

Refining Legal Frameworks for Cross-border Climate-Induced Displacement: A Comprehensive
Analysis of Provisions, Definitions, and New Arrangements under International Law

by

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Abstract

The thesis addresses the urgent and growing issue of displacement driven by climate change. As climate impacts intensify, more individuals are forced to cross borders in search of safety, yet current international legal frameworks are ill-equipped to offer them adequate protection. This research critically examines the existing legal provisions within International Refugee Law (IRL) and International Human Rights Law (IHRL), highlighting their limitations in addressing the unique challenges posed by climate-induced displacement.

The thesis explores the inadequacies of current refugee definitions under the 1951 Refugee Convention and the challenges in applying non-refoulement protections to those displaced by environmental factors. It also delves into the terminological ambiguities that plague the discourse, proposing a more coherent and inclusive definition that accurately captures the diverse realities of climate-induced displacement.

Building on this analysis, the thesis advocates for significant reforms, including the potential for a new international convention specifically designed to address the legal gaps faced by climate refugees. It emphasizes the need for a comprehensive legal framework that includes state responsibility, effective implementation mechanisms, and robust international cooperation to ensure the protection of vulnerable populations affected by climate change.

In summary, this thesis contributes to the ongoing global dialogue on climate-induced displacement by offering a critical evaluation of current legal frameworks and proposing actionable reforms to enhance the protection of those displaced across borders due to climate change.

Introduction

When global communities understood the seriousness of the impact of climate change, academicians and world leaders started engaging in discussions related to reducing carbon and greenhouse gas emissions.¹ This resulted in the ratification of various declarations, conventions, and treaties related to the environment and climate change, both domestically as well as internationally.² While the effectiveness of these instruments remains the subject of debate, they have nonetheless covered a wide range of issues related to climate change and its effects.³

However, the issue of climate-induced displacement was not given significant attention, even though the Intergovernmental Panel on Climate Change (IPCC), in its first report (1990), highlighted that the most significant impact of climate change would be on human migration.⁴

While climate-induced displacement has not been codified within any international legal instrument to date, millions of people are being displaced or are on the verge of being displaced due to the effects of climate change.⁵

¹ ‘What Are the World’s Countries Doing about Climate Change?’ (*Imperial College London*) <<https://www.imperial.ac.uk/grantham/publications/climate-change-faqs/what-are-the-worlds-countries-doing-about-climate-change/>> accessed 6 June 2024.

² For example – United Nations Framework Convention on Climate Change (UNFCCC) (1992), Convention on Biological Diversity (CBD) (1992), Paris Agreement 2015, Environmental Protection Act (UK, 1990) etc. Asian Development Bank, ‘Climate Change, Coming Soon to a Court Near You: International Climate Change Legal Frameworks’ (0 edn, Asian Development Bank 2020) <<https://www.adb.org/publications/international-climate-change-legal-frameworks>> accessed 6 June 2024.

³ ‘Climate Change Impacts and Adaptation — European Environment Agency’ <<https://www.eea.europa.eu/soer/2015/europe/climate-change-impacts-and-adaptation>> accessed 6 June 2024.

⁴ S. Lonergan, ‘The Role of Environmental Degradation in Population Displacement’ (1998) Environmental Change and Security Project Report Issue 4 5.

⁵ ‘Causes and Effects of Climate Change’ (*United Nations*) <<https://www.un.org/en/climatechange/science/causes-effects-climate-change>> accessed 6 June 2024.

Climate-induced displacement results in both internal and cross-border displacement.⁶ The Internal Displacement Monitoring Centre (IDMC) report indicates that more than 26.4 million people were displaced internally due to factors directly linked to climate change, such as floods or drought in 2023.⁷ In recent years, the proportion of people displaced due to climate change-related disasters is far more than the displacement due to armed conflicts.⁸ It is estimated that more than 1 billion people will be displaced due to the impacts of climate change by 2050.⁹

While a majority of climate-induced displacements are internal,¹⁰ there are also numerous instances of people displaced across international borders. Currently, global data covers only the incidence of displacement rather than where displaced people flee or where they eventually settle; therefore, it is difficult to quote the exact number of people crossing international borders.¹¹ Experts believe that hundreds of thousands of people are displaced across borders due to climate

⁶ Alea Mohamed, 'Climate Change-Induced Internal Displacement in Canada: An Analysis' [2020] British Columbia Council for International Cooperation 1.

⁷ 'Global Internal Displacement Database' (*IDMC - Internal Displacement Monitoring Centre*) <<https://www.internal-displacement.org/undefined>> accessed 7 June 2024.

⁸ "'Intolerable Tide" of People Displaced by Climate Change: UN Expert' (*Office of the United Nations High Commissioner for Human Rights*, 23 June 2022) <<https://www.ohchr.org/en/press-releases/2022/06/intolerable-tide-people-displaced-climate-change-un-expert>> accessed 7 June 2024.

⁹ Institute for Economics and Peace, 'Over One Billion People at Threat of Being Displaced by 2050 Due to Environmental Change, Conflict and Civil Unrest' <<https://www.economicsandpeace.org/wp-content/uploads/2020/09/Ecological-Threat-Register-Press-Release-27.08-FINAL.pdf>>; Sean McAllister, 'There Could Be 1.2 Billion Climate Refugees by 2050. Here's What You Need to Know' (*ZURICH*) <<https://www.zurich.com/en/media/magazine/2022/there-could-be-1-2-billion-climate-refugees-by-2050-here-s-what-you-need-to-know>> accessed 7 June 2024.

¹⁰ Jane McAdam, 'Displacement in the Context of Climate Change and Disasters' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (1st edn, Oxford University Press 2021) 834 <<https://academic.oup.com/edited-volume/41310/chapter/352057305>> accessed 20 October 2023.

¹¹ Ian Fry, 'Providing Legal Options to Protect the Human Rights of Persons Displaced across International Borders Due to Climate Change - Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Ian Fry' (United Nations Human Rights Council 2023) A/HRC/53/34 para 1.

change.¹² The Nansen Initiative's report mentions that more than 50 countries recorded instances of such cross-border climate-induced displacement in 2015.¹³

The thesis particularly focuses on cross-border climate-induced displacement for two reasons. First, the victims of cross-border climate-induced displacement do not have codified legal protection under international law.¹⁴ Therefore, when they cross international borders, they are either deported to their home state¹⁵ or sent to detention camps.¹⁶ Although, in some cases, they get protection from the host state in the form of humanitarian assistance, regional agreements or international solidarity, in most cases they are deprived of legal protection.¹⁷ Secondly, the victims of cross-border climate-induced displacement do not have a universally recognized name. They are labelled with different terminologies, such as climate displaced person, environment migrant, environment refugee, climate refugee etc. (discussed in detail in Chapter 2). This further makes them vulnerable. Therefore, it becomes increasingly necessary to analyze the aspect of cross-border climate-induced displacement from the perspective of International Law.

The thesis makes several arguments. First, the existing framework of international law provides protection to the victims of cross-border climate-induced displacement, but those protections are not effective and efficient. Second, climate refugee is the most suitable term to

¹² *ibid.*

¹³ The Nansen Initiative, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change' (2015) Volume 1 6 <<https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>>.

¹⁴ Emily Wilkinson and others, 'Climate-Induced Migration and Displacement: Closing the Policy Gap' [2016] Shaping policy for development <<https://environmentalmigration.iom.int/sites/g/files/tmzbd11411/files/documents/2023-11/10996.pdf>>.

¹⁵ *AF (Kiribati)* [2013] 800413 (NZIPT).

¹⁶ Deborah Wolfe, 'Who Are Climate Refugees – and How Can We Help Them?' (*World Vision*, 2 November 2022) <<http://www.worldvision.ca/stories/climate-change/who-are-climate-refugees-and-how-can-we-help>> accessed 1 August 2024.

¹⁷ 'Forced Displacement' (*European Commission*) <https://civil-protection-humanitarian-aid.ec.europa.eu/what/humanitarian-aid/forced-displacement_en> accessed 1 August 2024.

refer to the victims of cross-border climate-induced displacement. Third, there are three possible strategies to provide legal protection to the victims of cross-border climate-induced displacement, namely, protocol to the Convention Relating to the Status of Refugee (hereafter 1951 Refugee Convention), progressive interpretation of International Human Rights Law (IHRL) framework and new convention specifically designed for the victims of cross-border climate-induced displacement.

Structurization

The thesis is divided into three chapters. Chapter 1 focuses on existing legal protection available for the victims of cross-border climate-induced displacement within International Law. Here, the thesis discusses International Refugee Law (IRL) and International Human Rights Law (IHRL). Within IRL, the thesis focuses on assessing whether the victims of cross-border climate-induced displacement could be included within the definition of ‘refugee’ under the 1951 Refugee Convention. Similarly, in IHRL, the thesis focuses on analyzing whether the victims of cross-border climate-induced displacement could be afforded non-refoulment protection within IHRL.

Chapter 2 focuses on terminological debates that arise when discussing the victims of cross-border climate-induced displacement. Scholars and experts differ in their terminology regarding the victims of cross-border climate-induced displacement. Therefore, the thesis focuses on addressing the terminological confusion.

Chapter 3 discusses the legal arrangements that could be made available for the victims of cross-border climate-induced displacement. Here, the chapter is divided into three parts. Part I focuses on how IRL could protect the victims of cross-border climate-induced displacement. Similarly, Part II discusses how IHRL can be progressively interpreted to include the victims of

cross-border climate-induced displacement within its protection framework. Part III proposes a new convention designed specifically for them.

Unfortunately, the bounds of the present study do not permit a detailed exploration of every issue relevant to cross-border climate-induced displacement. Issues beyond the scope of this study, although nonetheless relevant to it, include the analysis of national laws, the law of the seas and international environmental law on cross-border climate-induced displacement. Along similar lines, the thesis does not focus on issues such as community-based adaptation strategies to tackle cross-border climate-induced displacement, the economic impact of displacement on host countries, the role of mitigation strategies in reducing the instances of such displacement and humanitarian assistance provided to the victims of cross-border climate-induced displacement.

Chapter 1: Climate Displacement and the Problems and Prospects of Existing Frameworks of International Law

The adequacy of IRL and IHRL frameworks for protecting victims of cross-border climate-induced displacement is currently at the forefront of international debate and concern. To determine the need for new legal arrangements, it is important to analyze the provisions of these frameworks and assess whether the protections accorded under them are efficient.

For that purpose, the chapter is divided into two parts. Part I focuses on IRL, and the second part focuses on IHRL. In both parts, the thesis first discusses the protections that are available under the framework and subsequently assesses whether these protections are sufficient or not.

1.1. International Refugee Law (IRL)

IRL is the primary body of law that deals with cross-border movement in International Law. Within the IRL, the 1951 Refugee Convention and Protocol relating to the Status of Refugees (hereinafter 1967 Protocol) are the fundamental instruments for refugees and asylum seekers.¹⁸ The 1951 Refugee Convention extends to a specific category of individuals that fall within the scope of the concept of ‘refugee,’ which is defined as:

“any person who....owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his

¹⁸ UN General Assembly, Convention Relating to the Status of Refugees 1951 (United Nations, Treaty Series, vol 189, p 137). UN General Assembly, Protocol Relating to the Status of Refugees 1967 (United Nations, Treaty Series, vol 606, p 267).

former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."¹⁹

Here, the phrase *well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion* is particularly important. 'Well-founded fear of persecution' is established through a forward-looking assessment of harm to the person if they return to their country.²⁰ This assessment means that the person claiming refugee status shall have a 'real chance' of experiencing 'serious harm' in case they are sent back to their country of origin.²¹ Here, 'real chance' means that the chance should be actual with a reasonable degree of likelihood and not a remote possibility, which is more likely than not.²² Similarly, 'serious harm' is understood by referring to IHRL's meaning of persecution, which states that "*persecution constitutes of sustained or systemic violation of basic human rights that demonstrate a failure of state protection.*"²³ This would include various serious human rights violations, including threats to life or freedom.²⁴

IHRL has also played an essential role in broadly looking at the aspect of persecution under this definition. Persecution was earlier limited to a violation of civil and political rights, such as arbitrary detention, arbitrary deprivation of life, or prohibition of torture.²⁵ Over time, however,

¹⁹ 1951 Refugee Convention art 1(a)(2). Article 1(c) talks about cessation and article 1(d), 1(e), 1(f) talks about exclusion. A more elaborate discussion on these provisions is beyond the scope of the discussion.

²⁰ Cathryn Costello, Michelle Foster and Jane McAdam, *The Oxford Handbook of International Refugee Law* (Oxford university press 2021) 628.

²¹ James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Second edition, Cambridge University Press 2014) chs 2 and 3.

²² Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press 2010) 342.

²³ *Canada (Attorney General) v. Ward* (n 11) 733–734; *Cheung v. Canada (Minister of Employment and Immigration)* [1993] 2 FC 314 (CA) 324–325.

²⁴ Hathaway and Foster (n 21) 112.

²⁵ Costello, Foster and McAdam (n 20) 629–630.

courts have extended its scope, and it now includes violations of socio-economic rights.²⁶ The expansion in the scope of elements of the 1951 Refugee definition is significant in the context of people displaced due to climate change.

Subsequently, such a real chance of serious harm should be due to race, religion, nationality, membership of a particular social group, or political opinion.²⁷ Of particular importance to the present discussion are social groups. Social groups are defined by two cumulative elements – common characteristics and distinct identity in the relevant country.²⁸ The changing nature of displacement, innovative analysis and research by decision-makers and asylum tribunals, and the general evolution in the scope of international law as a whole have all contributed to the expansion of social groups including women, homosexuals, conscientious objectors, and even people with particular occupations.²⁹

Another essential requirement is that there should be a ‘nexus’ between the well-founded fear of being persecuted and due to race, religion, nationality, membership of a particular social group, or political opinion, which means that both the elements should be connected.³⁰ The interpretation of the nexus requirement was also expanded, and now it includes not only visible persecution but also hidden or implicit forms of persecution that are apparent in social structures.³¹

²⁶ For example – serious restrictions on right to earn livelihood, right to practice religion, access to normally available educational facilities etc. UN High Commissioner for Refugees (UNHCR), ‘Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (UN High Commissioner for Refugees (UNHCR) 2019) HCR/IP/4/ENG/REV. para 54 <<https://www.refworld.org/policy/legalguidance/unhcr/2019/en/123881>>; Costello, Foster and McAdam (n 20) 629–630.

²⁷ Costello, Foster and McAdam (n 20) 629.

²⁸ European Asylum Support Office, ‘EASO Guidance on Membership of a Particular Social Group’ 11–15.

²⁹ United Nations High Commissioner for Refugees (UNHCR), ‘Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/02 (2002) para 1.

³⁰ Costello, Foster and McAdam (n 20) 629.

³¹ *ibid.*

The UNHCR’s legal considerations are the result of such expansion. At the time of drafting the 1951 Refugee Convention, the drafters felt that “*it was difficult to imagine that fires, flood, earthquakes, or volcanic eruptions... differentiated between their victims*”.³² However, over time, the implicit forms of persecution are realized, and the UNHCR legal considerations acknowledged that “*in the context of the adverse effects of climate change and disasters, a well-founded fear of being persecuted may arise especially for people who are already marginalized or vulnerable.*”³³

Questions have been raised on the scope of this definition concerning cross-border climate-induced displacement.³⁴ Until at least 2020, courts,³⁵ the United Nations,³⁶ and scholars³⁷ have opined that the victims of cross-border climate-induced displacement do not come under the definition of ‘refugee’ as per Article 1(a)(2) of the 1951 Refugee Convention. However, the United Nations High Commissioner for Refugees (UNHCR) published legal considerations in 2020, answering the question of the inclusion of persons displaced internationally due to climate change under IRL.³⁸

³² Hathaway and Foster (n 21) 362.

³³ ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (United Nations High Commissioner for Refugees 2020) para 10.

³⁴ Matthew Scott, ‘Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change’ (2016) 35 Refugee Survey Quarterly 26.

³⁵ *A and Another v Minister for Immigration and Ethnic Affairs and Another* [1997] HCA 4 (High Court of Australia).

³⁶ ‘Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective’ (United Nations High Commissioner for Refugees 2009) 8 <<https://www.unhcr.org/4901e81a4.pdf>>; Francesca Rosignoli, *Environmental Justice for Climate Refugees* (1st edn, Routledge 2022) 16 <<https://www.taylorfrancis.com/books/9781003102632>> accessed 1 February 2024.

³⁷ Scott (n 34); Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012).

³⁸ UNHCR issues legal considerations pursuant to its mandate included in the Statute of the Office of the United Nations High Commissioner for Refugees (paragraph 8(a)), in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees, Article II of its 1967 Protocol, Article VIII of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and Commitment II(e) of the 1984 Cartagena Declaration on Refugees. ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33).

