

# Migration



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## Climate Refugees – Current or future issue in Society and Law?

*On 13 November 2021, the COP26 ended in Glasgow. Thousands of delegates from almost 200 countries came to Scotland. The 26th UN Climate Change Conference was about the further implementation of the Paris Climate Agreement, which should limit global warming to 1.5 degrees. The "Glasgow Climate Pact" adopted an explanation regarding commitments of the signatory states to a "phase down" on the use of coal energy as well as inefficient subsidies for fossil fuels. Although the conference also made financial aid an issue, the precise design of the aid for adaptative measures was not considered.*

*While the world's governments are mainly concerned with reducing greenhouse gases, climate change is robbing more and more people of their living space. Natural disasters such as drought or heavy rain result in crop losses which lead to poverty and hunger. As a result, the number of people, who initially flee to neighboring regions and then seek refuge in other, rich countries is also increasing.*

*A World Bank report from 2021 estimates that 216 million people will be forced to migrate to temperate areas by 2050.<sup>1</sup> Their existence depends on agriculture and natural resources; however, the affected countries lack the financial resources to protect these resources and put in place necessary climate adaptations. Comparing this figure with those from the so-called "refugee crisis" in 2015: around one million people migrated to Europe from Syria, Iraq and Afghanistan. This stream of refugees alone gave rise to social and legal conflicts.*

### I. Definitions of Climate Flight

There is still no standardized legal definition for refugees who are forced to leave their home country due to climatic or environmental factors.<sup>2</sup> The first step is to distinguish between environmental refugees in general and migrants due to political persecution. In international refugee law, "environmental refugees" were first mentioned as a generic term for migration due

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1 World Bank, Report: Groundswell Part 2: Acting on Internal Climate Migration, 2021, p. 80.

2 Brouers, ZUR 2012, p. 81, 82.

to climactic conditions in a report by the United Nations Environmental Program in 1985.<sup>3</sup> Environmental refugees are therefore "people who have been forced to leave their traditional habitat, temporarily or permanently because of marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life".<sup>4</sup> These are people who have to leave their homes due to "natural disasters".<sup>5</sup> This first definition raises some unanswered questions: do people migrate voluntarily or involuntarily, permanently or temporarily; does the underlying environmental disaster happen suddenly or gradually; was it anthropogenic or was it caused by natural influences; and does a granted refugee status in this context only protect the individual or also his family and relatives?<sup>6</sup>

The term environmental catastrophe, on the other hand, is to be viewed as an all-encompassing one. Environmental disasters may trigger migration regardless of whether or not they are anthropogenically caused, climate-related disasters, so-called "man-made disasters".<sup>7</sup> Climate change as a root cause of climate migration therefore requires a narrower definition.<sup>8</sup> The colloquial term "refugee" is widespread and appears to be justified at this point. However, if you look at the legal level, there is a wide variety of terms, for example climate migrants or climate refugees.<sup>9</sup> The various terms are mostly used synonymously.<sup>10</sup> Because of this, a precise legal definition proves to be particularly difficult.

Climate-induced migration is related to a creeping ("slow-onset") or an abrupt ("sudden-onset") process of deterioration in natural living conditions caused by natural phenomena.<sup>11</sup> This cause of migration can only be ascribed to climate change in the rarest of cases. When in doubt, it is directly related to other factors, such as economic factors.<sup>12</sup> Biermann

3 See *El-Hinnawi*, Environmental Refugees, 1985.

4 *El-Hinnawi*, Environmental Refugees, 1985, p. 4.

5 *UNHCR*, Climate change, natural disasters and human displacement: a UNHCR perspective, 2008, p. 9; also: *Nümann*, ZAR 2015, p. 165, 167.

6 *Brouers*, ZUR 2012, p. 81, 82.

7 *Ammer/Nowak/Stadlmayr/Hafner*, Rechtsstellung und rechtliche Behandlung von Umweltflüchtlingen, 2010, p. 26; *IOM*, World Migration Report 2010, p. 74; also: *Nümann*, ZAR 2015, p. 165, 167; *Brouers*, ZUR 2012, p. 81, 82.

