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Reframing the Response to Climate Refugees

Alexander Grey Crutchfield

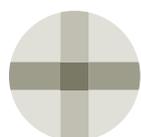


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CEU Ediciones

Julián Romea 18, 28003 Madrid

Teléfono: 91 514 05 73, fax: 91 514 04 30

Correo electrónico: ceuediciones@ceu.es

www.ceuediciones.es

Real Instituto Universitario de Estudios Europeos

Avda. del Valle 21, 28003 Madrid

www.ideo.ceu.es

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List of Abbreviations

1951 Refugee Convention	The Convention Relating to the Status of Refugees, Geneva Convention of 28 July 1951
COP	Conference of Parties
CJEU	Court Justice of the European Union EP - European Parliament
EU	European Union
GCR	Global Compact on Refugees
ICJ	International Court of Justice
OAU	Organisation of African Unity
QD	Qualitative Directive (of the European Union)
SIDS	Small Island Developing States
TFEU	Treaty of the Functioning of the European Union
TFD	Task Force on Displacement
UN	United Nations
UNDESA	United Nations Department of Economic and Social Affairs
UNFCCC	United Nations Framework Convention on Climate Change
UNEP	United Nations Environment Program
UNHCR	The United Nations High Commissioner for Refugees, the UN Refugee Agency
UNSD	United Nations Statistics Division

Introduction

People across the planet are on the move due to environmental disruption and degradation, causing them to abandon their countries of origin and find their future in new locations. To move away from natural disasters or long-term dangerous environmental phenomena such as drought or famine is a rational response to human survival. These people are referred to as ‘environmental refugees’ or ‘climate refugees’ in the international discourse. However, it is essential to state that ‘environmental refugees’ do not exist in legal terms despite the empirical evidence that people are migrating due to climate change. It is not defined as a category nor covered by the 1951 Convention relating to the Status of Refugees. Nevertheless, climate change will likely increase the number of people seeking to escape environmental pressures. As such, it is of great importance and urgency to address the gap of international protection for this class of migrants.

The objective of this research study is to examine the dilemma of forced migration due to climate change, given the hostile political climate towards migrants in general throughout the international community. Naturally, it is virtually impossible to come up with a definitive solution. However, I strive to maintain a focus on steps in the short-term that could lead in a positive direction for long-term answers. For clarity, this research study uses “protection” to refer to any type of positive or constructive action, legally based or not, assumed by state actors or non-state actors on behalf of climate refugees or people at risk of being displaced to strive to achieve full respect for their individual rights of personhood.¹ Chapter one will analyze the state of environmental refugees in the current international refugee legal framework and political context. It will highlight the significance of the erosion of international protections for climate refugees and describe their current options as of today. Chapter two will delve into the humanitarian side of the dilemma, and the advocated solutions. It will address what governmental and non-governmental agents are doing and the challenges they face. Lastly, chapter three will discuss the arguments made for reframing the discourse of environmental refugees as a human rights issue. The point of this exercise is to determine what can be achieved for environmental refugees based on the current conditions given the lack of international protection, and ultimately can environmental migration be reframed as a human rights issue? For the sake of depth, the scope of this study will focus primarily on the actions of the United Nations and the European Union as they are two of the most powerful multinational organizations that have a direct influence on the way climate refugees are recognized and protected. In addition, I chose to focus on the EU out of all regions throughout the world because I contend that it is uniquely positioned to be a leader in undertaking the climate refugee crisis given its progressive stance and leadership on confronting climate change.

Hypothesis

The hypothesis I have reached is that is unlikely that environmental refugees can be added as a new protected category of refugees given the reticence of state actors to accrue more liability and overwhelm their respective immigration systems, but it is possible to achieve greater protection in the medium to long term by reframing the discourse as a broader human rights issue, based on existing internationally recognized policies.

¹ This definition is in my own words and interpretation, however, it takes inspiration from the Nansen Initiative.

The Method of Study

Primary Resources

In order to evaluate the legal policies and regional frameworks, it was essential to consult those official international documents themselves. These included the 1951 Refugee Convention, the Bangkok Principles of 1966, the OAU Convention, the Cartagena Declaration, and the EU Qualification Directive. The Nansen Initiative and other UN-based documents were also consulted directly from their respective sources. Additionally, for the purposes of understanding the Teitiota case, it was necessary to consult the official court documents found in the United States Law Library of Congress and its subsequent ruling from the UN Human Rights Committee. Additionally, I had the privilege to have a brief correspondence about the migration-climate change nexus with the Migration, Environment, and Climate Change division of the International Organization of Migration.

Secondary Resources

A large array of books and academic articles were used to gain historical context and to track the evolution of the discourse surrounding climate refugees. Leading academics and experts in international refugee law such as McAdam, Kälin, Aleinikoff, and Williams were of particular significance to aid in the analysis of legal interpretation and documents in how they could or could not be applied to climate refugees. Given that this subject is an ever-evolving issue, few journalistic articles were consulted from reputable periodicals such as *Reuters*, *Scientific American*, and *The Diplomat* to investigate how the media portrays the current situation for climate refugees in context today. These media outlets reflected the most up-to-date sources of information as of 2020.

Chapter 1: The Adequacy of Existing Legal and Policy Frameworks

1. Who Is and Who Isn't a Climate Refugee?

There has been a noticeable uptick in reports in the media about climate change migrants (or environmental refugees, climate refugees, climate change-induced displacements, etc.) due to the increase in crises that have compounded over the years. For this reason, the term 'climate refugees' has entered the popular discourse. Although there are political debates about the terminology, and there are valid reasons for the advantages on both sides, I will continue to refer to them as climate refugees for pragmatism. It provides a straightforward, easily comprehensible, and translatable label to a complicated phenomenon: the displacement of individuals or groups of people fleeing a slow-onset change in their environment or a sudden disaster, which are directly triggered, partly caused or at least exacerbated by climate change. I have adopted this posture from leading academics, organizations, and position papers submitted by the European Free Alliance (The Greens)² in the European Parliament (EP) and briefings of the EP, but this is in no way a political stance or endorsement.