The UNHCR legal considerations were a significant development for the legal recognition of the victims of cross-border climate-induced displacement since this was the first instance when UNHCR acknowledged that the victims of cross-border climate-induced displacement could be included within the definition of ‘refugee’ as per Article 1(a)(2) of the 1951 Refugee Convention.³⁹

The UNHCR legal considerations clearly stated that the question of refugee protection under the 1951 Refugee Convention should not be automatically dismissed when the issue of climate change is involved.⁴⁰ The legal considerations interpreted the definition of article 1(a) (2) of the 1951 Refugee Convention and pointed out that upon the existence of certain complementary factors, a person affected by climate change can be included with the definition. These complementary factors are - a) if an individual (or groups of individuals) affected by climate change is also persecuted by the government;⁴¹ b) an individual (or groups of individuals) affected by climate change is also affected by secondary factors such as discrimination in assistance and evacuation procedures, etc;⁴² c) the climate change or its related effect amplifies with the ‘persecution’ within the traditional definition of the convention.⁴³

In its legal considerations, UNHCR explains how the victims of cross-border climate-induced displacement can fit into the elements of refugee definition under the 1951 Refugee Convention.⁴⁴ In doing that, UNHCR stressed the need to consider the broader ‘social and political characteristics of the effects of climate change or the impacts of disasters’ and their ‘significant

³⁹ *ibid* 6.

⁴⁰ ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33).

⁴¹ Costello, Foster and McAdam (n 20) 836.

⁴² *ibid*.

⁴³ *ibid*.

⁴⁴ ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33) paras 6–12.

adverse effects on state and societal structures and individual well-being and the enjoyment of human rights’ while looking into their protection claims under this definition.⁴⁵ Two issues merit attention.

Firstly, on the element of well-founded fear of persecution, the UNHCR legal considerations state that there is no denying that people are being displaced as a result of climate change. It further states that when people are affected by climate change, they are not only forced to be displaced, but such exposure also affects the enjoyment of several other human rights.⁴⁶

This exposure, coupled with the lack of the state’s ability and willingness to provide required safeguards, exacerbates vulnerability, ultimately affecting an adequate standard of living, health, water, and sanitation.⁴⁷ When these rights are affected for a longer period, the affected populations may be exposed to a risk of other human rights violations that amount to persecution within the meaning of the 1951 Refugee Convention.⁴⁸

Secondly, the UNHCR legal considerations agree that the impacts of climate change affect the entire community and do not discriminate based on particular factors. Therefore, persecution based on ‘race,’ ‘religion,’ ‘nationality,’ and ‘or membership of a particular social or political group’ (one of the essential elements of the definition) is difficult to ascertain.⁴⁹ However, when

⁴⁵ *ibid* 5; Costello, Foster and McAdam (n 20) 836.

⁴⁶ ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33) paras 7–8.

⁴⁷ *ibid* 7.

⁴⁸ UN High Commissioner for Refugees (UNHCR) (n 26) paras 51–55.

⁴⁹ ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33) para 8.

the effects of climate change are complemented by local, political, religious, and socio-economic circumstances, it may disproportionately affect marginalized and vulnerable communities.⁵⁰

These situations may result in a particular section of the community being prone to a risk of persecution.⁵¹ For example – New Zealand’s appeal court granted refugee status to a person who assisted in relief work following Cyclone Nargis in Burma in May 2008 on the basis that this work would be perceived as the expression of an anti-regime political opinion.⁵² Similarly, environmental degradation was used as a direct weapon of oppression against an entire section of the Iraqi Marsh Arabs.⁵³

Nonetheless, the UNHRC observed that any individual’s claim for refugee status cannot be made invalid merely because the entire community has been affected.⁵⁴ It should be kept in mind that individuals do not need to prove that their persecution is greater than that of other individuals of the same community.⁵⁵ Rather, the determining factor for the refugee status is whether there is persecution or not.⁵⁶ The legal considerations further state that in some situations, the effects of

⁵⁰ *ibid* 10. (such as - women, children, disabled, old ages, Indigenous, minorities or people relying on natural resources for living) severely as compared to others

⁵¹ *ibid*.

⁵² *Refugee Appeal No 76374* (New Zealand Refugee Status Appeals Authority) [69]; ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33) para 10.

⁵³ ‘The Iraqi Government Assault on the Marsh Arabs (A Human Rights Watch Background Paper, January 2003)’ <<https://www.hrw.org/legacy/backgrounder/mena/marsharabs1.htm>> accessed 18 May 2024.

⁵⁴ ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33) para 8.

⁵⁵ ‘Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions’ (UN High Commissioner for Refugees (UNHCR) 2016) HCR/GIP/16/12 para 17.

⁵⁶ ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33) para 8.

climate change affect an entire community.⁵⁷ This may strengthen rather than weaken the evidence that justifies the fear of an individual being persecuted.⁵⁸

The legal considerations also observed that assessing the risk of persecution is subjective and depends on the scenario of each case.⁵⁹ In determining persecution in the case of climate refugees, the most crucial aspect is to understand that the impact of climate change may emerge suddenly or gradually, overlap temporally and geographically, vary in intensity, magnitude, and frequency, and persist over time.⁶⁰ Therefore, these factors, along with other elements - such as national and international efforts to mitigate the effects of climate change, disasters, and operational responses in the country of origin, improvements, or innovations in the adaptive capacity of the country and its communities - need to be considered while evaluating whether there is a reasonable possibility of being persecuted in the country of origin.⁶¹

1.1.1. Are IRL provisions adequate?

Based on the elements of the refugee definition and the UNHCR legal considerations, the 1951 Refugee Convention leaves some scope to recognize people displaced in the context of

⁵⁷ *ibid*; ‘Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions’ (n 55) para 17.

⁵⁸ ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33) para 8; ‘Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions’ (n 55) para 17.

⁵⁹ ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33) para 9.

⁶⁰ *ibid*; Adrienne Anderson and others, ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ [2018] SSRN Electronic Journal 133–135.

⁶¹ ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33) para 9.

climate change within the definition of refugee. However, this recognition is subject to certain limitations, as discussed below-

I. Dependant on Complimentary Factors – The observations made by the UNHCR in its legal considerations clarify that victims of cross-border climate-induced displacement can be recognized as refugees within the 1951 Refugee Convention if other complementary factors accompany them. These complementary factors result in achieving the threshold to show a well-founded fear of persecution since these factors are caused by the act or omission of the state and lack of state protection, or due to the climate disaster itself.⁶²

Therefore, these complementary factors are essential for a person to get ‘refugee’ status, irrespective of whether they are displaced in the context of climate change or not. Although it is difficult to assume that every displacement situation in the context of climate change will always be complemented by one or other mentioned factors, in the absence of these factors, no protection could be afforded to such people. The result is a situation whereby a person affected by climate change has to wait to establish the fear of persecution due to one of the complementary factors to get protection. Arguably, this is the most significant limitation of this approach, which undermines the utility of the present provision.

II. Difficulties in Characterizing Persecution and Persecutor – The primary reason behind the limited application of the 1951 Refugee Convention while dealing with the victims of cross-border climate-induced displacement is the lack of involvement of human agency.⁶³ The legal concept of persecution is predicated on the involvement of human agency and an identified

⁶² Costello, Foster and McAdam (n 20) 836.

⁶³ *ibid.*

‘persecutor.’⁶⁴ Consequently, the impacts of climate change or disasters themselves would not satisfy the meaning of persecution.⁶⁵ In the present case, some scholars view that the impacts of climate change could be considered as persecution.⁶⁶ However, there are at least two challenges with this approach.

Firstly, persecution entails serious human rights violations due to its nature or repetition.⁶⁷ The nature of the right at risk, the type and degree of its restriction or impairment, and the possibility that the restriction or impairment will materialize in a particular case are all taken into consideration when determining whether anything qualifies as persecution.⁶⁸

Although the impacts of climate change are very harmful and fatal, they currently do not meet the threshold of persecution.⁶⁹ In part, this is because of the lack of discriminatory elements (grounds of persecution).⁷⁰ Persecution needs to be linked to one of the five grounds mentioned in the definition of refugee.⁷¹ However, the impacts of climate change affect everyone equally. As a result, a refugee claim that is primarily grounded in the effects of climate change will be unsuccessful.⁷²

⁶⁴ *AF (Kiribati)* (n 15) paras 54–55.

⁶⁵ Costello, Foster and McAdam (n 20) 836.

⁶⁶ ANGELA WILLIAMS, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’ (2008) 30 *Baldy Center for Law and Social Policy* 508; Jessica B Cooper, ‘Environmental Refugees: Meeting the Requirements of the Refugee Definition’ (1998) 6 *New York University Environmental Law Journal*; TA. Aleinikoff, ‘Protected Characteristics and Social Perceptions: An Analysis of the Meaning of “Membership of a Particular Social Group.”’ in E Feller, V Türk, and F Nicholson, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003).

⁶⁷ ‘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 the Protection Granted’ (2004) L304/12 *Official Journal of the European Union* art 9.

⁶⁸ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Fourth edition, Oxford University Press 2021) 92.

⁶⁹ *ibid* 90–134.

⁷⁰ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (1st edn, Cambridge University Press 2007) 104–105.

⁷¹ McAdam (n 37) 44.

⁷² *ibid*; Foster (n 70) 310.

Secondly, in situations where the impacts of climate change amount to persecution, the second issue would be identifying a persecutor.⁷³ In most cases, the governments of impacted countries are not the persecutors since they did not contribute alone to climate change.⁷⁴ Rather, they support their citizens in tackling the impacts of climate change.⁷⁵ In that case, it could be argued that the international community is persecuted since the international community failed to reduce greenhouse gas emissions, which caused this problem.⁷⁶ But then, it is essential to note that a person, when recognized as a refugee, may move to the same country, which would be labelled as a persecutor.⁷⁷ This would be a complete reversal of the traditional refugee paradigm where the persecuted person is not escaping their government. Rather, they seek refuge in countries where they are persecuted.⁷⁸ The Australian Refugee Review Tribunal has also rejected this argument.⁷⁹

Due to the limitations mentioned above, there are no reports to date of any person internationally displaced in the context of climate change being granted 'refugee' status under the 1951 Refugee Convention despite the justifications made by the UNHRC.⁸⁰ For these reasons, it is appropriate to observe that the 1951 Refugee Convention is not adequate to protect people displaced internationally in the context of climate change at this point.

⁷³ McAdam (n 37) 45; Costello, Foster and McAdam (n 20) 836.

⁷⁴ McAdam (n 37) 45; Costello, Foster and McAdam (n 20) 836.

⁷⁵ McAdam (n 37) 45.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *ibid.*; Costello, Foster and McAdam (n 20) 836.

⁷⁹ 0907346 [2009] RRTA 1168 (10 December 2009).

⁸⁰ Costello, Foster and McAdam (n 20) 837.

1.2. International Human Rights Law

IHRL provides legal protection to individuals that are guaranteed by states to everyone within their jurisdiction.⁸¹ The principle of non-refoulement within IHRL is particularly relevant for the people displaced internationally due to climate change. According to this principle, “*no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm.*”⁸² Multiple IHRL instruments explicitly mentioned non-refoulement in their provisions.⁸³ Moreover, international human rights bodies⁸⁴, regional human rights courts⁸⁵, and national courts have all opined that this principle is an implicit guarantee flowing from the obligations to respect, protect and fulfil human rights.⁸⁶

Existing case law makes clear that non-refoulement can be applied to serious human rights violations such as torture and other cruel, inhuman or degrading treatment, risks of violations of the rights to life, integrity and freedom of the person, serious forms of sexual and gender-based violence, death penalty, and prolonged solitary confinement.⁸⁷ Whether this principle does or should include the victims of cross-border climate-induced displacement is not immediately

⁸¹ *ibid.*

⁸² Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘The Principle of Non-Refoulement under International Human Rights Law’ <<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>>. It is important to mention that article 33 of the 1951 Refugee Convention also provide non-refoulement protection to those people who are refugees within the meaning of article 1(a)(2) of the 1951 Refugee Convention.

⁸³ including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)⁸³, Inter-American Convention on the Prevention of Torture has explicitly mentioned non-refoulement in their provisions.

⁸⁴ ‘General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (UN Human Rights Committee (HRC) 2004) CCPR/C/21/Rev.1/Add. 13 para 12.

⁸⁵ *D v United Kingdom* (24 EHRR 423); *Bader v Sweden* (2005-XI Eur Ct HR 75); *NA v Finland* (App No 25244/18, HUDOC).

⁸⁶ Office of the United Nations High Commissioner for Human Rights (OHCHR) (n 82).

⁸⁷ *ibid.*

apparent. While existing case law is limited, the case of *Ioane Teitota v. New Zealand*⁸⁸ is particularly significant as it is the only case from the community of people displaced internationally in the context of climate change that has been brought up in an international human rights body.⁸⁹

Ioane Teitiota comes from Kiribati, an island nation in the Pacific Islands. He moved to New Zealand and requested protection, claiming that conditions in his homeland were growing increasingly precarious due to climate change and rising sea levels, resulting in challenges such as insufficient fresh water, overcrowding, inundation, erosion, and land disputes.⁹⁰ New Zealand courts rejected his claims on the basis that there was no real chance of the appellant being persecuted if returned to Kiribati.⁹¹ Subsequently, he was deported back to Kiribati. After that, he complained to the Human Rights Committee (HRC) about the decision of the New Zealand courts, claiming the violation of his ‘right to life’ under the International Covenant on Civil and Political Rights (ICCPR).⁹²

The right to life under Article 6 of ICCPR encompasses a non-refoulement obligation under its duty to respect.⁹³ Paragraph 30 of the General Comment No. 36 on the right to life states that this obligation restricts state parties from deporting, extraditing, or transferring a person to other states in cases where the state has subsequent reason to believe that there is a ‘real risk’ of

⁸⁸ *Ioane Teitiota v New Zealand* [2020] CCPR/C/127/D/2728/2016 (UN Human Rights Committee (HRC)).

⁸⁹ Jane McAdam, ‘Current Developments - Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (2020) 114 *American Journal of International Law* 708, 708–709.

⁹⁰ *Ioane Teitiota v. New Zealand* (n 88) para 2.1.

⁹¹ *AF (Kiribati)* (n 15) paras 71–76.

⁹² *Ioane Teitiota v. New Zealand* (n 88) 2–3; Jane McAdam, ‘Current Developments’ (n 89) 710–711.

⁹³ United Nations General Assembly, International Covenant on Civil and Political Rights 1966 (United Nations, Treaty Series, vol 999, p 171).

irreparable harm in case if they are sent to that state.⁹⁴ Further, the comment states that the harm should be ‘personal’ in nature and shall not arise from the general condition of the receiving state.⁹⁵

The Human Rights Committee delivered the *Ioane Teitota* judgment in 2019.⁹⁶ In this case, although HRC rejected the claim that the complainant’s right to life is being violated based on the merits of the case, it observed that the state has an obligation to analyze foreseeable threats and life-threatening situations and act accordingly to ensure the protection of the right to life.⁹⁷ If a state fails to do so, it will be held liable for the violation of the right to life, even in cases where there is no actual loss of life.⁹⁸ It further stated that the situation of climate change and environmental degradation amounts to a serious threat to the right to life of both present and future generations.⁹⁹ The committee also highlighted the fact that other human rights tribunals have also determined the relationship between environmental degradation due to climate change and the violation of the right to life.¹⁰⁰ Therefore, HRC held that “*the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending States.*”¹⁰¹ Based on the observation made by the HRC in the *Ioane Teitota* case, it can be argued that a person crossing international borders due to climate change has a possibility of getting non-refoulement protection under IHRL.

⁹⁴ ‘General Comment No. 36, Article 6 (Right to Life)’ (United Nations Human Rights Committee (HRC) 2019) CCPR/C/GC/35 para 30.

⁹⁵ *ibid.*

⁹⁶ *Ioane Teitota v. New Zealand* (n 88).

⁹⁷ *ibid.* 9.3-9.6; Jane McAdam, ‘Current Developments’ (n 89).

⁹⁸ *Ioane Teitota v. New Zealand* (n 88) para 9.4.

⁹⁹ *ibid.*; ‘General Comment No. 36, Article 6 (Right to Life)’ (n 94) para 62.

¹⁰⁰ *Ioane Teitota v. New Zealand* (n 82) para 9.5; *Portillo Cáceres and Others v Paraguay* (CCPR/C/126/D/2751/2016, Communication 2751/2016) [7.4].

¹⁰¹ *Ioane Teitota v. New Zealand* (n 88) para 9.11.

1.2.1 Are IHRL provisions adequate?

Although the HRC accepted that persons affected by climate change have a possibility of getting protection under non-refoulement of IHRL, after four years of the judgment, no such protection has been granted to date.¹⁰² There are likely many reasons for this, but three in particular should be highlighted.

I. High threshold of risk assessment – The primary reason behind the rejection of Teitota’s claim was that the HRC was not satisfied after analyzing the evidence that Mr. Teitota faced a risk of imminent or likely risk of arbitrary deprivation of life upon return to Kiribati.¹⁰³ Scholars like McAdam believe that the HRC while assessing the ‘risk,’ stressed a very high threshold, which is difficult to ascertain in most cases.¹⁰⁴ There are various examples to back such an assertion.