8 After: *Hanschel*, ZAR 2017, p. 1, 2.

9 *Hanschel*, ZAR 2017, p. 1, 2 et seq.

10 *Zerger*, ZAR 2009, p. 85, 87.

11 To distinguish between "slow-" and "sudden-onset" take a look at: *Kälin*, in: McAdam, Climate Change and Displacement, pp. 84 et seq.

12 *Hanschel*, ZAR 2017, p. 1, 2.

and Boas' 2010 definition, which is widespread in literature, names this group of people as “climate refugees”.<sup>13</sup> This includes people, “who have to leave their habitats, immediately or in the near future, because sudden or gradual alterations in their natural environment related to at least one of the three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity”.<sup>14</sup> The group of people affected is determined on the basis of scientific findings, in particular the IPCC reports.<sup>15</sup> Reasons for migratory movements that can specifically be traced back to climate change are therefore tropical cyclones, the rise in sea levels and the drought caused by water scarcity and warming of the earth's surface.<sup>16</sup> A causality with regard to climate change cannot be assumed for all environmental events.<sup>17</sup> For the rise in sea level, this can be answered in the affirmative at this point in time.<sup>18</sup>

From today's perspective, climate change is seldom the only reason for migration and flight. Rather, there is an interplay of various individual reasons. A clear differentiation seems impossible.<sup>19</sup> The distinction between climate-induced and environmental migration is relevant on a legal level. It serves a better understanding of different causes. But it is not substantial for those affected, as they are forced to leave their homes for various reasons. Possible protective mechanisms should therefore be developed and applied independently of a direct causation by climate change.

## II. International and regional refugee Law

In terms of articulating an appropriate cultural and political response to climate-related migration, it seems natural to seek solutions in the international refugee law. In the following, we will distinguish between climate-induced domestic migration and international migration.

13 *Biermann/Boas*, Preparing for a Warmer World, p. 8.

14 *Biermann/Boas*, Preparing for a Warmer World, p. 8; also: *Nümann*, ZAR 2015, p. 165, 166.

15 See *Nümann*, ZAR 2015, p. 165, 167.

16 *IPCC*, special report 2021, p. 42.

17 The problem of causality shall not be considered in more detail at this point: in detail on the problem of causality in the case of climate damage *Frank*, NVwZ 2018, pp. 960; also *Frank*, NVwZ 2019, p. 529, 531.

18 *Frank*, NVwZ 2019, p. 529, 531.

19 *Hanschel*, ZAR 2017, p. 1, 2; also: *Welzer*, Klimakriege, 2008; *Bittner*, Die Klima- Kriege, 2007.

## 1. Refugee Law of the Geneva Refugee Convention - International Migration

The displacement of people from their home countries will be a central problem of climate change. Migrants will flee into temperate areas of the world. This is called international migration. International refugee law is based primarily on the Agreement on the Legal Status of Refugees from 1951 (Geneva Refugee Convention, hereafter 'GRC') in conjunction with the 1967 Protocol on the Legal Status of Refugees. The European Union has also obligated itself to comply with these.<sup>20</sup>

The term refugee is defined in Art. 1A No. 2 GRC in conjunction with Art. 1 of the Protocol as follows: A refugee is anyone who has a "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; (...)" A high level of protection for people who fall under it can be derived from this definition. However, it is subject to limitations of scope, which will be discussed in the following parts.

### a) Fear of Persecution – "forces of nature"

It should be noted that the protection provided by the GRC requires crossing national borders.<sup>21</sup> Refugees who are forced to flee within the state borders of their home state are not covered by the protection.<sup>22</sup> Furthermore, climate catastrophes are problematic in terms of a positive argument regarding the cause of flight, the requirement of fear of persecution required by the convention.<sup>23</sup> Historically, the GRC has a special exclusive relationship to the preconditions for persecution.<sup>24</sup> The focus here is on the persecutor's political motivation. Human behavior or omission is therefore essential for this requirement to be met.<sup>25</sup> Environmental changes are "forces of

20 Art. 78 TEU, Art. 18 GRCh and especially the Council Directive 2001/55/EC of July 20th 2001.

21 Art. 1A No. 2 GRC.

22 *Nümann*, ZAR 2015, p. 165, 167.

