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## ESCAPING THE SEA OF ZOMBIES: LESSONS LEARNED FROM CLIMATE CHANGE REFUGEES

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### ABSTRACT

*It stands to reason that where a country is overrun or is in the process of being overrun by zombies the inhabitants of that country are not likely to want to remain there. If there is any hope of safety in another state, there will be large-scale movement of people trying to reach it.*

*Under international law, States will only owe protection obligations to people deemed refugees, stateless persons, and those entitled to complementary protection. Any individuals who do not fit this narrow scope can find themselves in a legal and normative gap in the international protection regime. This is the current situation for those facing cross-border displacement as a result of natural disasters and the effects of climate change, and would also be the predicament faced by zombie apocalypse refugees.*

*The purpose of this article is to examine the ability of existing international law to respond to the likely refugee surge that the zombie apocalypse would create. Current legal and normative gaps and the possibility for future developments and expansion are identified. To achieve this, international legal principles, jurisprudence and state practice are examined in order to determine where gaps exist, and the most appropriate ways to address them.*

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## I INTRODUCTION

*'If you had a loved one, a family member, a child, who was infected, and you thought there was a shred of hope in some other country, wouldn't you do everything in your power to get there?'*<sup>1</sup>

*'No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention.'*<sup>2</sup>

Even in a zombie free world, there were an estimated 65.3 million forced migrants as of 2015.<sup>3</sup> Under international law States will only owe protection obligations to people deemed refugees, stateless persons, and those entitled to complementary protection. Any individuals who do not fit this narrow scope can find themselves in a legal and normative gap in the international protection regime. This is the current situation for those facing cross-border displacement as a result of natural disasters and the effects of climate change,<sup>4</sup> and would also be the predicament faced by zombie apocalypse refugees.

This article examines the ability of existing international law mechanisms to respond to the likely refugee surge that the zombie apocalypse would create. Current legal and normative gaps and the possibility for future developments and expansion are identified. To achieve this, international legal principles, jurisprudence and state practice are examined in order to determine where gaps exist, and the most appropriate ways to address them.<sup>5</sup>

The article begins with an examination of the present analogous situation for climate change refugees and how current international law fails to protect them. Section III considers whether people displaced by the zombie apocalypse would be considered refugees for the purposes of the 1951 Refugee Convention. Following this, section IV explores to what extent these refugees would be eligible for complementary protection and engage a state's *non-refoulement* obligations. Finally, section V provides some of the attempts that have been made to fill the legal gap for climate change refugees and suggests that similar measures would be needed to provide protection for zombie apocalypse refugees.

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<sup>1</sup> Max Brooks, *World War Z: An Oral History of the Zombie War* (Duckworth, 2006) 14.

<sup>2</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 248 (Dawson J).

<sup>3</sup> United Nations High Commission for Refugees, *Global Trends: Forced Displacement in 2015* (2016) 6 <<https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf>>.

<sup>4</sup> Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2013) 1.

<sup>5</sup> *Ibid* 7-8.

## II CLIMATE CHANGE REFUGEES

As there is currently no actual zombie apocalypse jurisprudence, climate change migration is used throughout this article as a way of identifying the gaps in existing legal refugee protection frameworks, which apply for climate change refugees and would potentially apply for zombie apocalypse refugees. There is no internationally agreed definition of ‘climate change refugee’<sup>6</sup>, however the term is used throughout this article to describe people forcibly removed from their homes as a result of climate change impacts, and encompasses environmental migrants, refugees and/or displaced persons.<sup>7</sup>

Climate change has the potential to displace millions of people by ‘shoreline erosion, coastal flooding, and agricultural disruption’ resulting in the need for cross-border migration and resettlement.<sup>8</sup> Figures are a matter of constant debate and controversy,<sup>9</sup> however some sources have estimated an average of 22.5 million people have been displaced (both internally and externally) *each year* from climate-related events from 2008-2015. This figure is predicted to increase in following years as the effects of climate change are magnified,<sup>10</sup> with an estimated 200 million people expected to be displaced from their homes due to climate change by 2050.<sup>11</sup>

One situation within the wide concept of environmental displacement is the small island nations at risk of disappearing as a result of rising sea levels.<sup>12</sup> In the Pacific, five

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<sup>6</sup> McAdam, above n 4, 3; Xing-Yin Ni, ‘A Nation Going Under: Legal Protection for “Climate Change Refugees”’ (2015) 38 *Boston College International & Comparative Law Review* 330; María José Fernández, ‘Refugees, Climate Change and International Law’ (2015) 49 *Forced Migration Review* 42.

<sup>7</sup> McAdam, above n 4, 4, 7, 39.

<sup>8</sup> These were the effects identified by the International Panel on Climate Change (IPCC) as early as 1990: Xing-Yin Ni, ‘A Nation Going Under: Legal Protection for “Climate Change Refugees”’ (2015) 38 *Boston College International & Comparative Law Review* 329; United Nations High Commission for Refugees, *Global Trends: Forced Displacement in 2015* (2016) 14 <<https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf>>; McAdam, above n 4, 2.

<sup>9</sup> McAdam, above n 4, 24.

<sup>10</sup> Michelle Yonetani, Internal Displacement Monitoring Centre, *Global Estimates 2015: People Displaced By Disasters* (2015) 8 <<http://www.internal-displacement.org/assets/publications/2015/20150713-global-estimates-2015-en.pdf>>; United Nations High Commissioner for Refugees, *Summary of Deliberations on Climate Change and Displacement* (April 2011), para 1-2 <<http://www.unhcr.org/4da2b5e19.pdf>>; Xing-Yin Ni, ‘A Nation Going Under: Legal Protection for “Climate Change Refugees”’ (2015) 38 *Boston College International & Comparative Law Review* 329.

<sup>11</sup> Frank Biermann and Ingrid Boas, ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees’ (2010) 10(1) *Global Environmental Politics* 68.

