James Randerson and John Vidal, ‘UK Should Open Borders to Climate Refugees, Says Bangladeshi Minister’, *The Guardian* (online), 5 December 2009 archived at <<https://perma.cc/6MGA-8S2N>>.

⁸⁰ ‘Pacific Islanders reject ‘climate refugee’ status, want to ‘migrate with dignity’, SIDS conference hears’, *ABC News* (online, 5 September 2014) <<https://www.abc.net.au/news/2014-09-05/pacific-islanders-reject-calls-for-27climate-refugee27-status/5723078>>.

⁸¹ Chris Methmann and Angela Oels, ‘From ‘fearing’ to ‘empowering’ Climate Refugees’ (2015) 46(1) *Security Dialogue* 51, 63.

⁸² *Ibid.*

⁸³ McAdam (n 5).

⁸⁴ Methmann and Oels (n 81) 57.

⁸⁵ Elizabeth Ferris and Jonas Bergmann, ‘Soft Law, Migration and Climate Change Governance’ (2017) 8(1) *Journal of human rights and the environment* 6.

transformed'.⁸⁶ This has been identified as being due to a lack of political will, as evidenced by the 2012 Nansen Initiative, which was described by Lairia as:

The result of a failed attempt by the UNHCR to get states to agree to the development of a global guiding framework or instrument to apply to situations of external displacement other than those covered by the 1951 Convention, especially displacement resulting from sudden-onset disasters.⁸⁷

Lairia's argument pushes for a treaty solution with the view of international law as a 'panacea to different forms of injustice in society'.⁸⁸ While a treaty could protect the right to life, McAdam argues a new treaty 'would not, without wide ratification and implementation, solve the humanitarian issue'.⁸⁹ Instead, McAdam pushes for regional approaches, tailoring the regulations and plans to the at-risk area to better 'take into account the particular features of the affected population, in determining who should move, when, in what fashion and with what outcome'.⁹⁰ This may be achieved via agreements on planned migration pathways or relocation strategies for people in at-risk areas should they need to migrate.⁹¹ This would protect the right to life of those impacted by adverse climate change effects by having regard to their specific needs, rather than trying to fit their circumstances under a generic treaty or tie their circumstances to one of the *Refugee Convention* grounds. Through an empirical study in the at-risk areas, McAdam finds arguments for a new universal treaty are misdirected as they rely on assumptions about climate change and the needs of at-risk states.⁹² She explores the complicated nature of climate migration, in that it exacerbates existing pressures and that the migration is usually internal. This further rejects the application of a universal treaty that would simplify these issues and potentially disregard the migrant's right to life.⁹³

⁸⁶ Ibid 7.

⁸⁷ Giovanna Lairia (n 17) 394.

⁸⁸ Ibid 393.

⁸⁹ McAdam (n 5) [4].

⁹⁰ Ibid.

⁹¹ Ibid; Methmann and Oels (n 81) 57; International Organization for Migration, *World Migration Report 2022* (Report, 01 December 2021) 236, 250.

⁹² McAdam (n 5) [8].

⁹³ Ibid [13].

V CONCLUSION

The analysis of the existing domestic and international regulation of climate migration demonstrates the anomaly of the climate migrant. This is evidenced by the fact the current law is lacking the ability to adequately address the issues of climate migration and offer legal protection, particularly through the use of refugee law. The current approach, therefore, has little regard to the climate migrant's right to life. For this issue to be appropriately addressed, the principle of non-refoulement, the right to life and the floodgates principle need to be balanced to plan effective options for climate migrants.

From this analysis, this reform is unlikely to be achieved through creation of a new universal instrument, as it could negate the needs of individual at-risk states in favour of a 'one size fits all' approach. It is also unlikely to eventuate as political will to negotiate a new instrument for this issue is lacking. Instead, it may be better addressed through individual, regional agreements between at-risk states and neighbouring states that could offer assistance or planned migration if necessary. It could also be addressed through offering pre-emptive aid to at-risk states to ensure their population can stay in their home for as long as possible. Soft law has also been proposed to fill the gaps by providing standards and guidelines for the treatment of climate migrants. As Philip concluded, echoing statements made by the UNHRC in *Teitiotia*:

The international community has a unique opportunity to tackle the anticipated increase in migration before it becomes overwhelming or life-threatening, unlike cases that have traditionally fallen under refugee law.⁹⁴

A collaboration between at-risk states and those with the resources to offer aid is essential to protect their right to life.

⁹⁴ Philip (n 10) 654.