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Climate Change and Forced Migration

How Climate Refugees fit into EU Asylum Law

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Abstract

Climate change is one of the greatest challenges facing humankind and its effects will hit the most vulnerable persons disproportionately hard. Several millions of people risk displacement due to environmental hazards, natural disasters and climate mediated conflicts, influencing migration patterns across the world. Without a strategy for protecting specifically climate refugees, States risk violating several human rights, which makes the issue highly relevant to the international community. Nevertheless, an intergovernmental strategy for addressing the challenges does not yet exist. This thesis focuses specifically on the European Union's role in protecting climate refugees. It offers an analysis of the mechanical and attitudinal dimensions of refugee protection in the Common European Asylum System (CEAS) and uses post-colonial theory as a tool for interpreting its implementation. This thesis is written with the purpose of contributing to the discourse on how climate refugees can and should fit in under current EU legislative mechanisms.

Keywords: *climate change, climate refugees, migration, asylum law, European Union, Teitiota*

List of Abbreviations

APD	Asylum Policy Document
CEAS	Common European Asylum System
Charter	Charter of Fundamental Rights of the European Union
CRT	Critical Race Theory
ECHR	European Charter of the Human Rights
ECtHR	European Court of the Human Rights
EU	European Union
HRC	(United Nations) Human Rights Committee
IDP	Internally Displaced Person
ICCPR	International Covenant on Civil and Political Rights
ICSECR	International Covenant on Social, Economic and Cultural rights
LDM	Legal Dogmatic Method
RCD	Reception Conditions Directive
TPD	Temporary Protections Directive
TEU	Treaty on the European Union
UDHR	United Nations Declaration for Human Rights
UN	United Nations
UNHCR	United Nations Human Rights Council
QD	Qualifications Directive

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1. Introduction

1.1 Background

Global warming is emerging as one of the most substantial challenges for the international community this century, as changes in global temperature is causing an increase in the frequency of natural disasters, extreme weather changes and environmental hazards.[1] While the direct effects from climate change are well-recognised and discussed, its effect on human rights are sometimes granted less medial and discursive attention, perhaps in part due to what ethnic and cultural groups will be hit the hardest.[2] Yet climate change will play a considerable role in shaping the migration patterns of the future, both due to its direct effects on individuals' livelihood and safety, but also as a mediator on national security and political stability, which can potentially result in armed conflict over resources.[3] Researchers have estimated the number of possible climate migrants will be in the hundreds of millions by the year 2050, albeit with limited certainty.[4] Only taking into account internally displaced persons (IDP, *i.e* persons who migrate nationally or regionally primarily due to sudden-onset climate change), 184.8 million faced displacement between 2008 and 2014 due to natural disasters, weather or climate related hazards.[5]

From a human rights standpoint, the impact of climate change on the individual is significant. The increase in temperature can lead to extreme drought, effectively compromising access to farming and fishing, which overall impacts resources.[6] Resource scarcity may in turn lead to increases in food pricing, which will disproportionally hurt the poorest.[7] Poverty and loss of livelihood may force persons into unsafe trades such as drugs distribution, trafficking or

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1 G. J. Abel, et al., 'Climate, Conflict and Forced migration', *Global Environmental Change,* vol. 54, 2019, p. 241.

2 R. Leal-Arcas, 'Climate Migrants: Legal Options', *Procedia - Social and Behavioral Sciences*, vol. 37, 2012, p. 89.

3 L. Dellmuth, et al., 'Intergovernmental Organizations and Climate Security: Advancing the Research Agenda', *Wiley Interdisciplinary Reviews: Climate Change,* vol. 9/no. 1, 2018 p. 3.

4 M. Mobjörk & L. Simonsson, *Klimatförändringar, migration och konflikter: samband och förutsägelser*, 2011, p. 9.

5 The Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change,* The Nansen Initiative, Volume 1, (s.l) February. 2015, p. 14.

6 For example: G. J. Abel, et al., p. 239.; R. Leal-Arcas, p. 91.; S. McInerney-Lankford, A. Darrow & L. Rajamani, *Human rights and Climate Change: A Review of the International Legal Dimensions,* Washington D.C: World Bank, 2011, e-book, p. 29pp.

7 S. McInerney-Lankford, A. Darrow & L. Rajamani, p. 29*p.;* G. J. Abel et al., p. 241.

prostitution, which puts many persons in severe dangers to health and safety.[8] Pollution in air and water may cause or contribute to cancers, increase spread of diseases such as malaria and lead to cardiovascular diseases, respiratory infections and lethal problems with the digestive system.[9] Extreme heat exacerbates these conditions and indirectly increases the risk for lung damage due to smoke inhalation as the frequency of forest fires increases.[10] As for region specific challenges, people residing in coastal cities, remote areas or on islands are particularly vulnerable due to already lacking resources, frail infrastructure, rapidly growing populations and sometimes limited access to adaptive measures.[11] Furthermore, rising sea levels also threaten to harm access to fresh water supplies due to salt water intrusion, potentially also destroying farms and livelihood.[12] Any preexisting vulnerability factors such as poverty, sickness, disability, old age, lack of parental care and preexistent statuses as a migrant or a minority, may furthermore hurt the person following the effects of climate change.[13] Globally, women and children are disproportionally hurt.[14]

Multiple human rights organisations and bodies have called for States to take responsibility for ensuring that adequate measures are taken to mitigate and adapt to climate change in a manner that also offers coverage to the most vulnerable in the population, stating that without additional State support, persons may suffer violations of several human rights articles. As per Article 11 in the International Covenant on Social, Economic and Cultural Rights (ICSECR), food, housing and water fall under the right to adequate living. This article also claims that States shall take "[…] measures, including specific programmes, which are needed […][t]o improve methods of production, conservation and distribution of food […] by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources […]."[15] Loss of livelihood can be considered a violation of Article 6 and 7 in the ICSECR, where

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[8] See for example: E. Lester, 'Work, the Right to Work, and Durable Solutions: A Study on Sierra Leonean Refugees in the Gambia', *International Journal of Refugee Law,* vol. 17/no. 2, 2005, p. 387*p.*

[9] J. Barnett & W. N. Adger, 'Mobile Worlds: Choice at the Intersection of Demographic and Environmental Change', *Annual Review of Environment and Resources,* vol. 43/no. 1, 2018, p. 247.

[10] Ibid.

[11] Foresight, *Migration and Global Environmental Change: Future Challenges and Opportunities*, p. 38.; R. Leal-Arcas, p. 87*p.*; J. Barnett and W. N. Adger, p. 7.

[12] S. McInerney-Lankford, A. Darrow & L. Rajamani, p.30; G. J. Abel et al., p. 241.

[13] J. Barnett & W. N. Adger, p. 253.; The Nansen Initiative, p. 14.

[14] Foresight, p. 72.; J. Anne 'What about Gender in Climate Change? Twelve Feminist Lessons from Development', *Sustainability,* vol. 10/no. 3, 2018, p. 2*pp.;* The Nansen Initiative (2015), p. 17.; S. J. Nawyn, 'Gender and Migration: Integrating Feminist Theory into Migration Studies', *Sociology Compass,* vol. 4/no. 9, 2010, p. 754.

[15] International Covenant on Social, Economic and Cultural Rights, (ICSECR), Article 11(2a).

the actions by the State should "[…] include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development […]."[16] This article violation is also applicable to scenarios where persons who become forced through lack of reumeration to work in low paying, high hazard environments with risk to health,[17] as well as in scenarios where people have to take to dangerous means of procuring an income.[18] Furthermore, loss of property in the case of mandated evacuation or environmental disaster could result in violations of the right to housing as per Article 17 in the United Nations Declaration of Human Rights (UDHR), prompting the State to take actions towards finding alternatives for its citizens or to evacuate them with dignity.[19]

These are some examples human rights violations following climate change that may force migration, which if sudden or unplanned can have detrimental effects on a person's ability to sustain themselves and enjoy human rights.[20] Socioeconomic status and group belonging play a large role in deciding the outcome for the individual migrant.[21] Middle income persons with social networks are generally able to migrate more strategically than poorer persons, who may find themselves choosing between risking entrapment in an unsustainable and dangerous situation (that is; to become a so called "trapped person"[22]) or seeking refuge internationally through the means of unsafe travel modes. If choosing the latter, the person risks death, trafficking and other human rights violations in the hopes of reaching their destination.[23] As an example, it was estimated that 9,492 persons died or were reported missing on the Mediterranean Sea *en route* to Europe to seek protection between 2014 and 2016.[24] This travel route is deemed one of the more dangerous routes of migration in part due to its high traffic, which is possibly a serious consequence of temporary

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16 Ibid., Article 6, Article 7

17 Infamous examples of these phenomena are the textile industry in Bangladesh, the tobacco industry in Zimbabwe and the wine fields in South Africa as reported by Swedwatch and Human Rights Watch (HRW). What all cases have in common are that people, unable to support themselves sustainably, become forced into low paying jobs with little opportunity for advancements, which perpetuates the poverty cycle.
For more on this, see Swedwatch https://swedwatch.org/publikationer/ last accessed on 27 March and HRW via https://www.hrw.org/publications last accessed on 13 May 2020.

18 E. Lester, p. 387*p.*

19 United Nations Declaration for Human Rights, UDHR, Article 17(1)

20 The Nansen Initiative, p. 17.

21 J. Barnett & N.W Adger, p. 253.; Foresight, p. 12*p.*

22 Foresight, p. 14.

23 Foresight, p. 13.; The Nansen Initiative, p. 37, J. Barnett and N.W. Adger, p. 253.

24 Global Migration Data Analysis Centre, *The Central Mediterranean Route: Deadlier than Ever*, Data Briefing Series, No. 3, ISSN 2415-1653, June 2016., p. 2.

restrictions in policy for family reunification in numerous EU States, which just a few months prior to several of these deaths otherwise would have made it possible for family members to utilise safer modes of travel.[25] Non-EU citizens who survive to seek asylum often face year-long waiting periods pending verdict of asylum in refugee camps, often in deplorable or unsafe conditions.[26] Within EU territory, this would result in violations of several articles in the EU Charter on Fundamental Human Rights (hereafter 'the Charter'), such as Article 3(1), which states that "[e]veryone has the right to respect for his or her physical and mental integrity"[27], Article 5 in the UDHR, which states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," as well as Article 8 of the UDHR which is applicable in scenarios where the asylum processes are prolonged, stating that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[28]

While the vast majority of forced migration will occur nationally or regionally primarily centred around areas in Africa, South Asia and Oceania which are particularly vulnerable to climate change, addressing the issue of internationally displaced persons will in the future likely become relevant for all international bodies, including the EU. In fact, due to its' highly influential standing in the global community, the EU itself might become a key actor in shaping future immigration policy. That said, the fact that the EU might come to play this role is not unproblematic. The subject of refugee reception in the EU is increasingly becoming interconnected with racism and xenophobia that is especially prevalent towards migrants with Middle Eastern or African descent, many of which are also muslim.[29] This sentiment has coloured media reporting, migration policies and reception praxis, ultimately adding additional dangers for any non-white, non-European person who seeks refuge within the EU.[30] This stands in dark contrast to the perhaps common view of the European Union as the "defeater of nazism", founder of the European Court of Human Right

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[25] See for example Svensk författningssamling, SFS 2016:752.

[26] J. Mink, 'EU Asylum Law and Human Rights Protection: Revisiting the Principle of *Non-refoulement* and the Prohibition of Torture and Other Forms of Ill-treatment', *European Journal of Migration and Law,* vol. 14/no. 2, 2012, p. 121.

[27] The European Charter of Fundamental Human Rights (ECHR), Article 3(1).

[28] UDHR, Article 8

[29] R. Samaddar, *A Post-Colonial Enquiry into Europe's Debt and Migration Crisis,* Singapore: Springer, 2016, e-book, p. 89.

[30] E. Harteveld, et al., 'Blaming Brussels? The Impact of (News about) the Refugee Crisis on Attitudes towards the EU and National Politics', *Journal of Common Market Studies,* vol. 56/no. 1, 2018, p. 157.

(ECtHR) and the birthplace of the United Nations.[31] It must be taken in consideration that many important European States, including Belgium, were until recently colonialists, which contributes to making European perception of the non-white other worthy of problematisation. Additionally, many EU Member States are now run by conservative, nationalistic and often populist governments, where upholding what is considered nationalistic and Eurocentric values are integral to their policy platform.[32] Such influence has contributed to closer kept borders, stricter immigration policy and a normative shift towards anti-immigration and anti-muslim sentiments among the European population.[33] As for EU asylum law, this has meant one of two things: that 1) Member States produce the bare minimum in terms of human rights coverage as mandated by the Common European Asylum System (CEAS) or that 2) Member States completely ignore or bypass any EU asylum law. An example of this is the Dublin regulation, which has been heavily criticised by both Member States and human rights organisations, where the former complain that the burden is not equally shared among the members and the latter claim that the current system allows for inefficient processing of asylum applications, ultimately resulting in human rights violations.[34]

The subject of forced migration is not unfamiliar to the human rights discipline. The precarious situation of a stateless person is well-known, lacking both equal access to health, education and civil rights.[35] Nevertheless, as more non-refugee persons find themselves facing many of the same challenges as 'regular' refugees, it becomes evident that there are still gaps in international strategies for handling persons seeking refuge for climate change related reasons. Climate refugees as emerging today do not fall within current international refugee law, nor is there a universally agreed upon answer to how the subject should be dealt with legislatively.[36] I aim to take part in the development of this research subject with this thesis in order to find an answer as to what a climate refugee is and to what extent this particular group of refugees can find protection in EU asylum law.

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[31] R. Samaddar, p. 89.