<sup>12</sup> This is one of several categories identified by the former UN Secretary-General’s Representative on the Human Rights of Internally Displaced Persons, Walter Kälin. Kälin’s typology of climate-change related movement also included: Hydro-meteorological disasters such as flooding, hurricanes and mudslides; Government-initiated planned evacuations from high-risk disaster areas; Environmental degradation and slow-onset disasters such as water shortages and increased salinity prompting ‘voluntary’ migration; and Risk of conflict over scarce essential resources: Walter Kälin,

Solomon Islands have already reportedly been lost to rising sea levels, with a further six experiencing severe shoreline recession resulting in the destruction of villages and community relocation.<sup>13</sup> Small and low-lying territories, prevalence of natural disasters and climate extremes, open economies and low adaptive capacity means that small island countries, such as Kiribati and Tuvalu, are particularly vulnerable and less resilient to climate change effects.<sup>14</sup> It is predicted that Tuvalu may become the first country to be ‘swallowed by the ocean’,<sup>15</sup> causing Tuvaluans to face a ‘tragic ending to their pictorial way of life.’<sup>16</sup> Rising seas have the potential to render a territory no longer inhabitable, for example because of an inability to produce crops or acquire fresh water. In this case, permanent relocation to other countries would be necessary however, current international law provides no protection status for such people.<sup>17</sup>

Furthermore, it is probable that the impacts of climate change - and likewise the zombie apocalypse - will be felt disparately in different communities, as people’s ability to cope and adapt to the situation will be affected by underlying political, economic, and social conditions. These factors will likely impact a country’s resilience and ability to assist its people, which will influence mobility decisions.<sup>18</sup> Thus, although the effects of both climate change and the zombie apocalypse will be indiscriminate and disregard national borders, the effects will be felt more acutely in some parts of the world than others, depending on the level of development and so the level of ability to adapt.<sup>19</sup>

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*The Climate Change-Displacement Nexus* (16 July 2008) <<https://www.brookings.edu/on-the-record/the-climate-change-displacement-nexus/>>. The typology was adopted by the UN’s Inter-Agency Standing Committee (IASC) Working Group on Migration/Displacement and Climate Change: IASC Working Group on Migration/Displacement and Climate Change, *Displacement and Climate Change: Towards Defining Categories of Affected Persons Working Paper First Draft* (20 September 2008); McAdam, above n 4, 18-19.

<sup>13</sup> News in Numbers, *The Chemical Engineer* (June 2016) 4.

<sup>14</sup> McAdam, above n 4, 19; Mark Baker-Jones and Melanie Baker-Jones, ‘Teitiota v. The Chief Executive of Ministry of Business, Innovation And Employment - A Person Displaced’ (2015) 15(2) *QUT Law Review* 102-103; Xing-Yin Ni, ‘A Nation Going Under: Legal Protection for “Climate Change Refugees”’ (2015) 38 *Boston College International & Comparative Law Review* 332.

<sup>15</sup> Tiffany T. V. Duong, ‘When Islands Drown: The Plight of “Climate Change Refugees” and Recourse to International Human Rights Law’ (2010) 31(4) *University of Pennsylvania Journal of International Law* 1239.

<sup>16</sup> Rebecca Elizabeth Jacobs, ‘Comment, Treading Deep Waters: Substantive Law Issues in Tuvalu’s Threat to Sue The United States in the International Court of Justice’ (2005) 14 *Pacific Rim Law and Policy Journal* 103; *Ibid.*

<sup>17</sup> McAdam, above n 4, 8.

<sup>18</sup> As the IPCC has observed, ‘[w]hile physical exposure can significantly influence vulnerability for both human populations and natural systems, a lack of adaptive capacity is often the most important factor that creates a hotspot of human vulnerability’: Martin L. Parry et al., Cambridge University Press, *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 317; McAdam, above n 4, 1, 3-4.

<sup>19</sup> International Organisation for Migration, *Assessing the Evidence: Environment, Climate Change and Migration in Bangladesh* (2010) 8; McAdam, above n 4, 4-5; Duong, above n 15, 1241.

Existing legal regimes do not provide adequate protection for climate induced inter-State migration.<sup>20</sup> The current international protection framework is grounded in the idea of a person's forced exile, where a non-origin State must extend legal protection if that person engages the State's *non-refoulement* obligations.<sup>21</sup> Reaching an agreed definition of a 'climate change refugee' in international law is crucial as it will assist to systematically develop discussions relating to the appropriate multilateral legal and institutional responses. This would determine whether climate-related movement should be dealt with at an international, regional, or local level and through which channel, for example within the present refugee protection framework or under the United Nations Framework Convention on Climate Change (UNFCCC).<sup>22</sup> This legal gap would also need to be overcome for zombie apocalypse refugees.

### III THE REFUGEE CONVENTION

The legal definition of a refugee and the rights and entitlements that ensue are set out in the 1951 Refugee Convention relating to the Status of Refugees, read in conjunction with its 1967 Protocol (together, the Convention). A refugee is defined as someone who:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion (the five Convention grounds), is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such a fear, is unwilling to return to it.<sup>23</sup>

Whilst the individualized approach of the Convention has been commended in its endorsement of individual human rights, it fails to encompass less well-defined situations of need.<sup>24</sup> The refugee definition provided for by the Convention contains a number of obstacles for those seeking protection for reasons either unforeseen or not prioritised by the 1951 drafters, including those people that would be displaced by the

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<sup>20</sup> McAdam, above n 4, 3; Xing-Yin Ni, 'A Nation Going Under: Legal Protection for "Climate Change Refugees"' (2015) 38 *Boston College International & Comparative Law Review* 330; María José Fernández, 'Refugees, Climate Change and International Law' (2015) 49 *Forced Migration Review* 42.

<sup>21</sup> For definition and discussion on *non-refoulement* see section IV Complementary Protection; *Ibid* 6.

<sup>22</sup> *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1993).

<sup>23</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) Art 1A(2) read in conjunction with the *Protocol Relating to the Status of Refugees*, opened for signature 28 July 1951, 606 UNTS 267 (entered into force 4 October 1967); McAdam, above n 4, 42.

<sup>24</sup> Guy S. Goodwin-Gill, 'Non-Refoulement and the New Asylum Seekers' (1986) 26 *Virginia Journal of International Law* 898.

effects of the zombie apocalypse.<sup>25</sup> Consequently, the following difficulties make it very problematic to argue that people displaced by the impacts of the zombie apocalypse are refugees within the meaning of the Refugee Convention.