23 Art. 1A No. 2 GRC.

24 See Supreme Court of Canada, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; High Court of Australia, *A. v. Minister for Immigration & Ethnic Affairs* [1997] HCA 4; also: *Nümann*, ZAR 2015, p. 165, 168.

25 *Zimmermann*, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Art. 1A No. 2, para. 568; also: *Brouers*, ZUR 2012, p. 81, 83.

nature",<sup>26</sup> making the satisfaction of this prerequisite problematic, given the lack of an actor or human activity that triggers the flight.<sup>27</sup> Similarly, environmental changes do not create fear of persecution.

This line of reasoning was followed by the New Zealand High Court in 2013, which did not recognize the prerequisite for individual persecution in the case of environmental migration.<sup>28</sup> There is no "ongoing systematic violation of fundamental human rights".<sup>29</sup>

#### b) Fear of persecution – Behavior contributing to Climate Change

A similar picture emerges when someone is persecuted by behavior that contributes to climate change. Global warming is due to the interaction of all global greenhouse gas emissions.<sup>30</sup> The international community as a whole is responsible for the anthropogenic climate change.<sup>31</sup> Every state that contributes to global warming would be an actor. The refugee status according to the GRC is also to be rejected due to the wording of Art. 1 A GRC. The industrialized countries and thus the host countries themselves make a significant contribution to climate change. They too are actors and persecutors of the refugees.<sup>32</sup> Furthermore, a specific allocation of anthropogenic emissions to individual countries is impossible.<sup>33</sup> The Convention imposes a protective function on the host third country, but this is not the case here.<sup>34</sup> A systematic interpretation of the Convention does not come to a different conclusion.<sup>35</sup> The historical formation of the GRC

26 See RRTA, N97/13305 [1997] 1731, S.9f; RRTA, N99/30231 [2000] 17, S.4; RSAANZ, Refugee Appeal No. 72185/2000, S.5; Nümann, ZAR 2015, p. 165, 168.

27 Nümann, ZAR 2015, p. 165, 168.

28 *Supreme Court of New Zealand, Ioane Teitiota v. The Chief Executive of the Ministry of Business*, July 20<sup>th</sup>, 2015, [2015] NZSC 107, paras. 12 et seq.

29 *Supreme Court of New Zealand, Ioane Teitiota v. The Chief Executive of the Ministry of Business*, July 20<sup>th</sup>, 2015, [2015] NZSC 107, paras. 12 et seq; Nümann, ZAR 2015, p. 165, 169.

30 Nümann, ZAR 2015, p. 165, 169.

31 New Zealand High Court, *Teitiota v. Chief Executive of the Ministry of Business, Innovation and employment* [2013] NZHC 3125 para. 55; RRTA, 0907346 [2009] 1168, paras. 51 et seq.

32 See *McAdam*, MelbJIL 579, 592; *McAdam*, *Climate Change and Displacement*, 2010, p. 2; Nümann, ZAR 2015, p. 165, 169.

33 According to the rejection of the qualified accountability of the effects of climate change: cf. UNHRC, Report on the relationship between climate change and human rights, para. 96; Nümann, ZAR 2015, p. 165, 169.

34 See *Zimmermann*, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, p. 281, 347; Nümann, ZAR 2015, p. 165, 170.

35 *Hanschel*, ZAR 2017, p. 1, 3.

refugee definition must also be considered. In post-war Europe, following the Second World War, the focus was primarily on political persecution.<sup>36</sup> Environmental refugees and climate refugees were explicitly not included in the convention.<sup>37</sup> If one looks at the genesis of this international treaty, it can be seen that environmental refugees have been seen, but the definition has not been expanded.<sup>38</sup> The teleological interpretation based on Article 31, Paragraph 1 of the Vienna Convention (according to which treaties should be given their ordinary meaning in the light of their context and purpose) does not lead to a different conclusion either.

c) Fear of Persecution – Behavior in response to environmental changes

A small group of climate refugees can still be granted refugee status according to the GRC. If political persecution is implicated in official behavior in response to environmental changes, such as, for example, government aid to certain groups of people being denied.<sup>39</sup> Relief and repair measures can lead to an unbalanced distribution of aid. The media is currently focusing on the renewed seizure of power by the Taliban in Afghanistan. In addition to the discussion about politically motivated persecution, famine and water crises, which threaten around 90% of the population, cannot be ignored.<sup>40</sup> The Afghanistan conflict illustrates that the increase in climate-related scarcity of resources and the failure of aid can, in combination, lead to both internal migration and international flight. In this context, it must be considered that refugee status per se is not sufficient to be accepted in the country of arrival. Further explanations in this regard would lead too far at this point.