One of the claims made by Mr. Teitota was that he and his family would be seriously harmed by the lack of access to potable water in Kiribati due to the rise in sea level.¹⁰⁵ Here, the committee stated that the author (Mr. Teitota) would have had to show that *“the supply of fresh water [was] inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death.”*¹⁰⁶ Similarly, Mr. Teitota made other claims that he had been deprived of his means of subsistence because his crops were being destroyed due to the contamination of the soil.¹⁰⁷ On this claim, the HRC highlighted the observation of New Zealand courts, which stressed that Mr. Teitota

¹⁰² Jane McAdam, ‘Current Developments’ (n 89).

¹⁰³ *Ioane Teitiota v. New Zealand* (n 88) paras 9–10.

¹⁰⁴ Jane McAdam, ‘Current Developments’ (n 89) 720.

¹⁰⁵ *Ioane Teitiota v. New Zealand* (n 88) para 9.8.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid* 9.9.

stated that it is difficult to grow crops, “*but it was not impossible.*”¹⁰⁸ Further, the HRC noted that when Mr. Teitota was deported to Kiribati, there was no “*real and reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food and extreme precarity that could threaten his right to life, including his right to a life with dignity.*”¹⁰⁹

Duncan Laki Muhumuza, a member of the Human Rights Committee in this case, highlighted the issue of the high threshold set by the committee in his dissenting opinion.¹¹⁰ According to Muhumuza, the burden of proof to establish the real risk and danger of arbitrary deprivation of life placed on the author is unreasonable.¹¹¹ McAdam also made a similar observation.¹¹²

Therefore, relying on the HRC’s current stance about risk assessment¹¹³ and the observations made by Muhumuza¹¹⁴ and McAdam¹¹⁵, the threshold is very high at this time, which may be challenging to achieve for people displacing internationally in the context of climate change. On a separate note, the threshold should be high so that only those affected can get the protection. Such an argument might be appropriate where one right is taken into consideration. However, when various rights are impacted, a high threshold seems like an obstacle. Instead, a cumulative assessment is more suitable.¹¹⁶ Refugee Law also follows a similar approach. For example, in IRL,

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *Ioane Teitiota v. New Zealand* (n 88) Annex I.

¹¹¹ *ibid* Annex I para 1. “*whereas the risk to a person expelled or otherwise removed, must be personal – not deriving from general conditions, except in extreme cases – the threshold should not be too high or unreasonable.*”

¹¹² Jane McAdam, ‘Current Developments’ (n 89) 714.

¹¹³ *Ioane Teitiota v. New Zealand* (n 88).

¹¹⁴ *ibid* Annex I.

¹¹⁵ Jane McAdam, ‘Current Developments’ (n 89).

¹¹⁶ *ibid* 714.

the threshold of assessing the persecution is evaluated on account of one grave risk or based on multiple, less severe risks that are assessed cumulatively.¹¹⁷

II. Positive actions of the home state – Similar to the situation in IRL, the positive actions of the home state are also one of the primary limitations in activating the non-refoulement obligation under IHRL. In the case of Mr. Teitota, amongst the various observations made by the HRC to reject the claim of Mr. Teitota, one of the observations was that there was no evidence that “*the Government of Kiribati had failed to take programmatic steps to provide for the necessities of life, in order to meet its positive obligation to fulfil the author’s right to life.*”¹¹⁸ A similar remark was made by the Immigration and Protection Tribunal of New Zealand, wherein it states that “*the Government of Kiribati had taken steps to address the effects of climate change, according to the 2007 National Adaptation Programme of Action submitted by Kiribati under the United Nations Framework Convention on Climate Change.*”¹¹⁹

Moreover, one of the claims made by Mr. Teitota was that as a consequence of the rise in sea level, Kiribati is likely to become uninhabitable in 10 to 15 years.¹²⁰ In this issue, the HRC agreed to the forecast but rejected the claim, noting that the risk for this time frame is too speculative and that “*Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms.*”¹²¹

HRC’s emphasis on the positive action of the home state to refuse Mr. Teitota’s claim was also mentioned by Mr. Muhumuza in his dissenting opinion, “*While it is laudable that Kiribati is*

¹¹⁷ *ibid.*

¹¹⁸ *Ioane Teitiota v. New Zealand* (n 88) para 9.6.

¹¹⁹ *AF (Kiribati)* (n 15).

¹²⁰ *Ioane Teitiota v. New Zealand* (n 88) para 9.12.

¹²¹ *ibid.*

taking adaptive measures to reduce the existing vulnerabilities and address the evils of climate change, it is clear that the situation of life continues to be inconsistent with the standards of dignity for the author, as required under the Covenant.....Even as Kiribati does what it takes to address the conditions, for as long as they remain dire, the life and dignity of persons remains at risk.”¹²²

III. Limited success rate of this protection under violation of the right to life – The human rights committee’s opinion on Mr. Teitiota’s case was based on the allegation of violation of Article 6 (right to life) of ICCPR.¹²³ This case was the first time when the HRC made its observation of the non-refoulement principle with respect to persons affected by climate change under Article 6.¹²⁴ Before this case, the human rights committee discussed the cases related to non-refoulement with respect to violation of Article 6 in other situations.¹²⁵ However, apart from one case (*Judge v. Canada*¹²⁶), which was related to the death penalty, no case has succeeded solely in the violation of Article 6 of ICCPR.¹²⁷ Rather, all the successful cases were either concerned with the violation of Article 7 (torture, cruel, inhuman or degrading treatment) in conjunction with Article 6 or Article 7 alone.¹²⁸

The European Court of Human Rights, which has spawned a vast jurisprudence in this area, has not successfully adjudicated any case of non-refoulement based on a violation of the right to

¹²² *Ioane Teitiota v. New Zealand* (n 84) Annex I para 6.

¹²³ *ibid.*

¹²⁴ Jane McAdam, ‘Current Developments’ (n 89) 712–713.

¹²⁵ *ibid.* 713.

¹²⁶ *Roger Judge v Canada* [2003] CCPR/C/78/D/829/1998 (United Nations Human Rights Committee (HRC)) [10.10].

¹²⁷ Jane McAdam, ‘Current Developments’ (n 89) 712–713.

¹²⁸ *ibid.* 713.

life alone.¹²⁹ All the decisions have been made on the basis that the feared harm constitutes inhuman or degrading treatment (Article 7).¹³⁰

It is also important to highlight that New Zealand's immigration and protection tribunal has briefly addressed the provisions of Article 7 of ICCPR (specifically ill-treatment) during the adjudication of the Teitota case.¹³¹ The court held that a state's general incapacity to respond to a disaster or the impacts of climate change would be insufficient to constitute such 'treatment.'¹³² The violation of Article 7 was not raised before the human rights committee in this case. Therefore, the approach of the human rights committee is not clear at this time. However, it would be interesting to see whether any non-refoulement case related to the violation of the right to life alone would be able to succeed in future.¹³³

These limitations have been highlighted based on the HRC's observation in the case of Ioane Teitota.¹³⁴ Notably, McAdam believes that the observation of HRC might have been different if - a) Mr. Teitota, rather than making an application for himself, had also included his wife and children in it¹³⁵ and b) if a violation of Article 7 (torture, cruel, inhuman or degrading treatment) has also been included in the application along with Article 6 of the ICCPR.¹³⁶

This is because in cases involving children, the aspect of the time frame might have been assessed differently.¹³⁷ Similarly, Article 7 might have been more relevant in the present context

¹²⁹ *ibid.*

¹³⁰ *D v. United Kingdom* (n 85); *Bader v. Sweden* (n 85); *N.A. v. Finland* (n 85); Jane McAdam, 'Current Developments' (n 89) 713.

¹³¹ *AF (Kiribati)* (n 15) paras 94–95.

¹³² *ibid.*

¹³³ Jane McAdam, 'Current Developments' (n 89) 715–716.

¹³⁴ *Ioane Teitota v. New Zealand* (n 88).

¹³⁵ Jane McAdam, 'Current Developments' (n 89) 716–717.

¹³⁶ *ibid* 715–716.

¹³⁷ *ibid* 716–717.

because the jurisprudence of non-refoulement under Article 7 does not restrict cruel, inhuman, or degrading treatment to positive acts or omissions as in the case of Article 6 of ICCPR.¹³⁸

1.3. Conclusion

To conclude, there is no denying that the UNHCR 2020 report provides a possibility of obtaining refugee protection for some of the people crossing international borders whose situation comes within the criteria mentioned in the report. However, a large number of people are unable to get refugee protection due to the limitations discussed above (see 1.1.1.). Similarly, IHRL's complementary protection framework (non-refoulement) has the potential to protect the victims of cross-border climate-induced displacement. However, they are inefficient at the moment due to the mentioned limitations (see 1.2.1.)

¹³⁸ *ibid* 715–716.

Chapter 2: Defining the Umbrella Term

As discussed in Chapter 1, a lacuna exists within the current framework of international law that hinders legal protections for the victims of cross-border climate-induced displacement. This is compounded by the absence of a universal term that encapsulates their unique factual and legal reality. In contrast, individuals forcibly displaced externally due to persecution are termed ‘refugees,’¹³⁹ while people migrating due to other reasons (push/pull factors) are called ‘migrants.’¹⁴⁰ However, the victims of cross-border climate-induced displacement are neither categorized as refugees nor migrants nor do they have any other unique term that encapsulates their unique factual and legal reality.¹⁴¹ As a result, it becomes difficult to assess who belongs to this category.

Identifying an appropriate term to both describe and categorize the victims of cross-border climate-induced displacement is necessary as it would play a crucial role in assessing which legal regimes are applicable and most effective in protecting the victims of cross-border climate-induced displacement. Scholars have called for clarity in the prevailing terminological debates, arguing that the lack of a universal terminology and precise definition “*obstructs the necessary international organization and cooperation necessary to put the appropriate legal and material infrastructures in place to resolve issues relating to displacement*”¹⁴²

¹³⁹ 1951 Refugee Convention.

¹⁴⁰ ‘Exploring Migration Causes: Why People Migrate’ (*European Parliament News*, 1 July 2020) <<https://www.europarl.europa.eu/news/en/headlines/world/20200624STO81906/exploring-migration-causes-why-people-migrate>> accessed 17 December 2023.

¹⁴¹ Joanna Apap, ‘The Concept of ‘climate Refugee’: Towards a Possible Definition’ (European Parliamentary Research Service 2019) PE 621.893 1.

¹⁴² Lydia Ayame Hiraide, ‘Climate Refugees: A Useful Concept? Towards an Alternative Vocabulary of Ecological Displacement’ (2023) 43 *Politics* 267, 271.

The chapter identifies a term that could be universally used to refer to the victims of cross-border climate-induced displacement. In doing so, it discusses a broad range of terms that have been used to refer to the victims of cross-border climate-induced displacement and subsequently suggests the most appropriate term. Once the term is identified i.e. climate refugee, this chapter defines it along with its limitations.

2.1. Different Terminologies

2.1.1. Terminologies associated with the Early Stage

In the absence of universal terminology, various terms have been advanced to refer to the people who are forcibly displaced due to climate change. The first such reference predates the Refugee Convention itself and is found in William Vogt's *Road to Survival*, published in 1948.¹⁴³ Vogt used the term 'ecological displaced persons' and compared them with refugees of Europe post-World War II.¹⁴⁴ Although Vogt did not explicitly refer to climate-driven displacement, his reference is essential because he accurately predicted that the solution for people displaced due to environment-related factors (overuse of lands) would be more complex than that of settling European displaced people in the aftermath of World War II.¹⁴⁵

Drawing on references from Vogt's work, Lester Brown and his co-authors also discussed this issue.¹⁴⁶ They used the term 'ecological refugees' and explained how the number of people

¹⁴³ William Vogt, *Road to Survival* (William Sloane Associates Inc Publishers 1948) <<https://lib.ui.ac.id/file?file=digital/20384667-Road%20to%20survival,%201948.pdf>>.

¹⁴⁴ *ibid* 107; Rosignoli (n 36) 3.

¹⁴⁵ William Vogt (n 143) 107.

¹⁴⁶ Lester R Brown, Patricia L McGrath and Bruce Stokes, 'Twenty-Two Dimensions of the Population Problem' (1980) 35 *Population* (French Edition) 233.

who are displaced by environment-related factors will keep on increasing with time.¹⁴⁷ Similarly, Kathleen Newland also discussed the movement of people due to environmental factors, which she referred to as ‘economic refugees.’¹⁴⁸ Newland specifically questioned the voluntary nature of the displacement. She mentions, “*The voluntarism of these migrants’ moves may be qualified by desperation and lack of alternatives, yet the force that expels them is usually not the force of arms but rather the force of circumstance.*”¹⁴⁹

As evident from above, early discussions were not explicitly focused on climate change. Indeed, the term ‘climate change’ is comparatively new, emerging with scientific discoveries, and the effects of climate change were not well-established at that time. Although unable to provide a concise definition, they raised their concerns about the general displacement that happens due to various reasons related to environmental factors. This, however, maybe for the better as the conditions/contexts in which these discussions occurred are perhaps of less relevance today.

2.1.2. Formal Definitions

The first formal definition was provided by the United Nations Environmental Program’s researcher, Essam El-Hinnwai, in 1985. He used the term ‘environmental refugee’ to refer to “*those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.*”¹⁵⁰ El-Hinnwai’s definition is considered a broad definition from where academics pick and choose their verses

¹⁴⁷ *ibid* 39; Rosignoli (n 36) 3.

¹⁴⁸ Kathleen Newland, *International Migration: The Search for Work* (Worldwatch Inst 1979) 5.

¹⁴⁹ *ibid*; Rosignoli (n 36) 3.

¹⁵⁰ Essam E el-Hinnawi (ed), *Environmental Refugees* (United Nations Environment Programme 1985) 4; Rosignoli (n 36) 3.

based on the requirements.¹⁵¹ Two advantages of this definition should be highlighted – a) it is the first comprehensive definition that mentions the issue of force-displacement in the context of environmental issues, and b) it uses the word ‘refugee,’ which raises the question of the inclusion of the victims of cross-border climate-induced displacement within the definition of ‘refugee’ under 1951 Refugee Convention. At the same time, it is not without limitation; most notably, it is overly broad and includes various categories of people. Consequently, it does not restrict the number of beneficiaries to the most vulnerable.¹⁵²

Soon after El-Hinnwai’s definition, Norman Myers and Jennifer Kent also defined ‘environmental refugees’ as individuals “*who can no longer gain a secure livelihood in their traditional homelands because of environmental factors of unusual scope, notably drought, desertification, deforestation, soil erosion, water shortages and climate change, also natural disasters such as cyclones, storm surges and floods.*”¹⁵³ Myers and Kent’s definition is relatively similar to that of Hinnwai insofar that it focuses on displacement due to natural hazards rather than specifically focusing on climate change. However, unlike Hinnwai, they did not mention the aspect of ‘forced’ displacement and whether such displacement would be temporary or permanent, which is arguably its principal shortcoming. However, a positive element of this definition is that it expanded the scope of the definition by establishing ‘failure to gain a secure livelihood’ as a threshold for displacement.

¹⁵¹ Bonnie Docherty and Tyler Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ (2009) 33 Harvard Environmental Law Review 349, 364.

¹⁵² Rosignoli (n 36) 11.

¹⁵³ Norman Myers and Jennifer Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Climate Institute 1995) 18–19.

2.1.2. Environmental Migrant

The term ‘environmental refugee’ was used by various scholars and newspapers during the early stages of reflection on this topic.¹⁵⁴ However, myriad terms also started being used after a distinction started being drawn between the different types of environmental change and forms of mobility.¹⁵⁵ Researchers started looking for a narrower and more definitive term that would focus on the most vulnerable in need of assistance.¹⁵⁶

At this point, Astri Suhrke & Annamaria Visentin formulated the term ‘environmental migrant.’¹⁵⁷ They criticized the use of the term ‘environmental refugee,’ which, they posited, was overly broad and suggested two different concepts: ‘environmental refugee’ and ‘environmental migrant.’ Suhrke & Visentin defined ‘environmental migrant’ as those who “*make a voluntary, rational decision to leave a region as the situation gradually worsens there. In that decision, environmental deterioration may be only one factor among others*” and environmental refugee as “*people or social groups displaced as a result of sudden, drastic environmental change that cannot be reversed.*”¹⁵⁸ A similar distinction was also drawn by William Wood wherein he replaced ‘environmental migrant’ with ‘ecomigrant.’¹⁵⁹

The added value of using two different terminologies is that it differentiates between forced displacement and voluntary movement. Such differentiation helps limit protection mechanisms for

¹⁵⁴ Joanna Apap (n 141) 3.

¹⁵⁵ *ibid.*

¹⁵⁶ Rosignoli (n 36) 11–12.

