

**The Urgent Need to Introduce Legal Protection for Inhabitants of Small Island  
Developing States Fleeing the Effects of Climate Change:**

An Analysis Of The Current Legal Framework And Potential Ways Forward

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## **List of Abbreviations**

GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
IPCC	Intergovernmental Panel on Climate Change
IOM	International Organisation for Migration
SIDS	Small Island Developing States
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees

## 1. Introduction

*‘There is one issue that will define the contours of this century more dramatically than any other, and that is the urgent threat of a changing climate’<sup>1</sup>*

Our changing climate is not solely an environmental problem. It is now universally accepted that it impinges on all aspects of human life: from the economy to public health, employment and in the long run international peace and security.<sup>2</sup> Human mobility is amongst the areas which will be severely affected by climate change. Climate change-induced displacement is triggered in several scenarios, of which rising sea levels, causing submerging territory, is probably the most extreme example.<sup>3</sup> The International Organization for Migration (IOM) estimates that by 2050, approximately 200 million people will be forced to relocate due to climate change.<sup>4</sup> In order to comprehend the magnitude of the problem, compare it to the total number of internally and externally displaced people in 2018: 70.8.<sup>5</sup> While 200 million is the most cited figure, estimates differ with reports citing numbers as high as 1 billion.<sup>6</sup> This variety in numbers finds its roots in the difficult distinction between anthropogenic impacts and ‘natural’ environmental challenges.<sup>7</sup> The number will also depend on whether effective action is taken to tackle climate change.<sup>8</sup>

The link between climate change and human mobility started to appear in the 1980s,<sup>9</sup> and was noted by the Intergovernmental Panel on Climate Change (IPCC) in its first assessment report.<sup>10</sup> Despite the varying numbers, it is now recognised that climate-related displacement is a serious problem.<sup>11</sup> The problem is already unfolding: for thousands of families leaving their homes,

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<sup>1</sup> Barack Obama, ‘Remarks by the President at UN Climate Change Summit’ (The White House Office of the Press Secretary, 23 September 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/remarks-president-un-climate-change-summit>> last accessed 24 June 2019.

<sup>2</sup> Sumudu Atapattu, ‘Climate Change, Human Rights and Forced Migration: Implications for International Law’ (2009) 27 *Wisconsin International Law Journal* 607, 608.

<sup>3</sup> IOM, ‘Migration and Climate Change’ (IOM, date unknown) <[www.iom.int/migration-and-climate-change-0](http://www.iom.int/migration-and-climate-change-0)> last accessed 9 January 2019.

<sup>4</sup> Oli Brown, *Migration and Climate Change* (IOM Research Series Paper 31, 2008) 29.

<sup>5</sup> UNHCR, *Global Trends: Forced Displacement in 2018* (2018) 2.

<sup>6</sup> Christian Aid, *Human Tide: The Real Migration Crisis* (2007) 5.

<sup>7</sup> Atapattu (n 2) 610.

<sup>8</sup> Christian Aid (n 6) 22.

<sup>9</sup> See Essam El-Hinnawi, *Environmental Refugees* (United Nations Environmental Programme 1985).

<sup>10</sup> IPCC, *Climate Change 1990: Assessment. Contribution of Working Group II to the First Assessment Report of the Intergovernmental Panel on Climate Change* (1990) 5-6.

<sup>11</sup> UN Office for the Coordination of Humanitarian Affairs, the Internal Displacement Monitoring Centre and the Norwegian Refugee Council, *Monitoring Disaster Displacement in the Context of Climate Change: Findings of a Study by the United Nations Office for the Coordination of Humanitarian Affairs and the Internal Displacement Monitoring Centre* (Geneva 2009) 8-9.

climate change is the sole contributing factor to this decision.<sup>12</sup> States like Bangladesh, Fiji and Papua New-Guinea have already been relocating parts of their population internally due to rising sea levels.<sup>13</sup> Still, it was only in 2010 that the link between climate change and migration became formally recognised by governments under the UN Framework Convention on Climate Change (UNFCCC), emphasising the need to process this in their adaptation plans.<sup>14</sup>

Since the turn of the millennium, academic literature has therefore started to focus on the need to afford protection to persons fleeing due to environmental reasons. However, this endeavour has mostly been concentrating on scenarios like desertification or environmental disasters.<sup>15</sup> This thesis instead focuses on a specific group of states and their populations in relation to climate change-induced displacement: small island developing states (SIDS). Although these states will feel the impact of climate change on multiple levels, they have one very specific problem: their territory is prognosed to become completely submerged due to climate change.<sup>16</sup> Already in 1997, Tuvalu saw its first islet completely submerge in the ocean.<sup>17</sup> While submerging islands are mentioned in the literature amongst examples of situations which will bring forth climate change-induced displaced persons, this is usually within the broader context of developing legal protection for climate change-induced displacement rather than looking at SIDS' scenarios in detail.

Despite the pressing nature of this issue, legal change has been very limited: as the framework stands now, no specific legal instrument binds other nations to accept climate change-induced displaced persons.<sup>18</sup> It raises several challenges for states which are expected to disappear into the sea or become inhabitable for other reasons.<sup>19</sup> This thesis focuses on the scenario in which

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<sup>12</sup> Nick Watts and others, 'The 2018 Report of the Lancet Countdown on Health and Climate Change: Shaping the Health of Nations for Centuries to Come' (2018) 392 *The Lancet* 2479, 2490.

<sup>13</sup> Ilan Kelman, 'Difficult Decisions: Migration from Small Island Developing States under Climate Change' (2015) 3 *Earth's Future* 133, 135.

<sup>14</sup> UNFCCC Conference of the Parties, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention' in *Report of the Conference of the Parties on its Sixteenth Session* (15 March 2011) FCCC/CP/2010/7/Add.1, para 14(f).

<sup>15</sup> See for example Christopher Kozoll, 'Poisoning the Well: Persecution, the Environment, and Refugee Status' (2004) 15 *Colorado Journal of International Environmental Law and Policy* 271.

<sup>16</sup> F Cameron, 'Saving the "disappearing Islands": Climate Change Governance, Pacific Island States and Cosmopolitan Dispositions' (2011) 25 *Continuum* 873.

<sup>17</sup> Patrick Barkham, 'Going Down' (*The Guardian*, 16 February 2002) <<https://www.theguardian.com/environment/2002/feb/16/weekendmagazine.globalwarming>> accessed 5 January 2019.

<sup>18</sup> Kara Moberg, 'Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection' (2009) 94 *Iowa Law Review* 1107, 1112.

<sup>19</sup> For a complete analysis of these challenges, see Selma Oliver, 'A New Challenge to International Law: The Disappearance of the Entire Territory of a State' (2009) 16 *International Journal on Minority and Group Rights* 209.

populations will have to resettle abroad, but where migration options are currently limited, as will be illustrated in the Chapter 2. The thesis aims to address the following question: *Can a SIDS citizen find protection as a refugee through the 1951 Refugee Convention or the concept of complementary protection, and if not, what potential solutions can be implemented?*

The research question will be addressed through answering several sub-questions. Chapter 2 will provide an overview of the adverse impact of climate change on SIDS, highlighting the necessity to relocate elsewhere in the near future. Chapter 3 analyses whether the 1951 Refugee Convention is open to citizens of SIDS. Chapter 4 answers the following sub-question: is there a possibility for a SIDS citizens to qualify as a refugee through the more recently developed concept of complementary protection? Chapter 5 will discuss three options to improve the current certain in a way which offer the necessary protection to inhabitants of SIDS. Chapter 6 will answer the research question and draw conclusions.

## 2. The Situation of SIDS' Inhabitants

This chapter addresses the following question: *Why is the ability to find protection abroad relevant for SIDS inhabitants?* It first explains the impact climate change has on the human rights of SIDS populations. Then, it outlines how SIDS have already tried to address the problem. At last, the current challenges for SIDS are explained, showing that regular migration is often hampered or impossible – which is the reason that applying for refugee status might be necessary.

### 2.1. *The Impact of Climate Change on the Lives of SIDS' Inhabitants*

In its first assessment report in 1990, the IPCC concluded that not all states are equally vulnerable to climate change.<sup>20</sup> It acknowledges SIDS as the most vulnerable states in relation to climate change. Their vulnerability is enhanced by a multitude of characteristics, which have been highlighted by the IPCC since 2001.<sup>21</sup> Firstly, the islands are limited in size. This means that they have less alternative locations where they can relocate their populations when parts of their territory will become unliveable. As such, any territory swallowed by the sea is a significant loss. Secondly, SIDS are prone to natural hazards, like cyclones, due to their geographical location.<sup>22</sup> Thirdly, the low elevation of SIDS renders sea level rise a significant threat.<sup>23</sup> In fact, several SIDS are expected to be completely submerged before the end of this century.<sup>24</sup> However, climate change also intensifies other phenomena that negatively impact island populations' livelihood, even before the submergence.

#### 2.1.1. *Living Conditions*

The vulnerability of SIDS is exacerbated by factors like limited institutional, technical and financial capacities, as well as constrained development opportunities.<sup>25</sup> Another factor which aggravates SIDS' susceptibility to the negative effects of climate change is the fact that most inhabitants, infrastructures, and activities are concentrated in coastal areas. These will be severely affected either by coastal erosion, tidal changes or general increase of the sea level.<sup>26</sup>

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<sup>20</sup> IPCC (n 10) 3.

<sup>21</sup> IPCC, *Climate Change 2001: Impacts, Adaptation, and Vulnerability. Working Group II Contributions to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (2001).

<sup>22</sup> United Nations Economic Commission for Africa, *Climate Change in the African Small Island Developing States: from Vulnerability to Resilience - the Paradox of the Small* (ECA 2014) v.

<sup>23</sup> *ibid.*

<sup>24</sup> Cameron (n 16) 873.

<sup>25</sup> Virginie Duvat and others, 'Trajectories of Exposure and Vulnerability of Small Islands to Climate Change' (2017) 8 *Wiley Interdisciplinary Reviews: Climate Change* 487, 489.

<sup>26</sup> *ibid* 488.

The coral reefs that offer coastal protection in these areas are also disappearing at an alarming rate due to environmental changes and overfishing.<sup>27</sup> These risks are already occurring in a manner perceptible for islanders,<sup>28</sup> destroying infrastructure and houses.<sup>29</sup> Islanders living in these regions are therefore forced to relocate. Remoteness to other islands or continental states may also represent a barrier to livelihood, especially in the case of emergency assistance and disaster response.<sup>30</sup> Being located far from metropolitan economies, SIDS do not attract the foreign investment necessary to build disaster resilient infrastructures.<sup>31</sup> This thus can have a direct impact on lives when a disaster happens.