In any case, there is no international consensus on whether climate change migrants should be classified as a distinct category. Betts suggests a new catch-all term to curtail the legal drama of refugee status: 'survival migrants'. Those who are compelled to move out of their native country because of "an existential threat to which they have no access to a domestic remedy".³ 'Survival migrants'⁴ encapsulates economic and climate change migrants. McAdam stresses that it is arbitrary to discriminate between those who are moving due to economic reasons as a consequence of climate change and those who are physically displaced by climate change when it comes to protection purposes.⁵ Others question the idea of an environmental migrant in the first place on the grounds of a poor definition and being legally meaningless such as McGregor, 1993 and Kibreab, 1994.⁶ The United Nations University's Institute for Environment and Human Security (UNU-EHS) defines a "forced environmental migrant" as "a person who "has" to leave his/her place of normal residence because of an environmental stressor ... in contrast to an environmentally motivated migrant who is a person who "may" decide to move because of an environmental stressor".⁷

The United Nations Environment Programme (UNEP) published a report in 1985 that popularized the term 'environmental refugees' in the global discourse. The UNEP researcher, Essam El-Hinnawi, defined environmental refugees generally as "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".⁸ By 1995, the trend of defining climate change refugees in broad strokes continued with Myers and Kent claiming that "environmental refugees" are people "who can no longer gain a secure livelihood in their traditional homelands because of

2 See: FLAUTRE, H  l  ne, LAMBERT, Jean, KELLER, Ska and LOCHBIHLER, Barbara, 2013, *CLIMATE CHANGE, REFUGEES AND MIGRATION* [online]. May 2013. [Accessed 5 January 2020]. Available from: <http://rosamartinez.org/wp-content/uploads/2015/11/Greens-EFA-Position-Paper-Climate-Change-Refugees-and-Migration.pdf>

3 BETTS, Alexander, 2010, Survival Migration: A New Protection Framework. *Global Governance: A Review of Multilateralism and International Organizations*. 2010. Vol. 16, no. 3p. 361-382. DOI 10.1163/19426720-01603006.

4 Ibid, 365.

5 MCADAM, Jane, 2011, Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer. *International Journal of Refugee Law*. October 2011. Vol. 23, no. 1, pp. 2-27. DOI 10.1093/ijrl/eeq045.23 IJRL 2, 4.

6 See KIBREAB, Gaim (1994). "Migration, environment and refugeehood". In: ZABA, B. and CLARKE, J. (eds.) *Environment and Population Change*, Li  ge, Belgium: International Union for the Scientific Study of Population, Derouaux Ordina Editions, 115-29. and MCGREGOR, JoAnn (1993). "Refugees and the environment". In BLACK, R. and ROBINSON, V. (eds.) *Geography and Refugees: Patterns and Processes of Change* London: Belhaven, 157-70.

7 RENAUD, FABRICE et al. 2007. Control, Adapt or Flee. How to Face Environmental Migration? Bonn: UNU-EHS, [Accessed 8 January 2020]. Available from: <http://www.ehs.unu.edu/file/get/3973>

8 HINNAWI, Essam E., 1985, *Environmental refugees*. Nairobi : United Nations environment programme.

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”.⁹ Yet, with this definition in mind, the total number of environmental refugees would have skyrocketed to around 25 million people (circa 1996), which is numerically well above the amount of “political” refugees that are already of concern to the United Nations High Commissioner for Refugees, the UN Refugee Agency (UNHCR).¹⁰

Despite the increased recognition of climate refugees in scholarly research over the years, the lack of reliable data has further hindered finding a consensus. Acquiring datasets will raise a problem for the future advancement of finding an appropriate definition for the group and assessing the level of protection needed and available for climate refugees.¹¹ The United Nations Department of Economic and Social Affairs (UNDESA) plus their Statistical Division (UNSD) compiles information on all types of international migration from national governments and reports from multiple UN agencies in an effort to obtain said data.¹² Nevertheless, there are various challenges with this type of data acquisition, particularly with regard to the use of distinct standards of measurement and definitions between different states and agencies, on which the UNSD is reliant.¹³ When there is a dearth of reliable data that can determine the severity of the problem, it becomes more difficult to pinpoint the group in question with precision and to be fully conscious of the problems that the group faces.¹⁴

Given the dispute on climate change refugees constituting what it means to be a refugee, many multinational bodies such as the United Nations or the European Union choose to use terms such as “displaced persons” or “migrants”. The UNHCR specifically defines migrants as people who “choose to move not because of a direct threat of persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons”.¹⁵ In effect, however, this would mean that the movement of environmental refugees, if conceptualized as “migrants”, is principally voluntary. Of course, this posture is highly contestable. Bierman and Boas argue that any definition of what a climate change refugee must address “(a) the cause of migration, namely the type of environmental harm or climate-change impact that would create this category of climate refugees; and (b) the type of migration, namely whether it is voluntarily or “forced”, temporary or permanent, and transnational or internal; and, related to this, (c) the appropriate terminology, that is, whether the term “refugee” is justified in the first place”. This wide range of interpretations and prioritizations of disparate factors illustrates some of the major challenges with the characterization and framing of the concept of environmental refugees.