The UN Human Rights Office emphasized in January 2020 that climate refugees should not be denied the right to asylum.<sup>41</sup> Climate issues should be regarded as a potentially relevant factor in asylum procedures in the future and should be considered.<sup>42</sup> In this respect, the decision of the UN Human Rights Committee in Geneva in relation to the judgment of the

36 Brouers, ZUR 2012, p. 81, 83.

37 Brouers, ZUR 2012, p. 81, 83.

38 Brouers, ZUR 2012, p. 81, 83; in addition to this: Preparatory work according to Art. 32 of the Vienna Convention on the Law of Treaties.

39 See RRTA, N94/05599 [1995] 488; RRTA, N96/12893 [1996] 992; RRTA, N96/05583 [1997] 1798; RRTA, N97/14406 [1997] 3626; RRTA, 0806395 [2008] 476; also: Nümann, ZAR 2015, p. 165, 170.

40 *Tagesthemen*, Die Not der Menschen in Afghanistan, September 13th, 2021.

41 *Zeit-Online*, Urteil: Klimaflüchtlinge, 2020.

42 *Zeit-Online*, Urteil: Klimaflüchtlinge, 2020.



New Zealand High Court was described as "historic",<sup>43</sup> but for the time being, climate issues alone are not sufficient grounds under the GRC for according refugee status to those who flee their effects.<sup>44</sup>

Accordingly, cross-border environmental or climate refugees are regularly not granted protection by the GRC. This is reinforced by the requirement, noted earlier, that the putative refugee show they are in fear of persecution (deriving from political or cultural factors of some kind).

## 2. Internal Migration – Examples around the world

Notwithstanding ongoing efforts to limit the amount and effects of future global warming, it is apparent that there are already today extreme weather events and hot regions around the world that make it impossible to inhabit and manage them. In most cases, migration will be limited to resettlement in one's own territory.<sup>45</sup> This is obvious because there are fewer legal and socio-economic hurdles. This type of migration is called internal migration.<sup>46</sup>

In the area of internal migration, the concept of European law is shaped by international law. In 1998 the so-called Guiding Principles on Internal Displacement of the UN emerged. These explicitly record "natural and man-made disasters" as reasons for emigration.<sup>47</sup> The Guiding Principles contain a useful set of rules for dealing with climate related migration within a territory, but they have no legally binding effect.<sup>48</sup>

The Cartagena Declaration for Central America contains similar regulations for internal migration in Central America.<sup>49</sup> It has no legally binding effect either. Unlike the Guiding Principles, it is recognized as regional

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43 *Zeit-Online*, Urteil: Klimaflüchtlinge, 2020.

44 *Zeit-Online*, Urteil: Klimaflüchtlinge, 2020.

45 See et al. EACH-FOR, Synthesis Report, p. 72.

46 Among others: *Zerger*, ZAR 2009, p. 85, 86.

47 Introduction para. 2 GP; *Nümann*, ZAR 2015, p. 165, 170 et seq.; also: *Hanschel*, ZAR 2017, p. 1, 3.

48 *Hanschel*, ZAR 2017, p. 1, 4; also: *Nümann*, ZAR 2015, p. 165, 171; *Brouers*, ZUR 2012, p. 81, 84.

49 *Brouers*, ZUR 2012, p. 81, 84.

customary law<sup>50,51</sup> The Organization of American States recognizes its definition of refugee as territorially binding.<sup>52</sup>

The so-called Nansen Initiative, which contains protective mechanisms for refugees exists on the European continent since 2012.<sup>53</sup> Since it was founded in Switzerland and Norway, it has set itself the goal of improving the protection of people who must emigrate from their homeland due to natural disasters. Their protection agenda contains, among other things, regulations for the protection of “people displaced across international borders by natural hazards, including the effects of climate change.”<sup>54</sup> A legally binding implementation, both at national and international level, has so far been lacking.