### **A     *Outside the Country of Nationality***

The Convention only applies to people who have already crossed a national border, and so does not facilitate direct resettlement. This significantly limits the scope of affected people who can be afforded protection.<sup>26</sup>

### **B     *Zombie Apocalypse as Persecution***

Characterising the zombie apocalypse as persecution will be integrally problematic. ‘Persecution’ is not defined by the Convention or any other international instrument,<sup>27</sup> but is generally agreed to involve particularly serious violations of human rights.<sup>28</sup> Relevant factors to be assessed include the nature of the right at risk, the severity of its restriction, and the likelihood of this eventuating in the individual case.<sup>29</sup> Despite the undeniable level of harm that the zombie apocalypse would inflict, including risk of infection, exposure to attacks and the probable breakdown of public services and livelihoods causing a lack of food and water security and welfare, it would be hard to argue that the harm suffered meets the definition of persecution as it is currently understood in international law.<sup>30</sup> Furthermore, it has been held that Convention protection does not extend to people in pursuit of better living conditions or victims of natural disasters, even if ‘both of these cases might seem deserving of international sanctuary.’ This is so ‘even when the home state is unable to provide assistance.’<sup>31</sup> It

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<sup>25</sup> McAdam, above n 4, 42; María José Fernández, ‘Refugees, Climate Change and International Law’ (2015) 49 *Forced Migration Review* 42.

<sup>26</sup> It is worth noting here that there would also be significant internal migration, but this is outside the scope of the paper; McAdam, above n 4, 43.

<sup>27</sup> United Nations High Commission for Refugees, *Handbooks And Guidelines On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees* (2011)

<<http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>> paras 51-65; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee In International Law* (Oxford University Press, 3rd ed., 2007) 90-91; Australia’s Migration Act defines ‘persecution’ as involving serious harm to the applicant and systematically discriminatory conduct. ‘Serious harm’ is describes as including a threat to life or liberty, significant physical harassment, ill-treatment or economic hardship: *Migration Act 1958* (Cth) s 91R(2); cf. *MIMA v Ibrahim* (2000) 294 CLR 1, [2000] HCA 5.

<sup>28</sup> See Council Directive (EC) 2004/83 on *Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of Protection Granted* [2004] OJ L304/12, Art 9; McAdam, above n 4, 43.

<sup>29</sup> McAdam, above n 4, 43; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee In International Law* (Oxford University Press, 3rd ed., 2007) 92.

<sup>30</sup> This is also the case for the current impacts of climate change, such as rising sea levels, increasing salination and extreme weather events; McAdam, above n 4, 43.

<sup>31</sup> *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 732; McAdam, above n 4, 46.



may be assumed then that this would apply to those fleeing the disaster of the zombie apocalypse.

The difficulty of arguing that the impacts of a disaster amount to persecution is exemplified by climate change refugee cases. Unlike the obvious urgency of fleeing a zombie apocalypse, there are particular difficulties for pre-emptive movement away from the slow-onset impacts such as climate change. Although the risk assessment of persecution is forward-looking and risk of harm can be less than 50 percent, the fear must be shown to be plausible and reasonable.<sup>32</sup> Consideration is given to the relation between the persecution feared and the degree of likelihood of its occurrence, which involves an assessment of the imminence of harm if the person is returned.<sup>33</sup> This has created significant barriers for climate change-related cases. For instance, in 2001, the Tuvaluan government requested Australia provide special migration assistance to relocate citizens impacted by climate change but were refused on the grounds that the situation was not urgent enough.<sup>34</sup> Contrastingly, in the event of a zombie apocalypse the fear of harm would undoubtedly be considered plausible and reasonable as well as sufficiently imminent.

The New Zealand case of *Teitiota v Chief Executive Ministry of Business, Innovation and Employment*,<sup>35</sup> was the first climate change refugee case to reach the High Court and Court of Appeal.<sup>36</sup> The case exemplifies the difficulties when the cause of displacement, in this case climate change, is not human. Reaching the Convention definition requires an identifiable, human actor to cause the harm.<sup>37</sup> The Court of Appeal ultimately concluded that the Refugee Convention ‘is quite simply not the solution’,<sup>38</sup> although the High Court did expressly acknowledge humanitarian protection as another avenue for relief.<sup>39</sup>

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<sup>32</sup> *Chan v Minister for Immigration and Ethnic Affairs* (1989)169 CLR 379, 389 (Dawson J) citing *INS v Cardozo-Fonseca* 480 US 421 (1987) 431.

<sup>33</sup> United Nations High Commission for Refugees, *Handbooks And Guidelines On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees* <<http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>> paras 42; McAdam, above n 4, 49-50.

<sup>34</sup> Senate Foreign Affairs, Defence and Trade Committee, Commonwealth of Australia, *A Pacific Engaged: Australia's Relations with Papua New Guinea and the Island States of the South-West Pacific* (2003) para 6.78; McAdam, above n 4, 32; Duong, above n 15, 1240.

<sup>35</sup> *Ioane Teitiota v Chief Executive Ministry of Business, Innovation and Employment* [2013] NZHC 3125.

<sup>36</sup> Xing-Yin Ni, ‘A Nation Going Under: Legal Protection for “Climate Change Refugees”’ (2015) 38 *Boston College International & Comparative Law Review*, 336.

<sup>37</sup> *Ibid* 338.

<sup>38</sup> *Ioane Teitiota v Chief Executive Ministry of Business, Innovation and Employment* [2014] NZCA 173, 21, 40, 41; *Ibid* 344.

<sup>39</sup> *Ioane Teitiota v Chief Executive Ministry of Business, Innovation and Employment* [2013] NZHC 3125, para 43; Ni, above n 36, 360; for further discussion on the possibility of humanitarian protection see sections IV Complementary Protection and V Filling the Gap.