[32] A. Benveniste, G. Campani & G. Lazaridis, 'Populism: The Concept and its' Definitions' in *The Rise of The Far Right in Europe: Populist Shifts and 'Othering',* edited by Gabriella Lazardis, Giovanna Campani and Annie Benveniste, London: Macmillan Publishers, e-book 2016, p. 12*p*

[33] C. Boswell, 'The 'External Dimension' of EU Immigration and Asylum Policy', *International Affairs (Royal Institute of International Affairs 1944-),* vol. 79/no. 3, 2003, p. 621.

[34] J. Mink, p. 122*p.*; E. Harteveld et al., p. 157.

[35] J. Goldenziel, 'The Curse of the Nation State: Refugees, Migration, and Security in International Law', *Arizona State Law Journal,* vol. 48/no. 3, 2016, p. 589.

[36] J. Goldenziel, p. 580.

1.2 Research Questions

The overarching goal of this thesis is to provide an answer to the question “How are climate refugees protected under EU legislation?" This research question is multifaceted and requires analysis of multiple different legislative aspects. I have created sub-questions in order to answer it. First, I ask “What is a climate refugee?”, as a prerequisite for determining whether asylum laws are applicable to climate refugees is analysing how climate refugees are viewed and defined in law and by human rights organisations. The terminology is new and functions as an umbrella term for a multitude of different climate change related variables, scenarios and push-and-pull factors deciding migration. As such, it creates a massive challenge for the legal community when finding solutions. For a reticent academic discipline that favours finite distinctions and definitions over ambiguity, accommodating climate refugees with a large and contextual variety of needs to seek international protection could turn into a difficult trial.

Second, I ask and answer “What does protection under asylum law look like for refugees in the European Union?”, as it is hard to discuss potential protection of a vulnerable group without also discussing the challenges in protecting of an already existing group with similar needs for international protection. A reasonable starting point for answering how climate refugees fit into the equation is, as such, to perform an analysis of the existing asylum law in the EU. For this reason, the analysis portion of this thesis will begin by disclosing the systems that already exist through an analysis of current laws and regulations in place to protect the refugee from human rights violations in the European Union. In essence this will answer what the protection is, both in terms of what EU asylum law looks like on paper as well as how it is followed in praxis.

When performing an analysis of the function and efficacy of an existing asylum, a central part of the issue is the social dimensions that have influenced the outcome of its functions or lack thereof. Due to the nature of the attitudes towards refugees being strongly influenced by racist sentiments and so called ‘othering' of the refugees, I hypothesise that it also plays a very important role in determining the outcomes of the efficiency of the CEAS. In a democracy, the public opinion and the actions of the government are interlinked, which I would argue makes highlighting the connection between the State’s action in regard to refugee reception to the public attitudes important. This brings me to my third sub-research question: “How can EU Asylum law and the challenges with systematic protection of climate refugees be viewed from a post colonial perspective?” This research question is highly relevant both when establishing the limitations of the CEAS and when discussing the future solutions, as it provides at least in part the answer to both

questions. For this question I use post-colonial perspectives on the CEAS as the basis for an analysis of any potential changes to the international asylum or immigration system to assist climate refugees, arguing that the attitudes towards the non-white other are used to forming the social identities which enable and disable political actions.

1.3 Previous Research

Both climate change and migration are rapidly growing research interests, often centring around predictions regarding migration flow. However, as of today, there is little actual foresight as to how climate change will impact patterns of migration and how these patterns, in turn, will impact the global society in the future. Furthermore, climate change related migration causes are often many and complex, making this form of migration hard to separate from other forms of migration in a meaningful way (one example being economic migration where loss of livelihood can and sometimes does follow as a result of climate change). Prediction focused research is as such often criticised.[37] Additionally, empiric models are rare and far between, in part due to the nature of the research topic as it observes changing of events "as they come" and where predictions rely heavily on untested theories.[38] For these reasons it becomes more difficult for researchers to make accurate anticipations of the flow of migration, which in turn provides a challenge for policy makers.

I have chosen to analyse climate refugee protection from the lens of EU Asylum law. The protection of refugees within EU is under scrutiny, for example by Mink (2012) who questions the consistency between EU Member States in ensuring adherence to the absolute rights of non-refoulement, freedom from torture and other ill-treatments in refugee camps. She criticises EU Member States for using detention camps to bypass culpability in the international norms of the right to non-refoulement, effectively stretching definitions as to what is allowed under EU legislation or, for that matter, international human rights law.[39] Another example of researchers who question specific violations of protection under EU legislation are De Bruycker and Tsourdi (2016), who delve deeper into reviewing the harmonisation between human rights and detention. They research attempts to rationalising exceptions to the jurisprudence of protection of asylum seekers and extra vulnerable persons by the European Court of Human Rights (ECtHR), the United Nations

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[37] M. Mobjörk & L. Simonsson, p. 9.

[38] G. J. Abel et al., p. 240.

[39] J. Mink, p. 125.

Human Rights Committee (UNHCR) and tribunals.[40] Their research found the legal system insufficient in terms of upholding the regulations in place by EU directives, such as the Dublin regulation, which allows States to detain persons more frequently.[41] The conclusion of this research was that the EU with its extensive yet flawed regulations can become a large actor in deciding the extent and mode of how detention can be used in the future, ultimately changing jurisprudence.[42] Both articles offer important insight into some gaps of the CEAS.

As for whether climate refugees can fit into preexisting legal framework for refugees, the research is divided. There is no clear way forward, nor is there a one-fits-all solution. Some researchers, such as Williams, propose a system which centres around the explicit recognition of climate refugees as a stand-alone group, prompting States to develop regional programs in accordance to what is feasible regionally and thus minimise the gap of protection in international refugee legislation. She deems joined international efforts unfeasible given the international response to climate change thus far and the unlikeliness that States will accept culpability.[43] This system, while perhaps more realistic in terms of what is feasible in praxis, is not a flawless solution. For one, it can be argued for a multitude of reasons pertaining to ethics and post-colonial theory that a system where culpability is not addressed is an unjust system. For example, it is estimated that levels of CO2 emissions are unevenly distributed across nations over history, whereas most emissions stem from North-Western States.[44] As all parts of the world are threatened by climate change, a deciding factor in the State's ability to withstand the effects of climate change is a line of adaptive and mitigative efforts, all of which do not come without a cost. The societies that will receive the hardest hit from climate change effects are, as such, low-income communities that are already lacking resources to perform adaptive measures. Simultaneously, forced migration is not inexpensive. Today, most migration is internal in nature with a smaller percentage becoming cross-border, making the burden disproportional to different regions.[45] Furthermore, while the EU and other international State parties already provide international grassroot organisations with

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[40] P. De Bruycker & E. L. Tsourdi, 'The Challenge of Asylum Detention to Refugee Protection', *Refugee Survey Quarterly,* vol. 35/no. 1, 2016, p. 2.

[41] Ibid., p. 5*p.*

[42] Ibid., p. 6.

[43] A. Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law', *Law & Policy,* vol. 30/no. 4, 2008, p. 517.

[44] R. Dellink, et al., 'Sharing the Burden of Financing Adaptation to Climate Change', *Global Environmental Change,* vol. 19/no. 4, 2009, p. 415.

[45] Foresight, p. 37*pp.*

monetary assistance to fuel adaptive efforts and development of human rights, the financial support is inadequate and insufficiently covers the costs and is not directly addressed to climate migrants.[46] As the need for relief support increases, the situation could thus quickly become unsustainable.

The solution proposed by Williams is furthermore symptomatic of a larger issue, showcasing the importance that research on possible solutions for revising international protection should be handled with an approach stemming from the perspectives found in post-colonial theory. These perspectives are also important if the current legal definition for refugee is to be reformed and expanded, as refugee law already can already be considered weakened internationally and as any changes to it may cause it to lose its special standing in jurisprudence, potentially causing more suffering to an already vulnerable, primarily North African or Middle Eastern group of asylum seekers. For my thesis, I decided to do a different take on how climate refugees fit into protection legislation. Inspired by the criticism directed at the CEAS, I wanted to focus specifically on how climate refugees fit into the EU framework. I wanted my study to take into consideration the social dimensions in the political climate that form and influence EU asylum policy. Given that racism and islamophobia have played a large role in shaping the policy of today, I deemed it appropriate to use post-colonial theory to highlight any underlying factors that may influence State action.[47]

2. Method

2.1 Choice of Methodology

This thesis utilises a critical legal dogmatic methodology and Critical Race Theory (CRT) to interpret and analyse EU legislation, as my research is done against the backdrop of the often abhorrent and racially fuelled reception of the ongoing refugee crisis of 2015, which will then be related to the political approaches to asylum law for climate refugees of the future. Following is a brief discussion and presentation on these methodologies.

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[46] A. Daar, S., Abdallah, et al., 'Grand Challenges in Humanitarian Aid', *Nature,* vol. 559/no. 7713, 2018, p. 169; R. Leal-Arcas, p. 91.

[47] See for example K. Durrheim, et al., 'How Racism Discourse can Mobilize Right-Wing Populism: The Construction of Identity and Alliance in Reactions to UKIP's Brexit 'Breaking Point' Campaign', *Journal of Community & Applied Social Psychology,* vol. 28/no. 6, 2018, p. 395*p.*

The legal dogmatic method (LDM) is a normative science used to deconstruct an unclear or ambiguous rule of law in order to explain or possibly reconstruct a legal framework.[48] This includes performing an analysis of sources of law, preparatory work, legal cases or legal articles with respect for the appropriate hierarchy.[49] In this thesis the LDM will be applied as a tool for analysing the structure, purposes and effects of the minimum directives in place for asylum law within the EU, as well as how States have chosen to interpret these directives. LDM is also used here to criticise the effects of the directives on practices in EU Member States. By using this method I provide an analysis of the mechanical possibilities and limitations of the CEAS and how the framework for this legislation works to enable and disable domestic legislative praxis.

As the legislative dimension is only part of the answer to my research question, I will accompany the LGM with a social scientific method. A sociological approach to interpreting law can be done to project the effects of legislations on the social sphere and vice versa.[50] In this thesis I analyse the consequences that the current law has on society and, in this case, the enjoyment of the human rights of climate change refugees. I have opted to use CRT to address the close interconnections between anti-refugee sentiments and praxis in implementation of immigration policy, as well as with problematising the solution of changing legal definitions to widen the term “refugee." CRT utilises several narrative methods and approaches to law with emphasis on the legal injustices towards racial, religious and cultural minorities.[51] This theory has grown out of the American civil rights movement as a symbol of activist radicalism and protection of the African-American minority against the white majority, recognising the disparity of the fact that the current legal system while protecting the interest of the masses also risks hurting a much more vulnerable minority. The recognition of this disparity of treatment in law has resulted in a call for additional specialised methods for ensuring this group’s human rights.[52] I argue that this method is highly relevant for my thesis analysis, as the research fields of global warming and migration are loaded with colonial ideas. There are several sociologists that discuss how colonial ideas permeate the Western World’s approach to climate change, ecology and global warming. Some theorists suggest

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[48] J. Kleineman, ‘Rättsdogmatisk metod’ in *Juridisk metodlära,* edited by Maria Nääv and Mauro Zamboni, 2nd edition, Lund: Studentlitteratur, 2019 p. 21.

[49] J. Reichel, ‘EU-rättslig metod’*,* in *Juridisk metodlära,* edited by Maria Nääv and Mauro Zamboni, 2nd edition, Lund: Studentlitteratur, 2019, p. 134.

[50] H. Hydén, ‘Rättssociologi: om att undersöka relationen mellan rätt och samhälle’*,* in *Juridisk metodlära,* edited by Maria Nääv and Mauro Zamboni, 2nd edition, Lund: Studentlitteratur, 2019, p. 230*p.*

[51] M. Grahn-Farley, ‘Critical race theory sett genom tre rättsfall’, in *Juridisk metodlära,* edited by Maria Nääv and Mauro Zamboni, 2nd edition, Lund: Studentlitteratur, 2019, p. 328.

[52] Ibid., p. 329.

that mitigative tools to combat climate change have become instruments for increasing the richer North-Western countries' diplomatic standing, while simultaneously blaming low-income countries for their quick development, high emissions and non-environmental friendly products.[53]

The discourse on both climate change and migration is primarily told from a Western view and understanding, often resulting addressing of migrants ranging from being clinical to (un)intentionally xenophobic in policy, research and media.[54] In discourse regarding restricting migration policy, the restrictions primarily seem to apply to poorer migrants, in particular from non North-western countries. As for climate refugees, class differences are reproduced as climate refugees with resources such as money or a higher education are able to move with dignity to a European country, whereas low-income climate refugees will become trapped or face the same challenges as other refugees in escaping to Europe.[55] Since the most impacted groups due to climate change will be non-European, it is of utmost importance to address any juridical solutions to offering climate refugees international protection while recognising how race perception and othering influence the efficiency of the asylum systems of the future. The latter sentiment will play a central role in the analysis leading up to the answering of my research questions, as public perception of the migrant has become highly influential in policy making and implementation across Europe.

2.2 Delimitations

Climate change has an extensive impact on communities all over the world and the refugee crisis is not and will not by any means become an issue limited to the EU. While Europe will continue to receive climate refugees, most climate change related movement is occurring predominantly within nations or regions that are hurt the most by climate change, mostly on the African and on the Asian continent.[56] Cross border migration is less common and occurs as a last resort strategy, where the foremost examples are the pacific islands.[57] That said, there are a few reasons why I have chosen to limit my research to cross-border migrants entering Europe as opposed to other forms of migration in other parts of the world. First, there is already a large amount of research on the subject of

[53] R. Samaddar, p. 97.

[54] Ibid., p. 96*p.*

[55] Ibid.

[56] The Nansen Initiative, p. 14.