But legally binding protection for environmental refugees is already granted in some parts of the world. The African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa<sup>55</sup> is particularly exemplary.<sup>56</sup> Since it came into force in 2012, it has included an obligation to take measures “to protect and assist persons who have been internally displaced due to natural or human made disasters including climate change.”<sup>57</sup>

### 3. *Statelessness caused by Climate Change*

In the future, climate disasters can also affect entire national territories. Due to the rise in sea level, causally attributable to climate change, small island states which are located a little above the sea level can disappear completely below it. If the global temperature rises indefinitely, entire territories will inevitably be lost. That is why the existence of island states is seriously threatened.<sup>58</sup> The loss of states not only leads to conflicts with the state population, but also to international conflicts under maritime law, which

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50 According to Article 38 (1) (b) ICJ Statute, customary international law is one of the unwritten sources of international law; similar to general international law, it regulates legal relationships between the subjects of international law connected by treaty.

51 *Brouers*, ZUR 2012, p. 81, 84.

52 *McAdam*, *Climate Change and Displacement*, p. 38; *Arboleda*, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, p. 185, 187.

53 More details on the Nansen initiative: [www.nanseninitiative.org](http://www.nanseninitiative.org).

54 *Nümann*, ZAR 2015, p. 165, 171.

55 Also called Kampala Convention.

56 *Hanschel*, ZAR 2017, p. 1, 4; also: *Nümann*, ZAR 2015, p. 165, 171.

57 Art. 5 para. 4, Art. 12 para. 2 Kampala Convention.

58 See *Hanschel*, ZAR 2017, p. 1, 4; *Nümann*, ZAR 2015, p. 165, 166.

lead to the shifting of baselines and other territorial disputes. But at this point the focus shall remain on the resettlement of populations.

In this context, Jellinek's three-element doctrine of the state from 1914 is particularly relevant for the protection of stateless persons. According to this, a state consists of three elements: state authority, state people and state territory.<sup>59</sup> It should be noted, that the flight of parts of the population does not cause a statelessness of the whole population. The question arises as to whether a state continues to exist if it can no longer be assigned a sovereign territory. To explain the legal status of a stateless population, international law has to be taken into account. The 1954 Convention on the Legal Status of Stateless Persons based on the Geneva Convention on Refugees contains corresponding regulations.<sup>60</sup> If a state loses its sovereign territory, the individual who moves elsewhere has at least subjective rights.<sup>61</sup> For those affected, this includes protection against expulsion, the facilitation of naturalization and further minimum standards in the host country.<sup>62</sup>

### III. International Human Rights

Refugee law does not provide any real protection for refugees due to climate change. But a protection of those could be required by human rights.

First, there is arguably an incipient, if not yet unified, human right to a healthy environment.<sup>63</sup> Such is demanded more and more vehemently not only in law but also in society. However, other basic human rights could also be violated by climate disasters. At the European level, the relevant standards can be found in the European Convention on Human Rights.<sup>64</sup> A violation of the right to life<sup>65</sup> and the right to respect for private and family life<sup>66</sup> come into consideration here. A state protection obligation in

59 *Jellinek*, *Allgemeine Staatslehre*, pp. 396 et seq.

60 Convention on the Status of Stateless Persons v. 9/28/1954, 360 UNTS 117.

61 Regarding the individual subjective rights: Art. 4, 13, 15, 16, 17, 22, 31, 32 Convention on the Status of Stateless Persons.

62 *Hanschel*, ZAR 2017, p. 1, 4.

63 European Court of Human Rights, 2005 – 55723/00, June 9<sup>th</sup>, Fadeyeva/Russia, para. 68; *Meyer-Ladewig*, in: *Meyer-Ladewig/Nettesheim/von Raumer*, EMRK, Art. 8, para. 45.

64 Short: ECHR

65 Art. 2 ECHR; for this: European Court of Human Rights, 36022/97, July 8<sup>th</sup>, 2003, Hatton et al./United Kingdom, NVwZ 2004, p. 1465.