¹⁵⁷ Astri Suhrke and Annamaria Visentin, ‘The Environmental Refugee: A New Approach’ (1991) 2 *Ecodecision* 73; Rosignoli (n 36) 11.

¹⁵⁸ Astri Suhrke and Annamaria Visentin (n 157); Rosignoli (n 36) 11.

¹⁵⁹ William B. Wood, *Global Migrants, Global Refugees: Problems and Solutions* (Aristide R. Zolberg and Peter M. Benda eds, Berghahn Books 2001) 46–47; Rosignoli (n 36) 11.

the most vulnerable individuals. The limitations include a) creating two different terminologies, which further complicates the process, and b) focusing on ‘voluntary’ movement, which diminishes the gravity of the problems the victims of cross-border climate-induced displacement face.

The term ‘environmental refugee’ was also criticized by the United Nations and the International Organization for Migration (IOM) for its inclusion of the word ‘refugee,’ which, according to them, contradicts the definition of refugee as per the 1951 Refugee Convention.¹⁶⁰ For this reason, the IOM also preferred using the term ‘environmental migrant’ which it defined as *“persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad”*¹⁶¹

This definition is nuanced because - a) it focuses on both internal and external displacement and—b) it includes both temporary and permanent movement. However, it is flawed because it focuses on both forced and voluntary movement.

The change in terminology from ‘refugee’ to ‘migrant’ is described by the researchers as a reason to eliminate any discrepancy that may arise in the scope of the 1951 convention.¹⁶² L. Hens explained the situation in his study on environmental-induced migration, wherein he considered

¹⁶⁰ Joanna Apap (n 141) 3.

¹⁶¹ ‘Types of Migration’ (*Migration data portal*) <<https://environmentalmigration.iom.int/environmental-migration>> accessed 1 February 2024.

¹⁶² Rosignoli (n 36).

such a category of people as refugees in the actual understanding of the word but whose conditions do not correspond with the legal definition of refugee.¹⁶³

This raises the question of limiting the usage of ‘refugee’ terms only to those defined in the 1951 Refugee Convention. Scholars have strongly opposed such restrictions and argued that it should not be believed that there is a single, immutable legal category of the refugee in international law.¹⁶⁴

2.1.3. Environmentally Displaced Person

To end the controversy regarding the usage of the word refugee or migrant, Reinhard Lohrmann coined the term ‘environmentally displaced person,’ and described it as “*those who can no longer gain a livelihood in their homelands because of soil erosion, deforestation, desertification, drought, chemical contamination, or other related collapses in natural carrying capacity, whether short-term or long-term.*” Similarly, IOM began to use ‘environmentally displaced person,’ which they defined as “*persons who are displaced within their own country of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one.*”¹⁶⁵

¹⁶³ L. Hens, ‘Environmentally Displaced People’ (2012) 2 Regional Sustainable Development Review, Encyclopedia of Life Support Systems 1 <<https://www.eolss.net/sample-chapters/c16/E1-48-51.pdf>>.

¹⁶⁴ Avidan Kent and Simon Behrman (eds), ‘*Climate Refugees*’: *Beyond the Legal Impasse?* (Routledge, Taylor & Francis Group 2018) 11; Rosignoli (n 36) 13.

¹⁶⁵ *Glossary on Migration, International Migration Law* (2nd edn, Intergovernmental Panel On Climate Change 2011) 34 <https://www.cambridge.org/core/product/identifier/CBO9781107415324A009/type/book_part> accessed 1 February 2024.

The term environmentally displaced person was also used in the Draft Convention on the International Status of Environmentally Displaced Persons (ISED) in 2013.¹⁶⁶

This term has both advantages and limitations. On the positive side, the word ‘displaced’ inclines towards the ‘forced’ aspect of movement, opposite to the ‘voluntary’ movement. Secondly, similar to the definition of ‘environmental migrant’ provided by the IOM, the definition of ‘environmental displaced person’ provided by Lohrmann and IOM also includes both internal and external movement. Thirdly, the IOM definition also mentions that environmental factors may not be the sole reason for such movement. Instead, they should be the primary cause. This reference is essential because, unlike the cases of refugees under the 1951 Refugee Convention, who are displaced due to persecution, many environmental-related displacements occur due to various reasons where environmental-related factors are significant causes.

On the other hand, the definitions lack clarity on the threshold question. Lohrmann’s definition stated ‘failure to gain livelihood’ as a threshold of movement. In contrast, the definition mentioned in the Draft Convention on ISED states “*impacts in their living conditions*” as the threshold of movement. The former is somewhat narrow, focusing exclusively on livelihood, whereas the latter is broader and more advanced because it includes a wide range of human rights.

2.1.4. Climate (Change) Refugee

Standard across all of the terms mentioned above is the word ‘environment’. However, in 2009, Bonnie Docherty and Tyler Giannini came up with a completely different term, ‘climate

¹⁶⁶ Michel Prieur, ‘Draft Convention on the International Status of Environmentally-Displaced Persons’ 12 *Revue Européenne de Droit de l’Environnement* 395.

change refugee’. They defined ‘climate change refugee’ *“as an individual who is forced to flee his or her home and to relocate temporarily or permanently across a national boundary as the result of sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributed.”*¹⁶⁷ Unlike the other definitions, which focus on the overall spectrum of environmental-related factors, Docherty and Giannini focused explicitly on the aspect of climate change.¹⁶⁸ Initially, this definition was criticized because it was difficult to distinguish human activity and environmental disruptions.¹⁶⁹ For example, two decades ago, it was challenging to prove that the rise in sea level in Kiribati is a consequence of human actions; however, with the development of science and the acknowledgment of the effect of climate change by international institutions¹⁷⁰, this challenge has become less relevant.¹⁷¹ Nonetheless, the distinction was questioned by some authors arguing that *“there were not sufficient reasons we should treat those fleeing from environmental changes and climate change-related disruptions differently.”*¹⁷²

The term ‘climate change refugee’ should be considered a positive development since this is the first definition that narrows down the scope of protection only to those affected by climate change. Moreover, the definition also discusses the human contribution to such displacement and

¹⁶⁷ Bonnie Docherty and Tyler Giannini (n 151) 361.

¹⁶⁸ Rosignoli (n 36) 12.

¹⁶⁹ *ibid.*

¹⁷⁰ Intergovernmental Panel on Climate Change, ‘Climate Change 2021- The Physical Science Basis’ (2021) Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 4–5. “increases in well-mixed greenhouse gas (GHG) concentrations since around 1750 are unequivocally caused by human activities” – IPCC Report 2021.

¹⁷¹ Rosignoli (n 36) 12.

¹⁷² *ibid.*

establishes the threshold of ‘more likely than not.’ Consequently, this definition could be considered highly nuanced.

On a separate note, all the earlier definitions either focused on internal movement or included both internal and external movement. At the same time, some still need to mention the nature of movement in their definition. Docherty and Giannini limited their definition only to external movement. This could be considered both a positive and negative development. Positive because it further narrows the scope of the term only to those crossing borders since those people are most vulnerable as compared to internally displaced, who have their home state protection in most cases. It is negative insofar that it eliminates the large number of people displaced due to climate change since the number of people displaced internally is significantly larger than the number of people displaced across borders.

2.1.5. Sub-Categorization Approach

A distinct approach was advanced by Diana Bates, who divided the environmental refugee into three sub-categories based on the type of environmental harm, i.e., ‘disaster refugees’ (who flee either natural or anthropogenic disasters), ‘expropriation refugees’ (relocated because of an anthropogenic expropriation of their ecosystem), and ‘deterioration refugees’ (who leave owing to gradual anthropogenic deterioration of their environment).¹⁷³ A similar sub-categorization was made by Renaud et al., who also divided environmental refugees into three sub-categories based on the degree of the compulsion to leave.¹⁷⁴

¹⁷³ Diane C Bates, ‘Environmental Refugees? Classifying Human Migrations Caused by Environmental Change’ (2002) 23 *Population and Environment* 465, 469–472.

¹⁷⁴ Fabrice Renaud and others, ‘Control, Adapt or Flee: How to Face Environmental Migration?’ (2007) 5 *UNU Institute for Environment and Human Security* 29–30 <<https://collections.unu.edu/eserv/unu:1859/pdf3973.pdf>>.

The advantage of this depth of subdivision is that it provides an understanding of different groups within the macro group. Such an approach would help eliminate those whose situation might include them in the macro group; however, they are not vulnerable in the true sense. However, this approach is a negative development because it further complicates the already complicated terminological debates.

2.1.6. Coming back to ‘Climate Refugee’

The sub-categorization approach was not carried forward. Instead, they seem to be interested in a climate change-based approach.¹⁷⁵ For example – Frank Biermann and Ingrid Boas in their work preferred using the term ‘Climate Refugee’ and defined it as those *“people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity.”*¹⁷⁶ Moreover, Biermann challenged the outdated UN terminology stating why an inhabitant of Maldives deserves less protection than traditional refugees in spite of the fact that they *“require resettlement for reasons of a well-founded fear of being inundated by 2050.”*¹⁷⁷ He also believes that there is a need to break the monopoly and move beyond the traditional refugee definition of the 1951 Refugee Convention.¹⁷⁸

¹⁷⁵ Rosignoli (n 36) 12.

¹⁷⁶ Frank Biermann and Ingrid Boas, ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees’ (2010) 10 Global Environmental Politics 60, 67.

¹⁷⁷ Frank Biermann and Ingrid Boas, ‘Protecting Climate Refugees: The Case for a Global Protocol’ (2008) 50 Environment: Science and Policy for Sustainable Development 8, 13.

¹⁷⁸ Frank Biermann, ‘Global Governance to Protect Future Climate Refugees’ in Simon Behrman (ed), *Climate Refugees’: Beyond the Legal Impasse?* (1st edn, Routledge 2018) <<https://www.taylorfrancis.com/books/9781315109619>> accessed 1 February 2024.

Biermann and Boas's definition are similar to that of Docherty and Giannini's definition insofar as both the definitions focused on climate change-driven displacement. However, the latter is not nuanced as compared to Docherty and Giannini's definition. For instance – the definition does not mention critical aspects like – duration of movement (temporary or permanent), types of movement (internal or external), nature of movement (forced or voluntary), etc. The other lacuna in this definition is that it specifies three impacts of climate change, thereby narrowing down the scope of the definition, the effect of which is that it may prove to be inefficient to cater to those people whose situation is outside the scope of the mentioned impacts of climate change.

Francois Gemenne adopted a similar approach, emphasizing the importance of 'climate' rather than 'environment' as the former was a form of political persecution against the most vulnerable.¹⁷⁹ Ian Fry also objected to eliminating the word 'climate (change)' in his report.¹⁸⁰ Although Fry used the term 'persons displaced across international borders due to climate change' in his report, he made clear it was for clarity purposes only and that it "*does not adequately describe the hardships faced by displaced individuals or the circumstances that have driven them to cross international borders.*"¹⁸¹ In fact, he used the term 'climate change refugee' in his call for inputs for the report.¹⁸²

¹⁷⁹ François Gemenne, 'The Refugees of the Anthropocene' in Benoît Mayer and François Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law* (Edward Elgar Publishing 2017) 396 <<https://china.elgaronline.com/view/edcoll/9781785366581/9781785366581.00025.xml>> accessed 2 February 2024.

¹⁸⁰ Ian Fry (n 11).

¹⁸¹ *ibid* 3–4.

¹⁸² Special Rapporteur on the promotion and protect of human rights in the context of climate change, 'Call for Inputs : Addressing the Human Rights Implications of Climate Change Displacement Including Legal Protection of People Displaced across International Borders'.

2.1.7. Climate Migrants

Before long, the term ‘climate refugee’ was increasingly used by scholars; at the same time, however, it has also been subject to criticism.¹⁸³ For example – when Gemenne stressed using ‘refugee’ in place of ‘Migrant’ because he believes the latter has negative labels.¹⁸⁴ Benoit Myers contradicted Gemenne’s idea by arguing that migrants’ rights are overlooked in most of the cases, therefore, rather than dividing them into categories, there is a need to protect the human rights of all migrants.

Moreover, Myers questioned the need to explicitly labelling the victims of cross-border climate-induced displacement, highlighting that “*environmental refugees are not unfortunate migrants omitted by an otherwise fair and protective world order, but they are part of large categories of vulnerable migrants, induced by a cluster of causes, who are generally not protected under international or national law.*”¹⁸⁵ Similarly, Sumudu Atapattu preferred using ‘climate migrants,’ defined as those “*persons who are forced to leave their natural habitat, either on a temporary or permanent basis, owing to serious environmental degradation associated with climate change.*”¹⁸⁶ Andrew Baldwin also used the term ‘climate-change migrants.’¹⁸⁷

Similar to the definition provided by Biermann and Boas, the definition of Atapattu is not exhaustive because it does not include several key elements. Furthermore, the definition provided

¹⁸³ Rosignoli (n 36) 13.

¹⁸⁴ Gemenne (n 179).

¹⁸⁵ Benoit Mayer, “‘Environmental Refugees’?: A Critical Perspective on the Normative Discourse’ [2012] SSRN Electronic Journal 15 <<http://www.ssrn.com/abstract=2111825>> accessed 2 February 2024.

¹⁸⁶ Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (1st edn, Routledge 2015) <<https://www.taylorfrancis.com/books/9781317910619>> accessed 2 February 2024.

¹⁸⁷ Andrew Baldwin, ‘Racialisation and the Figure of the Climate-Change Migrant’ (2013) 45 *Environment and Planning A: Economy and Space* 1474, 1475.

is contradictory to the concept of the term ‘migrant,’ which denotes a voluntary movement which involves push/pull factors.¹⁸⁸ However, Atapattu, in its definition, focuses solely on the ‘force’ nature of movement but calls them ‘climate migrants.’ Therefore, the definition does not justify the terminology.

2.1.7. Displacement

Distinct from these terminologies, Andrea Simonelli used the term ‘climate displacement,’ which he defined as “*those who will be forced to leave their current homes due to the continual environmental deterioration and secondary concerns (those affecting their livelihoods or having other economic and social impacts) from the processes of climate change, migrating inside or outside of their home country.*”¹⁸⁹

The Nansen Initiative chose the term ‘disaster displacement,’ which “*refers to situations where people are forced or obliged to leave their homes or places of habitual residence as a result of a disaster or in order to avoid the impact of an immediate and foreseeable natural hazard.*”¹⁹⁰

Both definitions lack certain elements. For example, Simonelli’s definition did not specifically focus on the aspect of climate change. Instead, it also added the element of ‘secondary concerns’, namely, “*economic and other social impacts.*” The practical effect of this is that it will expand the scope of the definition and might also include those who are not vulnerable in a real sense since terms like economic and social impact are very broad. Similarly, the Nansen

¹⁸⁸ ‘Who Is a Migrant?’ (*International Organization for Migration*) <<https://www.iom.int/who-migrant-0>> accessed 3 June 2024.

¹⁸⁹ Andrea C Simonelli, *Governing Climate Induced Migration and Displacement* (Palgrave Macmillan UK 2016) 53 <<http://link.springer.com/10.1057/9781137538666>> accessed 2 February 2024.

¹⁹⁰ The Nansen Initiative (n 13) para 16.

Initiative's definition stressed the onset of environmental disruption, which means that it has a limited scope on the question of types of impact (sudden or slow). However, the definition is descriptive and nuanced while mentioning the factors that result in such displacement.

2.2. What is the most suitable umbrella term?

The terminologies discussed above can be divided into two categories - a) terms focusing on the reason for displacement (*Environment vs Climate*) and b) terms focusing on the category of displacement (*Migrant vs Refugee*). Most of the definitions incorporate a combination of both of these aspects.¹⁹¹ Analyzing these factors would help in finding a suitable umbrella term.

a) Reason for displacement (Environment vs Climate) - Some scholars stressed the environmental factors as drivers of displacement¹⁹² while others focused specifically on climate change and its related impacts.¹⁹³ It is noteworthy that early contributors to the development of this concept, such as El-Hinnawi, Myers, Suhrke, and Visentin, often proposed environment-related factors. However, as the scientific and social recognition of climate change grew, many scholars shifted from using 'environmental' to 'climate.'¹⁹⁴ In the later stages of development, there appears to be a consensus among scholars in favor of the term 'climate.'¹⁹⁵ Here, the term 'environmental-related displacement' denotes all displacement that involves the element of environmental factors, be it natural or man-made, whereas 'climate-related displacement' should be understood as displacement that is only related to climate change and its impact as per the IPCC. On the question of the relationship between both terms, it could be said that both are linked with

¹⁹¹ Bonnie Docherty and Tyler Giannini (n 151) 364.

¹⁹² For example – El-Hinnawi, Myers, Suhrke, Lohrmann etc.

¹⁹³ For example – Docherty and Giannini, Biermann and Boas, Baldwin, Simonelli etc.

¹⁹⁴ Rosignoli (n 36) 12–13.