From an employment perspective, the adverse impact on agriculture has a significant economic impact. To illustrate, the World Bank foresees that Tarawa, a group of low islands in Kiribati, could see annual damages amounting to 16 million US dollars per year (equivalent to 8% of Kiribati's gross domestic product in 2017) due to failed harvests.<sup>32</sup> Economic activity and livelihoods from tourism will also be threatened by climate change.<sup>33</sup>

Atapattu points out that another reason why the populations of SIDS are especially affected by climate change is due to their way of life and culture being intrinsically linked to the land they live on.<sup>34</sup> For most people living in SIDS, land tends to have meanings to those who 'belong' to or are 'part' of it, something that is arguably difficult to encapsulate in the English language as this is a concept that Westerners are often no longer familiar with.<sup>35</sup> With losing this land, they will lose parts of its culture.<sup>36</sup>

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<sup>27</sup> IPCC, *Climate Change 2014: Impacts, Adaptation and Vulnerability, Working Group II Contributions to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) 1632.

<sup>28</sup> Tony Weir and Jamie Pittock, 'Human Dimensions of Environmental Change in Small Island Developing States: Some Common Themes' (2017) 17 *Regional Environmental Change* 949, 950.

<sup>29</sup> IPCC (n 27) 1632.

<sup>30</sup> James Schultz and others, 'Disaster Risk Reduction and Sustainable Development for Small Island Developing States' (2016) 3 *Disaster Health* 32.

<sup>31</sup> Mark Pelling and Juha Uitto, 'Small Island Developing States: Natural Disaster Vulnerability and Global Change' (2001) 3 *Environmental Hazards* 49, 55.

<sup>32</sup> Wayne Ganpat and Wendy-Ann Isaac, *Impacts of Climate Change on Food Security in Small Island Developing States* (IGI Global 2015) 13.

<sup>33</sup> Weir and Pittock (n 28) 951.

<sup>34</sup> Atapattu (n 2) 612.

<sup>35</sup> John Campbell, 'Climate-Induced Community Relocation in the Pacific' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 60.

<sup>36</sup> For extensive analysis of this issue see Margaretha Wewerinke-Singh, 'Climate Migrants' Right to Enjoy their Culture' in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018).

### 2.1.2. Health

The reliability on agriculture is threatened by more frequent droughts and heavy rainfall, increased cyclone and flooding activity.<sup>37</sup> As a result, local food production will be negatively impacted.<sup>38</sup> This is problematic for the food availability and accessibility in SIDS, which could lead to famines.<sup>39</sup> Adding up to problems of food accessibility is the fact that fishing, an important source of livelihood in these states, is severely affected by ocean acidification.<sup>40</sup> This impact will be significant, considering the fact that the average islanders in pacific SIDS consumes 70 kilogram of fish per person a year.<sup>41</sup>

Access to fresh water will become increasingly more difficult or impossible. If the sea level rise predicted by in the fifth IPCC assessment report is not curbed, many of SIDS' coral atolls – of which most land is less than 2 meters above sea level – will become uninhabitable by the year 2030, due to frequent saltwater inundation at higher tides.<sup>42</sup> These inundations will cause underground fresh water reserves to remain salty and become unsuitable for drinking supplies or crops irrigation.<sup>43</sup> This alone can be a reason for displacement in Kiribati, Tuvalu and the Maldives.<sup>44</sup>

As a result of changing rainfall patterns in combination with warmer temperatures, vector-borne diseases spread increasingly faster, which has a significant impact on the health of SIDS citizens.<sup>45</sup> Studies have also been concluded on the adverse effects of climate change on mental health: the rapidly growing frequency and intensity of extreme weather events, like heat waves and droughts, have shown strong causal links to population distress, hospital psychiatric admissions, and suicides.<sup>46</sup>

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<sup>37</sup> IPCC (n 27) 1632.

<sup>38</sup> See Ganpat and Isaac (n 32) 13-14.

<sup>39</sup> *ibid* 13.

<sup>40</sup> Moberg (n 18) 1110.

<sup>41</sup> Jon Barnett and Elissa Waters, 'Rethinking the Vulnerability of Small Island States: Climate Change and Development in the Pacific Islands' in Jean Grugel and Daniel Hammett (eds), *The Palgrave Handbook of International Development* (Palgrave MacMillan 2016) 737.

<sup>42</sup> Weir and Pittock (n 28) 954.

<sup>43</sup> Tony Weir and Zahira Virani, 'Three Linked Risks for Development in the Pacific Islands: Climate change, Disasters and Conflict' (2011) 3 *Climate and Development* 193, 203.

<sup>44</sup> Roy Smith and Karen McNamara, 'Future Migrations from Tuvalu and Kiribati: Exploring Government, Civil Society and Donor Perceptions' (2015) 7 *Climate and Development* 47, 55.

<sup>45</sup> Moberg (n 18) 1110.

<sup>46</sup> Watts and others (n 12) 2490-2491.

### 2.1.3. *Subsequent Effect on Human Rights*

Thus, even where SIDS' territory will not completely disappear due to rising sea levels, living will become untenable due to other factors.<sup>47</sup> These scenarios will lead to serious deprivation of human rights. Most particularly the right to an adequate standard of living, including adequate food, clothing and housing is at risk, as well as the right to health, and culture.<sup>48</sup> Consequently, by lack of better alternatives, inhabitants of these states will have to find refuge outside of their homelands.

### 2.2. *SIDS Advocacy in the Global Community*

The socioeconomic vulnerabilities of SIDS reflect on the international level. SIDS are but a small player on the international plane: their populations and territories are incredibly small and SIDS usually do not have any natural resources of significant interest to world powers.<sup>49</sup> As is pointed out by Kelman, SIDS 'do not have the financial resources or have the personnel with technical expertise to advise on the costs and feasibility of different propositions, such as building islands, creating floating islands or working through international law.'<sup>50</sup>

Nevertheless, SIDS have played a crucial role in pushing forward the political agenda on climate change since the 1980s.<sup>51</sup> In addition to advocacy, SIDS made pivotal contributions to the development of climate change law, such as the UNFCCC and related negotiations.<sup>52</sup> Most recently, their efforts epitomised in the drafting of the Paris Agreement, which recognises the special position SIDS are in five times.<sup>53</sup> However, it is argued that while being a positive development, the Paris Agreement does not put forward the concrete action SIDS need.<sup>54</sup> Especially developed states ought to adopt measures to help SIDS and other developing states, which has been recognised under the UNFCCC.<sup>55</sup> While in 2009 the UNFCCC adopted a draft text which included action on international mobility, this ended up being omitted and still no

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<sup>47</sup> Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 85.

<sup>48</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3 (ICESCR), art 11; art 12; Wewerinke-Singh (n 36) 199.

<sup>49</sup> Duvat and others (n 25) 488.

<sup>50</sup> Kelman (n 13) 137-138.

<sup>51</sup> Jan Petzold and Alexandre Magnan, 'Climate Change: Thinking Small Islands Beyond Small Island Developing States' (2019) 152 *Climatic Change* 145.

<sup>52</sup> Timothée Ourbak and Alexandre Magnan, 'The Paris Agreement and Climate Change Negotiations: Small Islands, Big Players' (2018) 18 *Regional Environmental Change* 2201, 2202.

<sup>53</sup> UNFCCC Conference of the Parties, 'Paris Agreement' in *Report of the Conference of the Parties on its Twenty-First Session* (13 December 2015) FCCC/CP/2015/10/Add.1, arts 4(6); art 9(4); art 9(9); art 11(1); 13(3).

<sup>54</sup> Weir and Pittock (n 28) 956.

<sup>55</sup> UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1993) 1771 UNTS 107 (UNFCCC), art 4.8(A).

action is stipulated.<sup>56</sup> Therefore, the UNFCCC as it stands now is not a suitable instrument to address this problem.

### 2.3. Migration as Adaptation: Challenges Overshadowing SIDS Citizens' Futures

Governments and inhabitants of SIDS have also been focusing on strengthening resilience and taking adaptive measures, including building sea walls.<sup>57</sup> While doing so, they have indicated that being labelled as refugees takes away their agency and portrays them as helpless peoples, which they do not necessarily believe in.<sup>58</sup> Being considered as refugees could have the economic disadvantage of reducing incentives for investors and donors to provide funding for adaptation projects.<sup>59</sup>

Despite this, migration has been described as being 'the best response to climate change' for SIDS.<sup>60</sup> It might even be the only response possible, which is why migration is sometimes seen as a failure to adapt.<sup>61</sup> This failure to adapt might, as indicated above, be a result of lack of adequate resources, or be the result of such grave consequences that adaptability is no longer a viable option. In this case, populations will become permanently displaced due to states' territory disappearing or becoming untenable.<sup>62</sup> Without a possibility to return, it puts them in a similar position as refugees. The difference will be that these populations become permanently displaced, while some refugees might be able to return home when circumstances change.

At the moment, visa problems and financial barriers hinder regular migration from SIDS to other states.<sup>63</sup> Visas are difficult to obtain for the majority of SIDS' inhabitants due to requirements for education, employability or family reunification.<sup>64</sup> Moreover, the need for financial resources restricts migration to those that have the access to capital, which excludes a significant part of SIDS populations.<sup>65</sup> Even where there are migration agreements between

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<sup>56</sup> Jane McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' (2011) 23 *International Journal of Refugee Law* 2, 19.

<sup>57</sup> Carola Betzold, 'Adapting to Climate Change in Small Island Developing States' (2015) 133 *Climatic Change* 481, 486.

<sup>58</sup> *ibid* 483.

<sup>59</sup> Carol Farbotko and Heather Lazrus, 'The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu' (2012) 22 *Global Environmental Change* 382, 387.

<sup>60</sup> Godfrey Baldacchino, 'Seizing History: Development and Non-Climate Change in Small Island Developing States' (2018) 10 *International Journal of Climate Change Strategies and Management* 217, 222.

<sup>61</sup> Heather Lazrus, 'Sea Change: Island Communities and Climate Change' (2012) 41 *Annual Review of Anthropology* 285, 293.

<sup>62</sup> Kálin (n 47) 85.

<sup>63</sup> Petzold and Magnan (n 51) 150.

<sup>64</sup> Jane McAdam, *Climate Change, Forced Migration and International Law* (OUP 2012) 194.

<sup>65</sup> Amy Constable, 'Climate Change and Migration in the Pacific: Options for Tuvalu and the Marshall Islands' (2017) 17 *Regional Environmental Change* 1029.