The greatest roadblock to developing a system to respond to climate refugees and climate change-related mobility in general lies in the nuances of migration in the first place. People migrate for a variety of reasons. The delineation between ‘voluntary’ and ‘forced’ is fairly clear in international law. However, it is never so simple in reality when it comes to a potential refugee’s motivation to move. Climate change has been considered to be a “force multiplier” that can “intensify the effects of disasters”.¹⁶ Yet, there has never been sufficient evidence to prove that a specific storm or climatic event was only due to climate change itself. Mayer asserts, “there were hurricanes, desertification and sinking islands before climate change, and greenhouse gas emissions do not bear the responsibility for all of these phenomena happening today.”¹⁷

9 MYERS, Norman and KENT, Jennifer, 1995, *Environmental exodus: an emergent crisis in the global arena*. Washington, DC : Climate Institute, 18-19.

10 MYERS, Norman and KENT, Jennifer, 1995.

11 MCLEMAN, Robert, 2012, Developments in modelling of climate change-related migration. *Climatic Change*. November 2012. Vol. 117, no. 3, pp. 599-611. DOI 10.1007/s10584-012-0578-2.

12 Ibid.

13 Ibid; UNSD.

14 Ibid, 606.

15 UNHCR 2016. “‘Refugee’ or ‘migrant’ – Which is right?”. Accessed [2 February 2020].

16 FERRIS, Elizabeth, 2017, Governance and climate change-induced mobility. *Climate Change, Migration and Human Rights*. December 2017. pp. 10-27. DOI 10.4324/9781315622217-2.

17 MAYER, Benoît, 2014, Climate Migration Governance. *Handbook of Climate Change Adaptation*. 2014. pp. 1-14. DOI 10.1007/978-3-642-40455-9_112-1.

Furthermore, the debate intensifies when one tries to pinpoint climate change as the particular cause for any situation because it is impossible to ignore the social, economic, political, demographic, and other factors that come into play. While it is widely accepted that there is a difference between 'migration' and 'displacement', the distinction is often blurred.

2. Climate Change Refugees in Context Today

Africa, Asia, Latin America, and the small island Pacific states have the most considerable share of at-risk populations of becoming climate refugees. Currently, fourteen African countries are experiencing water scarcity or drought, affecting millions of Africans. This number may increase to 25 countries by 2030.¹⁸ The desertification of the Sahel is a particular cause for concern.

Additionally, the continent is also very vulnerable to sea-level rise in key river deltas like in Nigeria and Egypt.¹⁹ Asia is also vulnerable due to its highly-populated, low-lying coastal areas that are habitually susceptible to typhoons and tropical cyclones. From 39 million to an extreme potential of 812 million South Asians will become at risk of water stress if a global temperature increase by two to three degrees occurs. Climate refugees from Bangladesh alone could outnumber all climate refugees worldwide today.²⁰ India is already feeling that impact today. Nearly 1.5 million people are classified as internally displaced every year, many of whom are fleeing natural disasters in rural areas to densely populated urban cities.²¹ In Latin America, millions of Mexicans and Guatemalans are experiencing worsening droughts.²² Conversely, thousands of Uruguayans and Venezuelans live in regions where the risk of flooding is high, which could devastate the latter country which already has profound political issues. Additionally, melting ice sheets has accelerated in the South American Andes producing flooding in parts of Peru and water scarcity during the dry season that could affect all regions that rely on the water flow from Cordillera Blanca. It is projected that this could affect up to 50 million people in 2050 because it will stifle major cities such as La Paz, Lima, and Quito.²³

In October 2009, former Maldivian President Nasheed attracted international attention when he held an underwater cabinet meeting in which he and his cabinet signed a global call to action to cut carbon emissions.²⁴ The Maldives had also pledged to become carbon neutral by this year, in an attempt to inspire other nations to do the same. It has made a valiant effort, but it appears that it still may not be enough to save the islands from its eventual submersion underwater. The citizenry of the Maldives will be faced with the stark choice of fleeing their native lands altogether or crowd into the remaining islands until they too are eventually inundated.

Other nations that do not have the clout of the Maldives and are perhaps more under threat by sea-level rise are the small island nations, Kiribati and Tuvalu. Their elevation is so low that it is less than two meters above sea level. In addition, these countries contribute less than one percent of the global greenhouse gas emissions. Their exposure to climate extremes and natural disasters, small physical size and capacity to adapt make them particularly vulnerable to climate change despite the fact that they contribute so little to it.

18 ANYADIKE, Obi, 2019, Drought in Africa leaves 45 million in need across 14 countries. *The New Humanitarian* [online]. 10 June 2019. [Accessed 8 January 2020]. Available from: <https://www.thenewhumanitarian.org/analysis/2019/06/10/drought-africa-2019-45-million-in-need>

19 Ibid.

20 ELLINGHAM, Vanessa, 2014, Climate refugees, the hot potato of immigration policy: FairPlanet. *Fair Planet* [online]. 10 November 2014. [Accessed 8 January 2020]. Available from: <https://www.fairplanet.org/story/why-climate-refugees-are-the-hot-potato-of-immigration-policy/>

21 SHARALAYA, Nandan, 2018, Taking India's Climate Migrants Seriously. *The Diplomat* [online]. 10 August 2018. [Accessed 1 February 2020]. Available from: <https://thediplomat.com/2018/08/taking-indias-climate-migrants-seriously/>

22 MASTERS, Jeff, 2019, Fifth Straight Year of Central American Drought Helping Drive Migration. *Scientific American Blog Network* [online]. 23 December 2019. [Accessed 1 February 2020]. Available from: <https://blogs.scientificamerican.com/eye-of-the-storm/fifth-straight-year-of-central-american-drought-helping-drive-migration/>

23 Ibid.

24 OMIDI, Maryam, 2009, Maldives sends climate SOS with undersea cabinet. Reuters [online]. 17 October 2009. [Accessed 8 January 2020]. Available from: <https://www.reuters.com/article/us-maldives-environment/maldives-sends-climate-sos-with-undersea-cabinet-idUSTRE59G0P120091017>

Kiribati, for example, is less resilient to climate change because it has one of the highest poverty rates in the Pacific, with a population of over 100,000 on one island that has a landmass of about 811 square kilometers. It does not possess a higher ground for long-term internal resettlement.