## C *Discriminatory Element*

For the deprivation of a right to amount to persecution, a discriminatory element is required. The persecution must have been inflicted because of an attribute related to at least one of the five Convention grounds, whether real or perceived, of the person being persecuted, rather than it being a random attack. Furthermore, the person facing persecution's government must be unable or unwilling to provide protection from it.<sup>40</sup>

The need for a discriminatory element was highlighted in a New Zealand Refugee Status Appeals Authority case.<sup>41</sup> The court determined that refugee claimants from Tuvalu who were experiencing extreme economic hardship were not refugees as they had not been treated differently from everyone else. The environmental problems, economic difficulties, and lack of social services applied indiscriminately to all Tuvalu citizens.<sup>42</sup> There have been a number of other Australian and New Zealand cases of Bangladesh applicants on the basis of natural disasters,<sup>43</sup> drought and destitution in Fiji,<sup>44</sup> and later citizens from Tuvalu, Kiribati and Tonga seeking refugee protection from climate change effects.<sup>45</sup> All claims were unsuccessful as they failed to establish that the harm caused involved the necessary element of discriminatory persecution.<sup>46</sup>

It may also be the case that governments of zombie infected nations are not responsible for the apocalypse, and are not developing policies to increase its negative impacts on particular segments of the population. They may even remain willing to protect their citizens, but lack the ability to do so. This scenario creates a 'delinking of the actor of persecution from the territory from which flight occurs',<sup>47</sup> which is a total reversal of the customary refugee paradigm. Convention refugees traditionally escape their own government; whereas zombie apocalypse refugees are not fleeing their government, but rather may even be seeking refuge in countries which have contributed to the

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<sup>40</sup> McAdam, above n 4, 44.

<sup>41</sup> *Refugee Appeal No 72189/2000*, RSAA (17 August 2000).

<sup>42</sup> The court expressed that '[t]his is not a case where the appellants can be said to be differently at risk of harm amounting to persecution due to any one of these five grounds. All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu... As for the shortage of drinkable water and lack of hygienic sewerage systems, medicines and appropriate access to medical facilities, these are also deficiencies in the social services of Tuvalu that apply indiscriminately to all citizens of Tuvalu and cannot be said to be forms of harm directed at the appellants for reason of their civil or political status.': *Refugee Appeal No 72189/2000*, RSAA (17 August 2000) para 13; McAdam, above n 4, 44-45.

<sup>43</sup> *Mohammed Motahir Ali v Minister for Immigration, Local Government and Ethnic Affairs* [1994] FCA 887.

<sup>44</sup> *Refugee Appeal No 70965/98*, RSA (27 August 1998); *Refugee Appeal No 70959/98*, RSA (27 August 1998).

<sup>45</sup> See cases provided in McAdam, above n 4, 47.

<sup>46</sup> McAdam, above n 4, 47; see also Mark Baker-Jones and Melanie Baker-Jones, 'Teitiota v. The Chief Executive of Ministry of Business, Innovation And Employment - A Person Displaced' (2015) 15(2) *QUT Law Review* 102-103.

<sup>47</sup> McAdam, above n 4, 45.



apocalypse.<sup>48</sup> However, the premise that a State's contribution to a disaster could be considered discriminatory persecution has been rejected by the Australian Refugee Review Tribunal (RRT). The RRT held that there must be evidence that a country's contribution had 'any motivation to have any impact on residents... either for their race, religion, nationality, membership of any particular social group or political opinion.'<sup>49</sup>

Thus, an undeniable difficulty is that the impacts of the zombie apocalypse will be essentially indiscriminate. Although, as was established earlier, less developed countries may experience the effects more adversely as a result of their geography and resources, the reasoning behind this is not premised on any attributes of the country's inhabitants.<sup>50</sup> Moreover, whilst it may seem reasonable to argue that a group of people affected by the zombie apocalypse constitutes a 'particular social group', the law requires the group be connected by a fundamental, immutable characteristic rather than the risk of persecution itself.<sup>51</sup> It is the particular attribute ascribed to them, not the persecutory acts per se, that establishes a group of people as a 'particular social group'.<sup>52</sup>

Furthermore, even if it could successfully be argued that a person displaced by the zombie apocalypse would meet the definition requirements of the Convention, the *non-refoulement* obligation in Article 33 is not an absolute principle.<sup>53</sup> For example, 'national security' and 'public order' have been recognised as potential justifications for derogation.<sup>54</sup> It is expressly stated by Article 33(2) that *non-refoulement* may not be claimed by a refugee, 'whom there are reasonable grounds for regarding as a danger to the security of the country.' National security is not defined in international law, making the assessment of whether an individual is a security risk up to the judgement

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<sup>48</sup> This of course would depend on the facts surrounding the origins of the zombie apocalypse.

<sup>49</sup> The case concerned climate change refugee applicants who attempted to argue that developed country's contribution to climate change amounted to persecution. This was rejected by the Tribunal: 'In this case, the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required... There is simply no basis for concluding that countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases, have any motivation to have any impact on residents of low lying countries such as Kiribati, either for their race, religion, nationality, membership of any particular social group or political opinion': 0907346 [2009] RRTA 1168 (10 December 2009) para 51; McAdam, above n 4, 45.

<sup>50</sup> McAdam, above n 4, 46.

<sup>51</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 341 (Dawson J); Guy S. Goodwin-Gill and Jane McAdam, *The Refugee In International Law* (Oxford University Press, 3rd ed., 2007) 79-80; *Ibid.*

<sup>52</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 341 (McHugh J); McAdam, above n 4, 46.

<sup>53</sup> See definition of *non-refoulement* in section IV(A).

<sup>54</sup> See for example, *Convention relating to the International Status of Refugees*, 159 LNTS 199, (1933) Art. 3; *Convention Concerning the Status of Refugees Coming from Germany*, 192 LNTS 59, (1938) Art. 5(2); Guy S. Goodwin-Gill and Jane McAdam, *The Refugee In International Law* (Oxford University Press, 3rd ed., 2007) 234-235.

of the State involved.<sup>55</sup> Considering the nature of infection involved in the zombie apocalypse, it is conceivable that this will result in a further protection barrier.

The necessity of a persecution element thus restricts the Convention's 'humanitarian scope and does not afford universal protection to asylum seekers,'<sup>56</sup> but instead 'has a more limited objective, the limits of which are identified by the list of Convention reasons.'<sup>57</sup> Hence, whilst there is nothing implicit in the Refugee Convention to preclude a person seeking protection as a result of harms caused by the zombie apocalypse, the requisite elements of Article 1A(2) would need to be established. Consequently, as the examination of difficulties has shown, a refugee claim based generally on the impact of the zombie apocalypse will most likely not succeed.<sup>58</sup> However, although a person may be outside this particular refugee definition, this does not make them unworthy of protection, and will not necessarily mean they will be denied it in another form.<sup>59</sup>

#### IV COMPLEMENTARY PROTECTION

This section will examine to what extent protection is provided for by existing international and regional standards on complementary protection for those forcibly displaced across international borders as a result of the zombie apocalypse.<sup>60</sup> Complementary protection is an alternative human rights law basis on which protection may be sought if a minimum standard of human rights is at risk,<sup>61</sup> named so because it provides protection that is complementary to that provided for by the Refugee Convention.<sup>62</sup> Under human rights law, a State's protection obligations are extended beyond the Convention to include people at risk of arbitrary deprivation of life or torture, or cruel, inhuman or degrading treatment or punishment, among others.<sup>63</sup> The focus in a complementary claim is on the potential harm to the applicant if they are returned.<sup>64</sup> A zombie outbreak in a country will undoubtedly impact on the citizens' enjoyment of their human rights and has potential to cause considerable harm.<sup>65</sup>

<sup>55</sup> Guy S. Goodwin-Gill and Jane McAdam, *The Refugee In International Law* (Oxford University Press, 3rd ed., 2007) 235.