66 Art. 8 ECHR; for this: European Court of Human Rights, 15339/02, March 20<sup>th</sup>, 2008, Budayeva et al./Russia; European Court of Human Rights, 48939/99, November 30<sup>th</sup>, 2004 Öneriyildiz/Turkey.

this regard is associated with some difficulties. Basically, since human rights are territorially oriented, their *de lege lata* extraterritorial effect is limited.<sup>67</sup> Each subordinate state is only obliged to protect its own population.<sup>68</sup> An obligation of one European Member state is primarily limited to the domestic area. Foreign refugees are therefore not entitled to the protection of the European Convention on Human Rights.

#### IV. European Secondary Law

The European Union's Qualification Directive<sup>69</sup> also only obliges member states to a limited extent to grant protection to environmental refugees. Art. 15 (a) and (b) of the Directive are to be understood as a ban on deportation due to environmental changes if they threaten the right to life or the requirements of Art. 3 ECHR.<sup>70</sup>

The situation is similar with the Directive on minimum standards for the granting of temporary protection in the event of a mass influx of displaced persons,<sup>71</sup> i.e. persons “who have had to leave their country or region of origin or, in particular, have been evacuated after a corresponding appeal by international organizations and because of the situation prevailing in that country, cannot return safely and permanently”. Here, protection for “environmental refugees” is severely limited due to the temporary granting of protection for a maximum of three years. This is even more serious because it is at the discretion of the member states, which have to come to a

67 See *Hanschel*, ZAR 2017, p. 1, 5.

68 *Hanschel*, ZAR 2017, p. 1, 5.

69 Directive 2004/83/EC of April 29th, 2004 on minimum standards for the recognition and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection, and on the content of the protection to be granted, OJ EC L 304, p. 12.

70 Kolmannskog/Myrstad, in: Brill/Nijhoff, *European Journal of Migration and Law* vol. 11 No. 4 (2009), p. 313, 322; *Kreck*, *Kritische Justiz* vol. 44, No. 2 (2011), p. 178, 183.

71 Directive 2001/55/EC of July 20<sup>th</sup>, 2001 on minimum standards for granting temporary Protection in the event of a mass influx of displaced persons and measures to promote a balanced distribution of the burdens associated with the reception of these persons and the consequences of such reception among the Member States, OJ EC L 212, p. 12; *Kreck*, *Möglichkeiten und Grenzen des rechtlichen Schutzes für Umweltflüchtlinge*, *Kritische Justiz*, p. 178, 183.

joint decision.<sup>72</sup> This Directive therefore does not grant any direct individual right, either.

## V. International Environmental Law

International environmental law also does not contain an explicit obligation to protect climate migrants. Directly there neither is a protection through the precautionary<sup>73</sup> nor the polluter pays principle.<sup>74</sup> However, the principles can be considered by way of interpretation.<sup>75</sup>

The quasi-universal, fundamental frame of reference of international environmental law is the United Nations Framework Convention on Climate Change,<sup>76</sup> which arose from the Rio Declaration of 1992. At this point, the signatory states recognized a joint, shared responsibility for anthropogenic climate change and established a framework for combating it, through a reduction in greenhouse gas emissions and possible adaptation measures.<sup>77</sup> This convention also stressed the desirability for a particularly high level of protection for developing countries.<sup>78</sup>

### 1. The Paris Agreement

The Paris Agreement, which came into force in 2016, has been a particular focus since 2015. The logical consequence of all-encompassing regulations on dealing with climate change would be a substantive discussion and legal assessment of the status of climate migrants. The Paris Agreement does not contain such regulations. It does indeed make "loss and damage" an issue and regulates adaptation measures to climate change; liability issues regarding climate migration are, however, left open.<sup>79</sup> Dealing with climate refugees remains a question of interpretation of the general state responsibility,<sup>80</sup> based on Article 31 § 3 lit. c) of the Vienna Convention.<sup>81</sup> In this

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72 Kolmannskog/Myrstad, in: Brill/Nijhoff, *European Journal of Migration and Law* vol. 11 No. 4 (2009), p. 313, 318; *Kreck*, *Kritische Justiz* vol. 44, No. 2 (2011), p. 178, 183.