The disappearance of sinking states is a scenario that is unprecedented for the international community. It raises multiple new challenges in international law and questions the idea of what national sovereignty means for a disappearing state. More importantly, it begs the question of how the people of those islands will be protected during their journey and once they arrive at their ultimate destination. Would they be effectively stateless? The majority of climate change refugees are displaced internally within their own borders. However, citizens that are displaced by sinking states are unique within the context of international law because they present a very specific set of attributes that differentiate them from the rest of climate change refugees. For example, they fulfill the provision in the 1951 Convention relating to the Status of Refugees that they must cross an international border to flee their disappearing homes.

Moreover, citizens that lose their homes in sinking states will probably lose them forever to the ocean and will never be able to return to their countries of origin. Effectively, this would mean displacing entire nations which has never been done before. The potential of mass migration by citizens of sinking states is frightening for the international community, but it must be confronted. It will result in countless humanitarian, legal, ethical, and practical challenges that now verge on the inevitable.

3. 1951 Convention relating to the Status of Refugees Analysis

According to the UN Treaty in conjunction with the 1967 Protocol Relating to the Status of Refugees, the definition of a refugee is established through the lens of persecution. This made sense given the post-World War II context in which the Convention was held. One can reasonably infer that the idea of a refugee was conceptualized in the minds of the *travaux préparatoires* or drafters as an Eastern European escaping the burgeoning communist regimes of the time, or Jews who had survived the holocaust. An important stipulation to note in the definition is that the refugee must cross an international border to escape said persecution.

A refugee is one who owing to well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion is outside the country of his own nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable to or, owing to such fear, is unwilling to return to it.²⁵

Although international law defines a refugee in this way, it cannot be assumed that people outside this definition are not eligible or unworthy of protection, or even denied it.²⁶ Legal definitions are instituted to create bureaucratic limits to where our rights and state obligations end. But these definitions are meant to be tested to keep the ongoing cycle of establishing and re-establishing parameters.

Applications for refugee status have been repeatedly denied by people who have tried to move preemptively to avoid damaging effects of climate change. For example, Philip recounts “numerous unsuccessful refugee applications in Australia and New Zealand” from Small Island Developing States (SIDS) in the Pacific including Kiribati, Tuvalu and Tonga despite demonstrable need of rescue.²⁷ In the past, New Zealand’s decision-making bodies sustained that people displaced due to climate change are not “differentially at risk of harm amounting to persecution due to any one of [the] 5 grounds and that “all... citizens [of the threatened states] face the same environmental and economic difficulties” as the applicants in question, thereby disqualifying them.²⁸

25 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html> [accessed 6 March 2020].

26 MCADAM, Jane, 2013, *Climate change, forced migration, and international law*. Oxford : Oxford University Press.

27 PHILIP, T., 2018. Climate change displacement and migration: An analysis of the current international legal regime's deficiency, proposed solutions and a way forward for Australia. *Melb. J. Int'l L.*, 19, p. 639.

28 Ibid.

The concept that climate change refugees are being persecuted is hotly contested. The word ‘persecution’ is not defined but it is generally accepted that it is an individual type of threat. It is based on the grounds of a threat to one’s identity (via one’s basic security and life) or one’s inclusion in a specific group. Thus, it begs the question if climate change refugees are a group that can be defined. Obviously, they are people who are living in the range of environments that are facing some type of decline. These could be from coastal, urban or rural communities. Moreover, this group would cover a large array of cultures, languages and societies with varying degrees of economic standing. Since climate change is a global phenomenon, everyone will be affected in one way or another. Only the need to flee based on the severity of the environmental deterioration binds “pockets of displaces” throughout the world.

For this reason, Simonelli argues, “persecution could only be considered impersonal, as human environments are indiscriminately threatened in different ways”.²⁹ The following line of logic gets weaker if we consider an Act of God like famine or drought as acts of persecution because nature cannot persecute. There is a stronger case to be made of impersonal persecution by the Global North through negligence. Once the developed world realized the damage it was causing to climate change refugees and continued to contribute to climate change, they could be considered complicit. However, virtually all countries are directly contributing to climate change as they develop their infrastructure or purchase products that harm the environment. Furthermore, carbon emissions come from a multitude of places across the planet, so it is doubtful that a climate change refugee could confidently pinpoint which state actor’s carbon emission caused their dilemma.³⁰

Therefore, the persecution in question would once again be considered impersonal since it is impossible to identify who or what directly caused it.

Some have tried to argue that that government-induced degradation is a form of persecution and that it is happening because of the concerned groups’ “membership of a certain social group” that falls under the criteria of the 1951 Refugee Convention.³¹ For example, the Chernobyl disaster in which it is arguable that the delayed response by the Soviet Union exacerbated the harmful effects displayed a clear indifference for safety and environmental concerns in the country’s pursuit of nuclear power.³² While this case was not induced by climate change, it could set a precedent for future legal battles. Another example suggested is the desertification of the African Sahel region, where it could be argued that Sahelian governments “could have enacted policies and programs to cut population growth, to improve agricultural techniques, or to heighten food production”.³³

Negligence by governments when they fail to address or manage vulnerable populations exposed to the harmful effects of climate change could reach the burden of proof to be considered ‘persecution’. Indeed, certain marginalized groups in society, such as ethnic minorities, are often more unprotected and exposed to disasters. Hence, they would because of their identity receive less protection and assistance during and following a disaster.³⁴ While these situations hold weight as an academic argument, it is highly improbable that they would stand in a legal context. When governments force people to relocate for development projects, or there are mass groups of people displaced by natural calamities or accidents, they may create or aggravate a refugee crisis. This can inspire justifiable claims of government responsibility or liability on the grounds of negligence that necessitate remedial action, but still does not fall within the scope of the Refugee Convention as it is currently interpreted.³⁵ Of course, it also bears mentioning that a large proportion of climate refugees

29 SIMONELLI, Andrea C., 2016, Institutional Expansion. *Governing Climate Induced Migration and Displacement*. 2016. P. 55–72. DOI 10.1057/9781137538666_5.