SIDS and other states, these are limited in the amount of people they allow. The Pacific Access Category Residence Visa allows a maximum of 75 out of 11,000 Tuvaluans, 75 out of 116,000 citizens of Kiribati, 250 out of 111,000 Tonga citizens and 250 out of 905,000 Fijians indefinite residence in New Zealand.<sup>66</sup> Another barrier for inhabitants of SIDS is the general aversion against welcoming migration in the world, which ‘obliges islanders to stay put and choose to fight, not resort to flight.’<sup>67</sup> However, if a person qualifies as a refugee under international law, they would acquire special status and not be hampered by visa complications. This possibility will be explored in the next chapter.

#### *2.4. Conclusion*

Within decades SIDS will no longer be able to sustain livelihood due to the adverse impacts of climate change, which cause serious lack of access to human rights and increasing death toll. This will inevitably force its populations to resettle abroad. At the moment however, international migration for SIDS populations is difficult and therefore applying for refugee status might offer an alternative.

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<sup>66</sup> New Zealand Immigration, ‘Information about Pacific Access Category Residence Visa’ (New Zealand Immigration, date unknown) <<https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/pacific-access-category-resident-visa>> last accessed 17 June 2019.

<sup>67</sup> Baldacchino (n 60) 222.

### 3. Protection under the 1951 Refugee Convention

This chapter answers the following question: *Can an inhabitant of a SIDS qualify as a refugee under the 1951 Refugee Convention?* First, this chapter will provide a short overview of the different ways in which protection can be found through refugee law. Then, it will analyse each element of the definition as provided in article 1(A)(2) of the Convention to see whether qualification is possible for citizens of SIDS. Concluding that this seems impossible upon plain textual interpretation, it will consider whether there is opportunity for more liberal treaty interpretation. Finally, it will discuss the scarce amount of case law on SIDS citizens seeking protection under the Convention.

#### 3.1. An Overview of Relevant International Refugee Law

The main aim of the international refugee regime is to establish alternative protection for individuals who have to leave their home state due to the state being unwilling *or* unable safeguard the most fundamental rights.<sup>68</sup> Within international refugee law, the most important instrument is the 1951 Convention Relating to the Status of Refugees (Refugee Convention).<sup>69</sup> Unlike earlier treaties pertaining to specific groups of refugees, this Convention entails a general definition of when someone qualifies as refugee. The Convention is supplemented by a 1967 Protocol, removing the temporal scope of the refugee definition, which stipulated refugees had to be a result of events occurring before 1951 and thus ensuring future refugees would also qualify under the Convention.<sup>70</sup> It might be beneficial for displaced persons to apply as a refugee under the Convention due to the specified rights within it, including but not limited to juridical status, employability and welfare.<sup>71</sup>

A cornerstone of the Refugee Convention and the paradigms of refugee law, is the principle of *non-refoulement*. This principle, originally enshrined in article 33(1) of the Refugee Convention, stipulates that ‘States must not return refugees to territories where their lives or freedom are threatened.’<sup>72</sup> Outside of the Convention, the principle of *non-refoulement* is also applicable to risks of article 7 violations within the International Covenant on Civil and Political

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<sup>68</sup> Alexander Betts, ‘Survival Migration: A New Protection Framework’ (2010) 16 *Global Governance* 361.

<sup>69</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>70</sup> Protocol Relating to the Status of Refugees (adopted 31 January 1967, 4 October 1967) 606 UNTS 267, art 1(2).

<sup>71</sup> Refugee Convention (n 69) arts 2-34.

<sup>72</sup> *ibid*, art 33(1).

Rights.<sup>73</sup> This has become an integral part of customary international law,<sup>74</sup> and has developed to include ‘any form of removal or transfer of persons, regardless of their status, where there are substantial grounds for believing that the returnee would be at risk of irreparable harm upon return on account of torture, ill-treatment or other serious breaches of human rights obligations.’<sup>75</sup> The scope of the customary obligation is thus much broader, opening up to the possibility of including persons which do not fall within the grounds stipulated in the Convention. Such individuals may find protection under what is called ‘complementary protection’, which is extended to individuals who cannot be removed by virtue of the non-refoulement principle and who do not qualify as a refugee under the Refugee Convention.<sup>76</sup> The principle of non-refoulement can be considered the most important distinction between migrants and protected persons: as it does not apply to migrants, who are considered to receive protection from their governments.<sup>77</sup>

### *3.2. Qualification under the 1951 Refugee Convention*

If inhabitants of SIDS wish to claim rights specified in the Refugee Convention, they will have to qualify as a refugee under this regime. The relevant definition for the purpose of this study can be found in article 1(A)(2) which stipulates that according to the Convention, the term refugee applies to any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>78</sup>

The following sections will analyse each element separately to consider the applicability to the situation of SIDS inhabitants.

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<sup>73</sup> UN Human Rights Committee, *CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (10 March 1992) para 9.

<sup>74</sup> UNHCR, *Introductory Note by the Office of the United Nations High Commissioner for Refugees to the Convention and Protocol Relating to the Status of Refugees* (2010) 5.

<sup>75</sup> OHCHR, *The Principle of Non-Refoulement under International Human Rights Law* (date unknown) 1.

<sup>76</sup> Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 3.

<sup>77</sup> Adrian Edwards, ‘UNHCR Viewpoint: “Refugee” or “Migrant” – Which is Right?’ (UNHCR, 2017) <<https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html>> last accessed 24 June 2019.

<sup>78</sup> Refugee Convention (n 69) art 1(A)(2).

### 3.2.1. 'Owing to well-founded fear of persecution'

It is generally accepted that individuals fleeing SIDS would fail to prove the full element of a well-founded fear of persecution.<sup>79</sup> Nonetheless, when the above described scenario will become reality, SIDS citizens would be able to fulfil the sub-element of 'well-founded fear.' The evaluation of this requires an evaluation of a subjective condition, whether the individual at stake experiences fear, which ought to be supported by an objective situation in the country of origin warranting the fear the individual has.<sup>80</sup> If climate change truly results in the scenarios as set out in the previous chapter, then SIDS populations have a reasonable basis to fear for their livelihoods. For example, they would face the permanent inability to find drinking water, which would inevitably lead to serious health problems and even death by dehydration where no alternatives, like importing fresh water, are possible. This ought to establish a reasonable ground for fear.

The problem of fulfilling the element of 'well-founded fear of persecution' the Convention's stipulation that persecution should be underlying the fear. Although the Convention does not define the scope of persecution, it includes at least threats to life or freedom. Namely, the Convention uses this as a basis for the obligation of non-refoulement.<sup>81</sup> There is room for scenarios other than these two, but the exact parameters is an issue of contention.<sup>82</sup> In its Handbook on Determining Refugee Status, the United Nations High Commissioner for Refugees (UNHCR) concludes that 'other serious violations of human rights (...) would also constitute persecution,'<sup>83</sup> but need to be linked to the specific grounds mentioned in Article 1(A)(2). The human rights violations would thus need to be discriminatory. Although particular groups in SIDS are more vulnerable to the effects of climate change,<sup>84</sup> this does not establish a discriminatory nature unless some degree of intent is involved. The Handbook itself recognises that differences within society are always present and less favourable treatment as a result of

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<sup>79</sup> Brittan Bush, 'Redefining Environmental Refugees' (2013) 27 *Georgetown Immigration Law Journal* 553, 564.

<sup>80</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992 edition) para 38.

<sup>81</sup> Refugee Convention (n 69) art 33.

<sup>82</sup> Francesco Maiani, 'The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-Sensitivity, and the Quest for a Principled Approach' (2010) *Les Dossiers du Grihl* <<https://journals.openedition.org/dossiersgrihl/3896>> accessed 1 June 2019.

<sup>83</sup> UNHCR (n 80) para 51.

<sup>84</sup> One example are women. See Lynette Joseph-Brown and Dawn Tuiloma-Sua, *Integrating Gender in Disaster Management in Small Island Developing States: A Guide* (UNDP 2012).

these differences does not constitute persecution per se, but rather specific circumstances of discrimination that would reach this threshold.<sup>85</sup>

Another problem with the element of persecution is that fact that discriminatory acts which establish the fear, have to come from a state in order to classify as persecution.<sup>86</sup> Alternatively, it could emanate from non-state factions (such as liberation armies, terrorist groups etc.). In this scenario the individual applying for refugee status would still have to demonstrate that this conduct was knowingly tolerated by the authorities, or that the authorities were unable or refused to provide effective protection.<sup>87</sup> Some even stretch the definition further, but in any event it at least has to involve some human agency.<sup>88</sup>

In the case of SIDS, the governments are often unable to provide effective protection, which is why they appeal to the international community. However, the circumstances that threaten populations of SIDS are not acts by parts of its populations or its governments. They are effects of climate change, which is a worldwide happening phenomenon. Theoretically, an argument could be made that climate change is caused by mankind and therefore the international community as a whole, or the most polluting states, produce the circumstances leading to well-founded fear. However, this link would be too indirect and broad, considering international law requires the agent of persecution to be a group of people or state actors.<sup>89</sup> The international community would furthermore need to possess a specific intent to negatively impact low lying states for a Convention reason with its emissions, which is not the case.<sup>90</sup> Considering well-founded fear is inextricably linked to persecution, it will be basically impossible for individuals fleeing the untenable circumstances in SIDS to fulfil this criterion.

Some states take a more liberal human rights approach to the definition of persecution. They define persecution ‘as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.’<sup>91</sup> This would have to result in serious harm, a threshold which the situation in SIDS at the moment does not reach.<sup>92</sup> However, it seems probable that based on

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<sup>85</sup> UNHCR (n 80) paras 54-55.

<sup>86</sup> Kozoll (n 15) 273.

<sup>87</sup> UNHCR (n 80) para 65.

<sup>88</sup> Stephen Tully, ‘Climate Change: Turning Refugee Law Upside Down’ (2014) 3 *Law Society of NSW Journal* 80.

<sup>89</sup> UNHCR (n 80) para 65.

<sup>90</sup> Tully (n 88) 80.

<sup>91</sup> *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 (*Teitiota v CEMBI*), para 8; *Canada (Attorney General) v Ward* [1992] 2 SCR 689, para 79; *Horvath v Secretary of State for the Home Department* [2000] UKHL 37 (HL).

<sup>92</sup> See for example *AF (Kiribati)* [2013] NZIPT 800413, paras 89-90.

the prognosis of the adverse effects of climate change, the situation will reach a point where this definition could apply. It would then need to be proven that measures taken by the state, such as the building of sea walls, are no longer effectively able to protect basic human rights.