¹⁹⁵ *ibid* 12–14.

each other, where ‘environmental-related displacement’ is a macro group which includes ‘climate-related displacement’ as one of its categories.

For these reasons and understood in these terms, the term ‘climate’ rather than ‘environment’ is better suited both factually and legally. Based on scientific reports¹⁹⁶ and the position of international institutions,¹⁹⁷ it is clear that climate change is a human-made phenomenon, and therefore, states are liable for its consequences. Using the term ‘climate’ would become relevant in dealing with issues such as liability, compensation, equity, and common but differentiated responsibilities.¹⁹⁸ This stands in contrast to the ‘environment,’ which could encompass natural factors that states may not be unwilling to take responsibility for.¹⁹⁹ Therefore, it is submitted that ‘climate’ is a more appropriate term than ‘environment.’

b) Category of displacement (Migrant vs Refugee) – The second area of inconsistency among scholars concerns ‘migrant’ and ‘refugee.’ Unlike the ‘environment’ versus ‘climate’ debate, we observe a different trend in the usage of these terms. Initially, early contributors used the term ‘refugee.’²⁰⁰ However, opposition regarding the usage of the term ‘refugee’ due to its inconsistency with the 1951 Refugee Convention prompted a shift towards the term migrants.²⁰¹ Interestingly, however, there was a notable shift back towards ‘refugee’ over time. Several scholars strongly opposed restricting the term ‘refugee’ only to traditional refugees, as mentioned in the 1951 Refugee Convention.²⁰²

¹⁹⁶ Intergovernmental Panel on Climate Change, ‘Climate Change 2021- The Physical Science Basis’ (n 170).

¹⁹⁷ Ian Fry (n 11); ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33).

¹⁹⁸ Biermann and Boas (n 176) 63.

¹⁹⁹ *ibid.*

²⁰⁰ For example – Brown, Newland, Hinnawi etc.

²⁰¹ “UNHCR has serious reservations with respect to the terminology and notion of environmental refugees or climate refugees. These terms have no basis in international refugee law.” ‘Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective’ (n 36) 8.

²⁰² Frank Biermann and Ingrid Boas (n 177); Gemenne (n 179); Kent and Behrman (n 164).

Here, it is essential to note that although the definition of ‘refugee’ in the 1951 convention has not been expanded to include these categories of people, other treaties and a range of soft law instruments have defined refugees differently. For example – the African Union²⁰³ and Cartagena Declaration on Refugees (1984)²⁰⁴ have provided a broader definition of refugees (discussed in detail in 3.1.1.2.). Similarly, the mandate of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) provides a separate definition for Palestinian refugees.²⁰⁵ These definitions suggest that the scope of ‘refugee’ should not be seen as limited only to the definition provided in the 1951 convention.²⁰⁶ For these reasons, arguments against using the term ‘refugee’ merely because they do not fit in the existing 1951 Refugee Convention are unconvincing.²⁰⁷

‘Refugee’ also seems to be a more accurate term than ‘migrants’ for several reasons. First, the concept of migration involves ‘push’ and ‘pull’ factors, which means that there is also an element of voluntariness involved in the movement,²⁰⁸ whereas ‘refugee’ involves only ‘push’/‘force’ factors, which talks explicitly about forced displacement.²⁰⁹ Second, refugees are more appropriate for international movement than migration, which can be both inter- and intra-national movements.²¹⁰ Third, the term ‘refugee’ carries powerful moral implications related to societal safeguarding across various global cultures and religions.²¹¹ Employing this terminology

²⁰³ Convention Governing the Specific Aspects of Refugee Problems in Africa (‘OAU Convention’) 1969 (Organization of African Unity (OAU)).

²⁰⁴ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama 1984 (Regional Refugee Instruments & Related).

²⁰⁵ ‘Palestine Refugees’ (UNRWA) <<https://www.unrwa.org/palestine-refugees>> accessed 3 June 2024.

²⁰⁶ Kent and Behrman (n 164).k

²⁰⁷ Biermann and Boas (n 176) 66–67.

²⁰⁸ Ahmet Emre Usta, ‘The Push and Pull Factors of Migration’ (ICRP, 28 December 2019) <<http://culturalrelations.org/the-push-and-pull-factors-of-migration/>> accessed 2 February 2024.

²⁰⁹ *ibid.*

²¹⁰ Gemenne (n 179).

²¹¹ Biermann and Boas (n 176) 67.

will appropriately underscore the legitimacy and pressing nature of ensuring protection for the victims of cross-border climate-induced displacement.²¹² For these reasons, it is submitted here that ‘refugee’ is a more appropriate term than ‘migrant.’

The above discussion makes it clear that the words ‘Climate’ and ‘Refugee’ could be preferred over ‘Environment’ and ‘Migrant’, respectively. Consequently, it is suggested that the term ‘Climate Refugee’ could serve as a universal term to refer to the people who are forced to be displaced due to the effects of climate change.

2.3. Definition of the term

Once it is clear that Climate Refugee is the most suitable term, the second question is the definition of climate refugee. As discussed above, various definitions have been provided by scholars. All the definitions have focused on certain elements. Rather than choosing which definition is most appropriate, this section analyzes the factors that scholars and practitioners have considered in their definitions. It identifies the essential elements that should be included in the definition of climate refugees. These factors are -

a) nature of movement (forced or voluntary) – Scholars’ opinions on the nature of movement could be divided into three groups – a) those who stressed the ‘forceful’ nature of movement; b) those who use the term ‘voluntary’ and c) those who advanced a neutral approach.

Kathleen Newland was among the first scholars to question the nature of the movement of these climate refugees.²¹³ She opined that such a movement might look voluntary but is forced by

²¹² *ibid.*

²¹³ Newland (n 148) 5.

certain circumstances.²¹⁴ Later, El-Hinnawai explicitly uses the word ‘force’ in his definition.²¹⁵ After him, most of the scholars, including Myers,²¹⁶ Docherty and Giannini,²¹⁷ Simonelli,²¹⁸ Atapattu,²¹⁹ Nansen Initiative²²⁰, etc., use the word ‘force’ in their definition. Different from them, Suhrke and Visentin mentioned voluntary movement in their definition.²²¹

On the other hand, some of the scholars have taken a neutral approach by not explicitly using either of the terms in their definitions.²²² But, upon analyzing the wordings in their definition, it could be said that most of them are inclined towards the aspect of ‘force’ in the movement. For instance – IOM, while defining Environmental Migrant, uses the word ‘obliged,’ which is somewhat the opposite of ‘voluntary.’²²³ Similarly, Renaud et al., when categorizing the victims of cross-border climate-induced displacement into three groups, use the words ‘forced’ and ‘flee’ in their definition.²²⁴

Therefore, the nature of movement in the case of climate refugees should be ‘forced’ as opposed to ‘voluntary.’ Here ‘forced’ refers to the movement which, although the drivers can be diverse, involves force, compulsion, or coercion.²²⁵ Similarly, ‘voluntary’ refers to the movement where the person knowingly and willingly decides to leave their country.²²⁶

²¹⁴ *ibid.*

²¹⁵ Hinnawi (n 150) 4.

²¹⁶ Myers and Kent (n 153) 18–19.

²¹⁷ Bonnie Docherty and Tyler Giannini (n 151) 361.

²¹⁸ Simonelli (n 189) 53.

²¹⁹ Atapattu (n 186).

²²⁰ The Nansen Initiative (n 13) para 16.

²²¹ Astri Suhrke and Annamaria Visentin (n 157) 73.

²²² For example – Renaud et al., Suhrke and Visentin, IOM, Lohrmann etc.

²²³ ‘Types of Migration’ (n 161).

²²⁴ Fabrice Renaud and others (n 174) 29–30.

²²⁵ ‘Types of Movements - EMM2.0 Handbook’ <<https://emm.iom.int/handbooks/global-context-international-migration/types-movements-0>> accessed 2 August 2024.

²²⁶ *ibid.*

b) duration of movement (temporary or permanent) – On the question of duration of movement, the majority of scholars do not choose one over the other; instead, they prefer to include temporary as well as permanent relocation in their definition.²²⁷ None of the scholars have raised concerns about including both temporary and permanent relocation in the definition. Moreover, the refugee definition within the 1951 Refugee Convention also provides refugee protection to people with the option either to return to their country shortly after displacement (cessation) or to resettle permanently.²²⁸ Therefore, the duration of movement for climate refugees should also include both temporary and permanent relocation.

c) type of movement (within boundary or cross-border) – Scholars have different opinions on the type of movement. Most of the scholars have opted for a neutral approach by using words like leaving ‘traditional habitats,’²²⁹ ‘region,’²³⁰ ‘habitual residence,’²³¹ or moving to ‘new areas’²³² when describing the type of movement. Although preferred by most scholars, such wordings might create ambiguity regarding the scope of the definition; therefore, it is essential to mention the type of movement within the definition explicitly.²³³

It is interesting to note that the IOM²³⁴ and UNHCR²³⁵ were the first to include both internal and external movement within their definitions. This could be considered a deliberate choice to

²²⁷ See, Hinnwai, Lohrmann, International Organization for Migration, Docherty and Giannini etc.

²²⁸ 1951 Refugee Convention art 1(a)(2), 1(C); Bonnie Docherty and Tyler Giannini (n 149) 369.

²²⁹ Hinnwai (n 150).

²³⁰ Astri Suhrke and Annamaria Visentin (n 157) 73.

²³¹ The Nansen Initiative (n 13).

²³² William B. Wood (n 159).

²³³ Bonnie Docherty and Tyler Giannini (n 151) 365.

²³⁴ ‘Types of Migration’ (n 161).

²³⁵ Reinhard Lohrmann, ‘Environmentally-Induced Population Displacements And Environmental Impacts From Mass Migrations’ (1996) 34 *International Migration* 335.

distinguish the victims of cross-border climate-induced displacement from refugees under the 1951 Convention.

Separately, Docherty and Giannini use the term ‘across national border,’ indicating their preference to only include cross-border movement in their definition.²³⁶ They also explain their decision. According to them, such a decision would ensure “*that migrants do not have incentives to leave their state unnecessarily, potentially precipitating an international crisis, because they believe they will receive better protections elsewhere.*”²³⁷

While their explanation does not seem very convincing, focusing solely on cross-border movement rather than both would have certain merit. Firstly, it would be straightforward to include climate refugees within the existing frameworks of the 1951 Refugee Convention. It is also important to note that in case climate refugees are included in the 1951 Refugee framework, internally displaced people (IDPs) would also be subject to the same treatment as traditional IDPs.²³⁸ Moreover, people displaced internally due to factors related to climate change also have certain existing protections under instruments such as - Guiding Principles on Internal Displacement²³⁹ and the Kampala Convention.²⁴⁰

²³⁶ Bonnie Docherty and Tyler Giannini (n 151).

²³⁷ *ibid* 369–370.

²³⁸ Bríd Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (First edition, Oxford University Press 2022).

²³⁹ “*For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of.... natural or human-made disasters.*” Guiding Principles on Internal Displacement 1998 (ADM 11,PRL 121, PR00/98/109) 5.

²⁴⁰ “*Internally Displaced Persons*” means persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of....natural or human-made disasters.” African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (‘Kampala Convention’) 2009 7.

On the other hand, if both internal and cross-border movements are included within the definition, it could become challenging to get protection under the 1951 Refugee Convention since it is structured to protect cases of cross-border movement.²⁴¹

Therefore, including only cross-border movement as the type of movement within the definition appears to be a reasonable option. Thus, the definition of climate refugees should only focus on cross-border movement.

d) Types of impacts (Sudden or Slow onset) – The impacts of climate change could be categorized into two types - sudden onset impacts (such as floods) and b) slow onset impacts (such as rise in sea level).²⁴² Most of the scholars have not mentioned the types of impacts in their definitions. However, Biermann and Boas,²⁴³ and Reinhard Lohrmann,²⁴⁴ have provided a list of the impacts of climate change within their definition. Although their definition is very descriptive, it seems to be restricted to only particular impacts. Such an approach does not provide the option to include the new impacts that might be recognized in the future.²⁴⁵

Some of the scholars, including Docherty and Giannini, took a broad approach by including the sudden and slow onset impact in their definition rather than listing particular impacts.²⁴⁶ This approach is more reasonable than Biermann's approach since it allows the inclusion of new impacts of climate change.

²⁴¹ 1951 Refugee Convention.

²⁴² The Nansen Initiative (n 13).

²⁴³ Frank Biermann and Ingrid Boas (n 177).

²⁴⁴ Lohrmann (n 235).

²⁴⁵ Bonnie Docherty and Tyler Giannini (n 151) 370.

²⁴⁶ Bonnie Docherty and Tyler Giannini (n 151).

Moreover, none of the scholars have raised any issue in including both types of impacts within the definition. Therefore, the definition of climate refugee should include both sudden and slow onset impacts. On a different note, there is usefulness to having some description without limiting to the examples. Therefore, I suggest that the definition could include the phrase ‘sudden and slow onset impact which are consistent with climate change.’ Here, the scope of ‘consistent with climate change’ should be based on the IPCC report which provides the relationship between a disruption and the impact of climate change (detailed discussion in next paragraphs).²⁴⁷

e) Cause of relocation (linked to climate change) – It is certain from the above discussion that the cause of relocation should be the impacts of climate change. To assess whether a particular disruption has an impact on climate change, we need to rely on the findings of the IPCC.²⁴⁸ IPCC has categorized the types of disruption that are linked to climate change. This categorization is based on the chances of such linkage, ranging from ‘virtually certain’ to ‘very likely.’²⁴⁹ Apart from that, scientific reports and judgments of courts could also help in assessing which disruptions are linked to climate change.

Once it is identified that the disruption is an impact of climate change, the second assessment is regarding the involvement of human agency. Similar to the previous assessment, we again need to look at the IPCC to ascertain human involvement.²⁵⁰ IPCC provides the likelihood of a

²⁴⁷ Intergovernmental Panel on Climate Change, ‘CLIMATE CHANGE 2007- The Physical Science Basis’ (2007) Contribution of Working Group I to the Fourth Assessment Report of the IPCC.

²⁴⁸ *ibid.*

²⁴⁹ Intergovernmental Panel on Climate Change, ‘Fourth Assessment Report: Climate Change 2007: Synthesis Report 30’ (2007) 53 27. According to the IPCC standards, “virtually certain” means more than a ninety- nine percent probability; “very likely” means more than ninety percent probability; and “likely” means more than sixty-six percent probability.

²⁵⁰ Intergovernmental Panel on Climate Change, ‘Fourth Assessment Report: Climate Change 2007: Synthesis Report 30’ (n 249).

relationship between particular impacts of climate change and the involvement of human agency.²⁵¹ Such likelihood ranges from more than fifty percent, which they termed as ‘more likely than not,’ to more than ninety percent, which they termed as ‘very likely.’²⁵²

Docherty and Giannini recommended ‘more likely than not’ (more than fifty percent) as a threshold to ascertain human involvement.²⁵³ According to them, the ‘more likely than not’ threshold might result in a limited degree of uncertainty. Still, such uncertainty should not be made as a reason for not providing protection.²⁵⁴ They also cited the precautionary principle of UNFCCC to justify their approach.²⁵⁵ The precautionary principle of UNFCCC justifies setting up a threshold of less than a hundred percent.²⁵⁶

Docherty and Giannini’s approach seems reasonable for assessing the threshold of human involvement. Therefore, the cause of relocation should be linked to climate change, and the involvement of human agency should be the threshold of ‘more likely than not’ (more than fifty percent).

2.3.1. Limitations

The above-mentioned essential elements have been suggested to protect those people who are forced to move across international borders due to the effects of climate change. However,

²⁵¹ *ibid* 39–41.

²⁵² *ibid*.

²⁵³ Bonnie Docherty and Tyler Giannini (n 151) 371.

²⁵⁴ *ibid*.

²⁵⁵ United Nations Framework Convention on Climate Change 1994 (A/RES/48/189) art 3; Bonnie Docherty and Tyler Giannini (n 151) 371.

²⁵⁶ “*The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures.*” United Nations Framework Convention on Climate Change art 3.

there are possibilities that certain groups of people may be able to meet all the essential elements but do not face the same problems as climate refugees. Therefore, the essential elements should also be accompanied by some limitations so that the protections are provided to those who are really in need without overly compounding the problem of climate refugees with other causes of migration.²⁵⁷ These limitations have been provided by Biermann and Boas²⁵⁸ and supported by Docherty & Giannini²⁵⁹. These are –

1. Non-plausible or only a marginal link with climate change – This limitation excludes those effects of climate change which are – a) non-plausible and b) marginally linked with climate change. Biermann and Boas also provided examples of such limitations. According to them, heat (or cold) waves and the spread of tropical diseases should not be included in the definition.²⁶⁰ Similarly, marginally linked to climate change shall include displacement due to urbanization, land acquisition for large-scale plantations etc.