[57] Ibid.

internally displaced persons, as well as potential solutions to minimise the damages, all of which require a wider understanding of regional politics in the relevant regions as well as the specific causes for migration. Restricting my research subjects to cross-border immigrants into the EU allows me to narrow my focus to a more restrictive branch of climate migration research which is more feasible for the scope of this thesis. Second, I have chosen to write this thesis as an analysis of asylum legislation. While there are other institutions of equal importance in influencing international law of human rights and/or in asylum policy, namely the United Nations via UNHCR or regional human rights law institutions such as the ECtHR, the EU plays a peculiar role in influencing global policy making it interesting out of a legislative perspective. This gives this thesis a niche and relevancy, while allowing me to take a closer look on specifically the notions of international protection for both climate refugees and 'regular refugees.'

As for the target group, I decided to make some additional delimitations. In this thesis I define "climate refugee" as any person who seeks international protection due to climate change. This creates a distinction between other groups of climate migrants and the climate refugees, which I argue needs a completely separate legal category than persons seeking cross border protection due to for example natural disasters. Legislation for temporary protection as a tool for assisting displaced persons and humanitarian action is in some cases a viable option when dealing with climate change induced migration. However, I would argue that it is insufficient when approaching the group of climate migrants as a whole. Furthermore, I am personally more interested in the challenges that arise when a person becomes *de facto* stateless due to climate change. As such, I want to research the potential of climate change as a reason for international protection as kin to prosecution in the sense of the current refugee status. Similarly, I have chosen to make delimitations in regard to refugees that flee war or conflict caused by or mediated through climate change, as there is some overlapping between this group and refugees that fall under the already established legal definition found in the Refugee Convention of 1951.[58] Environmental changes as conflict mediators are not any means part of a recent historical development, but have been present in forming conflicts throughout history. As such it is neither necessary nor possible to make a meaningful distinction between refugees who flee conflict mediated by climate and refugees who flee other conflicts. I have chosen to mostly exclude this type of climate refugees from my research questions. I say mostly, as an important part of my research consists of analysis of refugee law and

[58] For examples on how climate change can lead to armed conflict, there are several researchers that explore the link between famine and resource scarcity and conflict. See for example: V. Vernera & C. Breisinger, *Economics of Climate Change in the Arab World Case Studies from the Syrian Arab Republic, Tunisia, and the Republic of Yemen,* Washington DC: World Bank, e-book, 2013.

the gaps therein. This undoubtedly also concerns climate changed mediated conflict refugees, but for the purpose of discussing the potentials of including climate refugees in the EU asylum law framework this group is excluded.

2.3 Disposition and Outline

This thesis consists of ten chapters which are structured as follows: In Chapter 1 and 2 the topic of the thesis as well as its methodology was introduced. In Chapter 3 *EU Asylum from a Post-Colonial Perspective* the theoretical framework and its application is presented. In Chapter 4 *What is a Climate Refugee?* I expand on the concept of persons seeking international protection due to climate related reasons. Chapter 5 consists of a brief introduction to EU law and relevant directives.

The analysis is divided into three chapters. Chapter 6 *Protection under EU Law - Legal and Political Mechanisms* states current EU law, existing refugee protection in the EU and the potential of including climate refugees in EU asylum law. Chapter 7 *Establishing the Limitations of Protection* provides criticism towards said systems, the Member States approach to the non-refoulement principle and state sovereignty, as well as an analysis as to what underlying social and colonial mechanisms have motivated the unwillingness to protect refugees and undoubtedly also future climate refugees. This analysis will be performed using post-colonial theory as a baseline. Chapter 8 *The Contextual and Terminological Challenges in Asylum Policy* expands on the limitations presented in Chapter 7 by focusing on how the need for refuge for climate refugees is interpreted and viewed in human rights courts. I conclude my research in Chapter 9. In Chapter 10, I offer insights and suggestions for the future of the discourse of this topic, including a reflection about the challenges with demanding states to take responsibility for their contribution to climate change.

2.4 Material

In this thesis, I utilise several legal documents to analyse the protection for climate migrants, including the EU Charter, the Geneva convention, the CEAS documents and the Temporary Protections Directive. These are primary legal sources. In order to interpret these documents I have used multiple legal articles that offer different perspectives on the efficiency of EU law and the possibility of creating a refugee protection system that allows inclusion of climate refugees. I have to a limited extent used cases in law to determine court praxis in judging and determining the need for refuge as a climate refugee. As for the perspective used in the analysis, I have among others

used Stuart Hall's *The Fateful Triangle: Race, Ethnicity and Nation* and Ranabir Samaddar's *A Post Colonial Enquiry into Europe's Debt and Migration Crisis*. The latter applies an analysis of identity, migration and the nation state onto the migration crisis of 2015 and its reception through media and policy. I have used a variety of research articles on migration patterns, effects from global warming and changes in demographics. These were retrieved from several different research institutions, such as Nansen Initiative, the International Organisation of Migration (IOM) and SIPRI. These were used to illustrate the urgency of the development of legislation to protect climate refugees.

3. EU Asylum from a Post-Colonial Perspective

It is difficult to discuss EU asylum legislation and policy without also discussing the political climate in Europe. Migration is a divisive topic that is often at the centre of political debates and has influenced political law making on a national level. A relatively recent example was the British referendum of the United Kingdom's membership in the European Union (Brexit) of 2016, where anti-immigrant sentiments played an important role in the Leave-side's campaigns.[59] These campaigns managed to successfully reach the average voter by playing on the human anxiety from perceived threats that the voter felt towards migrants, in a manner that the moderate political side could not.[60] While not the only reason for the victory of the pro-Brexit side, xenophobia played an important role in steering the behaviours of the British governmental body.[61] As such, I believe that the anti-immigrant sentiment is worthy of further analysis when approaching the way that climate refugees fit into EU legislation. I have chosen to apply a variety of different post-colonial perspectives on migration, ethnicity and the European identity. Below the reader will find an introduction as to what perspectives will be relevant for the following chapters.

Firstly, these theories suggest that the person identifies with people with shared characteristics, forming a joined group identity around said characteristics and creating a so called in-group. The in-group is then reaffirmed by the members, creating a homogenous cultural identity

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[59] D. Abrams & G. A. Travaglino, 'Immigration, Political Trust, and Brexit – Testing an Aversion Amplification Hypothesis', *British Journal of Social Psychology,* vol. 57/no. 2, 2018, p. 311.

[60] Ibid., p. 321*p.*

[61] K. Durrheim et al., p. 401*pp.*

with its own language, customs or ethos.[62] These similarities are then used to create out-groups or 'strangers' in outsiders, which serve to strengthen the identity of the in-group by being different from the out-group,[63] regardless if the differences are minimal or socially fabricated.[64] In behavioural science, the 'other' is created in order to make sense of the bits and pieces of the moral or cognitive dimensions of social reality that they are perceived as not fitting into.[65] With post-colonial theory this point is extended to, in part, offer an explanation for systemic racism and societal structures stemming from the European ill-treatment, pathologisation and fetishising of other races.[66] Through creating distance between oneself and the non-white other, the other is made into an object. Stuart Hall refers to this as 'otherfication' performed by the means of retelling of rumours, anecdotes and stories about meetings with the non-white other. Material differences (for example colour of skin, hair, eyes) and cultural differences (such as mannerisms, religion, language and identity expression) are worn as symbols of differences to function additional obstacles for the person to overcome the distance.[67]

This brings me to a second important point of the post-colonial discourse on migration. Hall's perspectives on the non-white other become interesting due to the way he puts the otherfication of identity in the perspectives of migration and identity of the nation state. Modern globalisation offers challenges for maintaining the traditional rigid identities related to heritage. Cultures are becoming more intertwined and interdependent, as blood, inheritance and ancestry mix.[68] This results in a fractured national identity, Hall says, potentially also resulting in fractured institutions, habits, discourse and the notion of a cultural singularity.[69] Samaddar discusses the same sentiment, describing Europeanism as an ideology consisting of heterogeneous economies,

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[62] S. Hall, *The Fateful Triangle: Race, Ethnicity, Nation,* Cambridge, Massachusetts: Harvard University Press, 2017, e-book, p. 107.

[63] Ibid., p. 82*p.*

[64] An example I tend to bring up to illustrate how social identity can be formed and change over time is a study by Elias and Scotson '*The Established and the Outsiders',* first published in 1965. The study observes three different areas in the fictitiously named English town "Winston Parva" and details how the stereotyping is performed between the established and the outsiders. In this study, the insiders are people residing long-term in two local districts of low and medium income respectively, whereas the outsiders are low income newcomers. The study illustrates that the income level is not what separates the three groups, but rather the status of the stranger as an unwelcomed newcomer.

[65] Z. Bauman, 'The Making and Unmaking of Strangers', in *Debating Cultural Hybridity: Multicultural Identities and the Politics of Anti-Racism*, edited by Tariq Moodod et al. United Kingdom: Zed Books, 2015, e-book, p. 46.

[66] S. Hall, p. 82.

[67] Ibid., p. 62.

[68] Ibid., p. 71*p.*

[69] Ibid.

post-secularity and neo-liberalist values.[70] Built on colonialism, the European identity is formed by interpreting other cultures and through nationalist imagery, or as put by Peter Burgess via Samaddar: Europe becomes Europe when Europe is "abducted" by outside forces, comparing Europe to a "damsel in distress" in need of saving.[71] According to Samaddar, the migration crisis is considered a crisis not only for the migrants themselves, but also for the stability of the fabric that is the European identity. The migrants symbolise evil, danger and something ill-fitting whose presence in the European bubble has disrupted the divisions of West, middle and East that before were meant to make sense of the cognitive divide.[72] The attitudes towards the migrants are then discussed by Kymlicka who describes the dimensions of citizenship, multiculturalism and immigration as a "three legged stool" that crumbles once one dimension of the three begins to fail.[73] The three legged stool reflects changes in anxiety in society in regard to stability and attitude toward each dimension, for nationals and immigrants alike.[74] Politically, a person who opposes migration houses fear of changes in stability might also develop negative opinions towards the other two legs, potentially leading to a will to make limitations politically on multicultural projects or access to citizenships. In turn, the non-national feels excluded, potentially resulting in further distancing between the groups as the non-national loses willingness to accommodate to a nation which has previously oppressed them and now refers to them an enemy to the state.[75] The biggest threat to the nation state is globalisation, which has rendered a single national identity impossible. Nevertheless, in spite of inevitable changes to the weakened image of the nation state, the nationalist furiously holds onto its group identity against the threats from the other.[76] The migrant becomes an eyesore and another source of friction, as someone who does not fit in as they make claims at citizenship while maintaining bits and pieces of their cultural identity.[77] The white person demands
assimilation, but the non-white migrant cannot ever be completely assimilated in the eyes of the white person, as the non-white migrant may always carry qualities and characteristics with them

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[70] R. Samaddar, p. 69.

[71] Ibid., p. 72.

[72] Ibid., p. 89*pp.*

[73] W. Kymlicka, 'Immigration, Citizenship, Multiculturalism: Exploring the Links', *The Political Quarterly,* vol. 74/ no. s1, 2003, p. 202.

[74] Ibid.

[75] Ibid., p. 202*p.*

[76] M. Wieviorka, 'Is it so Difficult to be an Anti-Racist?', in *Debating Cultural Hybridity: Multicultural Identities and the Politics of Anti-Racism*, edited by Tariq Moodod et al. United Kingdom: Zed Books, 2015, e-book, p. 142.

[77] S. Hall, p. 88*p.*

that remind the white person about their origin and otherness.[78] As such, the white person retorts to simply shutting out the outsider.

Upon reading the perspectives on the perception of the refugee as the other and as a threat to the European identity, the challenge and dangerous routes to asylum to be discussed further in this thesis take a different meaning. Ignorance and ambivalence among politicians and voters regarding the refugees' situation is potentially common, that said it might not be the only driving force in maintaining harsh borders or making applying for asylum tedious, difficult and unappealing. An alternative goal might be to simply hold the migrant at bay or discourage them to proceed, purposely keeping them on the outside of the European bubble, even if that means that many die before they arrive. Bleak as this perspective on the migrant crisis may be, this type of sentiment is important to take into consideration when assessing the current law surrounding refugees and migration, as it illegitimacies the purpose of the EU asylum system and avoids taking responsibility. In this thesis, I return to the topic of the non-white other as a driving force in the development of the more restrictive immigration policies of the EU. While the composition of the CEAS and other relevant directives (such as the Temporary Protections Directive (TPD) of 2001, which is discussed in Chapter 7) play a role in the efficiency of ensuring international protection for climate refugees, I would argue that these are merely a necessary but insufficient factor for the challenges with refugee protection to arise. What directly determines the extent of human rights coverage in the EU I argue is the contexts which determine the State's willingness to comply with EU asylum law and to meet the goals of the EU using a more generous interpretation of the minimum directives; a context which I would argue is coloured by the social attitudes towards the non-white other. I apply these post-colonial perspectives not only when analysing the CEAS, but also when discussing any future political approaches to the subject of climate change refugees as a whole, given that social attitudes and willingness are integral points in terms of finding solutions of reassessing current asylum law or creating a separate system tailored specifically to climate refugees.