3.2.2. *'For reasons of race, religion, nationality, membership of a particular social group or political opinion'*

This part of the definition seems the most impossible for inhabitants of SIDS to fulfil. SIDS populations' livelihoods are not threatened based on their characteristics as an individual which is part of one of the above mentioned groups, but because they are born in areas which will be severely affected by climate change due to its vulnerability. There has to be a strong causal link between the action which causes the individual to want to find refuge abroad and the specific characteristic of this person,<sup>93</sup> which the inhabitants of SIDS lack.

Out of the Convention grounds, nationality would be the only ground which could be considered to be applicable to SIDS at all. Whether one person would have to leave its home state due to climate change is very dependent on the state in which it is born and thus the nationality which (s)he bears. However, this is rather based on geographical location than nationality, considering SIDS are not affected because of its specific nationalities but feel the effects of climate change due to their geographical characteristics. Moreover, the nationality element was specifically included to ensure the protection of national minority groups,<sup>94</sup> not whole populations.

It has been argued that by building upon previous refugee definitions, the Convention supports status for persons in need of international protection from armed conflict.<sup>95</sup> However, unless the circumstances in SIDS would lead to armed conflict, this is an inapplicable extension for this case. As the grounds enumerated in the definition of the Refugee Convention seem to be exhaustive, it thus seem impossible for SIDS refugees to satisfy one of the required grounds.<sup>96</sup>

For this reason, proposals have been made to expand this criterion of the definition of the Convention to include an environmental ground. The underlying rationale for this is that this

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<sup>93</sup> Dana Zartner Falstrom, 'Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment' (2002) 13 *Colorado Journal of International Environmental Law and Policy* 1, 11.

<sup>94</sup> UNHCR (n 80) para 76.

<sup>95</sup> McAdam (n 76) 35.

<sup>96</sup> Atapattu (n 2) 617.

type of refugees ought to be entitled to the same rights as ‘their traditional counterparts.’<sup>97</sup> In response, it has been argued that extending the definition is not an answer to the problem, because the root of the problem (climate change and its causes) needs to be tackled instead.<sup>98</sup> As of today, the framework of international environmental law has expanded substantially to include rules covering mitigation of climate change.<sup>99</sup> This counter-argument thus loses its strength. Whether these legal rules go far enough is a question outside the scope of this thesis.

At the same time, scholars have argued that environmental refugees are already able to meet this criterion of the Refugee Convention and thus fall within the existing legal framework. For example, Cooper has argued environmental refugees are ‘politically powerless’ individuals and that this can be considered ‘a particular social group’ as stipulated in the Convention.<sup>100</sup> This argument is not entirely convincing for three reasons. Firstly, powerlessness is not immutable or defining of a group.<sup>101</sup> In a related way, this would broaden the definition in the Convention to an extent where many people that would not even come close to the traditional classification of a refugee would now be able to fall into this regime, which might be undesirable. This would not be in line with the reasoning behind the narrow definition: ensuring that protection is available only for those who truly need it.<sup>102</sup> Finally, in the case of SIDS – it is not necessarily the individuals who are ‘politically powerless’ within their state, but rather their own governments being powerless on the international plane vis-à-vis big polluters.

Yet even if one considers the groups to be non-exhaustive; and an environmental ground would be included, the definition test would fail. Namely, the classification of groups cannot be seen as a completely separate characteristic, as it is, through the words ‘for reasons of’, linked to the element of persecution. Having established that persecution is highly unlikely to be fulfilled, the proposal of expanding the definition of the Convention would only work in the scenario where persecution would either be removed as a criterion in general or where it would be amended to exist next to a climatic reason for fear. However, the process of amending the Convention is unspecified,<sup>103</sup> and will depend on a state party requesting revision. In theory, this could be done by one of the SIDS governments which is a party to the Convention, such as

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<sup>97</sup> Jessica Cooper, ‘Environmental Refugees: Meeting the Requirements of the Refugee Definition’ (1998) 6 *New York University Environmental Law Journal* 480, 488.

<sup>98</sup> Zartner Falstrom (n 93) 8.

<sup>99</sup> See for example UNFCCC (n 55) and the Paris Agreement (n 53).

<sup>100</sup> Cooper (n 97) 524.

<sup>101</sup> Ira Kurzban, *Immigration Law Sourcebook* (6th edn, 1998) 264.

<sup>102</sup> Falstrom (n 93) 15.

<sup>103</sup> Refugee Convention (n 69) art 45.

Tuvalu or the Solomon Islands. However, the procedure is unclear and there is not enough political will to make such revision successful.<sup>104</sup> This was became clear in 2006 when the Maldives proposed including climate refugees into article 1(A)(2).<sup>105</sup>

### 3.2.3. 'Is outside the country of his nationality'

Another impediment for inhabitants of SIDS in applying for status relates to the geographical scope of SIDS and the geographical requirement in the definition. To claim rights under the Convention, the definition requires a refugee to have already fled its home state.<sup>106</sup> Due to the (relatively) gradual process of worsening circumstances in SIDS, it is unlikely that SIDS will produce acute stream of refugees like humanitarian disasters usually bring forth, especially considering the remoteness to other states. Furthermore, many of the islanders do not even wish to migrate, and are unlikely to leave their homes until it is absolutely necessary. Indeed this is said to be one of the limits which makes the Convention unreliable for environmental refugees,<sup>107</sup> and there are no exceptions to the rule of being outside of the home state.<sup>108</sup> Thus, there is no possibility to qualify as a refugee before leaving SIDS and therefore no possibility to arrange the procedures beforehand, which due to the remoteness of SIDS might be essential.

This element of the definition also results in the Convention only requiring states to offer protection to refugees when they have already entered their borders.<sup>109</sup> Continental refugees are often able to cross borders unnoticed when their states' borders are not adequately secured or through human traffickers. However, moving across borders becomes increasingly perilous when migrating from SIDS.<sup>110</sup> The journey itself might already prove impossible unless properly coordinated: around 6000 or 2000 kilometres will have to be crossed from Kiribati to reach Australia or Hawaii respectively. To put this into perspective: the sea-route from Libya to Italy is approximately 500 kilometres.

International law does recognise the concept of a 'refugee *sur place*.' In this case, a person can apply for refugee status when the circumstances in his country of origin arose while the person was abroad.<sup>111</sup> Nonetheless, the reason why this thesis concerns itself with refugee status is

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<sup>104</sup> Guy S Goodwin-Gill, 'Asylum: The Law and Politics of Change' (1995) 7 *International Journal of Refugee Law* 1, 11.

<sup>105</sup> Frank Biermann and Ingrid Boas, 'Protecting Climate Refugees: The Case for a Global Protocol' (2008) 50 *Environment Science and Policy for Sustainable Development* 8, 11.

<sup>106</sup> Refugee Convention (n 69) art 1(A)(2).

<sup>107</sup> Moberg (n 18) 1133.

<sup>108</sup> UNHCR (n 80) para 88.

<sup>109</sup> Refugee Convention (n 69) art 25(1).

<sup>110</sup> Constable (n 65) 1030.

<sup>111</sup> UNHCR (n 80) para 94.

because research has shown that SIDS populations either do not want to migrate or because migration fails due to legal obstacles. As such, becoming a refugee *sur place* is not a viable option for inhabitants of SIDS.

*3.2.4. 'Unable or, owing to such fear, is unwilling to avail himself of the protection of that country'*

This element sets out two possibilities. Firstly, a person might be unable to avail himself of the protection of its country of origin. In this case, the legal evaluation concerns 'circumstances which are beyond the will of the person concerned.'<sup>112</sup> In many instances, governments of SIDS are unable to offer adequate protection to climate change, hampered by limited resources or the overwhelming effects might simply be too grave. While the lack of adequate protection against the effects of climate changes may in these cases lead to a threat to life, the UNHCR handbook clarifies that protection in this definition specifically means that a person is denied services which are normally awarded to his co-nationals,<sup>113</sup> again stipulating a form of discriminatory treatment. As long as measures against climate change are thus not taken in a discriminatory manner, there is no reason to assume that SIDS populations would be able to argue that they are unable to avail themselves of the protection of their country in accordance with the Refugee Convention.

The second possibility is where a person is unwilling to avail himself of protection. This is generally inapplicable to SIDS inhabitants, as the problem rather lies with their states not being able to offer them protection against the effects of climate change.

*3.2.5. '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'*

SIDS wishing to resettle abroad will generally still possess nationality and would not be considered stateless persons, which is the category of people that is being dealt with in this element of the definition. From a legal perspective, this element of the definition would become relevant in the potential scenarios where a SIDS would indeed completely submerge. Namely, without territory, the question is whether this state could still be considered to exist as it no longer fulfils the criteria of statehood.<sup>114</sup> If a state ceases to exist, does this mean that its

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<sup>112</sup> UNHCR (n 80) para 98.

<sup>113</sup> *ibid* para 99.

<sup>114</sup> Montevideo Convention on Rights and Duties of States (opened for signature 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 1.

population lose their nationality? If this question is answered affirmatively, it would mean that SIDS populations indeed become stateless people. However, according to the UNHCR, in order to qualify as a stateless refugee, the refugee would still have to have left his former *residence* due to the reasons stipulated in the Convention.<sup>115</sup> As such, even when SIDS become stateless people, due to the restrictive legal definition, they would not qualify as refugees under the Convention. However, in this case inhabitants of SIDS might find some protection under the 1954 Convention Relating to the Status of Stateless Persons.<sup>116</sup>

### *3.3. Other Avenues of Meeting the Criteria in the Definition?*

The Refugee Convention is often criticised for being strictly construed and being unfair towards people who are fleeing miserable circumstances, e.g. a civil war (which under a narrow interpretation would not meet the criteria of the Convention) as it leads to decline of their asylum application or long periods of detention.<sup>117</sup> Moreover, it is said to place an unfair burden on developing states, for they are expected to deal with a high number of asylum seekers where they do not fall under the auspices of the UNHCR and have limited resources.<sup>118</sup> To see whether it is possible to circumvent this problem, this section considers whether there are any other avenues through which SIDS people can nonetheless be considered a refugee within the 1951 Convention.

Kozoll is often quoted for arguing that environmental refugees can already meet the definition as stipulated in the conventional regime.<sup>119</sup> He indeed puts forward a scenario in which this is possible, but it cannot be extended to inhabitants of SIDS generally. Namely, he argues that where environmental harm is utilised to persecute one of the protected groups in the Convention, these persons qualify as a refugee.<sup>120</sup> Cooper has also proposed the possibility of complying with the regime as it stands now, but the weakness of this argument was already discussed in section 3.2.2.

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<sup>115</sup> UNHCR (n 80) para 101.

<sup>116</sup> Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117.

<sup>117</sup> Sara Davies, 'Start Looking South: The Refugee Convention Fifty Years On' (2004) 8 *International Journal of Human Rights* 355, 357.

<sup>118</sup> *ibid* 356-357.