73 Principle 15 of the 1992 Rio Declaration in conjunction with Art. 3 para. 3 UNFCCC.

74 Art. 2 para. 2 PA.

75 *Frank*, *ZUR* 2016, p. 352, 354.

76 UNFCCC (1994).

77 See preamble and Art. 3 paras. 1, 2, 3 UNFCCC.

78 See preamble and Art. 3 paras. 1, 2, 3 UNFCCC.

79 Art. 8 para 1 PA.

80 „State responsibility“.

81 *Frank*, *ZUR* 2016, p. 352, 354.

context, climate refugees are at least subsidiarily or indirectly protected. The contributing states share the responsibility for the anthropogenic climate change.<sup>82</sup> A right to appropriate help would arise from §§ 4, 5 and 7 of the preamble in conjunction with Article 4, Paragraph 15 of the Paris Convention. Section 11 of the preamble explicitly names migrants.

In addition, the host countries are obliged to cooperate in international efforts to reduce greenhouse gas emissions and to take appropriate adaptation measures.<sup>83</sup> An interpretation of the provisions of the Paris Agreement could lead to the result that individual host countries would not have to accept all climate refugees on their own, since they are only partially responsible for climate change.<sup>84</sup> However, they committed to take appropriate measures, which might be read to include taking in people displaced from their home countries by climate change.<sup>85</sup> The European principle of promoting fairness and solidarity between the individual member states must also be interpreted in this way.<sup>86</sup> In emergency situations, the ECJ decided in 2017 regarding Art. 78 Para. 3 TFEU, that when distributing refugees, it is necessary to consider the principle of solidarity and the equitable division of the responsibilities of the member states according to Art. 80 TFEU.<sup>87</sup> Even so, approaching the protection of climate refugees based on general principles of this kind (not closely related to climate-related flight) is problematic.<sup>88</sup> Exemplarily the burden on the Federal Republic of Germany with regard to the admission of refugees is high, stresses Frenz 2021.<sup>89</sup> A human rights-compatible climate flight policy should here arguably also help the countries of origin counteract threatened population loss through appropriate climate change adaptation strategies, taking into account the resources available to them. The industrialized countries<sup>90</sup> should play a supportive role here by guaranteeing a transfer of finance<sup>91</sup> and technology.<sup>92</sup> In addition, a refugee-friendly interpretation of the Paris Agreement already requires border openings, a distribution of climate refugees in accordance

82 Frank, NVwZ 2019, p. 529, 531.

83 Hanschel, ZAR 2017, p. 1, 3.

84 Frank, NVwZ 2019, p. 529, 533.

85 Frank, NVwZ 2019, p. 529, 533.

86 Art. 2 para. 2 EU Climate Act.

87 ECJ, C-643/15 ECLI:EU:C:2017:631, Slovakia/Council, September 6<sup>th</sup>, 2017, paras 253, 291, 304, 323.

88 Frenz, EnWZ 2021, p. 201, 204.

89 Frenz, EnWZ 2021, p. 201, 204.

90 In this context, these are usually also host countries.

91 § 6 preamble in conjunction with Art. 2 para. 1 lit. c) PA.

92 Art. 4 para. 19 PA.

with the respective contribution of the industrialized countries to climate change, and financial support among each other.

## VI. The EU Green Deal

Considering the topic of the conference proceedings, the EU Green Deal should also be mentioned here. The "Fit for 55" program should also include the social context as a comprehensive regulatory framework for the European act of transformation.

Recently, in the summer of 2021, the European Parliament and the European Council passed Regulation (EU) 2021/1147 to set up an Asylum, Migration and Integration Fund,<sup>93</sup> which should support the previous mentioned Directives and strengthen the European Union's migration law. However, while the 67th recital of this Regulation recognises the problem of environmental and climate events, the definitions of terms in its Art. 2 only refer to the norms already mentioned in European migration law.

In this regard, the "Fit for 55" package fails not only to contain any legally binding regulations on wider social aspects of climate change, but also to address the important questions about climate flight.