4. What is a Climate Refugee?

Some readers may have reacted to the unusual and perhaps sensationalist usage of the terminology "climate change refugee." In fact, this denomination is not a legal status and primarily exists in academia. As for real world usage, it is controversial and divisive among organisations that work

[78] Ibid.

specifically with displaced persons and refugees, one of its larger opponents being the UNCHR.[79] On one end, the sensationalist nature of the terminology highlights the severity of the situation pertaining to climate refugees while signalling that some aspects of the challenges related to the groups are comparable, as many climate migrants also risk becoming stateless and paperless and many will be at the mercy of the international community. On the other end, using the term 'climate refugee' can potentially undermine the protection for the already established definition for refugees, as it could create confusion regarding the relationship between the two. Another concern regarding modifying the definition of refugees in the Refugee Convention of 1951 is that such change could open for renegotiations regarding the definition, which could potentially act as a disservice to refugee protection today.[80]

For a person to qualify as a refugee under the Refugee Convention, said person must fit the criteria of facing direct threat due to persecution on the basis of nationality, religion, political affiliation, race and group belonging.[81] While certain groups of climate refugees may fall under this definition (*e.g* refugees who are seeking protection from armed conflict or prosecution which may have started due to the effects of climate change), most may find themselves in urgent need for protection without the ability to claim a need for asylum. Under these definitions, those who I refer to as "climate refugees" would not fall in under the terminology, unless indicated that changes to the climate or the environment could be considered *prima facie* in influencing migration (*i.e* sufficient to prove a direct cause for the migration decision). As of today there is no such thing as a unified, clearcut definition of what climate induced migration could entail. One of the more challenging aspects of the subject of climate induced migration is its contextual nature, as numerous different factors contribute to a person's migration incentive.[82] The differences between causes for migrations have warranted the creation of several sub-categories to distinguish between different climate refugees. The first definition concerns the chronic state of the migration status, *e.g* whether the displacement is long-term or short-term. In a very broad sense, some organisation suggest that a person must live for a minimum of three months outside their original residence in order to be considered a migrant.[83] In environmental disaster scenarios it is common that persons who lose their

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[79] The UN High Commissioner for Refugees (UNCHR), *Climate Change, Natural Disasters and Human Displacement: a UNHCR Perspective,* p. 8.

[80] Ibid, p. 8*p.*

[81] The Geneva Convention, Article 1(2).

[82] **S**ee for example Mobjörk and Simonsson, p. 10.

[83] Foresight, p. 35.

homes or communities eventually return to their home if or when it becomes a possibility. These persons may need temporary shelter and support.[84] The second definition concerns the migration patterns and whether the person becomes displaced internally within a nation or must travel cross borders. As of today, most persons who are displaced due to climate change are displaced internally, becoming so called IDPs, but it is possible that this may come to change as climate change gradually makes land less habitable.

These categories can then be divided further into a person's migration *raison d'être*, i.e push and pull-factors that indicate whether the person was forced into migrating or if the action was more or less voluntary.[86] Such incentives stem either from a gradual onset (such as drought), an immediate onset (such as a natural disaster), or indirectly as a mediator (such as causing political instability in a state).[87] Gradually introduced effects generally cause people to remain in their area of origin, while sudden onset changes to the climate, such as natural disasters, are leading contenders in forcing displacement.[88] Push factors (*i.e* factors that lead the person to leave their home, such as armed conflict) are generally more common among displaced persons due to climate change than pull-factors (such as economic incentives), yet in many cases these are hard to distinguish from one another and the cause for migration is often a combination of several factors.[89] To account for the disparity between these factors, additional terminology is adapted and play a large role in how the refugee and the circumstances are viewed, as well as what actions are to be taken politically. "Forced migrant" is a different terminology that is used to describe a scenario where the person *per se* is not persecuted, yet has their situation dominated by push-factors opposed to pull-factors.[90] International Organisation for Migration (IOM) frequently uses the term "climate migrant" which allows for understanding of the complexity of climate caused migration. This term refers to people who have chosen to flee. The distinction between choosing to flee *versus* fleeing without choice is worthy of further analysis and will be discussed in Chapter 8.

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[84] J. Barnett and N. W. Adger, p. 252.

[85] Mobjörk and Simonsson, p. 9.

[86] Barnett and Adger, p. 247.

[87] Abel et al., p. 240*p.*

[88] Ibid.

[89] Leal-Arcas, p. 89.

[90] Ibid.

5. An Introduction to EU law

The EU is an interesting legislative body and a symbol of cooperation between Member States in Europe. As a body with an umbrella function, it uses a two level-system for legislation and implementation, which has traditionally meant that the EU decides regulations which have then been implemented by the Members, meaning that EU law holds a higher legislative position.[91] Regulations produced by the EU are applicable directly to the Member States and can create obligations within the national legal framework.[92] How exactly the Member States fulfil said obligations can however depend on the state and is influenced by the State's domestic legislation and abilities.[93] Many EU regulations are binding but are written with loose definitions for the State to interpret in implementation. Furthermore, EU Articles are subject to the principle of proportionality. Members and the EU are anticipated to work together as per the positive agreement of article 4(3) of the Treaty of the EU (TEU). This includes offering other Member States support in order to achieve the goals of the Union.[94] As per the negative obligation in the same article Members shall "[…] refrain from any measure which could jeopardise the attainment of the Union's objectives."[95] Outside the directives and EU law, EU committees also create several non-binding directives and reports which fill a normative function in order to guide and assist Member State courts. These are guidelines and are not legally binding, yet can contribute to implementation of EU law through national agencies.[96] These are considered soft laws, meaning that there are expectations on the members to follow them but no concrete repercussions if they cannot.

5.1 EU Documents and regulations

a. EU Charter of Fundamental Human Rights of the European Union (2012/C 326/02):

As the EU initially and primarily functioned as an economic trade union, a human rights focus took a long time to develop.[97] The initiative of the EU Charter was partly strategic, as it came to both aid

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[91] J. Reichel, p. 111.

[92] I. Cameron, *An Introduction to the European Convention,* Iustus*,* 2018, p. 181.; J. Reichel, p. 111.

[93] J. Reichel, p. 111.

[94] Treaty of the EU, TEU, Article 4(3).

[95] Ibid.

[96] J. Reichel, p. 127.

[97] I. Cameron, p. 183.

EU in gaining competence in human rights legislation and to secure the EU's standing versus other states in the global community, giving it a moral high ground of sorts in regards to human rights.[98] While met with hesitation from several Member States due to the potential increase in responsibility for the domestic courts, it eventually became binding through an addition in the TEU Article 6(1), which states that the Charter "[…] shall have the same legal value as the Treaties."[99] The EU Charter provides the minimum standard for Member States to comply with, where the goal is to achieve harmonisation of goals and ideals across Europe. The same *modus operandi* is applied to other EU legislation, such as the directives in the Common Asylum System, discussed in the next sub-chapter. The EU Charter states that limitations "[…] on the exercise of the rights and freedoms recognised by this Charter must be provided for by law […]" and that the principle of proportionality is to be used only if the limitations "[…] are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."[100]

The EU Charter is similar to the European Convention on Human Rights (ECHR) in its form and content. The Charter consists of relative rights (i.e rights that States can infringe upon if necessity prevails), through the usage of the principle of proportionality for all substantive rights in the EU Charter.[101] Many of the rights that exist within the Charter also exist in the ECHR, however in a more "slimmed down" fashion, with fewer sub articles detailing the application or scope of the articles.[102] The Charter does however have several more articles than the ECHR which put additional emphasis on specifically social, economical and cultural rights of the EU citizen, making the EU Charter wider than the ECHR.[103] Furthermore, there are no articles on asylum in the ECHR which are read into the ECHR by the Court in Strasbourg.[104] The EU Charter does not override any other human rights documents and specifically states that rights that exist in the International

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[98] Ibid.

[99] Ibid., p. 184.

[100] The EU Charter , Article 52(1)

[101] S. Greer, 'Europe', in *International Human Rights Law,* edited by David Moeckli, Sangeeta Shah and Sandesh Sivakumaran, 6th impression, United Kingdom: Oxford University Press, 2014, p. 437.

[102] I. Cameron, p. 183.

[103] Ibid.

[104] L. Roots, 'European Court of Asylum - Does it Exist?' in *Protecting Human Rights in the EU: Controversies and Challenges with the EU Charter,* edited by Tanel Kerikmäe, Springer, 2014, e-book, p. 131*p.*

Convention as well as in the Charter should be interpreted with the same "meaning and scope of those rights [shall] be the same as those laid down by the said Convention […]."[105]

b. The Common European Asylum System (CEAS):

The Common European Asylum System was created for the stated purpose of ensuring effective practical cooperation between EU members and countries outside EU through harmonising standards of protection concerning asylum legislation.[106] It consists of five directives to ensure efficient and equal treatment in all EU Member States: the Asylum Procedures Directive, the Reception Conditions Directive, the Qualification Directive, the Dublin Regulation and the EURODAC Regulation. In addition to the directives, there is also the European Asylum Support System. For the purpose of understanding the CEAS and the parts that are relevant to my thesis, I have chosen to only provide a brief description of the purpose of the Dublin Regulation, while placing more emphasis on the Asylum Procedures Directive, the Reception Conditions Directive and the Qualification Directive.

The Asylum Procedures Directive's *(2013/32/EU)* (hereafter APD) purpose is "setting up of a single, common asylum procedure leaving no space for the proliferation of disparate procedural arrangements in Member States […] providing for a comprehensive examination of protection needs under both the Geneva Convention and the EU's subsidiary protection regime."[107] The goal is to secure equal access to procedures in the EU that accommodates situations where people seek protection while present in the EU or otherwise. In addition, the APD is also "enhancing gender equality in the asylum process and providing for additional safeguards for vulnerable applicants."[108] The APD regulates the Member States' obligations to the asylum seeker during several integral steps of the asylum process, such as that the relevant authorities should provide information about the results of the case in a timely manner and in a language that the applicant speaks.[109] In the APD, articles and definitions regarding first, second and third safe countries can be found, which is information relevant to how European Member States moves asylum applicants between

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[105] The EU Charter, Article 52(3)

[106] Policy Plan on Asylum, 2008, The European Union's Commission, p.2*p,* available on European Union's Commission's webpage: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en [accessed on 4 March 2020.]

[107] Ibid., p. 5.

[108] Ibid.

[109] Asylum Procedure Directive 2013/32/EU *Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection,* Article 12.

themselves.[110] A first safe country is the first country of application where the applicant is considered a refugee as per Article 35(a): "he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection" and (b): "he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement."[111] The country of origin can be considered a second safe country if the person has a nationality in that country or has lived in the country habitually while being stateless and has not adequately "submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification […]."[112] Definitions of a safe second and third country or safe origin country are mentioned under Article 36(2) in the same directive, stating that Member States are free can deliberate on rules and on the concept of safe second and third countries themselves[113] but that they are expected to regularly review the safety of designated safe countries of origin in accordance with the content of Article 37(3) and update findings to the EU Commission.[114] Article 38 of the APD regulates when the concept of safe countries can be applied with the purpose of protecting the applicant's human rights, such as the freedom from torture and cruel, inhuman or degrading treatment.[115] A European safe country is considered safe if it has ratified and observes the Geneva Convention globally, has a legal asylum procedure in place and has ratified the EU charter.[116] The Member State can choose to not examine an applicant's application if a "competent authority" establishes that the person has entered the state illegally from a safe third country.[117]

The Qualification Directive (2011/95/EU) (QD) defines the minimum criteria for granting protection for refugees and should be viewed as a complimentary addition to the Refugee Convention of 1951 relating to the Status of Refugees,[118] which has been expanded on for a

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[110] Ibid., Article 35, 36, 37, 38

[111] Ibid, Article 35(a)(b)

[112] Ibid, Article 36(1)

[113] Ibid, Article 36(2)

[114] Ibid, Article 37(2)(3)(4)

[115] Ibid, Article 38(1)

[116] Ibid, Article 39(2)

[117] Ibid, Article 39(1)

[118] The Qualifications Directive, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast),* 2011, Introduction §33.

European setting. This encompasses the legal definitions of the refugee status and the requirements for subsidiary access. According to the QD, the term "refugee" is defined as the following:

> […] a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it […].[119]

The QD makes exceptions to the refugee status if the person has been found guilty of a violent non-political crime prior to the admission of refuge as per Article 12(2b), the person has committed a war crime, a crime against peace or a crime against humanity as per Article 12(2a) or the person in question is "[…] recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those."[120]

Furthermore, the QD sets the parameters for the state processing the application to follow when assessing the need for protection, what factors to take into consideration by the state which processes the applications and the steps of exclusion. This directive specifies which additional rights a refugee seeker shall be granted after receiving residential permits as well as their scope of limitations, such as access to employment, education and social welfare. Furthermore, the QD has a section for refoulement and under which conditions it is applicable. As per article 21(1) in the QD, the "Member states shall respect the principle of non-refoulement in accordance with their international obligations […],"[121] but may breach the non-refoulement rule for refugees who can on reasonable grounds be considered a danger to security of the Member State, alternatively if the person can be considered a serious danger to its community due to conviction of a "particularly serious crime."[122] It should be noted that there is a difference between how the QD and the Geneva Convention determine the status of a refugee. In both cases, a person's life and safety must be at risk, yet the two documents define the danger differently, whereas the definition used by the QD is narrower compared to international refugee law. To illustrate: Article 15 in the QD defines serious

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[119] Ibid, Article 2(d)

[120] Ibid, Article 12(1b)

[121] Ibid, Article 21(1)

[122] Ibid, Article 21(2)

harm as: "[…] (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment […] or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict"[123] whereas the Geneva Convention simply states that a person is a refugee if they "[…] are owing to a well-founded fear […]."[124]

The Reception Conditions Directive (2013/33/EU) (RCD) decides the minimum standards for the conditions all member states are to apply for refugees seeking asylum and awaiting their pending status as residents within the territory. This document consists of regulations of freedom of movements, access to human rights such as access to education and healthcare, as well as conditions of detention centres. It also ensures access to quick and clear information about the process. The content within this directive allows the Member State to determine (within reason) what it considers sufficient implementation of the articles by the Member State's abilities. This allows some States to restrict movement, for example Article 7 in this directive, which states that "[a]pplicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State […]"[125] but also that "Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection."[126] Notably, there is no statement as to what is the minimum amount of space allowed for a person, save for the space being sufficient for all benefits under the RCD to be guaranteed.[127] Determining whether restriction of movement is a violation of the correlating right in the ECHR is done on a case-by-case basis with regard for the severity of the circumstances.[128] This offers Member States some flexibility when implementing the content of the RDC.