<sup>56</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 248 (Dawson J); McAdam, above n 4, 46.

<sup>57</sup> *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 499-500 (Lord Hope).

<sup>58</sup> McAdam, above n 4, 44.

<sup>59</sup> Ibid 42.

<sup>60</sup> McAdam, above n 4, 55.

<sup>61</sup> Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007); McAdam, above n 4, 52; In Australia this is provided for by the *Migration Act 1958* (Cth): *Migration Amendment (Complementary Protection) Act 2011* (Cth).

<sup>62</sup> McAdam, above n 4, 53.

<sup>63</sup> Ibid 53.

<sup>64</sup> Ibid 60.

<sup>65</sup> This is also the case for climate change refugees, whose rights will be affected by 'coastal erosion, flooding, drought, and sea-level rise, together with more frequent and intense severe weather events, such as storms and cyclones.' These climate-related events will have negative impacts on

## A *Non-Refoulement*

The principle of *non-refoulement* is contained in a number of international law instruments and stipulates that a person must not be returned to a place where they will be at risk of certain types of harm.<sup>66</sup> Theoretically, any human rights violation can give rise to a *non-refoulement* obligation.<sup>67</sup> However, most human rights provisions also permit a balancing of interests between the individual and the State; hence protection from *refoulement* is usually only available in exceptional cases.<sup>68</sup> The two primary rights invoking *non-refoulement* obligations are the right to life and the right to be free from torture or cruel, inhuman or degrading treatment. Although they are not the only possible rights, the two have been incorporated into a number of domestic complementary regimes.<sup>69</sup>

## B *Right to Life*

The right to life has been pronounced by the United Nations Human Rights Council (UNHCR) as the ‘supreme right’ which is ‘basic to all human rights’.<sup>70</sup> It is protected in Article 3 of the Universal Declaration of Human Rights,<sup>71</sup> Article 6 of the International Covenant on Civil and Political Rights (ICCPR),<sup>72</sup> Article 6 of the Convention of the Rights of the Child (CRC),<sup>73</sup> and in all regional human rights treaties.<sup>74</sup> State’s also have a duty ‘to ensure to the maximum extent possible the

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‘agriculture, infrastructure, services, and the continued habitability of certain parts of the world’: McAdam, above n 4, 52; see also Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc A/HRC/10/61 (15 January 2009).

<sup>66</sup> Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 8-10; Goodwin-Gill & McAdam, above n 55, 201.

<sup>67</sup> *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26, paras 24-5 (Lord Bingham), 48-50 (Lord Steyn), 67 (Lord Carswell).

<sup>68</sup> McAdam, above n 4, 53.

<sup>69</sup> Ibid 55.

<sup>70</sup> Human Rights Committee, *General Comment No 6: The Right to Life (Art 6)* (30 April 1982) para 1; Human Rights Committee, *General Comment No 14: Nuclear Weapons and the Right to Life (Art 6)* (9 November 1984) para 1.

<sup>71</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

<sup>72</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>73</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>74</sup> *European Convention on Human Rights* (formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*), opened for signature 4 November 1950, ETS No 5 (entered into force 3 September 1953) Art 2; *American Convention on Human Rights*, adopted 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) Art 4; *African Charter on Human and Peoples’ Rights*, adopted 17 June 1981, 21 ILM 58 (entered into force 21 October 1986), Art 4; *Arab Charter on Human Rights*, adopted 22 May 2004, (entered into force 15 March 2008), Art 5.

survival and development of the child'<sup>75</sup> under the CRC and the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters.<sup>76</sup> The right is non-derogable and is recognised as imposing a *non-refoulement* obligation.<sup>77</sup>

The right to life is connected to other related human rights, such as an adequate standard of living,<sup>78</sup> and not to be deprived of a means of subsistence.<sup>79</sup> These rights are particularly relevant to people affected by climate change for example, who's ability to hunt, fish or undertake subsistence farming has been compromised, and would also apply to those affected by the zombie apocalypse.<sup>80</sup> Furthermore, it 'encompasses existence in human dignity with the minimum necessities of life.'<sup>81</sup> It is easy to imagine a zombie apocalypse situation where the necessities of life are no longer readily available.

In *Budayeva v Russia*,<sup>82</sup> the European Court of Human Rights (ECtHR) held that the right to life extends to an onus on States of protection from natural disasters where the risk is known. The case involved a complaint against a Contracting state for not properly preparing against foreseeable disasters. According to the court, authorities must enact and implement laws and set up the necessary mechanisms for disaster risk mitigation, supervise potentially dangerous situations, inform the inhabitants about possible dangers and evacuate the affected population. The reasoning in this case could arguably also extend to removal cases where there is a real risk the applicant would suffer the impacts of the zombie apocalypse in a State that failed to mitigate against it. Furthermore, the obligation is more onerous for human-induced harms than natural

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<sup>75</sup> Committee on the Rights of the Child, *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006).

<sup>76</sup> Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (Brookings-Bern Project on Internal Displacement 2011); McAdam, above n 4, 56.

<sup>77</sup> *Ahani v Canada* Communication No 1051/2002 (29 March 2004) UN Doc CCPR/C/80/D/1051/2002 (15 June 2005; Human Rights Committee, *General Comment No 31: The nature of the General Legal Obligations Imposed on State Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 12; Committee on the Rights of the Child, *General Comment No 6* (2005); McAdam, above n 4, 56.

<sup>78</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) Art 11.

<sup>79</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 1(2); *ibid* Art 1(2).