30 Ibid.

31 WILLIAMS, Angela, 2008, Turning the Tide: Recognizing Climate Change Refugees in International Law. *Law & Policy*. 2008. Vol. 30, no. 4, pp. 502-529. DOI 10.1111/j.1467-9930.2008.00290.x.

32 Ibid.

33 Ibid.

34 KOLMANNSSKOG, Vikram, 2012, Climate Change, Environmental Displacement And International Law. *Journal of International Development*. 2012. Vol. 24, no. 8, pp. 1071-1081. DOI 10.1002/jid.2888.

35 WILLIAMS, Angela, 2008. *supra* note 31.

are internally displaced, meaning that they do not physically cross a border, so they would not fall under the definition either.

For now, climate change refugees may receive protection only because they are fleeing persecution and/or conflict and not due to the environmental impacts that force them to cross international borders. Given the political atmosphere, states may prefer to maintain this dichotomy because they are not held liable for assuming newfound responsibilities and taking on high costs for a new wave of refugees.

4. Broader Definitions in Regional Conventions

4.1. Background Information

The 1951 Convention relating to the Status of Refugees and the 1967 Protocol served as a building block for regional conventions including the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention), and the Cartagena Declaration on Refugees (the Cartagena Declaration), which is applicable in Latin America, and the Bangkok Principles on the Status and Treatment of Refugees (Bangkok Principles). Furthermore, these stated conventions are necessary to include because there is a distinguishing factor between these regional instruments and the 1951 Refugee Convention. In short, the regional conventions define or at least offer the possible interpretation to define “refugee” in a wider scope. Plus, some may provide additional or complementary protection for non-convention applicable refugees. As a result, the regional agreements are some of the most important legal frameworks that climate refugees and other environmentally displaced people could depend upon.

5. The OAU Convention

The 1969 Convention Governing Specific Aspects of Refugee Problems in Africa of the Organization of African Unity (OAU) and the Cartagena Declaration of 1984 are both significant regional agreements that have worked to broaden the accepted definition of “refugee”. Notably, both conventions provide enough space to provide protections for people displaced by climate change despite that not being their original intentions.³⁶ In the African Convention, which did not come into effect until 1974, 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”.³⁷

The OAU is made up of 53 Member States, of which 50 of them have ratified or signed the Convention since it entered into force.³⁸ Moreover, this definition has been incorporated into domestic law in at least Kenya, Malawi, Mozambique, Namibia, Tanzania, and South Africa.³⁹ This means that that Convention regulates well over 6 million refugees.⁴⁰

The key phrase “*events seriously disturbing public order*” was originally intended to expand protections for natural events such as famine, natural disasters, or disease epidemics.⁴¹ However, some interpret the humanitarian context of the treaty as making it reasonable to argue that the open-ended language effectively

36 FORNALÉ, Elisa and DOEBBLER, Curtis F J, 2016, UNHCR and protection and assistance for the victims of climate change. *The Geographical Journal*. September 2016. Vol. 183, no. 4 p. 329–335. DOI 10.1111/geoj.12193.

37 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, 2018. *International Human Rights Law Documents*, pp. 599-605. DOI 10.1017/9781316677117.071.

38 African Union list of countries which have signed, ratified/acceded to the OAU Convention, available at: <http://www.africa-union.org/root/au/documents/treaties/text/refugee%20Problems%20in%20Africa.doc>

39 MCADAM, Jane *supra* note 26, at p. 48.

40 UNHCR, 2009, OAU Convention Remains a Key Plank of Refugee Protection in Africa after 40 years available at: <https://www.unhcr.org/4aa7b80c6.html>

41 FORNALÉ, Elisa and DOEBBLER, Curtis F J, 2016.

broadens the scope of the definition of who is and is not a refugee. Why? Fornalé and Dobbler contend that “such an interpretation of the terms of this legally binding treaty is not only consistent with its object and purpose, which is to protect Africans forced to migrate due to particularly aggressive harm, but it is also consistent with an understanding of the terms of the 1974 Convention in the light of developments among the African Member States that have recognized climate change is one of the most significant causes of forced migration”.⁴² This highlights a key distinction with regards to the 1951 convention, which was based on the European experience of people displaced by war and human threats of persecution, not environmental factors.

Other influential authors have debated whether the OAU Convention could be applicable to cases of Africans fleeing environmental disasters, and there are both expansive and restrictive interpretations on the topic as well. For example, international human rights lawyer, activist and the current UN representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, has advocated that he believes in the potential for sudden-onset disasters to be interpreted in that manner. Although he affirmed the theoretical possibility, Kälin also sustains that it is “rather unlikely that the States concerned would readily accept such an expansion of the concept beyond its conventional meaning of public disturbances resulting in violence”. In other words, a refugee could be successful in receiving protection if he or she were fleeing a public riot or some other type of persecution after an environmental disaster and his or her government failed to provide adequate assistance, in Kälin’s perspective.⁴³

Another prominent author in human rights and international refugee law, professor James C. Hathaway contended that the definition “does not [...] suggest that victims of natural disasters or economic misfortune should become the responsibility of the international community”. His posture was strict, but it should be noted that this was argued in 1991.⁴⁴ Additionally, the UNHCR Executive Committee Working Group on Solutions and Protection published a document in their 19th meeting in 1992, which covered the interpretation of peoples covered by the OAU Convention definition explicitly. It was to be made clear that only refugees fleeing man-made disasters were covered.⁴⁵