2. Measure of mitigation and adaptation to global warming – The second limitation excludes those people who are forced to move due to the measures taken by the government to mitigate and adapt to global warming and climate change. Examples of such measures are – the construction of dams to prevent water scarcity or floods, large-scale plantation of bio-fuels crops, etc.²⁶¹

In this case, the victims of such displacement shall be entitled to compensation or benefits from the government since they are being affected by government policies not by the direct or

²⁵⁷ Biermann and Boas (n 176) 63.

²⁵⁸ Biermann and Boas (n 176).

²⁵⁹ Bonnie Docherty and Tyler Giannini (n 151).

²⁶⁰ Biermann and Boas (n 176) 63–64.

²⁶¹ *ibid.*

indirect impacts of climate change. However, they shall not get the status of climate refugees because they are not being displaced due to the impacts of climate change. Such people could also be included in the first category of limitations because they have a marginal link with climate change.

3. Migration due to other types of environmental degradation – If a person is forced to move due to other types of environmental degradation which are not directly linked to climate change or involvement of human agency, they should also not be included under the concept of climate refugees, for example – displacement due to industrial accidents, industrial pollution, or volcano eruptions. Biermann and Boas state that the victims of these disruptions also require legal protection, but their situation is not similar to climate refugees because they are not impacted by climate change.²⁶²

4. Secondary or indirect impacts of climate change – This limitation incorporates those people whose situation does not fulfill the essential elements of the definition; however, due to certain secondary or indirect elements, they can reach the threshold of climate refugees. For example – environmental deterioration results in conflict, which ultimately forces people to move. In this scenario, people are not forced to move due to environmental deterioration but rather due to the secondary impact, i.e., conflict. Hence, the victims of cross-border climate-induced displacement should not be included in the definition.²⁶³

²⁶² *ibid.*

²⁶³ *ibid* 64.

Conclusion

After analyzing all the terminologies provided by the scholars and categorizing them into two major groups, I have concluded that Climate Refugee is the most suitable umbrella term. Secondly, regarding the definition, the thesis provided essential elements that represent the concept of climate refugees. These essential elements are - a) forceful movement, b) either temporary or permanent, c) cross-border, d) sudden and slow onset, and e) relocation due to climate change.²⁶⁴ The definition also includes some limitations, which are mentioned in part 2.3.1.

²⁶⁴ Docherty and Giannini have also provided similar essential elements to be included in the definition of climate (change) refugee. Bonnie Docherty and Tyler Giannini (n 151) 372.

Chapter 3 – Possible Forward Strategies

Chapter 1 demonstrated that the existing frameworks under IRL and IHRL are inadequate in protecting climate refugees. As a result, there is a need for a new legal regime. Scholars have suggested various arrangements to protect climate refugees, including reforms in the IRL framework,²⁶⁵ a new convention for climate refugees,²⁶⁶ and a progressive interpretation of IHRL principles.²⁶⁷ This chapter discusses how these suggestions could protect climate refugees legally.

3.1. Reforms in International Refugee Law (1951 Refugee Convention)

The 1951 Refugee Convention is a globally recognized instrument for determining the status of refugees. Including climate refugees within the 1951 Refugee Convention would be the most convenient way to provide legal protection to climate refugees around the world. Article 45 of the 1951 Refugee Convention provides an option for the member nations to propose revisions to the 1951 Convention, but there are no specific rules regarding the revision.²⁶⁸ To date, there has been no revision to the convention, but an optional protocol was brought in 1967.²⁶⁹ The 1967 Protocol expanded the scope of the Convention, which was earlier limited to protecting European refugees in the aftermath of World War II.²⁷⁰ Drawing inspiration from the 1967 and other protocols brought in the human rights treaties, climate refugees could be included in the 1951

²⁶⁵ Jessica B Cooper (n 66); Scott (n 34).

²⁶⁶ Bonnie Docherty and Tyler Giannini (n 151).

²⁶⁷ Jane McAdam, 'Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection', *Climate change, forced migration, and international law* (Oxford University Press 2012).

²⁶⁸ Convention Relating to the Status of Refugees 1951 (United Nations, Treaty Series, vol 189, p 137) art 45(1). "Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations."

²⁶⁹ 'THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: Q&A' <<https://www.unhcr.org/sites/default/files/legacy-pdf/4ec262df9.pdf>>.

²⁷⁰ *ibid.*

Refugee Convention through a protocol. Special Rapporteur Ian Fry has supported this idea in his report on cross-border climate-induced displacement.²⁷¹

3.1.1. Protocol to 1951 Refugee Convention

A protocol to the 1951 Refugee Convention could include climate refugees within its framework by two methods – a) by extending the scope of the ‘refugee’ definition to include climate refugees or b) by modifying the definition to align with the definitions in regional instruments.

3.1.1.1. Extending the existing definition

There are two approaches to extending the existing refugee definition under Article 1(a)(2) of the 1951 Refugee Convention.²⁷² The first approach is to expand the scope of the existing definition. Here, the phrase *well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion* within the definition of a refugee under Article 1(a)(2) of the 1951 Refugee Convention is particularly important.²⁷³

On the element of persecution, scholars argue that the impact of climate change is harmful and, in some cases, fatal.²⁷⁴ Therefore, they can be considered as giving rise to a well-founded fear of persecution.²⁷⁵ However, the main challenge is establishing that such well-founded fear of persecution is due to reasons of race, religion, nationality, membership of a particular social group

²⁷¹ Ian Fry (n 11) para 71.

²⁷² 1951 Refugee Convention art 1(a)(2).

²⁷³ *ibid.*

²⁷⁴ Jane McAdam, ‘The Relevance of International Refugee Law’, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012) 44.

²⁷⁵ ANGELA WILLIAMS (n 66) 508; Jessica B Cooper (n 66); TA. Aleinikoff (n 66).

or political opinion. Here, the social group category is the broadest among the other bases.²⁷⁶ The Convention includes no specific list of social groups that may constitute a ‘particular social group’ within the meaning of Article 1A(2), nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground.²⁷⁷ Rather, the UNHCR asserts that the membership of a particular social group should be read evolutionarily, and it should be open to the diverse and changing nature of groups in various societies and evolving international human rights norms.²⁷⁸ A similar remark was made by the U.S.A. refugee tribunal in *In re Kasinga* case.²⁷⁹

The evolutionary nature of the social group category is also evident from the real-world interpretation. States have, to date, recognized women, families, tribes, occupational groups, and homosexuals as constituting a particular social group.²⁸⁰ Now, climate refugees could be included within particular social groups. This inclusion could be made by asserting that the victims of cross-border climate-induced displacement are part of a particular social group since they share a common experience.²⁸¹ This proposition is supported by Jessica Cooper, who explains that “*Under international refugee law, ‘social group’ has been interpreted to mean a recognizable or cognizable group within... a society that shares some ... experience in common.*”²⁸² Further, Cooper states that the other reason why the victims of cross-border climate-induced displacement (climate refugees) can be included with the particular social group is that the victims of cross-border climate-induced displacement are composed of a group “who lack the political power to protect

²⁷⁶ Jessica B Cooper (n 66) 521.

²⁷⁷ United Nations High Commissioner for Refugees (UNHCR) (n 29) 2.

²⁷⁸ *ibid.*

²⁷⁹ Interim Decision 3278, 1996 Westlaw 379826, 35 ILM 1145 (1996).

²⁸⁰ United Nations High Commissioner for Refugees (UNHCR) (n 29) 2.

²⁸¹ Jessica B Cooper (n 66) 521–522.

²⁸² *ibid.*; *Denissenko v Haskett* [1996] ED No 404/96 (Australia).

their environment.”²⁸³ Following this analogy, the thesis suggests that climate refugees could be added to the criteria of particular social groups within the definition of Article 1(a)(2) of the 1951 Refugee Convention. This approach would extend the scope of the refugee definition without making any substantial amendments to the wording of the definition.

A second approach is to divide the definition of refugee under Article 1(a)(2) into two parts. Part I focuses on the persecution based on the five mentioned grounds, and the second part focuses exclusively on climate refugees. A proposed expansion of the refugee definition might read as - any person who owing (1) to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, or (2) to degraded environmental conditions as a consequence of climate change, threatening their life, health, means of subsistence, or use of resources, is outside the country of their nationality or former habitual residence and is unable or, owing to such condition, is unwilling to avail themselves of the protection of that country.²⁸⁴ Here, the protection should be understood as being the same scope as in the current definition.

The second approach will eliminate the requirement of establishing persecution and will include individuals based on the environmental conditions linked to climate change. This has merit as compared to the first approach because the element of persecution could be challenging to achieve in the case of climate refugees due to its multicausal nature, (explained in detail at 3.1.2.).

²⁸³ Jessica B Cooper (n 66) 521–522.

²⁸⁴ *ibid* 494.

3.1.1.2. Modifying the definition

Apart from extending the existing definition of refugee under Article 1(a)(2), the other proposition is to modify the definition. In addition to the 1951 Refugee Convention, other regional frameworks deal with refugees. Although deriving their sources from the 1951 Refugee Convention, the 1969 OAU Convention²⁸⁵ and the 1984 Cartagena Declaration²⁸⁶ also provide extended definitions of refugees.

Article 1 of the OAU Convention defines the term ‘Refugee’, although it provides the same definition as the 1951 Refugee Convention. Article 1(2), however, is an extension clause that states, *“the term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”*²⁸⁷ A similar definition has been provided in the 1984 Cartagena Declaration, Conclusion III (3) of which states that the definition of refugees includes people *“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.”*²⁸⁸

Here, the text *‘public order’* is particularly relevant. Neither the OAU Convention nor the Cartagena Declaration defined the text *‘public order.’* But UNHCR 2020 legal consideration

²⁸⁵ OAU Convention.

²⁸⁶ Cartagena Declaration.

²⁸⁷ OAU Convention art 1(2).

²⁸⁸ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama III(3).

proposes that ‘public order’ in both regional instruments refers to: “prevailing level of the administrative, social, political and moral order as assessed according to the effective functioning of the State in relation to its population and based on respect for the rule of law and human dignity to such an extent that the life, security and freedom of people are protected.”²⁸⁹

Scholars believe that this phrase provides the option to include climate refugees within its definition.²⁹⁰ For instance, Edwards argues that this phrase could be interpreted as a provision to include people fleeing from environmental catastrophe, at least theoretically.²⁹¹ Similarly, Rwelamira states that this phrase is “designed to cover a variety of man-made conditions which do not allow people to reside safely in their countries of origin.”²⁹² Kalin also finds the potentiality of this phrase to cater to at least climate refugees who are displaced due to sudden-onset events.²⁹³

An important point to highlight here is that this provision was previously applied at minimum two occasions to provide refugee protection to the victims of environmental disruption.²⁹⁴ For instance – Mexico has granted refugee status to Haitians affected by the 2010 Earthquake under the Cartagena Declaration.²⁹⁵ Similarly, Ethiopia and Kenya granted refugee

²⁸⁹ ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (n 33) para 16.

²⁹⁰ Jane McAdam, ‘The Relevance of International Refugee Law’, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012) 48–50; Alice Edwards, ‘Refugee Status Determination in Africa’ (2006) 14 *African Journal of International and Comparative Law* 204, 225–227.

²⁹¹ Alice Edwards (n 290) 225–227.

²⁹² MR Rwelamira, ‘Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa’ (1989) 1 *International Journal of Refugee Law* 557, 557–558

²⁹³ Walter Kälin, ‘Conceptualising Climate-Induced Displacement’ in Jane McAdam, *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 88–89.

²⁹⁴ Tamara Wood and Cleo Hansen-Lohrey, ‘Disasters, Climate Change and Public Order: A Principled Application of Regional Refugee Definitions’ (*Refugee Law Initiative Blog*, 24 May 2021) <<https://rli.blogs.sas.ac.uk/2021/05/24/disasters-climate-change-and-public-order/>> accessed 2 August 2024.

²⁹⁵ Sanjula Weerasinghe, ‘In Harm’s Way International Protection in the Context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change’ (United Nations High Commissioner for Refugees 2018) PPLA/2018/05 75–86 <<https://www.unhcr.org/media/no-39-harms-way-international-protection-context-nexus-dynamics-between-conflict-or-violence>>.

status to Somalis who were victims of food insecurity, famine and violence in 2011-12 under the OAU Convention.²⁹⁶

Hence, the definition provided by the regional framework is broader in scope than that in the definition in the 1951 Convention. Therefore, this proposition suggests that the existing definition of refugee under the 1951 convention could be modified to make it similar to that of these regional frameworks. This would provide refugee protection to climate refugees.

3.1.2. Challenges:

Including climate refugees within the 1951 Refugee Convention would provide significant legal protection to them. This arrangement would not only include climate refugees in the definition of refugees but also provide them with specific and extensive legal protections that are afforded to traditional refugees. However, this arrangement would also have certain challenges, which will make the implementation difficult. Two challenges warrant brief analysis.

First is the likely prospect of resistance by the international community. Indeed, any recommendation to bring any changes in the seven-decade-old document would result in resistance from the member states, who are not satisfied with the status quo of the 1951 Convention.²⁹⁷ Such resistance is likely expected because various countries feel that the current 1951 convention is failing in its aim and objective.²⁹⁸

²⁹⁶ *ibid* 36–59.

²⁹⁷ Jessica B Cooper (n 66) 498–499; Jane McAdam, “Protection” or “Migration”? The “Climate Refugee” Treaty Debate’, *Climate change, forced migration, and international law* (Oxford University Press 2012) 197–199.

²⁹⁸ ‘UK Home Secretary Calls UN Refugee Convention Rules “Absurd, Unsustainable”’ (*Anadolu Ajansı*) <<https://www.aa.com.tr/en/europe/uk-home-secretary-calls-un-refugee-convention-rules-absurd-unsustainable/3001637>> accessed 7 April 2024.

The second challenge is related to causality. Under the current 1951 Refugee Convention, protection is granted if a well-founded fear of persecution is established on the mentioned five grounds.²⁹⁹ Here, the standard of proof for persecution could be less than 50 fifty percent³⁰⁰ but shall not be merely a prediction. Instead, it should be a supposition based on the available evidence.³⁰¹

Unlike the case of refugees under the 1951 Refugee Convention, determining the role of climate change as a causal factor for displacement is inherently challenging. While there is no doubt that the impacts of climate change create climate refugees, this impact is also intertwined with other socio-political factors in many cases.³⁰² Untangling the influence of other factors to ascertain the connection between displacement and the impact of climate change would no doubt prove challenging. Scientists explain that “*debates about whether single events are “caused” by climate change are illogical*” since it is impossible to attribute individual events to it conclusively.³⁰³ The gradual and cumulative nature of climate change adds yet another layer of complexity, as it may not always manifest as an immediate trigger for migration but rather as a gradual exacerbation of existing vulnerabilities over time.³⁰⁴

This challenge of assessing causality poses a considerable hurdle in drafting legal frameworks and determining eligibility criteria for climate refugees under the 1951 Refugee Convention. Without clear and robust mechanisms to establish causality concerning climate-

²⁹⁹ 1951 Refugee Convention art 1(a)(2).

³⁰⁰ *INS v Cardoza-Fonseca* 480 US 421(1987) 431.

³⁰¹ Jane McAdam, ““Protection” or “Migration”? The “Climate Refugee” Treaty Debate’ (n 297) 196.

³⁰² *ibid* 196–197.

³⁰³ Daniel G Huber and Jay Gullede, ‘Extreme Weather and Climate Change: Understanding the Link and Managing the Risk’ [2011] Centre for Climate and Energy Solutions 1.

³⁰⁴ António Guterres, ‘United Nations High Commissioner for Refugees, “Statement”’ (*Nansen Conference on Climate Change and Displacement in the 21st Century*, 6 June 2011) 2.

induced disruptions, there is a risk of inconsistency and subjectivity in decision-making processes, potentially undermining the effectiveness and credibility of any protocol aimed at addressing the plight of climate refugees.

3.2. Progressive Interpretation of International Human Rights Law’s Complementary Protection

International Human Rights Law’s complementary protection (non-refoulement) is not only limited to those defined as ‘refugees’ under the 1951 Refugee Convention; rather (at least) in theory, it can be provided for any human rights violations.³⁰⁵ However, in most cases, it is difficult for an individual to prove it because most human rights provisions “*permit a balancing test between the interests of the individual and the State, thus placing protection from refoulement out of reach in all but the most exceptional cases.*”³⁰⁶

Nonetheless, arbitrary deprivation of life (article 6 of ICCPR) and torture, cruel, inhuman or degrading treatment or punishment (article 7 of ICCPR) have been recognized as provisions giving rise to non-refoulement obligations under international law³⁰⁷ and domestic frameworks.³⁰⁸ Hence, unpacking these two provisions is particularly relevant for the current research.

³⁰⁵ *R v Special Adjudicator, ex parte Ullah* (UKHL 26); Jane McAdam, ‘Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection’ (n 267) 53.

³⁰⁶ Jane McAdam, ‘Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection’ (n 267) 53.

³⁰⁷ *Ioane Teitiota v. New Zealand* (n 88).