<sup>80</sup> McAdam, above n 4, 55.

<sup>81</sup> UN Commission on Human Rights, *Human Rights and Extreme Poverty*, Human Rights res 2005/16 (14 April 2005) para 1(b).

<sup>82</sup> *Budayeva v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02 (ECtHR, 20 March 2008).

ones,<sup>83</sup> which a zombie apocalypse might be.<sup>84</sup> The ‘origin of the threat and the extent to which one or other risk is susceptible to mitigation’ will also be taken into account.<sup>85</sup>

The protection obligation may also extend to protection from environmental harm.<sup>86</sup> The realisation of the right to life has been recognised as inherently connected to and dependant on the physical environment,<sup>87</sup> and the right to a safe environment is specifically recognised in African and Latin American human rights treaties.<sup>88</sup> It could be argued that a zombie infested country does not constitute a safe environment.

Thus, the right to life has the potential for further utilisation and progressive development for removal cases. However, claims will still fail in some countries that do not accept cases if the threat is generalised.<sup>89</sup>

### C *Torture or Cruel, Inhuman or Degrading Treatment*

Torture and cruel, inhuman or degrading treatment or punishment is prohibited by Article 3 of the United Nations Convention Against Torture,<sup>90</sup> and Article 7 of the ICCPR, which also invoke a *non-refoulement* obligation.<sup>91</sup> Only one removal case based on a violation of the provision has been successfully established, however.<sup>92</sup> Regionally, the right is also protected by Article 3 of the European Convention on

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<sup>83</sup> McAdam, above n 4, 59-60.

<sup>84</sup> This would depend on the facts surrounding the origins of the zombie apocalypse. For example, in the Resident Evil movies the zombie ‘T-Virus’ is created in a lab.

<sup>85</sup> *Budayeva v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02 (ECtHR, 20 March 2008) para 137; McAdam, above n 4, 60.

<sup>86</sup> See *Oneryildiz v Turkey* (2005) 41 EHRR 20, paras 71-2.

<sup>87</sup> *Report on the Situation of Human Rights in Ecuador* (1997) OEA/Ser.L/V/II.96, Doc 10, Rev 1, ch; *Yanomami case* (Case 7615 of 5 March 1985) in Inter-American Commission on Human Rights, *Annual Report* (1984-85) OEA/Ser.L/V/II.66, Doc 10, Rev 1.

<sup>88</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, opened for signature 17 November 1988, OAS TS69 (entered into force 1999), Art 11, which states that ‘[e]veryone shall have the right to live in a healthy environment and to have access to basic public services. The States Parties shall promote the protection, preservation, and improvement of the environment.’; *1981 African Charter on Human and People’s Rights*, adopted 27 June 1981 (entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev.5, 21 ILM 58 (1982), Art 24, declaring that all people’s ‘shall have the right to a general satisfactory environment favourable to their development’; McAdam, above n 4, 61.

<sup>89</sup> McAdam, above n 4, 62.

<sup>90</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>91</sup> Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 12; *Kindler v Canada* Communication No 470/1991 (30 July 1993) UN Doc CCPR/C/48/D/470/1991 (11 November 1993) para 6.2; *ARJ v Australia* Communication No 692/1996 (28 July 1997) UN Doc CCPR/C/60/D/692/1996 (11 August 1997) para 6.8; *Ahani v Canada* Communication No 1051/2002 (29 March 2004) UN Doc CCPR/C/80/D/1051/2002 (15 June 2005).

<sup>92</sup> *Ng v Canada* Communication No 469/1991 (5 November 1993) UN Doc CCPR/C/49/D/469/1991 (7 January 1994).



Human Rights (ECHR).<sup>93</sup> Unlike the other provisions, Article 3 of the ECHR has been recurrently utilised in the ECtHR in *non-refoulement* jurisprudence. The provision ‘has been recognised as precluding removal to a place where an applicant would face a real risk of being subjected to torture, or inhuman or degrading treatment or punishment’<sup>94</sup> since the case of *Soering v United Kingdom*.<sup>95</sup>

The phrase ‘inhuman or degrading treatment’ has been carefully constrained by courts so as not to apply remedially to general poverty, unemployment, lack of resources or medical care except in the most exceptional circumstances.<sup>96</sup> Inhuman treatment has been defined as involving ‘a minimum level of severity’ of ‘actual bodily injury or intense physical or mental suffering’.<sup>97</sup> It does not need to be deliberate.<sup>98</sup> Degrading treatment ‘humiliates or debases an individual, showing a lack of respect for, or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance’.<sup>99</sup> A lack of intent will not necessarily disprove a violation,<sup>100</sup> and the threat can be from non-State actors against whom ‘the state has failed to provide reasonable protection.’<sup>101</sup> A breach of Article 3 will be more easily established where a case involves deliberate action or inaction by a State.<sup>102</sup>

The case of *D v United Kingdom*<sup>103</sup> provides encouraging precedent to argue for complementary protection claims based on socio-economic zombie apocalypse impacts such as the difficulties that would be incurred in finding fresh water, food and safe shelter.<sup>104</sup> The ECtHR stated that:

Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3... his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.<sup>105</sup>

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<sup>93</sup> *European Convention on Human Rights* (formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*), opened for signature 4 November 1950, ETS No 5 (entered into force 3 September 1953) Art 3.

<sup>94</sup> McAdam, above n 4, 64.

<sup>95</sup> *Soering v United Kingdom* (1989) 11 EHRR 439.

<sup>96</sup> McAdam, above n 4, 54.

<sup>97</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1, para 52, referring to *Ireland v United Kingdom* (1979-80) 2 EHRR 25, para 167.

<sup>98</sup> *Labita v Italy* (2008) 46 EHRR 1288, para 120.

<sup>99</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1, para 52; McAdam, above n 4, 64.

<sup>100</sup> *Peers v Greece* (2001) 33 EHRR 51, para 74.

<sup>101</sup> *R v Secretary of State for the Home Department, ex parte Bagdanavicius* [2005] UKHL 38, para 24 (Lord Brown); McAdam, above n 4, 65.

<sup>102</sup> *Sufi and Elmi v United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) para 292.

<sup>103</sup> *D v United Kingdom* (1997) 24 EHRR 423.

<sup>104</sup> McAdam, above n 4, 66.

<sup>105</sup> *D v United Kingdom* (1997) 24 EHRR 423, para 53.