Conversely, George Okoth-Obbo, the former UNHCR Director of the Regional Bureau for Africa and current Assistant High Commissioner for Operations, has argued for a more expansive posture in his legal review of the OAU Convention and its 30 years in practice. Okoth-Obbo asserts that the public order as stated in the definition could potentially be disturbed by “accidental situations not necessarily based on deliberate state action”, which in turn gives leeway for a broader interpretation that could include natural disasters as a result of climate change.⁴⁶

In any case, the OAU Convention has been cited for its robust potential to be utilized as a casemaker based on customary international law.⁴⁷ “To establish a customary international law rule, there needs to be evidence of widespread and uniform state practice on the subject, as well as a sense of a legal obligation to the practice, the so-called *opinio juris* element”.⁴⁸ Accordingly, with the first element of state practice, there is not a required number of states that must participate in said practice before it becomes the law. It is generally accepted that there is not a threshold and it does not have to be all of the states, but presumably

42 KALIN, Walter, ‘Conceptualising Climate-Induced Displacement’ in JANE MCADAM (ED), CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 2010. pp. 88-9.

43 Ibid.

44 HATHAWAY, James C., 1991, *The law of refugee status*. Markham, Ont.: Lexis Nexis Butterworths. pp. 16-21.

45 UNHCR, Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group), U.N. Doc. EC/1992/SCP/CRP6 (Apr. 6. 1992).

46 OKOTH-OBBO George, 2001. Thirty Years on: a Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa, 20 REF. SURVEY QUARTERLY, p.112.

47 BARISIC, Angela and INCI, Dilan, 2013, [online]. 13 May 2013. [Accessed 5 April 2020]. Available from: <http://www.diva-portal.org/smash/get/diva2:633332/ATTACHMENT01.pdf>

48 Ibid.

many of them would engage. This was established by the International Court of Justice (ICJ) Fisheries Case.⁴⁹ However, it is important to note that in the North Sea Continental Shelf cases, the ICJ upheld that the practice of “specifically affected states” is the practice of greatest significance. Thus, it begs the question, which states are especially affected by refugee flows and account for their practice and *opinio juris*? The states that experience critical numbers of refugee inflows would be considered “specially affected” and therefore are more essential and representative in developing a general practice and *opinio juris* imperative.

In the graph above, provided by the UNHCR website for statistics (the 2018 Global Trends in Forced Displacement), we can see that Sub-Saharan Africa hosts more than 26 percent of the world’s global refugee population.⁵⁰ This means that the OAU Convention has been adopted by some of the largest host countries of refugees on the planet including: Sudan, Uganda, Ethiopia, Tanzania, Rwanda, Zambia, Kenya, Democratic Republic of the Congo, Chad, Cameroon, and Egypt.⁵¹

To conclude, it is not far-fetched for the OAU Convention to encapsulate climate refugees, because there have already been examples of state practice of the African Union coming together to offer assistance to sudden onset environmental refugees. For example, the OAU offered protections for Haitian refugees after the 2010 earthquake.⁵² In addition, Rwanda opened their borders to Congolese refugees after the 2002 volcanic eruptions of Mount Nyiragongo.

6. The Cartagena Declaration

In the Latin American context, the Cartagena Declaration was drafted by the Colloquium on the International Protection of Refugees in Latin America and adopted in 1984. It continued with a similar standard as the OAU Convention and builds upon the 1951 Refugee Convention. It declares:

Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.⁵³

The same logic applied to the African Convention would apply to the Cartagena Declaration for climate refugees to be covered. This is perhaps because the Cartagena Declaration was influenced by the provisions on the right of refugees agreed upon in the OAU Convention.⁵⁴ Like the OAU Convention, the Cartagena Declaration has been adopted into domestic law in some of the Member States as well. These include Argentina, Bolivia, Colombia, El Salvador, Guatemala, Nicaragua and Panama. However, it is important to acknowledge that this is merely a domestic instrument with no legally binding effect.⁵⁵ Additionally, neither Brazil nor Ecuador attended the drafting conference nor signed the Cartagena Declaration, although the main principles of the agreement have been incorporated into municipal law in both countries.⁵⁶ Moreover, the definition was endorsed by the Organization of American States in its 1985 General Assembly Session.⁵⁷

49 Fisheries Case (U.K. v. Norw.), 1951 I.C.J. 138.

50 UNCHR. 2018. “Global Trends: Forced Displacement in 2018” p.14 [Accessed 02 April 2020] <https://www.unhcr.org/5d08d7ee7.pdf>

51 Ibid, 20.

52 MCADAM, Jane 2013. *supra* note 26, at 48, 107.

53 Cartagena Declaration on Refugees (Nov. 22, 1984) in ‘Annual Report of the Inter-American Commission on Human Rights’ 1984–85 O.A.S. Doc. OEA/Ser.L/V/II.66/doc.10, rev.1 [hereinafter Cartagena Declaration].

54 OAU Convention, *supra* note 37, at Conclusions III(3) III(8).

55 MCADAM, Jane, 2013. *supra* note 26.

56 WORSTER, William Thomas, 2011, The Evolving Definition of the Refugee in Contemporary International Law. 113, 30. *Berkley International Law*. 2011. DOI 10.2139/ssrn.1736547.

57 Cartagena Declaration, *supra* note 49, Article III(3).

In addition, the Inter-American Commission on Human Rights has sustained that the definition as written should be considered as a “codification of a customary regional rule”.⁵⁸ If the Cartagena Declaration and the OAU Convention were to be consistently and practically applied, this still would not cover the majority of the international community. They are not universally applicable nor internationally accepted. Few state parties are “specially affected” by refugee inflows, especially in comparison to African states.⁵⁹ Therefore, using the Cartagena Declaration as an argument for customary international law may not be as strong. Nevertheless, the declaration has stood the test of time as a significant regional instrument given its legally obligatory nature that takes consideration of its adoptees’ geographically diverse practice.