<sup>119</sup> See Brittan Bush (n 79) fn 2.

<sup>120</sup> Kozoll (n 15) 297.

### 3.3.1. *The Impossibility of Creativity in Treaty Interpretation*

In some instances, alternatives to textual treaty interpretation can provide a useful tool to solve the problems of legal definitions and qualifications. The Vienna Convention on the Law of Treaties stipulates that treaties: ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.’<sup>121</sup> This leaves some room for discretion and in scholarship it has led to the development of two other modes of interpretation complementing the textual approach: the subjective and teleological approach. The school of subjective interpretation argues ‘treaties should be interpreted according to the intentions of the state parties that signed them.’<sup>122</sup> The teleological approach on the other hand interprets treaties according to their object and purpose.<sup>123</sup> Although there are varying views on whether these interpretations follow a hierarchy or should be used simultaneously, there exists consensus that treaty interpretation should only be used in cases where a text of a treaty is unclear.<sup>124</sup> Based on the analysis of the elements of the Refugee Convention above, the text does not cause any ambiguity as to whether SIDS citizens could rely on it.

Even if one assumes treaty interpretation is warranted, the Convention may not be construed in a way which goes against the intention of the State Parties or drafters.<sup>125</sup> The intention of the state parties or drafter can usually be found in the *travaux préparatoires*. While for the Refugee Convention the *travaux préparatoires* are available for articles 2-37,<sup>126</sup> guidance on article 1 is scarcer. The UNHCR is the authority with regard to supervision of the application of the Convention,<sup>127</sup> and it has offered some comment on interpretations of article 1 by different states: ‘it should be kept in mind that a positive and humanitarian approach should continue to be taken by States in implementing the 1951 Convention definition in a manner fully compatible with the objective and purpose.’<sup>128</sup> How the objective and purpose of the Convention were framed at the time, is left unspecified.

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<sup>121</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1).

<sup>122</sup> Shai Dothan, ‘The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights’ (2019) 42 *Fordham International Law Journal* 765, 766.

<sup>123</sup> *ibid.*

<sup>124</sup> *ibid* 767.

<sup>125</sup> *ibid* 768.

<sup>126</sup> UNHCR, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (1990).

<sup>127</sup> Refugee Convention (n 69) art 35.

<sup>128</sup> UNHCR, *Information Note on Article 1 of the 1951 Convention* (1995).

What can be concluded is that the Convention is ‘in many respects a basic statement only’ of States’ protection obligations.<sup>129</sup> According to Goodwin-Gill, ‘it was never intended as a comprehensive document, as it did not deal with, and was not intended specifically to deal with: large-scale refugee movements, the question of asylum or admission to asylum, the details of international co-operation or the promotion of solutions other than those related to the status of the individual as a refugee.’<sup>130</sup> Moreover, at the time of drafting the effect of environmental degradation on human rights was unforeseen,<sup>131</sup> making it more difficult to assess whether the drafters intended to include individuals such as inhabitants of SIDS. All in all, this points toward the restrictive approach, not allowing refugee status for individuals living in SIDS.

This is supported by proposals made during the negotiations. For example, some delegations proposed to include pre-existing national categories of refugees rather than using a general scope, implying that the definition as it stands now was already a compromise toward the more general side and some state parties would thus not be in accordance of expanding the definition even more.<sup>132</sup> Moreover, most draft definitions included the possibility for the General Assembly to recommend expansion of the categories of refugees, but this was ultimately left out of the definition, reaffirming the idea that the Convention is not open to any expansion of the definition.<sup>133</sup>

Indeed, this is also the position that the UNHCR seems to take. The Handbook on Determining Refugee Status seems to exclude victims of climate change, as it remains silent on the issue.<sup>134</sup> In 1997 the UNHCR reaffirmed that it did not consider any type of environmental refugees to be able to meet the criteria stipulated in the Refugee Convention and thus excluded them from automatic protections under the Convention or corresponding domestic law.<sup>135</sup> This decision was mainly reasoned by the fact that refugees are vulnerable because of the lack of protection

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<sup>129</sup> Erika Feller, ‘The Refugee Convention at 60: Still Fit for Purpose? Protection Tools for Protection Needs’ in Susan Kneebone and others (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge 2014) 60.

<sup>130</sup> Guy S Goodwin-Gill, ‘Editorial. The International Protection of Refugees: What Future?’ (2000) 12 *International Journal of Refugee Law* 1, 2; see also Jane McAdam, ‘The Enduring Relevance of the 1951 Refugee Convention’ (2017) 29 *International Journal of Refugee Law* 1.

<sup>131</sup> Kerry Kennedy Cuomo, ‘Human Rights and the Environment: Common Ground’ (1993) 18 *Yale Journal of International Law* 227.

<sup>132</sup> ECOSOC, ‘Ad Hoc Committee First Session, Summary Record of the Third Meeting Ad Hoc Committee First Session, Summary Record of the Third Meeting (New York, 17 January 1950)’ UN Doc E/AC.32/Sr.3 (26 January 1950).

<sup>133</sup> McAdam, (n 76) 35.

<sup>134</sup> UNHCR (n 80) para 39.

<sup>135</sup> UNHCR, *The State of The World’s Refugees 1997: A Humanitarian Agenda* (1997) Chapter 6, box 1.2.

from their state, while in the case of climate change refugees the state can often still be counted on for emergency relief or reconstruction assistance.<sup>136</sup>

### 3.4. Case Law Relating to SIDS and the Refugee Convention

Case law can provide a useful tool to see whether the interpretation of treaties has evolved or has remained the same. As early as 2000, New Zealand rejected applications from inhabitants of SIDS relying on the Convention.<sup>137</sup> While climate change has since then received much more attention, it has not changed the position of courts in New Zealand. It was reaffirmed in 2013 that the Refugee Convention is, as it stands now, not able to be used by persons from SIDS.<sup>138</sup> This judgment was confirmed on appeal in 2014.<sup>139</sup> Mr Teitiota, a Kiribati man, tried to claim refugee status under the Refugee Convention based on the ‘perception that the inhabitants of Kiribati will be obliged to leave their islands because of rising ocean levels and environmental degradation.’<sup>140</sup> The applicant referred to ocean inundation that led to increasingly insecure life at the island he used to live at.<sup>141</sup>

New Zealand is a party to the Refugee Convention and has adopted the precise text of the definition into its domestic refugee law.<sup>142</sup> In discussing the case, the New Zealand High Court highlighted several arguments which led to the rejection of the applicant’s arguments. Firstly, in order to be well-founded, the fear of persecution has to ‘real, as opposed to a remote or speculative, chance of it occurring.’<sup>143</sup> Mr. Teitiota could not reach this threshold, as there was no evidence that the environmental conditions ‘are so parlous that his life will be placed in jeopardy, or that he and his family will not be able to resume their prior subsistence life with dignity.’<sup>144</sup> Secondly, it was confirmed that some degree of discriminatory intent to reach the definition of persecution was necessary, as one of the grounds of rejection was the fact that these environmental threats were faced by the population of Kiribati in general, and not just by the applicant.<sup>145</sup> Finally, the claim that human agency in relation to persecution could come from the international community in general was dismissed.<sup>146</sup>

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<sup>136</sup> *ibid.*

<sup>137</sup> Tully (n 88) 80.

<sup>138</sup> Teitiota v CEMBIE (n 91).

<sup>139</sup> *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2014] NZCA 173.

<sup>140</sup> Teitiota v CEMBIE (n 91) para 15.

<sup>141</sup> *ibid.*, para 19.

<sup>142</sup> Immigration Act 2009 (NZ) section 129.

<sup>143</sup> Teitiota v CEMBIE (n 91) para 53.

<sup>144</sup> *ibid.*, para 29.

<sup>145</sup> *ibid.*, para 30.

<sup>146</sup> *ibid.*, paras 57-58.

At the same time, the Court did leave room for future innovation in jurisprudence: it confirmed that it did not exclude the option of using the Refugee Convention in cases based on environmental degradation or climate change as a whole.<sup>147</sup> More hope was offered when Justice Priestley explicitly stated that ‘a person may properly be described as a refugee for reasons other than a well-founded fear of persecution on one of the five convention grounds’ and included climate change as a possibility.<sup>148</sup> He clearly stipulated that the reason why the Court could not accept these types of claims to refugee status was on the basis of the persecutory elements in the Convention, even though they might be ‘worthy objects of assistance and relief by the international community, the United Nations High Commissioner for Refugees, and non-governmental organisations.’<sup>149</sup>

There are only a few other cases of citizens of SIDS which have tried to claim refugee status in New Zealand since. In 2014, 2015 and twice in 2017, Tuvaluan families or couples relied on the adverse effects of climate change on Tuvalu, specifically referring to the lack of clean water, proper sanitation and adequate health.<sup>150</sup> However, in all these cases the judgment of Mr Teitiota was confirmed: ‘refugee claims based on the generalised consequences of climate change, without anything more, cannot give rise to recognition of refugee status due to the lack of a nexus to a Convention ground.’<sup>151</sup>

In the region, Australian refugee applications followed a similar pattern. The relatively few cases from Tonga, Tuvalu and Kiribati,<sup>152</sup> were all declined because the harm did not amount to persecution and there was no discriminatory element involved.<sup>153</sup>

### 3.5. Conclusion

As the 1951 Refugee Convention stands now, inhabitants of SIDS will not be able to apply for refugee status. Different types of interpretations would not seem to offer credible ways of bringing SIDS under the scope of this definition, which was confirmed by the UNHCR. The scarce availability of case law confirm this finding. While Australia and New Zealand would be the most likely states to seek refuge for pacific SIDS inhabitants, it is legally futile.

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<sup>147</sup> Teitiota v CEMBIE (n 91) para 25.

<sup>148</sup> *ibid*, para 10.

<sup>149</sup> *ibid*, para 11.

<sup>150</sup> *AC (Tuvalu)* [2014] NZIPT 800517; *AF (Tuvalu)* [2015] NZIPT 800859; *AI (Tuvalu)* [2017] NZIPT 801093 and *AJ (Tuvalu)* [2017] NZIPT 801120.

<sup>151</sup> *AI (Tuvalu)* (n 150) para 46.

<sup>152</sup> See *McAdam* (n 64) 47 fn 43.

<sup>153</sup> *ibid* 47.

#### 4. Complementary Protection

This chapter will answer the following sub-question: *Can inhabitants from SIDS qualify as refugees through the elements of complementary protection?* It will shortly outline what the concept of complementary protection entails. The Latin American and African regional instruments will be discussed to assess whether inhabitants from SIDS can be considered a refugee therein. Then, the development at the international level will be analysed to examine any ‘trickle down’ effect through the position of the UNHCR. Finally the position of SIDS inhabitants in the Global Compact on Refugees and its counterpart on migration will be examined to gauge progress in recognition of this problem.