Furthermore, it was held in *N v Secretary of State For the Home Department* that a want of resources would be a breach of Article 3 in extreme cases which demand one's sympathy on pressing grounds.<sup>106</sup> Similarly, in *MSS v Belgium and Greece*, the court found that the Belgium government had breached its Article 3 *non-refoulement* obligations when it returned an asylum seeker to 'living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving.'<sup>107</sup>

These living conditions were held to amount to degrading treatment,<sup>108</sup> and could likely occur in a zombie infected nation.

The threshold for the severity of deprivation in removal cases is particularly high.<sup>109</sup> For climate change cases, this high threshold will mean that the slow-onset negative impacts which exasperate socio-economic vulnerabilities may be a long way from constituting an Article 3 violation and so necessitating *non-refoulement* protection. As Article 3 does not provide protection for pre-emptive movement, those affected will be unable to move until the conditions are considered intolerable. Thus, reliance on the ECHR for protection against climate change-related impacts is imperfect and more appropriate protection is needed.<sup>110</sup> Whilst existing jurisprudence does not explicitly exclude climate change effects as inhuman treatment, more development is needed for it to qualify.<sup>111</sup> Zombie apocalypse refugees may be more fortunate, in that their plight will be comparatively more rapid and overt.

It is clear from the analysis in this section that although there is certainly potential for complementary protection availing in *non-refoulement* obligations, significant gaps remain in the existing normative framework. This is particularly so for protection against the slow-onset process of climate change impacts compared to rapid-onset disasters.<sup>112</sup> Thus, existing international refugee and complementary protection frameworks are insufficient to address necessary pre-emptive and staggered movement. Any new protection or migration agreement would need to remedy this gap.<sup>113</sup>

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<sup>106</sup> The court explained, '[t]he application of Article 3 where the complainant in essence is of want of resources in the applicant's home country... is only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised State... an Article 3 case of this kind must be based on facts which are not only exceptional, but extreme; extreme, that is, judged in the context of cases all or many of which... demand one's sympathy on pressing grounds': *N v Secretary of State for the Home Department* [2008] ECHR 453 paras 38-40; McAdam, above n 4, 68.

<sup>107</sup> *MSS v Belgium and Greece* App no 30696/09 (European Court of Human Rights, Grand Chamber, 21 January 2011), para 254.

<sup>108</sup> McAdam, above n 4, 69-70.

<sup>109</sup> *Bensaid v United Kingdom* (2001) 33 EHRR 205 para 40.

<sup>110</sup> McAdam, above n 4, 76.

<sup>111</sup> *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26; Human Rights Committee, *General Comment 15: The Position of Aliens under the Covenant* (11 April 1986) para 5; Human Rights Committee, *General Comment 18: Non-Discrimination* (10 November 1989); *ibid* 54.

<sup>112</sup> McAdam, above n 4, 83.

<sup>113</sup> *Ibid* 84.

## V FILLING THE GAP

A considerable amount of work has been done to redress the legal and normative gap for climate change-related protection. This section explores these efforts and proposes that the same measures could be used to provide protection for people displaced by the zombie apocalypse.

### A *Expanding the Definition of Refugee*

There is support in academic circles to extend the logic of the Convention definition to incorporate climate change impacted individuals.<sup>114</sup> The expansion of the refugee definition has even been described as an easy extension of human rights policy. As the 1951 Convention definition is heavily imbued with human rights notions, using human rights concepts should have natural appeal. As Musalo et al. comment, “[t]he realities of the human condition have continued to exert powerful stretching forces upon the traditional refugee definition,” creating a need for an expanded definition to “more fully respond to the broad range of individuals who flee in fear.”<sup>115</sup>

Examples of expanding the refugee definition beyond the Convention definition can be found in the Regional Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) and the Cartagena Declaration on Refugees in Latin America (Cartagena Declaration).<sup>116</sup> The OAU Convention includes as refugees people displaced on account of ‘events seriously disturbing public order.’<sup>117</sup> Similarly, Article III(3) of the Cartagena Declaration explicitly considers the need to enlarge the concept of a refugee to include not only the elements of the Refugee Convention but also:

[R]efugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

Whilst scholarly debate has questioned whether environmental disasters could be included in this category, it has been deemed unlikely that involved States would

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<sup>114</sup> Mark Baker-Jones and Melanie Baker-Jones, ‘Teitiota v. The Chief Executive of Ministry of Business, Innovation And Employment - A Person Displaced’ (2015) 15(2) *QUT Law Review* 119.

<sup>115</sup> Karen Musalo et al., *Refugee Law And Policy: A Comparative And International Approach* 36 (Carolina Academic Press, 3d ed. 2007) 54-55 in Duong, above n 15, 1262.

<sup>116</sup> *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, adopted 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974); *Cartagena Declaration on Refugees*, adopted 22 November 1984, in *Annual Report of the Inter-American Commission on Human Rights* (1984-85) OAS Doc OEA/Ser.L/V/II.66/doc.10, rev 1, 190-3.

<sup>117</sup> *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, adopted 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974), Article 1(2).

readily accept such an expansion beyond its conventional meaning of ‘public disturbances resulting in violence.’<sup>118</sup>

## **B     *Expanding Human Rights Law Protection***

There may be a need to move away from traditional approaches of dealing with forced migration to accommodate the new and unforeseen refugee problem created by the zombie apocalypse.<sup>119</sup> The benefits of a human rights-based approach have been addressed by the International Law Commission:

A rights-based approach deals with situations not simply in terms of human needs, but in terms of society’s obligation to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed.<sup>120</sup>

Any approach to creating a new, specific instrument would need to involve a comprehensive human rights framework,<sup>121</sup> combining protection, assistance and responsibility and the incorporation of principles of proximity, proportionality and non-discrimination.<sup>122</sup> Alternatively, extending protection to people displaced by the zombie apocalypse could be seen as developing a right of temporary protection on humanitarian grounds under customary law, rather than under a treaty.<sup>123</sup>

One solution could be the negotiation and creation of a new international agreement that specifically addresses the issue and provides a suitable protection framework. This approach however, is not without problems. Attributing the international rights and responsibilities of displaced persons is integrally a state sovereignty matter and the contentious nature would certainly impede universal agreement.<sup>124</sup>

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<sup>118</sup> Alice Edwards, ‘Refugee Status Determination in Africa’ (2006) 14 *African Journal of International and Comparative Law* 204, 225–27; Walter Kälin, ‘Conceptualising Climate-Induced Displacement’ in Jane McAdam, *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart, 2012) 88; McAdam, above n 4, 47.