³⁰⁸ *Re MQF* [2004] RPDD No 87.

3.2.1. Right to Life

The primary reason why Teitiota was denied non-refoulement protection was that the HRC was not satisfied that he faced a “*risk of an imminent, or likely, risk of arbitrary deprivation of life upon return to Kiribati.*”³⁰⁹ The HRC reached this conclusion by analyzing the issues raised by the *Teitiota* case.

As discussed in Chapter 1(1.2.1), the HRC relied on high thresholds while analyzing these issues. Consequently, Teitiota was not able to reach the threshold. There is no denying that the threshold should be high or substantial so that only those individuals who are vulnerable in the true sense can claim the protection. However, such a high threshold might be appropriate for one element, but when a range of rights are impacted, a cumulative assessment is more suitable.³¹⁰ For instance – in the *Teitiota* case, he alleged scarcity of habitable places³¹¹ and environmental degradation³¹² as a reason for the violation of his right to life. Here, the Committee assessed both reasons independently and maintained a high threshold for both.³¹³

If, however, the HRC had made a cumulative assessment, the opinion of the HRC in the *Teitiota* case might have been different. The cumulative assessment approach holds merit because it is followed in the cases of refugees under the 1951 Refugee Convention.³¹⁴ In the 1951 Refugee Convention, the threshold for assessing the persecution is evaluated on account of one very serious

³⁰⁹ *Ioane Teitiota v. New Zealand* (n 88) para 9.6.

³¹⁰ Jane McAdam and others, ‘International Law and Sea-Level Rise: Forced Migration and Human Rights’ (2016) FNI Report 1/2016 [2016] UNSWLRS 60 Report in cooperation with the Andrew & Renata Kaldor Centre for International Refugee Law, University of New South Wales para 93; Jane McAdam, ‘Current Developments - Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement’ (n 50) 714.

³¹¹ *Ioane Teitiota v. New Zealand* (n 88) para 9.8.

³¹² *ibid* 9.9.

³¹³ Jane McAdam, ‘Current Developments’ (n 89) 714.

³¹⁴ *ibid*.

risk or based on multiple, less severe risks that, when assessed cumulatively.³¹⁵ In fact, the UNHCR's guidelines on determining refugee status also employ and justify the cumulative assessment approach.³¹⁶

Moreover, the cumulative assessment approach has also been followed in the non-refoulement cases under the human rights framework.³¹⁷ The Regional Conference of Migration acknowledged that human rights-based non-refoulement obligations “*could perhaps apply, mutatis mutandis, to [disaster] situations, especially if the cumulative conditions in those countries amounted a threat to life or cruel, inhuman or degrading treatment.*”³¹⁸ Relying on these facts, it is argued that cumulative assessment would be an appropriate approach when a range of rights are impacted.

Similarly, the HRC in the Teitiota case held that he does not face “*a real, personal and reasonably foreseeable risk of a threat to his right to life.*”³¹⁹ Here, the term reasonably foreseeable is particularly important. There is no specific meaning of ‘Reasonably Foreseeable.’³²⁰ It is a contextual term that depends on the individual case. The jurisprudence states that the ‘reasonably foreseeable (future)’ is “*something of an ambulatory period of time,*”³²¹ but what is ‘reasonable’ is to be assessed “*on the basis of probative material, without extending into guesswork.*” As such,

³¹⁵ *ibid.*

³¹⁶ ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (UN High Commissioner for Refugees (UNHCR) 2019) HCR/IP/4/ENG/REV. 4 para 53. See also, Jane McAdam (n 41) 715.

³¹⁷ *Sufi and Elmi v United Kingdom* [2012] 54 EHRR 9 [291–292].

³¹⁸ Which consists of 11 members (Belize, Canada, Costa Rica, El Salvador, the Dominican Republic, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States of America) Nansen Initiative on Disaster-Induced Cross-Border Displacement, ‘Protection for Persons Moving Across Borders in the Context of Disasters: A Guide to Effective Practices for RCM Member Countries’ 12 n. 15; Jane McAdam, ‘Current Developments’ (n 89) 715.

³¹⁹ *Ioane Teitiota v. New Zealand* (n 88) para 9.4.

³²⁰ Jane McAdam, ‘Current Developments’ (n 89) 717.

³²¹ *CPE15 v Minister for Immigration and Border Protection* [2017] FCA 591 (Australia) [60].

it is “intended to preclude predictions of the future that are so far removed in point of time from the life of the person concerned at the time the person is returned to her or his country of nationality as to bear insufficient connection to the reality of what that person may experience.”³²²

Australian jurisprudence in refugee cases has interpreted ‘reasonably foreseeable’ as a time frame for up to a decade in matters involving children,³²³ however, it was observed that a period of fifteen years is too distant.³²⁴ In the Teitota case, the HRC acknowledged that Kiribati would likely become uninhabitable in fifteen years,³²⁵ however, they held that the time frame is too speculative to give protection at the moment.³²⁶ The HRC relied its opinion on the fact that Kiribati is “taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms.”³²⁷ Hence, the steps taken by Kiribati, along with international assistance, could reduce the harm.³²⁸

Such an interpretation is problematic. Here, it is important to understand the nature of the harm. In other cases, speculation for a hypothetical event that could happen in ten or fifteen years could be considered as not reasonably foreseeable at the moment.³²⁹ However, in cases involving climate change, such an interpretation does not seem fitting, considering that these events have scientific evidence.³³⁰ For instance, the Teitiota case involves the issue of the rise in sea level. The

³²² *ibid.*

³²³ *I703914 (Refugee)* [2018] [2018] AATA 3088 (Australia) [75].

³²⁴ *Mok v Minister for Immigration, Local Government & Ethnic Affairs (No 1)* [1993] 47 FCR 1 (Australia) [96]; *Minister for Immigration, Local Government & Ethnic Affairs v Mok* [1994] 55 FCR 375 (Australia).

³²⁵ *Ioane Teitiota v. New Zealand* (n 88) para 9.12.

³²⁶ *ibid.*

³²⁷ *ibid.*

³²⁸ *ibid.*

³²⁹ *Anderson and others* (n 60) 133–135.

³³⁰ *ibid.*; Jane McAdam, ‘Current Developments’ (n 89) 718–719.

IPCC has expressly stated that “[l]owlying areas are at risk from sea-level rise,”³³¹ and it is “virtually certain that global mean sea-level rise will continue for many centuries beyond 2100.”³³² Such scientific analysis cannot be put on the same threshold as other hypothetical speculations. It is also important to look at how the issue is interpreted in refugee law. Here, a notable example is Australia, which has granted protection even in cases where the risk of harm is anything more than ten percent.³³³ The jurisprudence on this issue states that “[i]f the evidence is strong, an event or occurrence can be foreseeable even if it is not likely to manifest in the short term.”³³⁴ In the case of climate change, scientific predictions certainly weigh much more than the ten percent threshold.³³⁵ Therefore, it is argued that the manifestation of harm should be considered differently in cases involving climate change due to its scientific evidence.

On a separate note, human rights can be expanded to include precautionary principles in cases related to climate refugees.³³⁶ Here, the precautionary principle recognizes the need to take measures to deal with potential threats to the environment.³³⁷ This concept is built on the notion that “science cannot sufficiently predict all possible environmental outcomes of human activity and that society cannot afford to wait to find out if certain activity carries with it irreversible harm.”³³⁸

³³¹ IPCC, 2014, ‘Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change’ (Intergovernmental Panel on Climate Change 2014) [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. 13.

³³² *ibid* 16.

³³³ *Chan v Minister for Immigration and Ethnic Affairs* [1989] 169 CLR 379 (Australia) 389.

³³⁴ Anderson and others (n 60) 138.

³³⁵ Jane McAdam, ‘Current Developments’ (n 89) 719.

³³⁶ Giovanni Sciacaluga, *International Law and the Protection of “Climate Refugees”* (Springer International Publishing 2020) 162 <<https://link.springer.com/10.1007/978-3-030-52402-9>> accessed 6 April 2024.

³³⁷ Paul Guy, ‘Throwing Caution to the Wind: The Precautionary Principle, NAFTA and Environmental Protection in Canada, 2004’ 13 *Dalhousie Journal of Legal Studies* 192.

³³⁸ P.S. Puttagunta, ‘The Precautionary Principle in the Regulation of Genetically Modified Organisms’ (2000) 9 *Health Law Review* para 3.

It is important to note that precautionary principles exist in International Environmental Law.³³⁹ In the case of climate refugees, the conditions of the victims of cross-border climate-induced displacement are strictly connected and depend on environmental factors.³⁴⁰ Therefore, a provision of international environmental law could be linked with human rights law. Such a linkage is possible, considering these two bodies of law are connected in various issues. For example – in cases of threat to environmental damages, states are obliged under human rights law to enforce environmental protection policies.³⁴¹ If the precautionary principle is applied in the present case, climate refugees would be able to get non-refoulement protection on the basis that their territory is about to become uninhabitable.³⁴²

To conclude, if human rights law is progressively interpreted to include cumulative assessment of impacted rights, customized manifestation of harm, or application of precaution principles, it might result in climate refugees getting non-refoulement protection under Article 6 of the ICCPR.

3.2.2. Inhuman or Degrading Treatment

Article 7 of the ICCPR prohibits torture and cruel, inhuman, or degrading treatment or punishment.³⁴³ The Human Rights Committee did not specify the list of acts that could be included within the scope of this article because they consider drawing a list of prohibited acts or establishing sharp distinctions between the different kinds of punishment or treatment as

³³⁹ Paul Guy (n 337) 192–197.

³⁴⁰ Sciacaluga (n 336) 162.

³⁴¹ *ibid.*

³⁴² *ibid.*

³⁴³ International Covenant on Civil and Political Rights art 7.

undesirable.³⁴⁴ Moreover, such distinctions depend on the nature, purpose and severity of the treatment applied.³⁴⁵

However, courts over time evolved that ‘inhuman treatment’ must have a “*minimum level of severity*” and involve “*actual bodily injury or intense physical or mental suffering.*”³⁴⁶ Similarly, ‘Degrading Treatment’ refers to a situation which “*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.*”³⁴⁷ In both cases, merely a lack of intent will not rule out the possibility of violation.³⁴⁸

Article 7 is broader in scope than Article 6. This is the reason why various economic and social rights are re-characterized as article 7 of ICCPR to avail non-refoulement protection.³⁴⁹ Due to its broader scope, scholars like McAdam believe that the HRC’s observation in the Teitiota case might have been different if the case had been brought for the violation of Article 7 of the ICCPR.³⁵⁰ Therefore, it is important to unpack this provision.

Although courts have affirmed that Article 7 contains a non-refoulement obligation³⁵¹, there is no vast jurisprudence regarding its application within ICCPR.³⁵² Therefore, we need to

³⁴⁴ ‘General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)’ (UN Human Rights Committee (HRC) 1992) para 4.

³⁴⁵ *ibid.*

³⁴⁶ *Pretty v United Kingdom* [2002] 35 EHRR 1 [52].

³⁴⁷ *ibid.*

³⁴⁸ *Labita v Italia* [2000] Application No 26772/85 (European Court of Human Rights) [120].

³⁴⁹ Jane McAdam, ‘Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection’ (n 267) 54.

³⁵⁰ Jane McAdam, ‘Current Developments’ (n 89) 715.

³⁵¹ *Kindler v Canada Communication No 470/1991* [1993] UN Doc CCPR/C/48/D/470/1991 (UN Committee on the Rights of the Child) [6.2]; *ARJ v Australia Communication No 692/1996* [1997] UN Doc CCPR/C/60/D/692/1996 (UN Committee on the Rights of the Child) [6.8].

³⁵² Jane McAdam, ‘Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection’ (n 267) 64.

turn to Article 3 of ECHR (torture and inhuman or degrading treatment or punishment)³⁵³, which is similar to Article 7 of the ICCPR. Article 3 is a frequently utilized provision which has significantly developed the human rights-based non-refoulement jurisprudence in the European Court of Human Rights.³⁵⁴ *Soering v. United Kingdom* was the first case when the European Court of Human Rights recognized Article 3 as giving rise to non-refoulement.³⁵⁵ Since then, the European Court of Human Rights has consistently affirmed that Article 3 “cannot be balanced against the public interest or any other matter, irrespective of the applicant’s criminal or personal conduct.”³⁵⁶

On the aspect of climate refugees, unlike Article 6 of the ICCPR, no claims have been brought under Article 7 of ICCPR or Article 3 of ECHR to date. Therefore, we would rely on a hypothetical question: what would have been the outcome if Teitiota had brought his claim under Inhuman or Degrading Treatment (Article 7 of the ICCPR)? In such a case, the primary consideration would be whether the deprivation of socio-economic rights in Kiribati can give rise to non-refoulement under Article 3 of ECHR.³⁵⁷ To answer this, we will be turning towards International Refugee Law to examine how socio-economic rights are assessed in IRL.

As discussed in Chapter 1, ‘persecution’ within the 1951 Refugee Convention is not limited to civil and political rights but also includes socio-economic rights.³⁵⁸ The Australian Migration

³⁵³ ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 1950 art 3.

³⁵⁴ Jane McAdam, ‘Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection’ (n 267) 64.

³⁵⁵ *Soering v United Kingdom* [1989] 11 EHRR 439.

³⁵⁶ *Chahal v United Kingdom* [1996] 23 EHRR 413.

³⁵⁷ Jane McAdam, ‘Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection’ (n 267) 72.

³⁵⁸ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (1st edn, Cambridge University Press 2007) 104–105.

Act has provided a detailed description of the socio-economic nature of persecution. According to this, persecution includes “*significant economic hardship that threatens the person’s capacity to subsist*”, “*denial of access to basic services, where the denial threatens the person’s capacity to subsist*”, and “*denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist*.”³⁵⁹ Applying the observation of IRL in the present context, it can be said that deprivation of socio-economic rights can give rise to a non-refoulement obligation under inhuman or degrading treatment.

The second question would be regarding the severity of such deprivation. Here, courts have observed non-refoulement cannot be granted merely because the condition of treatment in the origin state is lower than that of the receiving state.³⁶⁰ Rather, the prime consideration would be “*if the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or punishment*.”³⁶¹ The UNHCR has further explained this in its guidelines on internal flight alternatives. According to UNHCR, it is unreasonable to relocate someone to a place where they will face economic destitution. At the same time, a simple lowering of living standards cannot be considered unreasonable. Rather, “*conditions in the area must be such that a relatively normal life can be led in the context of the country concerned*.”³⁶²

Applying this reasoning in the context of Teitiota, it could be said that if it had been proven based on the cumulative assessment of his situation in Kiribati that he was living destitute or below

³⁵⁹ Migration Act 1958 (Cth, s91R(2)).

³⁶⁰ *Salkic v Sweden* [2004] App no 7702/04 (European Court of Human Rights); *Amegnigan v The Netherlands* [2004] App no 25629/04 (European Court of Human Rights).

³⁶¹ *Januzi v Secretary of State for the Home Department* [2006] UKHL 5 [19,45]; Jane McAdam, ‘Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection’ (n 267) 73.

³⁶² Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees 2003 (UN Doc HCR/GIP/03/04) para 29.

the minimum subsistence level, he would have been granted non-refoulement protection since the situation would have amounted to inhuman or degrading treatment.³⁶³ Such an observation was likely possible because the HRC has explicitly mentioned that “*the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant.*”³⁶⁴

To conclude, if inhuman or degrading treatment is progressively interpreted, climate refugees may be able to get non-refoulement protection under it. It is important to note that the assessment of deprivation of rights depends on the judicial interpretation of the provision. Still, the Teitiota judgment has opened the possibility for climate refugees to bring actions for the violation of inhuman or degrading treatment.

3.3. New Convention

The problem of climate refugees is complex enough to have its own legal instrument instead of being fitted into other instruments that have been established for a different purpose. Therefore, a new convention specifically dealing with climate refugees is both justified and necessary to identify the accurate legal vocabulary and distinguish them from refugees under the 1951 Convention.³⁶⁵ While the bounds of the present study do not permit a comprehensive discussion on the possibility of a new convention, the following section provides a brief overview of the aim and objectives of the convention along with limitations.

³⁶³ Jane McAdam, ‘Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection’ (n 267) 74.

³⁶⁴ *Ioane Teitiota v. New Zealand* (n 88) para 9.11.

³⁶⁵ Bonnie Docherty and Tyler Giannini (n 151) 350.

3.3.1. Aim and Objectives of the Convention

The new convention should recognize the problems of climate refugees, define their rights and the corresponding obligations of states, and provide legal mechanisms for effective remedies.³⁶⁶ In a broad sense, the new convention should include the victims of both internal and cross-border climate-induced displacement. However, as the current thesis is focused on cross-border climate-induced displacement, therefore the present discourse on the new convention will be limited to that discussion.