Professor Kälin postulates that his interpretation of the OAU Convention to be essentially equal in application to the Cartagena Declaration. That is to say, there is theoretical potential for the declaration to be used for protection for environmentally displaced people, however, most likely it would only work if said applicant did so immediately after a natural disaster and subsequent public disorder.⁶⁰ Also, legal scholars in their work as representatives of Latin American human rights institutions have already interpreted the definition in studies which were later used for background papers for the International Conference on Central American Refugees, held in Guatemala City in May 1989. It was stated explicitly that in their purview that the victims of natural disasters were not meant to be included in the definition.⁶¹

7. The Bangkok Principles of 1966

Another regional framework that helps to create the core global legal framework are the Bangkok Principles of 1966. It was adopted by the Asian-African Legal Consultative Organization, which is made up of 47 states, on June 24th, 2001. Like the Cartagena Declaration, the Bangkok Principles is a document considered to have a soft-law status. Article 1 (a) and (b) of the Bangkok Principles has also, similar to the OAU Convention and the Cartagena Declaration, the same definition of the term refugee as article 1a(2) of the 1951 Refugee Convention. Article 1(2) in the Bangkok Principles continues to widen the scope of the definition in similar fashion to the OAU Convention and the Cartagena Declaration. It 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.⁶²

Despite the Bangkok Principles being non-binding, they could still serve a purpose, perhaps in conjunction with other regional instruments to be a foundation of *opino juris*. After all, “documents produced by states during for example conferences can be authoritative statements of state opinion”.⁶³ Furthermore, a large number of “specially affected” states of refugee inflows and contributors to refugee outflows have authorized the Bangkok Principles. These member states include Syria, Saudi Arabia, Iran, Yemen, India, China, Kenya, Pakistan, Jordan, Nepal, Thailand, Cameroon, Tanzania, Egypt, Uganda. Many of these states have been some of the top receivers of refugees for years.⁶⁴

58 Inter-American Commission on Human Rights, Annual Report 1981-82, OEA/Ser.L/V/II.57 doc. 6 rev.1 (1982) Chapter IV, ¶ 11(d).

59 BARISIC, Angela and INCI, Dilan, *supra* note 47.

60 KALIN, *supra* note 42.

61 ESPIELL, Hector Gros, PICADO, Sonia and LANZA, Leo Valladares, 1990, Principles And Criteria For The Protection Of And Assistance To Central American Refugees, Returnees And Displaced Persons In Latin America. *International Journal of Refugee Law*. 1990. Vol. 2, no. 1p. 83-117. DOI 10.1093/ijrl/2.1.83.

62 Asian-African Legal Consultative Organization. 1966. Bangkok Principles on the Status and Treatment of Refugees. Available at <https://www.refworld.org/pdfid/3de5f2d52.pdf>

63 BARISIC, Angela and INCI, Dilan, *supra* note 47, and Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 23.

64 UNHCR, *supra* note 50.

8. The European Union Conceptualization of Climate Refugees

The last regional instrument that constructs the foundation of the global regional agreements is the EU Qualification Directive⁶⁵ and other relevant instruments of the EU *asylum acquis communautaire*. Protections for refugees in the EU is part of the Common European Asylum System, which is based on a total and all-inclusive application of the 1951 Refugee Convention. According to the Court of Justice of the European Union (CJEU) case law and the Treaty on the Functioning of the European Union (TFEU) all legal and policy measures adopted by an EU legislator on asylum must be in accordance with the 1951 Refugee Convention.⁶⁶ Likewise, the Qualitative Directive intends to ensure that member states utilize a common criteria for recognizing applicants for asylum as refugees within the interpretation of Article 1 of the 1951 Refugee Convention stated above. Therefore, the definition of a refugee found in Article 2(d) of the Qualitative Directive could be considered the strictest because it is practically the same, except that it is referring to third-country nationals. Naturally, EU citizens are excluded from this Directive and it is evident that climate refugees do not fall within its scope of the definition of a refugee since it does not in the 1951 Refugee Convention.

However, there is hope for protection of climate refugees when one considers the subsidiary protection regime. What is subsidiary protection? This is the term used to denote the protection regime of the Qualitative Directive, for forced displacees who do not meet the requisite level of “persecution” or otherwise fall outside of the 1951 Refugee Convention standard of what it means to be a refugee.⁶⁷ According to Articles 2 and 3 of the European Convention on Human Rights (ECHR), subsidiary protection should be granted based on the right to life, the ban on torture, and on inhuman or degrading treatment or punishment.⁶⁸

As a consequence, these articles have given rise to the principle of non-refoulement, which means that it is prohibited for countries to return asylum seekers to a country in which they would be in mortal danger or exposed to torture or inhuman or degrading treatment or punishment. It is found in Article 3 of the United Nations Convention against Torture (CAT), Article 6 and 7 International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the ECHR.⁶⁹

Hence, to be eligible to receive subsidiary protection, the person must be facing “serious harm” as made clear in Article 15 of the Qualitative Directive. In said article, there is an open-ended but comprehensive list of what constitutes a serious harm. Accordingly, serious harm is explained as either 1) “death penalty or execution”, or 2) “torture or inhuman or degrading treatment or punishment of an applicant in the country of origin” or (3) “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”. Clearly, none of these factors at first glance apply to climate refugees. The first subsection obviously does not apply to any type of climate-induced displacement. The second subsection does not appear to be referring to environmental degradation. And the scope of the third subsection seems to be narrowed to wartime scenarios. However, it is important to note that some academics have attempted to argue that the second subsection gives enough room in its verbage for the potential to assist in times of extreme cases of natural disasters or environmental degradation (which theoretically would include climate refugees).⁷⁰

65 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L 337.