##### 4.1. The Concept of Complementary Protection

Complementary protection is designed to address the situation of individuals who do not fall within the definition of refugee for the purposes of being granted protection under those instruments, but who may face a risk of serious harm if they are returned to their country of origin.<sup>154</sup> It thus addresses the grey area between voluntary migrants and status refugees. However, at this point it still is a relatively amorphous concept, without appearance in international treaty law or overwhelming state practice.<sup>155</sup> On the international level, the concept started to gain ground in the beginning of this century, with the UNHCR acknowledging there are refugees falling outside of the Convention regime, who merit protection and who are not necessarily targeted by persecution.<sup>156</sup> This is an important step for SIDS, as persecution – as stated above – would be arduous, if not impossible, to prove.

In 2005 the UNHCR Executive Committee published the ‘Conclusion on the Provision on International Protection Including through Complementary Forms of Protection.’<sup>157</sup> In this document, the preamble recognises regional developments which broaden the principle of international protection, which merit attention because they entail a more encompassing definition of who can claim international protection.

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<sup>154</sup> Debrah Mercurio and Emily Rutherford, ‘Complementary Protection: What Does it Really Mean for Potential Applicants?’ (2011) 33 *Law Society of South Australia Bulletin* 12, 13.

<sup>155</sup> McAdam (n 76) 40.

<sup>156</sup> UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime* (2000) 3.

<sup>157</sup> UNHCR Executive Committee of the High Commissioner’s Programme, ‘Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection No. 103’ UN Doc A/AC.96/1021.

#### 4.2. *The 1969 OAU Refugee Convention*

The Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) was adopted in 1969 and entered into force in 1974 as a response to the quickly augmenting number of refugees in Africa.<sup>158</sup> The OAU Convention adopts the definition of the 1951 Refugee Convention verbatim.<sup>159</sup> However, it differs from the 1951 Convention as it introduces an additional ground to which the term refugee shall apply, namely to people 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.<sup>160</sup>

This definition is beneficial for SIDS in several ways. Firstly, the 'generalized nature of the refugee-generating events (...) means that the definition provides better protection to persons fleeing widespread or indiscriminate forms of harm.'<sup>161</sup> This removes the barrier of individualised harm which SIDS' inhabitants face in relying on the Refugee Convention. Although the first three grounds cannot be applied to the situation of SIDS, the ground 'events seriously disturbing public order' could be a potential avenue for SIDS' inhabitants of finding protection. No criteria are stipulated to reach this threshold. A scenario in which services like infrastructure, healthcare and drinking water perish, is likely to escalate into events which would seriously disturb the public order. This part of the definition has generally meant events resulting in violence, and therefore some question whether an expansion like this would therefore be accepted by the OAU Convention's state parties.<sup>162</sup> Yet the text is less restrictive than the 1951 Refugee Convention and therefore grants flexibility, which could work in the benefit of SIDS' inhabitants. Applying this definition to the scenarios of climate displacement has yet to be tested.

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<sup>158</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, preamble, recital 1.

<sup>159</sup> *ibid*, art 1(1).

<sup>160</sup> *ibid*, art 1(2).

<sup>161</sup> Tamara Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee' (2014) 26 *International Journal of Refugee Law* 555, 559.

<sup>162</sup> Kälén (n 47) 88.

The phrase 'is compelled to leave' is a lot more flexible than the phrase used in the 1951 Refugee Convention 'is outside the country of his nationality.'<sup>163</sup> The term from the 1951 Convention stipulates a factual situation; the potential refugee has to have left its country of nationality already. However, the OAU definition requires the person to be forced to leave in order to seek refuge; it does not imply that the person will already have to have left. In this sense, the definition could be construed in a manner in which SIDS populations could already seek refugee status before they leave their island, without stretching the textual interpretation in an implausible way. Indeed, it has been argued that this definition only asks the person to demonstrate that (s)he 'has to leave/shall leave.'<sup>164</sup> Once the situation in SIDS becomes inhabitable or where staying in SIDS would deprive access to basic human rights, this would be viable to demonstrate.

The Seychelles and Mauritius are low-elevation SIDS located in the proximity of the African continent to whom this definition could thus be applicable and beneficial. Their populations could rely on this definition when wishing to apply for refugee status in state party to the OAU Convention. It should be noted that the Convention was originally not intended to protect these types of refugees, for the same reason that the 1951 Refugee Convention did not recognise them: at the time this was simply not a problem yet.<sup>165</sup> In contrast to the 1951 Convention however, the relatively open definition allows adaptation to new circumstances, such as the phenomena of survival migration. Yet because this is such a new phenomenon, it remains to be tested whether states would accept the use of the definition in this way.<sup>166</sup> Nonetheless, whether refugees from other SIDS could benefit from this broader definition highly depends on its customary status.

#### 4.3. *The 1984 Cartagena Declaration and its Succeeding Process*

The Cartagena Declaration on Refugees is a non-binding declaration adopted in 1984 by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama. Like its African counter-part, it explicitly acknowledges that its adoption is a response to massive flows of refugees which would not be covered by the 1951 Refugee Convention and

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<sup>163</sup> Abdulqawi Yusuf and Fatsah Ouguergouz (eds) *The African Union : Legal and Institutional Framework, a Manual on the Pan-African Organization* (Martinus Nijhoff 2012) 501.

<sup>164</sup> *ibid.*

<sup>165</sup> Frank Biermann and Ingrid Boas, 'Climate Change and Human Migration: Towards a Global Governance System to Protect Climate Refugees' in Jürgen Scheffran and others (eds), *Climate Change, Human Security and Violent Conflict: Challenges for Societal Stability?* (Springer 2012) 293.

<sup>166</sup> Alice Thomas, 'Human Rights and Climate Displacement and Migration' in Sébastien Duyck and others (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 115.

emphasises the need to enlarge the concept of refugee.<sup>167</sup> This instrument was adopted by only 10 states: Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela. However, it also established a forum which would meet each 10 years to develop the field of refugee protection in Latin America and the Caribbean. Most recently, in 2014 the Brazil Declaration and its Action Plan were adopted, with endorsing states having increased up to 28, in addition to 3 territories.<sup>168</sup>

The Cartagena Declaration builds upon the OAU Convention by using some of the same elements and introducing new ones:

Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.<sup>169</sup>

Most notable is the inclusion of internal conflicts and massive violation of human rights. Both these elements might be applicable to SIDS. First and most clearly, massive violation of human rights can be a result of climate change, as was demonstrated in the second chapter. Decisive will be the degree of human rights violation in order to reach the threshold of ‘massive.’ Based on the judgments in Australia and New Zealand, it seems that at the moment there is no state in which climate change amounts to such an impact on human rights. If taking a strict approach, only where the violation of these rights start to have an impact on the right to life or on human dignity, SIDS displaced persons would be able to claim status in the states which have adopted this definition into their domestic jurisdiction. So far, there has not been jurisprudence which has set out the exact parameters of massive violation of human rights, especially not in an environmental context. Nonetheless, a reason to be optimistic about the use of this declaration and this term is the fact that the participating states have reaffirmed the centrality of the principle of *pro homine*, meaning that the law shall be interpreted and applied in a way which will favour the respect of human rights of the individual the most.<sup>170</sup>

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<sup>167</sup> OAS, ‘Cartagena Declaration on Refugees’ in Annual Report of the the Inter-American Commission on Human Rights (1984-1985) OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1 (Cartagena Declaration), art III(3).

<sup>168</sup> UNHCR, ‘Brazil Declaration and Plan of Action’ (UNHCR, 2014) <<https://www.acnur.org/5b5101644.pdf>> last accessed 29 June 2019 (Brazil Declaration).

<sup>169</sup> Cartagena Declaration (n 167) art III(3).

<sup>170</sup> Carlos Maldonado Castillo, ‘The Cartagena Process: 30 Years of Innovation and Solidarity’ (2015) 49 *Forced Migration Review* 89.

Studies have not proven that climate change has a direct impact on the appearance of armed conflict.<sup>171</sup> However, climate change-related effects act as a catalyst for the underlying socio-economic, ethnic and political tension which trigger internal and international conflicts worldwide, when compared to a scenario without climate change.<sup>172</sup> The UN has confirmed this finding.<sup>173</sup> Thus, if SIDS would become an area of conflict, inhabitants could rely on this part of the definition. This is beneficial, because the Refugee Convention does not explicitly refer to armed conflict, a reason why courts sometimes grapple with applying the definition to persons fleeing armed conflict.<sup>174</sup> Nonetheless, this ground is only a limited improvement from the perspective of SIDS, as it is not one that can be relied on in peacetime.

While the successors of the Cartagena Declaration have not built upon the definition in such a way to explicitly include climate change refugees as a category of status holders, the most recently adopted declaration, the Brazil Declaration, does acknowledge the link between climate change and migration.<sup>175</sup> In its plan of action, it requests the UNHCR to prepare a study on the matter.<sup>176</sup> The next declaration will only be adopted in five years, but it would be likely that this Declaration would further develop and include an explicit provision on the climate change and migration, possibly making it much easier for SIDS in the region. Nonetheless, while the Cartagena process provides more opportunities than the Refugee Convention, its declarations remain non-binding instruments. Therefore, the possibilities of migrating SIDS populations to use this to their advantage heavily depends on the adoption of these definitions by the legislative and judiciary branches of the participating states. Like the OAU Convention, this remains untested and therefore to be seen.

#### *4.4. A Trickle Down Effect on the International Level?*

In 2006, the UNHCR released its publication outlying the grounds of international protection for refugees and other persons of concern.<sup>177</sup> Instead of solely maintaining the Refugee Convention as a ground to decide refugee status, it included the possibility of complementary

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<sup>171</sup> Nils Gleditsch, 'Whither the Weather? Climate change and Conflict' (2012) 49 *Journal of Peace Research* 3, 7.

<sup>172</sup> Solomon Hsiang and others, 'Quantifying the Influence of Climate on Human Conflict' (2013) 341 *Science* 1235367, 11.

<sup>173</sup> UNGA, 'Climate Change and its Possible Security Implications Report of the Secretary-General' (2009) UN Doc A/64/350.

<sup>174</sup> Vanessa Holzer, *Refugees from Armed Conflict: The 1951 Refugee Convention and International Humanitarian Law* (Intersentia 2015) 183.

<sup>175</sup> Brazil Declaration (n 168) preamble.

<sup>176</sup> *ibid*, chapter 7.