<sup>119</sup> Angela Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’ (2008) 30(4) *Law & Policy* 514.

<sup>120</sup> International Law Commission, *Preliminary Report on the Protection of Persons in the Event of Disasters* by Mr. Eduardo Valencia-Ospina, ‘Special Rapporteur’, 60<sup>th</sup> Session, UN Doc A/CN.4/598 (5 May 2008) para174; McAdam, above n 4, 8.

<sup>121</sup> Duong, above n 15, 1251.

<sup>122</sup> See the *Project for a Convention on the International Status of Environmentally Displaced Persons* <<http://tinyurl.com/CIDCE-Environmental-displaced>>; María José Fernández, ‘Refugees, Climate Change and International Law’ (2015) 49 *Forced Migration Review* 42.

<sup>123</sup> Alice Edwards, ‘Refugee Status Determination in Africa’ (2006) 14 *African Journal of International and Comparative Law* 227; United Nations High Commission For Refugees, *Note on International Protection*, UN Doc A/AC.96/1008 (4 July 2005) para 36; McAdam, above n 4, 49 (discussing people displaced by environmental events).

<sup>124</sup> Williams, above n 119, 517.

Consequently, addressing the issue may be better coordinated through a regional agreement, operating under an international umbrella framework. A regional cooperation and bilateral agreement could expand upon existing geopolitical relationships and allow states to develop appropriate policies to respond to the situation within the relative capacities of the countries involved. An agreement in this form will be more likely to achieve a greater degree of commitment from participating states compared to what may be achieved at a global level.<sup>125</sup>

Direction could be taken from the recently endorsed ‘Agenda for the Protection of Cross-Border Displaced Persons in the context of Disasters and Climate Change’, which highlights State efforts to adopt a more flexible approach to ‘applying “regular migration categories”, granting “temporary stay arrangements”, and wider applications of current refugee law.’<sup>126</sup> A number of other approaches that could be used as a guide for zombie protection have been proposed to fill the climate change legal protection gap, ranging from binding multilateral instruments to policy recommendations and commitment statements by multilateral bodies.<sup>127</sup> The Cancun Adaptation Framework was negotiated by the Ad Hoc Working Group on Long-term Cooperative Action under the UNFCCC in 2010.<sup>128</sup> The framework explicitly recognised climate migration and the inadequacy of current protection. It promotes the need for parties to enact ‘[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels’.<sup>129</sup>

The following year, the Nansen Conference on Climate Change and Displacement in the 21st Century developed a set of 10 recommendations known as the Nansen Principles.<sup>130</sup> These principles address the protection gap that exists for externally displaced persons and the need for international action.<sup>131</sup> The resulting Nansen Initiative aimed to develop state consensus on how to most affectively address the issue.<sup>132</sup> Additionally, the UNHCR hosted the 2011 Bellagio Deliberations which were a series of expert roundtables on climate change and displacement.<sup>133</sup> Both the Nansen

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<sup>125</sup> Ibid 518.

<sup>126</sup> The Nansen Initiative, *Agenda for The Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change Final Draft* (2015) iv <<https://www.nanseninitiative.org/global-consultations/>>; Baker-Jones & Baker-Jones, above n 114, 119.

<sup>127</sup> United Nations High Commissioner for Refugees, *High Commissioner’s Closing Remarks: 2010 Dialogue on Protection Gaps and Responses*, at 2 (Dec. 9, 2010), available at <<http://www.unhcr.org/4d0732389.html>>; Ni, above n 36, 346.

<sup>128</sup> United Nations Framework Convention on Climate Change, Cancun, Mexico, Nov. 29-Dec. 10, 2010, *Report of the Conference of the Parties on its Sixteenth Session*, at 1, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

<sup>129</sup> Ibid, para 14(f).

<sup>130</sup> United Nations High Commission for Refugees, *The Nansen Conference: Climate Change and Displacement in the 21<sup>st</sup> Century* (2011).

<sup>131</sup> See in particular, ibid Principle IX.

<sup>132</sup> Ni, above n 36, 347.

<sup>133</sup> United Nations High Commissioner for Refugees, *Summary of Deliberations on Climate Change and Displacement*, (2011) <<http://www.unhcr.org/4da2b5e19.pdf>>.

Initiative and the Bellagio Deliberations emphasise the importance of regional responses and recognise the international community's vital role in assisting and coordinating such regional efforts.<sup>134</sup>

These regional proposals provide an encouraging platform on which to base a zombie apocalypse refugee protection framework. However, it is important not to forget that even if resettlement is successfully facilitated, issues of identity, culture and self-determination will arise for people who have lost their homes and homelands. Any new policy should therefore also address these fundamental issues through a comprehensive human rights framework.<sup>135</sup>

## VI CONCLUSION

The movement of people away from a threat toward actual or perceived safety has been occurring since time immemorial. Whilst the concept of migration is not new, over time people have faced a range of both new and continued threats such as war, famine, persecution, severe economic hardship, climate change impacts and perhaps one day the threat of the zombie apocalypse. Regardless of the threat faced, people fleeing their homes for the sake of survival, deserve to be legally protected.

This article has sought to assess the ability of existing international law frameworks to provide legal protection for zombie apocalypse refugees. It has found that the Convention definition of refugee is mired in the strict categories prioritised by the 1951 drafters and it seems unlikely that states will be willing to expand it.<sup>136</sup> Alternatively, complementary protection based on human rights principles and the ensuing *non-refoulement* obligations has the potential to provide protection, although this is also not guaranteed. Most likely a new form of instrument or agreement to address the issue will be needed. The best protection will arise from incorporating regional cooperation between states and 'building on existing geopolitical, economic, cultural, and environmental relationships that already exist within many regional frameworks.'<sup>137</sup> In this way the international community can provide the much-needed protection for zombie apocalypse refugees as their homes are lost to the waves of undead.



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<sup>134</sup> Ni, above n 36, 348.

<sup>135</sup> McAdam, above n 4, 36.

<sup>136</sup> Williams, above n 121, 523.

<sup>137</sup> Ibid 524.