The Dublin Regulation (No 604/2013) determines the application examination procedure for refugees seeking asylum in an EU Member State, including which Member State will be responsible for overseeing the application process. As a rule, it is decided that the state in which territory the application was first filed becomes responsible for the application process and for

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123 Ibid., Article 6

124 The Geneva Convention, Article 1(2)

125 The Reception Conditions Directive, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast),* 2013, Article 7(1).

126 Ibid., Article 7(2)

127 E. L. Tsourdi, 'Asylum Detention in EU Law: Falling Between Two Stools?' *Refugee Survey Quarterly,* 35, 2016, p. 11.

128 Ibid., p. 11*p.*

enforcing reception conditions.[129] In praxis, the Dublin Regulation places an unequal burden on coastal cities in the EU, causing over-encumbrance in the asylum facilities and States to forego their responsibilities.[130] Furthermore, some content of the Dublin Regulation is often disregarded, namely the articles regarding prioritising family reunification and protection of minors.[131] Member States have further begun transferring asylum seekers to other Member States in accordance with the APD, which can result in asylum seekers being placed in refugee camps where the standards of living are *sub par*, as the APD largely lets the Member States to determine what it considers a second and third safe country.[132] A side effect of the faltering Dublin Regulation system is the effects it has had on the person's rights to effective remedies as listed in Article 13 of the ECHR, as well as the risk that a persons's application is rejected without adequate examination.[133]

To improve the functionality of the CEAS, the system is currently under revision.[134] The CEAS allows the Member States ample room for individual assessments regarding implementation, as long as they meet the minimum standards as to what is required by the directives. Naturally, this can become problematic when over-burdened and asylum facilities disregard using a more individualised approach when possible in order to save time and resources. I will discuss how this change in praxis influences the protection for refugees in the Chapter 6 and 7.[135]

c. The Temporary Protections Directive (TPD), Directive 20 01/55/EC:

The TPD was produced in 2001 in response to the influx of displaced persons following the conflicts in Kosovo and former Yugoslavia. The need for a directive at an EU level that offers protection for non-refugee asylum seekers became notably important as EU Member States struggled with reception coordination, resulting in over-cumbrance and unevenly distributed

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[129] The Dublin Regulation, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 2013,* Article 3.

[130] H. Battjes, Hemme & E. Brouwer, 'The Dublin Regulation and Mutual trust: Judicial Coherence in EU Asylum Law?', *Review of European Administrative Law,* vol. 8, nr. 2, 2015, p. 185.

[131] Ibid.

[132] Ibid., p. 186.

[133] Ibid.

[134] EU Commission: 'Towards a Reform on the Common European Asylum System and Enhancing Legal Avenues to Europe', 6.4.2016 COM(2016) 197 final. Available on: https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-reform-of-the-common-european-asylum-system-(ceas) [Accessed on 9 May 2020.]

[135] E. L. Tsourdi, p. 28.

burdens on the Members.[136] The purpose of the directive was to create a unified strategy for all Member States to use when the standard asylum system is overloaded due to processing large amounts of migrants with alternative forms of protection needs. It was set to grant temporary and immediate protection for non-EU nationals who do not meet the refugee criteria and who are unable to return to their country of origin. It defines 'displaced persons' as "[…] third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated […] and are unable to return in safe and durable conditions because of the situation prevailing in that country […]", a definition which could potentially include climate refugees.[137] Additional provisions are supposed to be granted to those who are particularly vulnerable, such as children or victims of extreme violence.[138] Unlike the CEAS, this directive is flexible and adapted to accommodate different contexts, making it an appropriate tool to be adapted for various sorts of mass migration, the parameters to which are to be considered on a case-to-case basis.[139] This directive could theoretically become a viable option for protecting climate refugees as well as other groups with needs for temporary protection if called into action.

6. Protection under EU Law - Legal and Political Mechanisms

International refugee law was introduced after the events of World War II and functions in parallel with international human rights law pertaining to refugees as a specific vulnerable group.[140] This co-existence of human rights documents guarantee refugees the rights found in ordinary human rights law as well as special rights to address specifically their vulnerability.[141] All Member States in the EU have signed all four of the Geneva Conventions including all three protocols, as a whole or with reservations, including the Geneva Convention and protocol relating to the status of

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[136] H. Beirens, et al., *Directorate- General for Migration and Home Affairs, EU Commission, Study on the Temporary Protection Directive*, Jan 2016, p. 1.

[137] Temporary Protections Directive, *Council Directive 20 01/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof,* 2001, Article 7.

[138] Ibid., Article 28

[139] Ibid., Article 2(a)

[140] A. Edwards, 'International Refugee Law', in *International Human Rights Law,* edited by David Moeckli, Sangeeta Shah and Sandesh Sivakumaran, 6th impression United Kingdom: Oxford University Press, 2014, p. 512.

[141] J. Mink, p. 130.

refugees.[142] At a regional level, the EU's efforts to create harmonisation between EU law and international refugee law included creating the CEAS, which places obligations on Member States to at least meet the minimum requirements of protecting refugee rights,[143] as such ensuring refugee applications to be met with *habeas corpus*, that is the right to a speedy application process, as well as access to enjoyment of several rights while awaiting verdict. Additionally, some international refugee law pertaining to the right to asylum have become incorporated in other EU law as well. In the Charter, Article 18 states that "[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union […]."[144]

An article related to refugees that is of high importance for the right of climate refugees is Article 33(1) in the Refugee Convention, which states that any person who would risk having their lives and safety threatened cannot be returned or expelled.[145] In the EU Charter the article on non-refoulement takes the form of Article 19(2), which states that no person shall "be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[146] Prohibition of torture is internationally considered *jus cogens*, that is a universally recognised juridical norm "[…] from which no derogation is permitted […]."[147] Limitations of the article of non-refoulement can only be done if the person in question is deemed a severe danger to the security of the country that they have applied for asylum in or if the person has become convicted of a serious crime. As for obtaining a refugee status, a person according to the Refugee Convention Article 1(a) must be "[…] persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion […]", whereas persecution is generally defined as threats to freedom or life.[148] The QD makes the same distinction, albeit with more sub articles determining at what point a refugee

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[142] State Parties to the Following International Humanitarian Law and Other Related Treaties as of 29-Apr-2020, Available on The International Committee of the Red Cross' website: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp [Accessed on 9 May 2020.]

[143] J. Mink, p. 124

[144] The EU Charter, Article 18

[145] The Geneva Convention 1951, Article 33(1)

[146] Ibid, Article 19(2)

[147] C. Chinkin, 'International Law' in *International Human Rights Law,* edited by David Moeckli, Sangeeta Shah and Sandesh Sivakumaran, 6th impression, United Kingdom: Oxford University Press, 2014, p. 84.

[148] A. Edwards, p. 518.; Convention and Protocols Pertaining to The Rights of Refugees, Article 1(a)

can no longer be considered a refugee. For example, while the Refugee Convention states in Article 1 that a person who is "[…] guilty of acts contrary to the purposes and principles of the United Nations,"[149] on exclusions in the QD adds that the article "applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned."[150]

The reader might have noticed that the content of the 1951 Refugee Convention, including the article in regard to non-refoulement, is applicable to refugees and not other types of migrants. Logically, what follows is that climate refugees are not covered by the rule of non-refoulement as they do not fall under the same legal definition as refugees. Article 33(1) is applicable to asylum seekers who have not yet been granted asylum, with the purpose of to protecting asylum seekers at the border. Unfortunately, this protection becomes obsolete once it is determined that a person does not meet the criteria for receiving refugee-status,[151] as general human rights law does not hinder refoulement if the prosecution that the person faces in the country of origin does not consist of human rights violations concerning articles considered absolute or inviolable as per *jus cogens* or general human rights law.[152] Arguably, violations of human rights caused by climate change effects do not necessarily constitute prosecution by the state.

That said, there is potential for changes to the praxis of ruling, which may expand scope of interpretation of the legal definition of refugees in favour of climate refugees. One of the foremost and more recent cases that may allow these changes to take place was *New Zealand v Teitiota*. Ioane Teitiota is a citizen of the Republic of Kiribati who applied for asylum in New Zealand in 2013 as his island was threatened to become uninhabitable due to sea water rising within the next 10-15 years.[153] He claimed that the changes in housing density put both him and his children at risk of violence, as the lack of habitable land and access to drinking water led to overcrowding and increased tensions among the habitants.[154] When his application was rejected, Teitiota contested the tribunal's decision stating that by expelling him New Zealand had violated his right to life under Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR).[155] The threat of his right to life was found inadmissible and insufficiently substantiated under all national instances, as

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[149] Refugee Convention, Article 1(F)

[150] QD, Article 12(3)

[151] A. Edwards, p. 521*p.*

[152] Ibid., p. 522.

[153] New Zealand v Teitiota, CCPR/C/127/D/2728/2016, §7.2

[154] Ibid., §2.4

[155] Ibid., §1.1

the UN Human Rights Committee (HRC) in 2016 upon exhausting all national remedies. What makes the case of *New Zealand v Teitiota* an important development in the discourse on the legal options for climate refugees is that it may contribute to developing a court praxis where Article 6 is interpreted more broadly in asylum cases. Firstly, the HRC acknowledged that failure to protect human rights from environmental hazards known to the state "[…] may constitute an omission that falls afoul of article 6(1) of the Covenant."[156] This stance places emphasis the burden of the state to exercise due diligence relating to adaptive measures. Furthermore, the HRC made the following statement:

> […] The obligation not to extradite, deport or otherwise transfer pursuant to article 6 of the Covenant may be broader than the scope of the principle of *non-refoulement* under international refugee law, since it may also require the protection of aliens not entitled to refugee status. Thus, States parties [sic] must allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against *refoulement*. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin. The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that this assessment was clearly arbitrary or amounted to a manifest error or a denial of justice.[157]

This statement by the HRC sets precedence for domestic courts to apply a new interpretation to an Article of the ICCPR, which is legally binding to the EU Member States. Courts often use other court rulings to interpret individual claims, in particular when the claim of right violations is conflicting or ambiguous. This means that rulings and commentaries from different courts are important for deciding court outcomes.[158] In the case of climate refugees, this type of asylum application is still relatively unfamiliar to domestic asylum courts, which makes the content of rulings in individual cases like this are particularly important. The HRC is furthermore a highly legitimate court with high expertise in international human rights law, which means that decisions made by the HRC could carry a direct influence onto rulings of domestic asylum processing courts when assessing climate refugees. A statement of this sort can also have normative repercussions on the EU asylum policy and the restructuring of CEAS by enabling refugees to apply and be granted asylum to the point where non-refoulement applies to them, without requiring that they fulfil the refugee criteria.

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[156] Ibid., §4.6

[157] Ibid., §9.3

[158] C. Chinkin, p. 87.

Above, I have discussed a change of interpretation of refugee law can result in a new praxis of application processing where climate refugees under the right circumstances can potentially receive coverage. For a more systematic solution we can discuss the means by which climate refugees could be included in the final version of the CEAS when reconstructed, alternatively that they can be granted protection under the TPD, which I introduced in Chapter 5. TPD could be considered an alternative directive to the CEAS, under which climate refugees would be offered protection systematically across all Member States in the EU. This Directive would work similarly to the CEAS, as it would be legally binding for all EU Member States and would guarantee solidarity and cooperation in cases of mass influx of displaced persons that do not fall within the CEAS. Furthermore, it would promote fairness and avoid situations where individual Member States are over-encumbered, acting as proof that cooperative directives and regulations between intergovernmental bodies are, in fact, possible to create in order to further the goal to protect human rights. That said, the reason why this directive is granted less attention in this Chapter than the CEAS and the HRC ruling is that, as of today, I do not consider the TPD to be a realistic option. In fact, even though it was created nearly 20 years ago, the TPD is yet to be activated. I will explain why in the next chapter.

7. Establishing the Limitations of Protection

At first glance, it may appear that there are several different options for providing protection for non-EU nationals seeking refuge from climate change related reasons. Unfortunately, it is not as simple. While the development in the case of Teitiota is promising for individual applicants, it does not by any means offer the same protection for climate refugees compared to an extensive system geared towards specifically refugees. Furthermore, the mere fact that TPD in a sense is system a that could fit the purpose of systematic protection of climate refugees but is yet to be implemented is illustrative of as to why this is a challenge to begin with. In this chapter I will discuss the challenges with the current CEAS, including some of the social and political causes for the obstacles to its implementation pertaining to racist and Eurocentric attitudes towards to the non-white other. I will return to this and to discussing the TPD after first discussing the CEAS, as the CEAS suffers many of the same problems as the TPD.

First, it should be noted that the existing CEAS in its current form is filled with flaws. There are primarily two reasons for this: 1) the nature of minimum directives and 2) the lack of

willingness among States to abide by minimum directives. In Chapter 6, I wrote about the nature of the obligations placed on Member States to follow international human rights law, illustrating how the structure of EU asylum law has ensured a baseline for harmonised standards of human rights protection across Europe. Regretfully, a universal baseline protection does not guarantee that the *de facto* protection for refugees meets the goal of a high standard. The CEAS directives are riddled with exceptions and limitations to allow Member States to diverge from the documents within reason. The exceptions as stated in the directives are deliberate, as they can be considered a fundamental cornerstone of harmonisation of implementation of human rights law.[159] Following are examples of how the articles in the Directives are written in order to allow for a more flexible implementation in domestic law. For example: Article 7(1) of the RCD states that all:

> […] [a]pplicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.