<sup>177</sup> UNHCR, *UNHCR and International Protection: A Protection Induction Programme* (UNHCR Legal Publications 2006) 89.

protection into its mandate. The category adding up to the Refugee Convention is described as follows: ‘persons outside their country of origin who are unable to return owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing public order.’<sup>178</sup> In the publication, it explicitly acknowledges the development of the Cartagena Declaration and the OAU Convention, from which the UNHCR’s definition takes certain elements. It explicitly introduces the fact that threats may be indiscriminate, thus highlighting the contrast between the Refugee Convention and complementary protection.

Some elements of the OAU Convention and Cartagena are left out in the UNHCR’s definition. It is striking that the Cartagena elements of foreign aggression, internal conflicts and massive violation of human rights have not been incorporated, as they remain highly relevant today. For SIDS inhabitants, especially the element of massive human rights violation would be advantageous. Nonetheless, the fact that the UNHCR included serious disturbance of the public was a step forward for the inhabitants of SIDS, as long as this remains open to other events than violence.

To this day, the UNHCR has not expanded its mandate to explicitly include the category of SIDS inhabitants. It has started to take more action with regard to climate change and displacement.<sup>179</sup> Nonetheless, the focus remains on internal and disaster displacement.<sup>180</sup> Permanent displacement, as SIDS inhabitants will face, receive little attention, despite the pressing nature of the issue. The most positive development is the UNHCR encouraging states to ‘consider establishing alternative forms of protection for those persons who do not qualify as refugees but whose return is not feasible or not reasonable due to circumstances in the place of origin.’<sup>181</sup> Despite this being a decade ago, states have not complied with this request.

#### *4.5. SIDS Inhabitants position in the 2018 Global Compacts: Migrant Yes, Refugee No*

The political issue of refugees and migration was tabled as warranting international response in 2016, when world leaders for the first time came together to discuss this during the United

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<sup>178</sup> UNHCR (n 177) 22.

<sup>179</sup> UNHCR, ‘Why UNHCR is Taking Action on Climate Change Displacement’ (UNHCR, 2017) <<https://www.unhcr.org/innovation/why-unhcr-is-taking-action-on-climate-change-displacement/>> last accessed 18 June 2019.

<sup>180</sup> See for example Guy Goodwin-Gill and Jane McAdam, *UNHCR and Climate Change, Disasters and Displacement* (UNHCR 2017).

<sup>181</sup> UNHCR, *Forced Displacement in The Context of Climate Change: Challenges For States Under International Law, Submission to the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention* (20 May 2009) 2.

Nations General Assembly (UNGA).<sup>182</sup> This set in motion the process necessary to develop the Global Compact for Safe, Orderly and Regular Migration (GCM) at an international summit,<sup>183</sup> as well as the Global Compact on Refugees (GCR), which was endorsed by the UNGA in December 2018.<sup>184</sup>

While both compacts are soft-law instruments and not legally binding,<sup>185</sup> they merit attention for two reasons. Firstly, being the most recently developed texts covering the issue, their content can demonstrate whether there is any ongoing development. Secondly, soft-law instruments may develop into legally-binding rules by being incorporated into regional or domestic law, or developing into customary law – although it is too early to say now whether this is a viable possibility.

According to the UN, the GCR constitutes ‘a unique opportunity to transform the way the world responds to refugee situations, benefiting both refugees and the communities that host them.’ While not being legally binding, it does represent the political will of the international community.<sup>186</sup> As such, it is striking that the GCR does recognize climate change’s interaction with drivers of refugee movements, while it denies the possibility of climate change being a cause in itself for refugee movements.<sup>187</sup> However, it does recognize the possibility of ‘external forced displacement from sudden-onset natural disasters and environmental degradation.’<sup>188</sup> As such, the GCR thus seems to signal that there is not yet willingness on the international level to recognize the effect climate change can have and that this in itself could be a cause for seeking refuge abroad. The GCR therefore does not offer many reasons for optimism for persons from SIDS needing to seek refuge elsewhere. Nonetheless, the fact that the link between climate change and refugee streams receives attention is a positive development.

While the principles and law governing international migrations or refugees are two distinct frameworks, a quick analysis of the GCM is important to assess the position of SIDS as it stands now. The UN claims to have covered ‘all dimensions of international migration in a holistic

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<sup>182</sup> New York Declaration for Refugees and Migrants (adopted 19 September 2016) UNGA Res 71/1.

<sup>183</sup> Global Compact for Safe, Orderly and Regular Migration (adopted 10 December 2018) UN Doc A/CONF.231/3 (GCM).

<sup>184</sup> Global Compact on Refugees (adopted 19 December 2018) UN Doc A/73/12 (Part II) (GCR).

<sup>185</sup> *ibid*, para 4.

<sup>186</sup> UNHCR, ‘The Global Compact on Refugees’ (UNHCR, date unknown) <<https://www.unhcr.org/the-global-compact-on-refugees.html>> last accessed 18 June 2019.

<sup>187</sup> GCR (n 184) para 8.

<sup>188</sup> *ibid*, para 12.

and comprehensive manner’ with the adoption of this instrument.<sup>189</sup> Indeed, unlike the GCR, the link between migration and adverse impacts of climate change, not just environmental disasters is explicitly recognized and specific actions are proposed.<sup>190</sup> These actions do not only include addressing the effects of climate change in order to minimize the impact on migration streams, but most importantly also promise access to humanitarian assistance and the develop coherent approaches to address the challenges of migration movements in these context.<sup>191</sup> Probably for this reason, Erik Solheim (Executive Director of the United Nations Environment Program) and William Swing (Director General of the United Nations Migration Agency) have called the Global Compact a ‘sound framework for taking action that addresses climate-driven migration’, although still emphasising that its success will depend on its implementation.<sup>192</sup> While a complete analysis of international migration law would be outside of the scope of this thesis, the global compacts show that there is more acceptance of the existence of migrants due to climate change’s adverse effects than of refugees.

#### *4.6. Conclusion*

Even though it remains untested, a SIDS citizen could in theory claim refugee protection under the expanded definition of states where the OAU Convention applies or where the Cartagena process has become part of domestic law. While many SIDS are located in the Pacific, inhabitants of the Seychelles or other SIDS in the proximity of the African and Latin American regions could benefit from this. On the international level however, the UNHCR has not devoted specific attention to incorporating this group of peoples into its mandate, although it is improving with a general response to climate change-induced displacement. Although not being considered refugees, there has been progress in establishing a framework for coordinated international migration through the GCM, which has been said to work in the benefit of citizens of SIDS. Whether this is true, remains to be seen on the basis of its implementation.

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<sup>189</sup> UN, ‘Refugees and Migrants: Global Compact on Migration’ (UN, date unknown) <<https://refugeesmigrants.un.org/migration-compact>> last accessed 18 June 2019.

<sup>190</sup> GCM (n 183) para 18(h-l).

<sup>191</sup> *ibid.*

<sup>192</sup> Erik Solheim and William Swing, ‘Making Migration Safe for Climate Nexus’ (UNFCCC, 7 September 2018) <<https://unfccc.int/news/migration-and-climate-change-need-to-be-tackled-together>> last accessed 19 June 2019.

## 5. The Way Forward: Possibilities to Improve the Current Framework

The previous chapters have demonstrated that it is impossible to claim refugee status through the 1951 Convention and that complementary protection might be possible, although it is untested and therefore unclear to what extent it can really protect inhabitants of SIDS. The second chapter of this thesis showed that SIDS populations will face such severe problems that seeking refuge elsewhere might be the only option available. Therefore, this chapter will provide an overview of potential solutions to this gap in protection of SIDS populations and answer the question: *in what ways can the current situation of SIDS wanting to seek refuge abroad be improved?* It will discuss the advantages and disadvantages of amending the 1951 Convention, establishing a new framework and the negotiation of separate migration agreements.

### 5.1. Amending the Definition in the 1951 Convention

Chapter 3 has already touched upon the practical difficulty of introducing an amendment to include this category of refugees, which is unlikely to be accepted by states.<sup>193</sup> It is also questionable whether amending the definition is desirable at all. Some have argued that altering the definition would lead to states refusing to abide to international refugee law altogether.<sup>194</sup> This would thus have the unintended consequence of making things worse for individuals who would currently be considered refugees. Secondly, expanding the definition would be an impediment to the existing asylum and refugee programmes. The number of persons eligible to apply for refugee status would increase dramatically. Consequently, courts might narrow the selection by arbitrary barriers and domestic refugee procedures would operate much slower,<sup>195</sup> leading to prolonged detention periods. ‘There is strong agreement amongst scholars and practitioners that if states attempted to negotiate a new Convention in the current political climate, they would adopt an even weaker set of legal norms, one that would leave even more vulnerable people outside of its scope.’<sup>196</sup> In this way, the UNHCR has also warned that it might lead to a decline of international protection overall.<sup>197</sup>

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<sup>193</sup> Moberg (n 18) 1128.

<sup>194</sup> *ibid.*

<sup>195</sup> *ibid* 1129.

<sup>196</sup> Luara Ferracioli, ‘The Appeal and Danger of a New Refugee Convention’ (2014) 40 *Social Theory and Practice* 123, 126.

<sup>197</sup> McAdam (n 56) fn 71.

Due to the practical difficulties and consequences for current refugees, this option might not be the most desirable.

### *5.2. Protection Established in a New Framework*

Advocates for a new convention see the phenomenon of climate displacement as too recent and substantially different to attempt fitting this into an outdated framework.<sup>198</sup> However, the proposals of how such a framework should look differ. The most elaborative framework that has been proposed is that of Docherty and Giannini: in addition to a determination of climate change-induced refugees, it would establish a global fund, a coordinating agency, a body of scientific experts.<sup>199</sup> If adhered to properly, this Convention would greatly help prevent or alleviate the emerging phenomenon of climate change-induced refugees. Nonetheless, it does not seem feasible due to the great amount of financial and other types of obligations for state.

Another framework is proposed by Bush, which is still extensive but state obligations would be significantly less. It presents three components to it: refugee protection, adaptation and mitigation measures and sustainable land use initiatives.<sup>200</sup> Within this proposal, she includes an obligation for states to ‘enact domestic legislation providing protection for environmental refugees.’<sup>201</sup> Essentially, from the perspective of SIDS inhabitants needing to seek refuge elsewhere, this is the most important element. After all, its governments have already tried to negotiate much stronger adaptation and mitigation measures through the UNFCCC but it remains to be seen whether these agreements will stop the development of adverse impact of climate change on SIDS. It would probably be more feasible to create a convention which only enacts the protection of vulnerable people in refugee-like situations due to climate change, than negotiating a comprehensive framework including a global fund etc.