As discussed previously, academicians worldwide have different synonyms for climate refugees. This research has demonstrated why ‘climate refugee’ is the best term to recognize the victims of cross-border climate-induced displacement. It is, therefore, important that the new convention identify a proper term to address them. An appropriate definition of climate refugee should, therefore, be one of the principal objectives of the convention. The definition should be narrow enough to be accepted by states while simultaneously including the victims of climate-induced displacement.³⁶⁷ The definition should also include exclusion and cessation clauses, similar to those mentioned in the 1951 Refugee Convention.³⁶⁸

Further, the new convention should have provisions for the determination of climate refugee status. Similar to the 1951 Refugee Convention, the new convention should include both individuals and groups as the basis of determination.³⁶⁹ However, preference should be given to the latter since climate change affects entire communities, and the displacement would likely be

³⁶⁶ *ibid.*

³⁶⁷ *ibid* 374.

³⁶⁸ 1951 Refugee Convention art 1(C),1(F).

³⁶⁹ UN High Commissioner for Refugees (UNHCR) (n 26).

in groups.³⁷⁰ This would reduce the overall cost of the application and decision procedure.³⁷¹ Nonetheless, individual refugee status determination should also be allowed.³⁷²

Similarly, climate-induced displacement impacts the living conditions of the climate refugees and even their fundamental rights are jeopardized. These rights can be basic human rights that are jeopardized in times of crisis and the rights linked to cross-border displacement (such as *non-refoulement*).³⁷³ According to Docherty and Giannini, “*the instrument should establish guarantees of human rights protections and humanitarian aid for a specific class of people*”.³⁷⁴ This means that fundamental rights like social, economic, and cultural rights should apply to climate refugees without any restriction. In this regard, the new convention could draw inspiration from the 1951 Refugee Convention, which sets up provisions for recognizing the rights of refugees on an international level.³⁷⁵ Further, it is also vital that the new convention should strictly be based on the principle of non-discrimination,³⁷⁶ and support non-refoulement, customary law and a core principle of the 1951 Refugee Convention.³⁷⁷

Although the primary purpose of the new convention should be defining climate refugees and establishing a rights-based framework to safeguard their fundamental human rights, the convention needs to be successful in establishing other provisions that can help in fulfilling the

³⁷⁰ Bonnie Docherty and Tyler Giannini (n 151) 374.

³⁷¹ *ibid.*

³⁷² *ibid.*

³⁷³ Michel Prieur (n 166).

³⁷⁴ Bonnie Docherty and Tyler Giannini (n 151) 350.

³⁷⁵ Introductory note 1951 Refugee Convention. See, Preamble. The Convention states, “*human beings shall enjoy fundamental rights and freedoms without discrimination.*”

³⁷⁶ *Ibid* at 325-326.

³⁷⁷ 1951 Refugee Convention art 33.

purpose it was made for. The author suggests that the new convention should contain the following components:

a) Responsibility of home state, host state and the international community: To effectively protect climate refugees, the responsibility should be shared by all nations to varied extents. In this regard, the new convention should state the specific responsibilities of the home state, host state, and other nations. The responsibility of the host state is crucial. The convention should set out provisions for host states to assist climate refugees. The responsibilities set out for the host state in the 1951 Refugee Convention could very well apply to the case of climate refugees.³⁷⁸ Moreover, host states should share the burden of providing humanitarian aid, human rights protection, settlement, financial assistance, etc., to climate refugees within their jurisdiction with home and other states. The host state should also allow various governmental, non-governmental, and international organizations to aid within their territories. This will also reduce the burden on the host state.

Further, the convention should reiterate the state's human rights obligations to provide a minimum standard of treatment for climate refugees by the host state. In this regard, James Hathaway agrees that "*the host state should be obliged to meet a general standard of treatment.*"³⁷⁹ He also states that "*the host state, in some cases, should also provide a better treatment, equal to the treatment accorded to the nationals of the host state.*"³⁸⁰ This is only possible if the new convention adopts a 'right-based framework' for climate refugees. To

³⁷⁸ *ibid* 17–19, 21, 23–24, 26–28, 31–32.

³⁷⁹ James C Hathaway, *The Rights of Refugees under International Law* (2nd edn, Cambridge University Press 2021) 192 <<https://www.cambridge.org/core/product/identifier/9781108863537/type/book>> accessed 10 June 2024.

³⁸⁰ Hathaway (n 379).

ensure that climate refugees receive these rights, the convention could also accord them a ‘Special Legal Status.’

Similarly, the convention should also include a provision for the international community (not the host state) to assist climate refugees. Such assistance should largely be financial. Further, the convention should also set out provisions for the home state in consistency with state sovereignty. Generally, under IHRL and IRL, the host state would exercise jurisdiction and, therefore, primary responsibility for rights protections. However, the home state should also be obligated to assist to the maximum possible extent.³⁸¹ Here, it is essential to understand that the relationship between states and the victim in this case is different as compared to that of traditional refugees. Despite this, the 1951 Refugee Convention talks about the responsibility of the home state during immigration and return.³⁸² Hence, this convention should extend the responsibility of the home state by obligating them to “*provide financial, material, and/or logistical assistance for temporary relocation or permanent resettlement to the degree they can.*”³⁸³ This will allow the home state to facilitate the voluntary return of its people, if possible. Such cooperation and shared responsibility are essential to resettling climate refugees and guaranteeing their protection.

On the issue of determining the proportion of sharing responsibilities, the new convention can give responsibility to the coordinating agency (discussed in the next part) to develop a criterion. Such criteria can either be generic which would be applied in all cases or tailored according to the mutual agreement of concerned parties. The new convention should also mention how disputes related to the proportion of sharing responsibilities can be resolved.

³⁸¹ Bonnie Docherty and Tyler Giannini (n 151) 380.

³⁸² *ibid.*

³⁸³ *ibid.*

For that purpose, the new convention can either give authority to the coordinating agency or create an advisory committee similar to the committees created under the UNFCCC.³⁸⁴

b) Implementation Framework: To be effective, like other international legal instruments, the new convention should set up an implementation framework. Without a proper implementation framework, the new convention will amount to little more than a piece of paper. In this regard, Docherty and Giannini state that the new instrument “*should spread the burden of fulfilling those guarantees across the home state, host state, and the international community. It should form institutions to implement the provisions*”.³⁸⁵ This suggestion of Docherty and Giannini is essential because for the new convention to ensure implementation, there should be provisions to establish a coordinating agency in place that overlooks if the requirements are implemented fairly. A coordinating agency is also essential for ensuring human rights protection and related programs for the rehabilitation and support of climate refugees. This agency could also oversee international assistance, support, finances, etc.³⁸⁶

The new convention can borrow this mechanism from other international treaties and conventions and create an agency similar to UNHCR. The convention can, in fact, also mandate the UNHCR. Both approaches would have some merits and demerits. The merits of creating a new agency are - a) it would be specifically designed and tailored to cater to the needs of climate refugees, and b) it could provide an innovative approach to policymaking, implementation and coordination without being unburdened by the existing structure. While the demerits are - a) the new agency would require significant setup costs, and b) the new

³⁸⁴ ‘Constituted Bodies - UNFCCC’ (*United Nations Framework Convention on Climate Change*) <<https://unfccc.int/process-and-meetings/bodies/constituted-bodies>> accessed 2 August 2024.

³⁸⁵ Bonnie Docherty and Tyler Giannini (n 151) 350.

³⁸⁶ Michel Prieur (n 166).

agency may overlap with the functions of UNHCR. Similarly, the positive factors of mandating the UNHCR are – a) it would be more cost-effective than creating a new agency, and b) it could ensure a holistic approach to address the needs of broader categories of refugees. On the other hand, the negative factors are – a) UNHCR is already dealing with numerous crises and additional responsibility could strain its resources and capabilities, and b) while the UNHCR has extensive experience in dealing with refugees, the specific issues of climate refugees may require a specialized focus.

Weighing the effectiveness of each mechanism and subsequently looking for solutions to overcome their shortcomings should be an important factor to consider while deciding the best suitable agency. In this way, an effective implementation framework would ensure that the new convention could achieve its aim and objectives.

c) International Assistance: The new convention will be futile without any assistance and recognition from the international community. The new convention can, therefore, specify provisions of humanitarian aid and place an obligation on state parties to contribute. This assistance can come in the form of financial aid from countries. Assisting and resettling climate refugees requires significant funding. International assistance to climate refugees and effective implementation of the new convention will be futile without any financial aid. Therefore, setting up a global fund to assist the people displaced by climate change should be a priority in the convention.³⁸⁷ The sole purpose of this fund should be to aid climate refugees worldwide. In this regard, the Special Climate Change Fund,³⁸⁸ which accepts funds to address problems

³⁸⁷ Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (1st edn, Cambridge University Press 2013) 323 <<https://www.cambridge.org/core/product/identifier/9781139198776/type/book>> accessed 16 June 2024.

³⁸⁸ United Nations Framework Convention on Climate Change, ‘REPORT OF THE CONFERENCE OF THE PARTIES ON ITS SEVENTH SESSION, HELD AT MARRAKESH FROM 29 OCTOBER TO 10 NOVEMBER 2001’ (2002) FCCC/CP/2001/13/Add.1.

related to climate change, could act as an example. Interestingly, many authors have previously discussed such global funds in relation to climate change. Benito Muller, in 2002, suggested the creation of a similar fund to assist people affected by climate change-related disasters.³⁸⁹ He based his idea on “*binding contributions from counties across the globe to cover the costs of the international relief effort for climate-related disasters.*”³⁹⁰ Similarly, the new convention could set up a global fund based on the idea of contributions from the international community.

An alternative approach can be to merge the Loss and Damage³⁹¹ fund into the new convention. However, a principal shortcoming of this fund is that it relies on voluntary contribution rather than allocation on the principle of *states’ common but differentiated responsibilities*.³⁹² This principle (currently exists in international environmental law)³⁹³ recognizes the responsibility of all states to protect the environment. However, at the same time, it also recognizes that there are historical differences in the contributions of developed and developing States to global environmental problems, as well as differences in their respective economic and technical capacity to tackle these problems.³⁹⁴ Therefore, it is justified that different states should pay different amounts. Such an approach seems reasonable since it does not put an unreasonable burden on states.

³⁸⁹ Benito Müller, ‘An FCCC Impact Response Instrument as Part of a Balanced Global Climate Change Regime’ 3.

³⁹⁰ *ibid.*

³⁹¹ Created by United Nations Framework Convention on Climate Change (UNFCCC) in the Conference of the Parties’ (COP) 27th session in 2022. ‘What You Need to Know about the COP27 Loss and Damage Fund’ (*UNEP - UN Environment Programme*, 29 November 2022) <<http://www.unep.org/news-and-stories/story/what-you-need-know-about-cop27-loss-and-damage-fund>> accessed 9 July 2024.

³⁹² ‘THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES: ORIGINS AND SCOPE’ [2002] Centre for International Sustainable Development Law.

³⁹³ RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT 1992 (A/CONF151/26 (Vol I)) art 7; United Nations Framework Convention on Climate Change art 3.

³⁹⁴ RIO DECLARATION art 7.

Apart from financial contributions, countries can also provide medical assistance, victim assistance, assistance with adaptation and mitigation measures, etc.³⁹⁵ This contribution and assistance by the international community can help countries and individuals who are both vulnerable to and already displaced by climate change.

By including the provisions outlined above, the new convention can address the concerns of climate refugees. In light of the various advantages of the new convention, it is also essential to highlight the limitations related to the new convention.

3.3.2. Limitations

While climate change is a global phenomenon and can lead to cross-border displacement, internal displacement exceeds cross-border displacement.³⁹⁶ In such a scenario, an international convention will be ineffective in solving the issues. As per Jane McAdam, *“a universal treaty may be in-appropriate in addressing the concerns of particular communities. The role of ‘international movement’ as a response to climate change is conceived of differently in different regions due to their particular geographical, demographic, cultural and political circumstances, and it may be that localized or regional responses are better able to respond to their needs.”*³⁹⁷ In trying to find a solution for climate refugees, it is therefore essential to take geographical, demographic, cultural, and political differences in mind. A global convention may not be able to accommodate these differences, rendering the purpose behind the new convention unfulfilled.

³⁹⁵ Bonnie Docherty and Tyler Giannini (n 151) 382–384.

³⁹⁶ Mohamed (n 6).

³⁹⁷ Jane McAdam, ‘Swimming against the Tide: Why a Climate Change Displacement Treaty Is Not the Answer’ (2011) 23 International Journal of Refugee Law 2, 4.

Climate refugees are the creation of climate change. Climate change can produce both slow and sudden onset of events that can cause displacement.³⁹⁸ Although displacement can be caused by both sudden and slow onset of events, the magnitude of displacement required to displace people across borders cannot be predicted precisely. Consequently, the magnitude of the effect caused due to climate change resulting in displacement is difficult to define. Therefore, it will be challenging to set a 'standard of proof' to qualify for the status of climate refugee, unlike the 1951 Refugee Convention, where the standard of proof is based on a well-founded fear of persecution. This difficulty of unpredictability will also hinder people from seeking protection under the new convention. Displacement due to climate change is currently based on predictions. The main criteria for affording the protection under the new convention is based on the probability of near or future harm linked to climate change as opposed to natural or man-made disasters, which will create complexity in decision-making. Therefore, this complexity will confuse people as well as decision-makers as to who can afford the protection under the new convention.

Other factors can render the idea of a new convention unfruitful. McAdam believes that *"states presently seem to lack the political will to negotiate a new instrument requiring them to provide international protection to additional groups of people."*³⁹⁹ Due to the obligations of the 1951 Refugee Convention that the states are currently under, a new convention may not be the right solution that the nations are currently looking forward to. Even if the new convention can be somehow possible, its implementation, enforcement, and ratification may prove challenging. Together, these concerns point towards the potential drawbacks of an international convention on

³⁹⁸ UNEP, 'Facts about the Climate Emergency' (UNEP - UN Environment Programme, 25 January 2021) <<http://www.unep.org/facts-about-climate-emergency>> accessed 10 June 2024.

³⁹⁹ Jane McAdam, 'Swimming against the Tide' (n 397) 16.

climate refugees. These drawbacks imply that a new convention may not be a proper answer to extend international protection to people displaced due to climate change.

Although the drawbacks are concerning, the author believes that the new convention can pave the way to create a much-needed solution for cross-border displacement due to climate change. Cross-border displacement due to climate change is already happening, and waiting for the nations to disappear to find a legal solution is not a good choice. The new convention is a much-needed protection and recognition for the people displaced due to climate change, and it is time for the convention to be turned into a reality rather than a discussion.

Conclusion

This thesis critically examined the framework applicable to cross-border climate-induced displacement within international law. Addressing this issue is crucial not only because of its pervasive human rights implications but also because of the various reports suggesting that it will increase substantially in the coming years.

The first chapter analyzed the existing legal frameworks that could protect the victims of cross-border climate-induced displacement under IRL and IHRL. The analysis revealed that both provisions are inefficient and ineffective in protecting the victims of cross-border climate-induced displacement because of several reasons. The former is dependent on complementary factors and faces difficulty in characterizing persecution and persecutor. Similarly, the latter has a high threshold of risk assessment, faces obstruction due to positive action of home states and has a limited success rate (see 1.1.1 and 1.2.1, respectively).

The second chapter addressed the terminological debate surrounding climate-induced displacement. This chapter reviewed the existing terms used to refer to the victims of cross-border climate-induced displacement. This chapter identified areas of convergence and divergence across the existing terms and argued that the concept of ‘climate refugee’ is the most appropriate term to refer to the victims of cross-border climate-induced displacement because of its relevancy with the situation of the victims (see 2.2.). Subsequently, the chapter defines climate refugees, drawing from existing definitions provided by scholars and institutions, as people whose situation includes the following essential elements - a) forceful movement, b) either temporary or permanent, c) cross-border, d) sudden and slow onset, and e) relocation due to climate change (see 2.3).

The third chapter identified and examined three legal arrangements that could be made available for the protection of the victims of cross-border climate-induced displacement. First, it recommended extending or modifying the existing definition of a refugee under the 1951 Refugee Convention through a protocol. Here, the principal challenges are resistance by the international community and determination of the role of climate change as a causal factor for displacement (See 3.1.2.). Second, it recommended a progressive interpretation of non-refoulement provisions under International Human Rights Law to include climate refugees within its scope. This approach hinges on the judicial interpretation of the provision. Third, it suggested a new convention specifically dealing with climate refugees. The limitations of this approach are the diverse effects of climate change in different regions, difficulty in setting the threshold for the standard of proof and the lack of political will (See 3.3.2.).

Overall, the thesis stresses the need for a paradigm shift in the approach to addressing the issue of cross-border climate-induced displacement. What is needed is a proactive and forward-looking approach. Protecting the victims of cross-border climate-induced displacement is not merely a legal obligation but also a moral responsibility that requires collective support from the international community. Recognizing the rights of the victims of cross-border climate-induced displacement and implementing a legal framework that protects them is essential in the face of an unprecedented global challenge.

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