This is then followed by Article 7(2), which states that: "Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection."[160] Both sub-articles leave room for interpretations about the holding conditions and freedom of movements of applicants.

For practical reasons the articles in the directives are subject to the usage of the principle of proportionality. Each State has different points of departure, with different abilities to meet a set goal. To ensure that the goal can be met by all, the Member States agree on a minimum level for all parties to meet, with room for interpretation. In praxis a low bar can incentivise lower effort as there is no punishing mechanism for States to not do more than what is asked.[161] For example, the human right of access to health, which is regulated under Article 19 in the RCD states that: "Member States shall ensure that applicants receive the necessary health care which shall include, at

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[159] F. Mégret, 'Nature of Obligations' in *International Human Rights Law,* edited by David Moeckli, Sangeeta Shah and Sandesh Sivakumaran, 6th edition, United Kingdom: Oxford University Press, 2014, p. 104.

[160] RCD, Article 7(1)(2). It should be further noted that this particular article does *not* refer to persons who are facing detentions, but merely to applicants.

[161] R. Byrne, 'Remedies of Limited Effect: Appeals Under the Forthcoming Directive on EU Minimum Standards on Procedures', *European Journal of Migration and Law,* vol. 7/no. 1, 2005, p. 77.

least, emergency care and essential treatment of illnesses and of serious mental disorders."[162] This article I believe is particularly telling and illustrative of the problem with minimum directives, as it exhibits two different ways that a right within the CEAS can be limited. First it makes a distinction regarding what must be ensured by the state (*e.g* access to emergency care and essential treatment) within the health care article, effectively leaving it up to the States to decide what should be provided outside the obligation. Latterly, the protection of the right is further weakened as the State is allowed room for interpretation as to what is considered "essential treatment of illness" and, for that matter, what is considered a "serious mental disorder." Due to the costly nature of health care, this ambiguity in interpretation can feasibly incentivise States to cut spendings, disregarding the importance that access to health care holds to a person's quality of life. There are several studies that show how access to healthcare in refugee camps is limited and of poor quality, which has carried negative consequences into the large population currently residing in refugee camps. For example, studies on some of the largest refugee camps on Lesbos, Greece have shown that lack of sanitations, overcrowding and lack of vaccination programs negatively impacted the welfare of refugees[163] and that many medical resources are missing. This includes mental health care to combat trauma, PTSD and sexual assault, as well as services that specifically concern persons who are pregnant.[164] The flaws of minimum directives do not per definition mean that the standard in the asylum system must be low. In fact, until recently several Member States performed above the minimum level, which unfortunately has come to change as a result of changes in political opinion among voters, the economy and global events, the nail in the coffin being the refugee crisis of 2015.[165] Nonetheless, adhering to only producing the bare minimum has impacted the efficiency of the CEAS.

This brings me to the second issue with the CEAS. States not only provide the minimum as what is expected from them in these directives, but several Member States have opted out of meeting the directives altogether. The Dublin regulation failed mid-crisis due to overwhelmed domestic asylum systems and inabilities to meet the requirements that exist therein, subsequently becoming quickly abandoned by EU Member States.[166] While the principle of non-refoulement on

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[162] Ibid., Article 19(1)

[163] M. Hermans, et al., 'Healthcare and Disease Burden among Refugees in Long-Stay Refugee Camps at Lesbos, Greece' in *European Journal of Epidemiology,* vol. 32/no. 9, 2017, p. 851- 854.

[164] D. Moris, Demetrios & A. Kousoulis 'Refugee Crisis in Greece: Healthcare and Integration as Current Challenges' in *Perspectives in Public Health,* vol. 137/no. 6, 2017, pp. 309-310.

[165] See for example E. Karageorgiou, 'Downgrading Asylum Standards to Coerce Solidarity: Sweden as a Case in Point', *Eu Migration Law Blog,*13 May 2016.

[166] A. Niemann & N. Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives', *CMS: Journal of Common Market Studies,* vol. 56/no. 1, 2018, p. 4.

paper is respected, there have been numerous examples of its principle having become breached by the Member States, which has resulted in death, torture and ill-treatment of asylum seeking migrants over the last years.[167] For example, detention has become frequently used for persons who enter the EU in an unauthorised manner, in spite of irregular entry not being considered a punishable crime as per the Refugee Convention of 1951.[168] In praxis, this means that many of today's refugees attempting to enter the EU for example via Turkey are particularly vulnerable for detention as they are considered an irregular migrant, a notion which was interpreted from Article 39(1) in the APD which states that Members can reject reviewing applications from asylum seekers that arrive via third-safe countries.[169] The ill-treatment of persons is particularly prevalent in long term refugee removal camps, where persons for a prolonged period of time are exposed to poor living conditions, lack of employment of human rights and violence, often in wait for results from a slow application procession.[170] I mentioned earlier the clauses in the APD that regulate what is considered second and third safe countries for asylum seekers and that they leave room for interpretation for the Member States as to what is considered adequate living standards in a safe third country.[171] This has had severe consequences. For example: during the earlier years of the migration crisis EU member states would consistently send applicants to Greece (which due to its' geographic location was already a common first country for asylum seekers) claiming that this would not breach the APD. Greece, which had just gone through an economic crisis, quickly became overburdened, which had detrimental effects for the quality of life in the Asylum centres. The notion of Greece being considered a second safe country regardless of the deplorable conditions the applicants were left to live in is illustrative of how these articles were interpreted.[172]

The lack of willingness is at the core of the issue. The TPD, discussed earlier, is an example of a directive that fell flat before it was tested. Since its inception in 2001 only Italy and Malta have requested its activation, which ultimately never passed trough the EU Commission.[173] In 2016, The EU Commission performed a study on its strengths and weaknesses, where they determined that the

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167 J. Mink, p. 120.

168 C. Costello, & M. Mouzorakis, 'Detainability of Asylum Seekers', *Refugee Survey Quarterly,* 35, 2016 p. 53, p. 56

169 C. Costello & M. Mouzorakis, p. 57.; APD, Article 39(1)

170 Costello and Mouzorakis, p. 57.

171 Mink, p. 121.

172 Ibid, p. 123.

173 H. Beirens, et al., p. 13.

reason why it failed is the same reason why it would have worked in order to protect climate refugees: its flexibility.[174] In addition to faltering bureaucracy, the TPD was a tool built on solidarity between states, making political will across Europe a necessary factor for its activation and for it to achieve its intended purpose. Uncertain definitions regarding what should be considered a mass-influx of persons with temporary protection was suggested to be decided on a case-by-case basis, which made activation of the directive impossible as Member States were not able to agree on what conditions constitute need for refuge, nor what measures to implement.[175] The purpose of the lack of set definitions was to make the document adaptable, both to the situation at hand and to the abilities of the individual Member State, yet in reality the lack of set definitions would only encourage States to make estimates of own reception capacity, potentially undermining of the solidarity that was said to be at the core of the TPD's function.[176] The failure of the TPD perfectly illustrates both the issue with voluntarism on the basis of solidarity as well as the reason why minimum directives are still important and necessary.

The next step is to ask where the unwillingness stems from. I believe that a good place to start is to turn towards post-colonial theory and the attitude towards non-European migrants. Over the last decade Europe was hit with a new wave of anti-immigrant sentiment. This change has happened gradually, but the political shift received a boost in the EU circa 2016 in the light of the Syrian refugee crisis in 2015, following media reporting and debates on social media.[177] The subject of refugee reception has been politically divisive. For example: a study performed by Van Prooijen, Krouwel and Emmer revealed that people who identified themselves as far right of the left- right spectrum predominantly express increased levels of anxieties in regards to refugees, while people who identify to the far left have expressed more tolerance.[178] Similar findings by Harteveld, Schaper, De Lange and Van Der Brug showed that attitudes towards the refugee crisis were influenced by the pre-existing political world-view, where right leaning voters were more likely to interpret large numbers of migrants as something negative than the left leaning counterparts.[179] The same study also revealed that the manner of reporting of the refugee crisis in numbers has played a

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[174] Ibid., p. 14.

[175] Ibid.

[176] Ibid., p. 19.

[177] J. W. Van Prooijen, et al., 'Ideological Responses to the EU Refugee Crisis:
The Left, the Right, and the Extremes', *Social Psychological & Personality Science,* vol. 9/no. 2, 2018, p. 143.

[178] Ibid.

[179] E. Harteveld, et al., p. 170.

large role in the development towards EU-scepticism among right-leaning voters. In all of these studies, the far-right was described as "anxious."[180] Over time, the anxious far-right increased in size and affirmed a populist worldview that appealed to many voters. This created a shift towards a more restrictive immigration policy in multiple Member States. The discourse on accepting and not accepting refugees often centres around a couple of speaking points, whereas the economic cost of immigration is one of the more popular. Common arguments include immigration as a heavy strain on social welfare, redistributions in resources to police to compensate for alleged increase in criminality as well as unemployment for nationals.[181] Another common sentiment is based on the presumption that immigrants as inherently incapable of contributing to society, but instead leeching off welfare and governmental support.[182] Setting aside the contents of the arguments, as these are already heavily discussed and debunked in other research, they display with clarity the dimension that is lacking in the discourse: the notion of seeking asylum is an absolute necessity for persons. Instead of placing focus and recognitions of the moral importance to assist out of mere humanity, the topic is discussed in terms of an exchange of services that is either beneficial or detrimental to European culture, security and economy.

The discussion of migration as an exchange of resources does two things; first it dehumanises the refugee and diminishes the circumstances for their existence into something debatable, second it deflects solutions and ultimately avoids participation or taking of responsibility. In order for the States to avoid overwhelming societal change due to migration, preparation and strategising are key-components for transitioning from one state. This is the same notion as proposed by the Nansen Initiative[183] to use planned relocation in order to minimise the economic damages to the family facing displacement. There are ample studies that research how regional and state policy can be used to assist integration, employment and naturalisation and avoid segregation.[184] However, as the current trend is leaning towards a strict limitation on immigration,

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[180] Ibid., p. 174.

[181] N. Esipova, et al., *How the World Views Migration*, Geneva, 2015, p. 20*p.*; V. Esses, P. M. Brochu & K. R. Dickson, 'Economic Costs, Economic Benefits, and Attitudes Toward Immigrants and Immigration', *Analyses of Social Issues and Public Policy,* vol. 12/no. 1, 2012, p. 133*p.;* N. Pyrhönen, K. Creutz & M. Weide, 'Orchestrating National Unity: An Assessment of Discourses in Immigrant Legislation and the Surrounding Parliamentary and Public Debates' in T*he Challenge of Minority Integration: Politics and Policies in the Nordic Nations,* edited by Peter A. Kraus and Peter Kivisto, Germany: De Gryter, 2015, e-book, p. 163.

[182] N. Pyrhönen, K. Creutz & M. Weide, p. 163.

[183] The Nansen Initiative, p. 37*pp.*

[184] For more information on different schools of integration policy and efficiency, see P. R. Ireland, *Migrant Integration in Times of Economic Crisis: Policy Responses from European and North American Global Cities*, New York: Palgrave Macmillan, 2017, e-book.

such means run the risk of becoming under prioritised, such as through the dismantlement and defunding of common meeting places and language programs.[185]

This brings me back to Chapter 3 about theory and the notion of the non-white stranger. I particularly want to return to Samaddar's take on the migrant crisis as a crisis not for the fleeing individual but for Europeanism as an ideology, where the European nationals perceive the immigration by refugees as less of a personal necessity and more as an attempt for evil to infiltrate the European bubble.[186] Ideals such as liberalism, post-secularist Christianity, peace and wealth make out the global perception of Europe, perhaps of equal standing with the understanding of Europe as "white."[187] Migration as a form of infiltration is essential to the political narrative of anti-immigration, as it dehumanises the stranger in the same way as a Nation at war paints the enemy, thus accentuates the difference between us and them. Gossip, fear-mongering, distinctions between alternative media "reporting on the truth" and *die lügenpresse* (*i.e* the established media) and satire all serve the same purpose of dehumanising the other and invoking distrust.[188] Tragedies such as the news that several thousand persons were presumed dead from shipwreck in the Mediterranean Sea were discussed in terms of being deaths of illegals or ISIS members, whereas the latter epithet when applied to asylum seekers creates aversion towards specifically muslim migrants.[189] The effects of non-safe travel modes or lack of legal ways into Europe are a symptom of a conscious choice by politicians and legislators. By making it harder to reach Europe or lawfully apply for asylum, more people are kept at bay and unable to be granted asylum, thus making detention easier to justify. This practice is not new. Additional hindrances are created, such as the demanding of legal paperwork or valid forms of identification make it harder for persons to be granted asylum, despite the known fact that these documents are often not carried by refugees.[190] The deaths at the Mediterranean Sea and

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[185] There are multiple examples on this praxis to be found in policy proposals and actions in Sweden. A recent example is the budget proposal from the extreme-right nationalist party the Sweden Democrats (SD) in late 2019, in the municipality Kristianstad where they have high influence. They proposed a budget cut of 4 million SEK on the language programme Swedish for Immigrants (SFI), refugee related activities and teaching in other languages save for Swedish, stating that "every governmental function must pull their straw to the stack [my translation]." See https://kristianstad.sd.se/wp-content/uploads/sites/84/2019/01/SD-Kristianstad-Budget-2019.pdf p. 7*p.*

[186] R. Samaddar, p. 90.

[187] R. Samaddar, p. 89.