## VII. Social Aspects

The social acceptance of climate refugees can be illustrated and compared particularly clearly with the so-called "refugee crisis" in Europe, 2015. This example shows that there is a fundamentally hostile attitude especially towards foreign groups. Right-wing populism embraces this fear, both in European countries and in other parts of the world. The nationalist movements propagate a potential threat to cultural values from foreign migrants and thereby make clear the need to strengthen one's own population. This way, the refugee issue is emotionalized. One might easily assume that these prejudices exist not only against politically persecuted people or refugees for economic reasons, but also against climate refugees.

In fact, the 2019 project "Climate Change Impacts on Migration and Urbanization" (Impetus)<sup>94</sup> of the Potsdam Institute for Climate Impact Re-

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93 Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, Official Journal of the European Union, L 251/1.

94 The Project was funded by Leibniz Association and runned from 03/2018 to 08/2021.

search (PIK), the Berlin Social Science Center (WZB), the Research Institute for Regional and Urban Development (ILS) and the City University of New York (CUNY) showed instead that climate refugees have a higher social standing than other refugee groups in society. Among other things, this may be because their reason for fleeing is seen as “legitimate”.<sup>95</sup> However, it could also reflect the absence to date of systematic discussion at the public level, due to the lack of generally direct, strong effects of climate change.<sup>96</sup>

In particular, the latter does not occur as suddenly as a war caused by political or religious reasons. Here, the current political discourse sees climate flight as a future problem that does not yet require any control. A low public disapproval thus may have less to do with the legitimacy of their cause than simply that so far climate refugees do not present a large-scale social phenomenon. The fear of the new, including cultural or social changes, is not exclusively dependent on the reasons for flight.

## VIII. Conclusion and Outlook

According to the IOM in its 2020 report, as early as 2018 there were some 17.2 million climate refugees globally.<sup>97</sup> As it pointed out:

*“There has been growing recognition in recent years of the need to better integrate migration into global climate and environmental mechanisms, and for climate change mechanisms to incorporate human mobility aspects. The places people currently live and work in are under increasing pressure from environmental and climate change. Migration, displacement and planned relocation are capturing increased attention from research, policy and practice as people attempt to move away from stress and risk, and towards safety or opportunity. (...) The literature and cases examined in this chapter indicate a need for research, policy and practice on which adaptive options can help people move towards well-being even in the face of growing environmental and climate risks. (...) The importance of environmental, climate change and disaster drivers will continue to be a key area for future research and policy developments in the international migration governance debate. The reality of how slow and sudden-onset hazards impact people’s livelihoods and influence their migration strategies, as much as the signifi-*

95 Helbling, Attitudes towards climate change migrants, Climatic Change 2020 No. 1, p. 89, 91.

96 Helbling, Attitudes towards climate change migrants, Climatic Change 2020 No. 1, p. 89, 98.

97 IOM, World Migration Report 2020, PUB2019/006/L WMR 2020, p. 45.



*cance of the political questions around migration and climate change issues will continue to position environmental migration at the forefront of these debates.*"<sup>98</sup>

The focus of current and future governments is largely on mitigating climate change. As part of this, the resulting refugee flows should also be named. IOM pointed out that there is already a political debate, but this has to be intensified as the problems relating to climate change are increasing. It is correctly recognized that a humanitarian approach to support potential refugees would initially be to equip people in threatened regions with the aids they need to protect themselves from disasters. In the future, larger adaptive measures will become necessary due to the enormous number of refugees. In this respect, it is not only a question of responding to slowly advancing climate change, but also to effects that in some cases, are not slowly advancing (like the rise in sea level), but rather are abrupt and sudden, like hurricanes or heavy rain events, and can trigger migratory flows.

Climate change already affects people now and it is not sufficient to view this as solely a "future issue". In fact, the number of people fleeing will further increase in line with climate change in the coming decades. Adaptive options must be found for the even bigger challenges in the future. Climate refugees are both a present and future issue in law and society. Legal uncertainty and problems that may occur with social acceptance could be reduced through appropriate readjustments at European level. This also applies to the level of international law. Already Antonio Guterres, currently the UN Secretary-General, said that "we can't deter people fleeing for their lives. They will come. The choice we have is how well we manage their arrival, and how humanely."<sup>99</sup>

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