Again, the feasibility of this project would depend on political will. If one considers that many states already consider the definition under the 1951 Convention as ‘too generous’,<sup>202</sup> a new instrument is doomed to fail amidst of political pressure. Nonetheless, it would be worth trying for two reasons. The negotiation of another convention, which would be separate to the 1951 Convention, would not jeopardise the 1951 Convention as they would be two separate instruments. Moreover, if the minimum numbers of ratifications to trigger entry into force for

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<sup>198</sup> 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, 350.

<sup>199</sup> *ibid* 384-391.

<sup>200</sup> Bush (n 79) 573.

<sup>201</sup> *ibid* 574.

<sup>202</sup> Michael Dummett, *On Immigration and Refugees* (Routledge 2001) 37.

this climate refugee Convention is low, more ‘progressive’ states might be willing to adopt it and in due time other states might join. This would provide at least a minimum of protection for inhabitants of SIDS.

However, an argument against a new framework, or wanting to place these type of displaced person within international protection at all, is the slow onset nature of climate change.<sup>203</sup> The adverse effects of climate change on SIDS is known and as such we can prepare for it: it presents a rare opportunity to plan ahead of migration streams instead of respond to them. This is also in line with the wishes of inhabitants of SIDS, who have at numerous occasions given notice of the fact that they would prefer an option which would not have to classify them as a refugee due to the psychological effects and the stigmas it brings with.<sup>204</sup> Nonetheless, a plan to fall back on would be desirable in cases where migration planning goes awry. It should be noted that a treaty per se can never be the answer, because without the power of political will the implementation and enforcement of the treaty might nonetheless be below par.<sup>205</sup>

### *5.3. Planned Migration through a Special Visa Programme or Agreement*

Due to the gradual yet permanent nature of climate change effects in SIDS an effective solution could be planned migration. Moberg has advocated for a so-called ‘Environmentally Based Immigration Visa’, in which protection is not only extended to persons who are already suffering harm and forced migration, but also to persons facing impending displacement,<sup>206</sup> which would be beneficial for SIDS’ inhabitants. Innovatively, she proposes that the number of visas each state has to extend should depend on its emission rate.<sup>207</sup> From a normative perspective, this would be desirable, considering SIDS are amongst the most vulnerable to climate change while being the least polluting states. It could be considered compensation, and might have the effect of states who are not keen on the intake of more displaced person to deduce their emissions. It would be in line with the principle of common but differentiated responsibilities.<sup>208</sup>

At the moment, visa programmes for climate change-induced displaced persons do not exist, although Sweden and Finland have immigration policies in place for victims of acute

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<sup>203</sup> McAdam (n 56) 5.

<sup>204</sup> See Betzold (n 57).

<sup>205</sup> Jane McAdam (n 56) 17.

<sup>206</sup> Moberg (n 18) 1135.

<sup>207</sup> *ibid.*

<sup>208</sup> Benoit Mayer, ‘The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework’ (2011) 22 *Colorado Journal of International Environmental Law and Policy* 357, 394-398.

environmental disasters.<sup>209</sup> A real life version of Moberg's proposal was an Australian bill which proposed amending the Migration Act to include a class of 'climate change refugee' visas.<sup>210</sup> The bill came as direct response to the question on how to assist its neighbouring SIDS. It included sea level rise, coastal erosion and fresh water contamination as reasons for inhabitants being 'unable to lead safe or sustainable lives in their immediate environment,' which formed the entitlement to the visa.<sup>211</sup> This would especially have been beneficial for Pacific SIDS persons, who have tried to emigrate to Australia already with this rationale, as demonstrated in Chapter 3. However, the bill failed to make it through the second reading, as members of parliament feared Australia would be placed with an unfair burden when no other states were introducing similar visa categories.<sup>212</sup> The case exemplifies that in order to coordinate relocation, joint international action is essential.

Considering the need for coordination, the GCM is a welcomed development if it indeed reaches the promise of providing the framework necessary to tackle climate-change induced migration. The success remains dependent on states' implementation and is therefore precarious. Host state populations are generally less accepting of migrants compared to refugees, which is one of the benefits of refugee status.<sup>213</sup> In fact, the intake of climate change-induced displaced persons has been linked to being a threat to national security, and even to increased chances of terrorism.<sup>214</sup> These negative attitudes might make a coordinated response more difficult. This atmosphere is especially dangerous, because unless stipulated otherwise, migrants are generally not protected under the principle of *non-refoulement*. For these reasons, there have been calls to the IOM to take a lead role.<sup>215</sup>

From the perspective of SIDS, there are strong benefits to the migration approach than those mentioned already above. Planned migration would allow inhabitants to make a decision before the situation comes to a point where inhabitants *have to* leave and allows a safer and more dignified way of leaving. Migration agreements could include financial assistance from host states, considering many inhabitants of SIDS are currently unable to afford the costs related to

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<sup>209</sup> Gil Tabucanon, 'Migration for Environmentally Displaced Pacific Peoples: Legal Options in the Pacific Rim' (2012) 30 *UCLA Pacific Basin Law Journal* 55, 57.

<sup>210</sup> Migration Act Amendment Bill (Climate Refugees) 2007 (AU), lines 18-20.

<sup>211</sup> *ibid*, lines 5-12.

<sup>212</sup> McAdam (n 74) 199.

<sup>213</sup> Silke Christiansen, *Environmental Refugees: a Legal Perspective* (Wolf Legal Publishers 2010) 15.

<sup>214</sup> Justin Locke, 'Climate Change-Induced Migration in the Pacific Region: Sudden Crisis and Long-Term Developments' (2009) 175 *The Geographic Journal* 171, 177.

<sup>215</sup> Tracey King, 'Environmental Displacement: Coordinating Efforts to Find Solutions' (2006) 8 *Georgetown International Environmental Law Review* 543, 564.

resettlement.<sup>216</sup> Migration agreements could allow indefinite stay when concluded between one SIDS and one host state at a time.<sup>217</sup> However, negotiations between SIDS and other governments to conclude such agreements have thus far not been fruitful, so a change in willingness from host states is needed.

#### *5.4. Conclusion*

Out of the options currently available, amending the 1951 Convention is the least desirable option and seems unlikely to happen. A framework specifically tailored to the needs of SIDS will be the most beneficial, as they can be distinguished from other climate change-induced persons due to the permanent nature of their displacement. In order to cater to SIDS' citizens' wishes, the most appropriate option would be to structure a global migration agreement for SIDS or concluding separate agreements between a SIDS and a host state. However, due to the lower acceptance of the public of migrants, this might fail. As such, an instrument similar to the 1951 Refugee Convention might be advantageous to ensure safety net where attempts at concluding migration agreements will be fruitless. It is thus the combination of the two possibilities which would provide the best option to improve the situation for SIDS inhabitants.

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<sup>216</sup> Constable (n 65) 1030.

<sup>217</sup> See for example the Pacific Access Category Residence Visa (n 66).

## **6. Conclusion**

This thesis aimed answering the question whether a SIDS citizen can find protection within international law when wanting to seek refuge abroad, either through the 1951 Refugee Convention or the concept of complementary protection, and if they cannot, whether any appropriate responses can be developed.

Through analysing the several elements inhabitants of SIDS would have to fulfil to fall within the regime of 1951 Refugee Convention, it becomes clear that this instrument is not open to the circumstances in SIDS. Not now, and seemingly neither when the situation escalates into being unable to sustain life. This can be attributed to the restrictive character of the definition, which does not allow liberal interpretation to include SIDS inhabitants nonetheless. It is a shame as nationals of SIDS within decades are likely to find themselves in refugee-like positions: needing to seek refuge abroad to be able to survive, without a possibility to return home again.

The answer to the second part of the question, whether inhabitants can rely on the concept of complementary protection, offers more cause for optimism. Regional developments in Africa and Latin-America have provided a broader definition, offering some prospects of incorporating SIDS inhabitants into its refugee classification. The real-life application has been untested and the success will thus revolve around whether immigration services and courts accept this interpretation of the definition. On the international level, the concept of complementary protection has developed, although not to the extent in which it secures protection for displaced inhabitants of SIDS.

The main problem is that there is no coordinated response to the effects of climate change on human mobility. Despite calls from the UNHCR, only Sweden and Finland have taken limited steps to include some form of protection to persons fleeing environmental disasters into their domestic legislation. The Global Compact on Migration is a step in the right direction, but is not a legally binding instrument. Other instruments refrain from including any specific provisions on climate change-induced displacement and even the UNFCCC does not take comprehensive action on the issue. Inhabitants of SIDS are therefore dependent on the advocacy of their government in respect to which resettlement agreements they manage to secure – which so far has not resulted in successful outcomes. It has been demonstrated that inhabitants of SIDS do not wish to be considered a refugee, due to negative associations with the term. The international community ought to take this into account. The unique ability to predict when people will have to relocate should be taken advantage of by developing responses in

cooperation with inhabitants of SIDS to establish a safe transition to other states before the effects of climate change leads to serious threats to life, limb and health.

Without doing so, the international community will fall short in protecting the most vulnerable to the effects of climate change as they will not be protected by the framework of refugee law. Most importantly, it should be remembered that refoulement of displaced persons to SIDS is likely to become impossible. With the prospects of developing appropriate migration agreements and mechanisms being bleak due to the general attitude towards migrants in host states, international norms should be developed to guarantee the most basic rights of inhabitants of SIDS. This could be through a new convention or by adding a protocol to existing regimes like the UNFCCC.

In the case where migration agreements do end up being successful, they might render the question of refugee qualification less germane. As demonstrated in Chapter 5, coordinated migration has the preference of inhabitants of SIDS themselves. Yet protection needs to be enshrined within international obligations to make sure they outlast governmental and political changes, in the case where political agreements on migration vanish. The Refugee Convention should not be revised, but simply needs to be supplemented by another instrument to respond properly to the contemporary challenges brought about by climate change.

There are specifically two problems which need to be addressed. The requirement of some form of discriminatory intent or persecution will need to be removed. While some people within SIDS are more vulnerable to the effects of climate change, all inhabitants of SIDS will face their environment become uninhabitable and thus deserve to find a dignified existence elsewhere. Secondly, inhabitants of SIDS will, unlike other types of refugee, face permanent displacement: once their environment becomes uninhabitable, there is no turning back. Even in the case where the effects of climate change could be reversed, this does not happen in one person's lifetime. In developing responses to the situations of SIDS, law- and policymakers need to take this into account and make sure that SIDS inhabitants are allowed to stay indefinitely.

Mitigating climate change should remain high on states' agenda, but addressing the drastic impact it will have on individuals' lives should not be forgotten. While no one wants to leave their homes, it is imperative that both migration plans and refugee protection are agreed upon before it is too late.

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