[188] J. Sinram, 'I am not racist, but…', *in Fortress Europe?: Challenges and Failures of Migration and Asylum Policies,* edited by Anette Jünemann, Nicolas Fromm and Nikolas Scherer, Wiesbaden: Springer VS, 2017, p. 163*p.*

[189] A. Błuś, 'Beyond the Walls of Paper. Undocumented Migrants, the Border and Human Rights', *European Journal of Migration and Law,* vol. 15/no. 4, 2013, p. 414.

[190] C. Costello & M. Mouzourakis, p. 58.

the deplorable living conditions in refugee camps can be avoided, nonetheless many politicians opt to uphold the harsh conditions or to make them harsher.

The act of referring to migrants as illegal immigrants, whose identities cannot be confirmed, further strengthens the public's perception of the migrant as a criminal who could have migrated in the legal and correct manner but opted not to. To strengthen the image of the asylum seekers as being strong enemy warriors, the common image of the average asylum seeker has been turned into a young, able-bodied man, which has indirectly negatively impacted the availability of protection for women under the CEAS, who are less likely to receive support both during and after admittance as a means of integrating them into the labour market.[191] The stereotype of the refugee has been contested and while there is documentation that persons of all ages and genders flee to Europe,[192] I will to this day still find persons who claim the narrative that refugee children are props or actors, among others from political commentators.[193]

The view of the non-white other as an invading enemy is further strengthened by the actions of the States as many, including Hungary and Poland, close borders and other States decrease the amount of accepted refugees per year.[194] Early 2020, Syrian refugees attempting to enter Greece from Turkey were greeted with pellet guns and tear gas, repeating the similar events that took place a couple of years earlier.[195] The events during the Spring of 2020 prompted the Head of the EU Commission to make the following statement:

> […] Those who seek to test Europe's unity will be disappointed. We will hold the line and our unity will prevail. Now is the time for concerted action and cool heads and acting based on our values. Turkey is not an enemy and people are not just means to reach a goal. We would all do well to remember both in the days to come. I thank Greece for being our European *ασπίδα* [English: shield] in these times.[196]

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[191] E. Morris, 'Family Reunification and Integration Policy in the EU: Where Are the Women?', *Journal of International Migration and Integration,* vol. 16/no. 3, p. 662*p.*

[192] For example by Oxfam's report on the Situation of Refugees and Migrants in Greece (2016), p.10*p,* accessed via https://www-cdn.oxfam.org/s3fs-public/file_attachments/oxfam_gender_analysis_september2016_webpage.pdf on 10 May 2020.

[193] E. Rosenberg: 'Migrant kids are 'child actors,' Ann Coulter says on Fox News, telling Trump not to be fooled', Washington Post, June 19, 2018 accessed via https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/06/18/migrant-kids-are-child-actors-ann- coulter-says-on-fox-news-telling-trump-not-to-be-fooled/ on 10 May 2020.

[194] R. Samaddar, p. 91.

[195] Ibid.

[196] See the transcript attached, Appendix 1: *Remarks by President von der Leyen at the joint press conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel, 3 March 2020.*

In this statement, the Head Commissioner briefly communicates her alleged distaste for persons to be used as pawns in a game of chess between the EU and Turkey, yet her overall tone and the wordings surrounding it delegitimatise this sentiment. Furthermore, it marginalises the dangers faced by the refugees and reaffirms the EU citizens perception of the migrant who is, in the best case scenario, viewed as an object and, in the worst case, an intruder to defend Europe against. The statement serves to unify the EU as a whole, as she praises the border guards of Greece for protecting and upholding order at what she calls "the European border."[197] With the Head Commissioner's statement, EU appears less like an international power with the ability to protect human rights, liberty and equality, but as a unit fighting what it has determined to be the enemy.

In press conference, the Eu Commissioner does not reference the refugees outside the statement above, save for a brief moment where she expresses regret that the refugees, whom she refers to as 'migrants' opposed to 'asylum seekers,' "[…] have been lured through false promises into this desperate situation."[198] Saying this serves two purposes: First, it diminishes and marginalises the need for asylum. The persons who were residing in the refugee camps in Turkey and Greece in 2016 were estimated to be predominantly from Syria, Afghanistan and Iraq, which indicates that most entered the EU to seek asylum due to conflict and civil unrest.[199] However, since migrants and refugees have different rights and different protection, approaching the asylum applicants as if they are migrants who do not qualify as refugees will greatly harm their opportunity to receive protection. Second, this statement has normative effects on how the need for asylum is viewed. It disregards the utmost desperation that has led people to apply for asylum in the first place and treats the choice of EU as a destination as a set of pulling factors, a sentiment that has become increasingly popular in the EU as a method to place doubt on the refugee's intentions and honesty.[200] Refugees are frequently conflated with economic migrants, another migrant group that is unpopular with the European extreme right due to a perceived threat to the State citizens' employment prospects and way of life.[201] For the European individual, the need for asylum seems

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[197] Ibid.

[198] Ibid.

[199] Oxfam, *Gender Analysis: The Situation of Refugees and Migrants in Greece*, August 2016, p. 12; D. Moris & A. Kousoulis, p. 309.

[200] L. Mayblin, 'Complexity Reduction and Policy Consensus: Asylum Seekers, the Right to Work and the 'Pull Factor' Thesis in the UK Context', *The British Journal of Politics And International Relations, vol. 18(4)*, 2016, p. 812*pp.*

[201] Ibid, p. 824.; D. Abrams and G. A. Travaglino, p. 313.

less like a necessity and more like a choice, as if the need for refuge is negotiable or will disappear if the EU puts up a harder fight.

Ultimately, how lawmakers and politicians approach the subject of migration carries detrimental effects on its application. In this chapter I have analysed some of the many challenges that come with using a voluntary system for implementing refugee rights across multiple different States, regarding both the challenges stemming from colonial bias and the nature of the CEAS as a factor which allows human rights violations to occur as a result from said bias. In the next chapter, I will discuss the denomination "climate refugee" and how it proposes additional challenges pertaining to how climate refugees fit into current regulation.

8. The Contextual and Terminological Challenges in Asylum Policy

Earlier in this thesis I discussed the concept of the status of the climate refugee as complicated as well as ambiguous, making it stand apart from other legally and politically recognised categories of migrants. For example, for a person who migrates due to loss of livelihood caused by destruction from salt water intrusions, the reason for their migration is not much different from a person striving for a pathway out of poverty. In fact, it is not unthinkable that many of those who are considered economic migrants today have lost their access to fair remuneration due to climate change or other persistent changes in the environment. Towards the end of the previous chapter I briefly discussed how European media and politicians refer to refugee as other forms of migrants to minimise the severity of their push factors. This chapter will continue that discussion while focusing on the challenges that surface when a group of persons with both push and pull factors, often very conflated, applies for asylum. When assessing the need for international protection, these unclear distinctions may muddle the lines.

I want to return for a moment to the case of *New Zealand v Teitiota* to discuss the reasons why Teitiota applied for asylum in New Zealand and how these were addressed, as it illustrates how push and pull factors are judged as cause for migration for displaced persons. As the reader may remember, Teitiota argued violation of the right to life under Article 6 in the ICCPR, as removal to Kiribati would entail living with his family in overcrowded cities with large risk of violence without access to freshwater.[202] The threat to personal safety here acts as a push factor, forcing Teitiota to take actions and apply for asylum in a different state other than his own. It is, however, only one

[202] New Zealand v Teitiota, CCPR/C/127/D/2728/2016, §3

component in a long chain of cause and effect. As the case progressed, the quality of the other claims to violations to the right to life (*e.g* challenges with growing crops and access to clean water, as well as access to housing) were contested. The following is a citation of the ruling of the HRC:

> […] The Tribunal considered a substantial amount of information and evidence from both the author and an expert concerning the effects of climate change and sea level rise on the people and geography of Kiribati. The Tribunal […] found that there was no evidence that the author had faced or faced a real risk of suffering serious physical harm from violence linked to housing, land or property disputes. The Tribunal also found that there was no evidence to support the author's claim that he was unable to grow subsistence crops or obtain potable water in Kiribati. The author had claimed that it was difficult, not impossible, to grow crops as a result of saltwater intrusion onto the land. The Tribunal considered that there was no evidence establishing that the environmental conditions the author faced or was likely to face upon return to Kiribati were so parlous that his life would be jeopardized, or that he and his family would be unable to resume their prior subsistence life with dignity. […][203]

Most noteworthy from this judgement is the distinction between "impossible" and "difficult." While *impossibility* to obtain necessary resources indicates a clear push-factor, *difficulty* makes the decision callous, as it can both pull and push. Climate change mediated conflict and political tensions can act as push-factors, while conflict without high risk of immediate harm to the person can function merely as a pull-factor. The HRC found that there was no evidence of imminent harm to him or his family, as the effects following climate change are considered to be of gradual onset and as his claimed threat of violence could not be considered personally directed at his family.[204] Similar rulings could be found in the case of *Beydon et al. v France,* where court had ruled that in order for a person to claim victimhood of violations of right in the Covenant they "[…] must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such effect is imminent […]."[205] Climate refugees may find themselves in similar predicaments as Teitiota due to the fact of climate change related causes for migration are not linear with a clear cause and effect. The murkier the line between established refugee needs and climate refugee needs, the harder it is to argue these on the same terms. Once again, a willingness to apply a generous interpretation of Article 6 in the ICCPR in court — both domestic and international — is a prerequisite for a climate refugee's application for asylum to be granted.

I will now move on to a second problem with assessing climate refugees' applications, namely the severity of the threat, what is considered imminent harm and what persecution entails

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[203] Ibid., §4.6

[204] Ibid., §8.4, §8.5

[205] Beydon et al. v France (CCPR/C/85/D/1400/2005) §4.3

concerning climate change. In Teitiota's case, the changes in the climate were not deemed urgent enough, in spite of expert opinion corroborating Teitiota's claims regarding the status of the Islands of the Republic of Kiribati. The Islands consist of largely infertile soil due to salt water and waste contamination, dire lack of fresh water supplies, prevalence of natural disasters, quickly growing population, high unemployment and high risk of violence.[206] While his claims were believed by the HRC, as well as the Tribunals and courts before them, it was argued by the State party that there was not enough proof to indicate that Teitiota's life would be threatened with torture or death as a result from refoulement, a sentiment which was further echoed by the HRC.[207] This claim by the State party was further supported by the fact that the Republic of Kiribati has a strategy in place to adhere to the National Adaptation Programme of Action of 2007, which potentially could salvage the prospected future of the State, reduce vulnerabilities among the population and enforce resilience measures.[208] By taking steps to address the dangers from climate change as potential violation of human rights, the HRC deemed that the Republic of Kiribati had not failed to uphold its positive obligations to ensuring its citizens enjoyment of human rights.[209]

This ruling brings up two interesting points in regard to how State action might have to be interpreted in the future, namely whether insufficient exercise of due diligence can be considered persecution and, if so, at what point inefficiencies in implementation of adaptive efforts can be considered violations. Furthermore, it invokes questions regarding the political implications. Michael Kidd, who is Teitiota's lawyer, expressed frustration when interviewed by the BBC in the months before Teitiota's scheduled deportation, stating that he fears that the ruling was made from fear among wealthier countries like New Zealand that making exceptions for one climate refugee could result in the allowance of several millions more, referring to a statement that had been made by the judge in one of the earlier rulings.[210] Kidd has also stated that this type of reasoning by New Zealand courts takes away from the circumstances of the individual cases and is unfortunately founded.[211]

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[206] New Zealand v Teitiota, §2.4

[207] Ibid., §6.1; §8.4; §9.7

[208] Ibid., §9.12

[209] Ibid., §9.6

[210] T. McDonald: 'The Man who would be the First Climate Refugee', BBC, Kiribati, 15 November 2015, available on https://www.bbc.com/news/world-asia-34674374 [Accessed 21 May.]

[211] S. Coelho: 'People are Dying as a Result from Climate Change', 27 November 2011, available on: https://p.dw.com/p/1APTy [Accessed 21 May 2020.]

As it stands today, not all human rights violations can necessarily be considered persecution, neither does failure to exercise due diligence.[212] That said, this is worthy of consideration, as lack of proactive measures in terms of dealing with climate change can result in detrimental effects by natural disasters or armed conflict. Ultimately, States have the foremost responsibility for their citizens and may be expected to take actions to protect, such as by relocating persons from high risk areas by evacuation and offer protection for internally displaced persons as per the Guiding Principles on International Displacement (1998).[213] If the recognition by the HRC in regard to this holds water internationally in setting praxis is a different story.

9. Conclusion

In this thesis, I have shown how refugees are protected by EU asylum law and in what capacity climate refugees can fit into the equation. In doing so, I analysed both the bureaucratic as well as the attitudinal aspects of protection as it has evolved following the refugee crisis of 2015. In addition to my analysis of the CEAS I also analysed the terminological and contextual challenges concerning climate refugees as an emerging group that is today practically unaccounted for by international human rights law. This chapter will conclude my research as well as function as a chapter for discussion.

The main research question for this thesis was *How are climate refugees protected under EU legislation?* The answer is in fact that they are not, for the most part. The CEAS largely follows the 1959 Refugee Convention and as such shares its definitions. As climate refugees for most part do not meet the criteria for falling under these definitions, they cannot expect refuge in the EU.[214] A walkabout way of introducing climate refugee protection in CEAS is through changing the praxis for how individual asylum applications are interpreted by immigration courts domestically. This can be done through legislative influences stemming from highly influential human rights courts setting precedence for using a wider interpretation when accepting refugees, as was suggested through the commentary of the HRC in *New Zealand v Teitiota.* Here, the HRC recognised of both the

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[212] A. Edwards, p. 519.

[213] UN High Commissioner for Refugees (UNCHR), *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, p. 4.

[214] The exception to this rule are climate refugees seeking refuge due to conflict or persecution caused by climate change, which some political scientists have suggested to be a mediated reason for the wars in Syria and Yemen, making the migration crisis of 2015 technically a climate refugee crisis.

possibility that a State theoretically can be held accountable for omission of due diligence to protect its citizens from climate change, as well that as a generous interpretation of Article 6 should be applied to rulings on asylum applications. Seen together, this could potentially result in the approval of several more kinds of asylum applications. Regardless of outcomes, these additions to the discussion about climate refugees hold potential to prove to be game changers for migration policy as a whole.

However, while indicative of a change in recognition of different refugee needs, this is not a long term solution to providing protection for climate refugees. It relies on individual assessments of persons against criteria where a new praxis is yet to be established, which begs the question of: for what did *New Zealand v Teitiota* set really set praxis? The Pacific Islands are considered one of the more high risk areas in terms of climate change damage and The Republic of Kiribati faces great risk of complete uninhabitability within the next decade. This indicates an urgency and severe restriction on quality of life. In spite of these circumstances, Teitiota's application was rejected as he did not adequately provide foundation for the claim that the threat is urgent and personal. The ruling of this case was done against the same definitions and interpretations as a regular refugee case, merely conveying that a climate refugee can receive asylum on the same terms as an ordinary refugee provided they are, in fact, a refugee under the interpretation of the Refugee Convention of 1951. Furthermore, it is suggested that politics played a role in deciding the severity of his claims. There is an unwillingness among wealthier predominantly white States to accept climate refugees which is a group that predominantly consists of persons from vulnerable non-white communities, as expressed by Teitiota's lawyer. This unwillingness is detrimental to the possibilities for asylum application courts to make a more generous interpretation of the Refugee Convention. Even in the best case scenario, changes in praxis may be slow and inadequate. When taking into account the tendencies in the context of the CEAS where many refugees' applications are not always processed, it becomes unfathomable to expect due processing of individual assessments on a case-by-case basis. As such, this is by no means an ensured way that persons facing displacement will indeed enjoy the international protection they seek.

Whether or not climate refugees should be covered by the same protective system as the already established group of refugees is debatable. As mentioned, even the terminology faces resistance among human rights organisations due to fear that changes in refugee definitions will delegitimatise the Refugee Convention. The concerns of UNHRC regarding the illegitimatisation of current refugee law are valid and show that the future discussions in the academic sphere must be done with sensitivity towards the very real threat that asylum law is facing politically around the world. If the current refugee protection was to be negotiated there is a realistic risk the outcome

would be less generous than as of today, much thanks to the political developments and harshened attitudes towards the non-white other. For the very same reason, it might be contra-productive to negotiate changes in policy regarding climate refugees into the new CEAS, as this too may weaken asylum law under EU legislation. Instead, it is possible that a separate system for international protection could be more favourable and potentially more efficient.

Another reason why a separate system could be more favourable was revealed when in researching the CEAS and the ways which climate refugees are protected by the CEAS. One discovery is that the effects of the already existing protections of human rights of the refugee are (arguably) limited. The CEAS as of today is a very flawed instrument and does not meet its promises of ensuring a high standard of refugee protection across the EU. This is symptomatic of overloaded domestic asylum systems, a lack of EU Member State solidarity and inadequate as well as limited oversight over operations. That said, I would argue that the CEAS is not primarily threatened by its own structure, but rather the ways that the anti-immigrant sentiments in the political discourse have decided its' usage. Over the previous decade, the EU has seen a widespread and intense surge in extreme right populism which has had an impact on what kind of migration policy the country has implemented. As of today, several countries within the EU including Poland, Hungary, Greece and Italy, are run by extreme-right governments, whereas several more have minority governments where the extreme right parties that influence the political agenda. These political governments were not created in a vacuum, but have grown as a result from the power of the anxious and misinformed masses, many of which are fuelled by an aversion for migrants as the non-white other. I discussed this phenomena by highlighting the relationship between the anxious extreme right defending nationalist European ideals against the Middle Eastern or North African stranger, a development that I have argued as stemming from colonial sentiments. The White European desperately seeks unity within itself as the international distances shrink, attempting to create distance between itself (white, often Christian) and the other (non-white, often muslim) by the means of rumours, 'fake news', violence and policy to physically keep the non-white other outside the borders of Europe or in refugee camps. Despising the established media for its neutrality towards immigrants as Europe's attackers the anti-immigration supporter turns to alternative media, which provides them with an echo chamber of gossip, storytelling and reaffirmation of preexisting bias. Furthermore, as this anti-immigrant sentiment goes hand-in-hand with EU-scepticism, as it also threatens the EU *status quo* in terms of memberships. The consequences of Brexit have created turmoil in the EU, both as new bureaucratic challenges have emerged and as EU's international legitimacy has weakened. I have presented examples from EU Commission press conferences, news

articles and studies that reveal how medial discourse, both fake and established, influences public perception when discussing refugees, which in turn reinforces the political actions. The stranger becomes subject of objectification. By applying the perspectives granted from the theory of the other onto the CEAS, I determine it to be highly unlikely that the political climate in the EU would allow for a more generous interpretation of the refugee definition, nor do I suggest that climate refugees would indeed be offered adequate human rights protection, as this is already not a guarantee in refugee camps. In Chapter 7 I analysed the ways that the minimum directives encourage complacency among Member States. As for pre-existing systems, the TPD is by no means a given alternative to human rights protection for climate refugees. Its structure and content makes it very hard to activate and fully reliant on the solidarity of the Member States, which may render it useless. This outcome is, I argue, directly related to the political climate. As such, I have answered the sub-research question: *"How can EU Asylum law and the challenges with systematic protection of climate refugees be viewed from a post colonial perspective?"*

To summarise this last point and relate it to the core research question of the thesis: there is potential for legal protection for climate refugees within the EU. That said, how realistic it is that such protection will be actualised in this political climate is debatable. Both the TPD and the application of a more generous view on the grounds to asylum individual assessments are resting on the notion of willingness to participate among Member States, which may perhaps be hard to find in for as long as the racist, anti-immigration sentiments are present and influential in policy. This lack of willingness further makes it difficult to feel hopeful about the revisions to the CEAS if they are to happen, as the already low bar for protection of refugees may be lowered further. The EU is a highly influential conglomerate in the world with potential of reforming migration policy for the better or for worse. That said, there is still time for EU to take a proactive approach to means of protecting climate refugees and displaced persons. Hopefully, the EU takes this opportunity to set precedent in offering human rights protection for the migrants of the future.

10. Final Thoughts

The subject of refugees is a challenge to the international community as well as the to the concept of state sovereignty. The mere action of seeking refuge in a different State highlights a paradox that is yet to be solved or even completely understood by Nation States. This problem is perhaps most famously discussed by Hanna Arendt, who was one of the first to coin the term "rightless person" and problematised the accepted notion of human rights as a state given thing only available to those belonging to a rights-granting polity.[215] Just over 70 years later, save for the Refugee Convention, the international community is still without substantial means to tackle cross-border displacement; a gap in proficiency which is becoming all the more evident as the refuge needs and circumstances resulting in statelessness occur and evolve. Jill Goldenziel offers an interesting perspective on non-refoulement and refugee law as enigmas to the notion of state sovereignty, that is the concept that each State's sovereignty should be respected by other States in the international community. The international consensus that lead to international refugee law forces responsibility of other citizens onto other States. She writes the following:

> "Refugee status begins when a sovereign decides not to or fails to protect an individual's human rights to the point that the individual is compelled to disassociate himself completely from the sovereign. International refugee law presents a challenge to human rights law—and to the very notion of sovereignty—by suggesting that humans have rights independent of a sovereign. International refugee law is an acknowledgment that rights exist outside the state, and thus a threat to the concept of the benefits of sovereignty: a refugee may have more human rights outside of an oppressive state than within it. International refugee law both implies that human rights exist outside the sovereign and that when states cannot provide those human rights to their own citizens, other states are bound to provide a substitute, thereby infringing on their own sovereignty. This leads to a dilemma that may explain a doctrinal divide: if the human rights regime is based on the premise of a sovereign who can guarantee those rights, then rights that exist without a sovereign to guarantee them must be something outside of that human rights regime."[216]

This paragraph suggests that responsibility for human dignity itself does not belong solely to one state but is the responsibility of international governance. This, again, brings me back to accountability for climate change effects in a globalised world where nation states are faced with challenges that they may not be able to control. We can divide responsibility for this matter into two

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[215] J. Goldenziel, p.589., p. 613.

[216] Ibid., p. 588.

categories: 1) responsibility on a regional and national level and 2) responsibility on a global level. Traditionally viewed, a person becomes a refugee once the State of origin no longer fulfils their duty to protect its citizens. The interstate responsibility becomes emphasised, challenging both the sovereignty of the State of origin and the destination State, as the latter gains a degree of responsibility to persons outside its jurisdiction due to a different State's failure. From this position it has previously been accepted that the responsibility lies with the State of origin, as it has failed to fulfil its positive obligation to ensure that it is performing adequate due diligence for example through endorsing favourable normative actions or creating extensive and comprehensive regulations that can suppress potential violations of rights.[217] That said, when assessing climate change refugees and determining State culpability this becomes more challenging.

For one, there are a multitude of reasons why a State may not able to offer adequate protection from climate change, such in scenarios of conflict, lack of State funds or due to uncontrollable natural disasters, which are all factors that can be related to actions by the global community. Cultural and national habits of consumption of clothes and food, as well as things such production of infrastructure or industrial production contribute to the inequality of emissions of CO2 and inevitably to global warming. Furthermore, the uneven distribution of wealth, political instability and conflict do not occur within a vacuum and without relation to historical oppression of different States. Many of the States that will be hit the hardest from climate change were previously colonised by Europe, many of which still suffer the economic consequences and are less able to take adaptive and mitigative measures to the same extent as rich Western countries. Furthermore, the worldview continues to be formed even as States combat climate change, which is then used as leverage in diplomacy. In fact, climate change has become yet another area in which the West claims superiority over the rest of the world, shaming other nations for developing too quickly and for "being behind" in terms of using sustainable production and green technology.[218]

I will end this essay by, once again, emphasise the importance of allowing the discourse surrounding climate change, responsibility and migration to be held with an awareness that climate change is indeed global and that it, as such, is a global responsibility. Even efforts like the UN Agenda 2030, one of the largest and most ambitious plans for global cooperation to mitigate and create resilience to climate change, has been criticised by numerous humanitarian aid organisations, activists and academics who feel that it inadequately extends recognitions of the social, economic

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[217] J. A. Hessebruge, Jan Arno, 'Human Rights Violations Arising from Conduct of Non-State Actors', *Buffalo Human Rights Law Review,* vol. 11/, 2005, p. 85.

[218] R. Samaddar, p. 97.

and political challenges of those who are the poorest and are most likely to be "left behind."[219] This failure to look past the perspective on climate change of the Western world is problematic and its' recognition must play a vital role in forming the next steps to be taken by the global, political sphere, particularly when addressing policy regarding migration, humanitarian aid and inequality.

[219] For more on this, see the report produced by the UN Development Programme (UNDP) that was released in response to the agenda, highlighting additional efforts that must be done in order for the Agenda 2030 to have complete global impact: *Leaving No One Behind in Implementing the 2030 Agenda,* available on: https://www.researchgate.net/publication/ 324455734_Leaving_no_one_behind_in_implementing_the_2030_Agenda_Roma_inclusion_in_Europe, [Accessed 15 March 2020.]

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Appendix

Remarks by President von der Leyen at the joint press conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel

Kastanies, 3 March 2020, EU Commission Statement

Thank you very much Kyriakos, I want to thank you for the invitation.
Indeed, these are extraordinary circumstances. And we have just been to the border area and have seen how tense and how difficult the situation is. The Greek authorities are facing a very difficult task in containing the situation. And I want to thank the Greek border guards and the coast guards, I want to thank the civilians, the police, the servicemen and servicewomen, and I want to thank Frontex for their tireless effort. It is important to me to be here today with you and to tell you that the Greek worries are our worries.

This border is not only a Greek border but it is also a European border. And I stand here today as a European at your side. I also want to express my compassion for the migrants that have been lured through false promises into this desperate situation. We have come here today to send a very clear statement of European solidarity and support to Greece. Our first priority is making sure that order is maintained at the Greek external border, which is also a European border. I am fully committed to mobilising all the necessary operational support to the Greek authorities.

Following Greece's request, Frontex is now getting ready to deploy a Rapid Border Intervention Team. Frontex is preparing the deployment of one offshore patrol vessel and six coastal patrol vessels, two helicopters, one aircraft, and three thermo-vision vehicles. 100 border guards in addition to the current 530 border guards will be deployed by Frontex at the land and at the sea borders. Secondly, we can provide financial assistance of EUR 700 million to Greece. This consists of EUR 350 million, which is immediately available, plus an additional EUR 350 million that can be requested as part of an amending budget. The financial assistance is for migration management generally, for setting-up and managing the infrastructure needed. Thirdly, we launched the Civil Protection Mechanism based on a request made by Greece. Through this, Greece can receive assistance in terms of medical equipment, medical teams, shelters, tents, blankets, as needed.

Kyriakos, Charles, David, Andrej and I will remain in very close contact in the coming days and weeks to make sure that we deliver all the support that is needed. The situation at our border is not only Greece's issue to manage. It is the responsibility of Europe as a whole. And we will manage it in an orderly way, with unity, solidarity and determination.

Those who seek to test Europe's unity will be disappointed. We will hold the line and our unity will prevail. Now is the time for concerted action and cool heads and acting based on our values. Turkey is not an enemy and people are not just means to reach a goal. We would all do well to remember both in the days to come. I thank Greece for being our European ασπίδα [English: shield] in these times.