66 Article 78 Treaty on the Functioning of the European Union and Case C-31/09 Nawras Bohol v Bevandorlasi es Allampolgarsagi Hivatal [2010].

67 Article 2 (f) Directive 2011/95/EU.

68 Ibid, 321.

69 FARMER, Alice, 2008, Non-Refoulement and jus cogens: Limiting anti-terror measures that threaten refugee protection. *Georgetown Immigration Law Journal*. 2008. Vol. 23, no. 1, pp. 18-19.

70 MYRSTAD, Finn and KOLMANSKOG, Vikram, 2009, Environmental Displacement in European Asylum Law. *European Journal of Migration and Law*. 2009. Vol. 11, no. 4, pp. 313-326. DOI 10.1163/157181609789804321.

Why? It has been claimed that a fourth subsection was discussed during the drafting of the Qualitative Directive.⁷¹ This unrealized section would have entitled the applicant with the right to be protected against refoulement, thus providing subsidiary protection for people that fail to meet the requirements of the first 3 subsections. However, several member states asserted that the wording was too nebulous and therefore would have led to a too-wide spectrum of interpretation.⁷² It is common knowledge that environmental disasters and climate change is impossible to detach from its economic and political context. Many European states eschew the idea of having too wide of a spectrum in fear that economic migrants may try to take advantage of the system and/or the sheer influx of people including climate refugees, would overwhelm the immigration system. This is why such a broad interpretation was unlikely to pass. Even though subsection 4 was ultimately omitted, subsection 2 is theoretically capable of providing the same protection that was meant to be offered under subsection 4.

Another instrument that may be applicable to climate refugees is the Temporary Protection Directive. It is important to acknowledge that this tool is primarily utilized in the event of a mass influx of people, so it could be feasible in cases á la SIDS, and a catastrophic rise in sea level reaches the point of no return. The Temporary Protection Directive⁷³ has two main objectives: First, to set the parameters around the temporary protection the EU will provide in the scenario of a mass influx of non-EU displaced nationals who cannot return to their country of origin. Secondly, the Temporary Protection Directive is meant to balance the resources and efforts made by member states in solidarity as a consequence of taking in a mass influx of non-EU displaced nationals.⁷⁴ The third chapter of the Temporary Protection Directive discloses the requirements on behalf of the member states towards people who are granted protection, such as employment, education, social services, and medical services amongst others.⁷⁵ To be clear, however, articles 2(c)(i) and (c)(ii) characterize displaced persons as “in particular” individuals who have fled areas of armed conflict or widespread violence and as people that are at grave risk of, or who have already been the victims of systemic or generalized violations of their human rights.⁷⁶ The use of the phrase “in particular” is noteworthy because it shows that the list is not exhaustive, which in turn, creates the potential for an extension to climate refugees.⁷⁷ As a result, the Temporary Protection Directive is a protective instrument that has a wider scope than the Qualification Directive and the 1951 Refugee Convention.

However, it is still important to take the limitations of the Temporary Protection Directive into account. The principal restriction is that this specific Directive only comes into play when there is a mass influx of people, and therefore does not apply to individual cases.⁷⁸ Consequently, it is improbable that slow-onset environmental degradation that often is a result of climate change would result in a mass inflow of refugee applicants (except in the case of SIDS). Yet, natural disasters and sudden-onset environmental hazards sparked by climate change are possible, and the Temporary Protection Directive appears to be more suited for a resultant mass influx of refugee applicants in this scenario. (This is supposing only immediate, short-term protection.) Additionally, it is important to acknowledge that the European Council has never exercised the Temporary Protective Directive in reality.⁷⁹ It has been cited that Italy and Malta have jointly attempted to invoke the Temporary Protective Directive to counter the mass inflow of applicants from Tunisia and Libya

71 Ibid, 320.

72 Ibid.

73 Article 15 Directive 2011/95/EU.

74 Ibid.

75 Article 8-19 Directive 2001/55/EC.

76 Article 2 (c)(i) – (ii) Directive 2001/55/EC.

77 COOPER, Michael D., 2012, Migration and Disaster-Induced Displacement: European Policy, Practice, and Perspective. SSRN Electronic Journal. 2012. DOI 10.2139/ssrn.2226540.

78 Article 1 Directive 2001/55/EC.

79 COOPER, *supra* note 77.

at the tumultuous zenith of the Arab Spring.⁸⁰ Plus, article 2(a) of the Temporary Protective Directive asserts that temporary protection should only be invoked under extraordinary circumstances.⁸¹ Given the nature of such a threshold, the Council of Europe is obligated to make a decision to proceed or not, as a follow-up to a proposal by the European Commission. Even then, the European Council must have a qualified majority to advance with a consensus that the circumstances meet the definition as one of a “mass influx” given that it is not explicitly defined in the Temporary Protective Directive.⁸² Therefore, it is possible that the Temporary Protective Directive could be subject to politicized battles resulting in a higher threshold to succeed.

For climate refugees, it is not only an uphill battle to fall under the scope under this Directive if it is a slow-onset environmental degradation hazard, but also sudden-onset climatic hazards and natural disasters. More importantly, the Temporary Protective Directive is simply that, temporary, meaning that it does not have an established framework for those needing long-term solutions. This is especially relevant for those who are permanently displaced like those in the SIDS.

9. Analysis of the Conceptualization of Climate Refugees by the United Nations

In 2016, the UNHCR affirmed that displacement impacted by climate change could no longer be seen as an abstract hypothetical, but “a current reality”.⁸³ It was estimated that at least 21.5 million people had been forcibly displaced internally and externally by foreseeable and sudden disasters due to climate change and global warming each year since 2008.⁸⁴ At this point, the UN was then using the term “forcibly displaced” to describe the plight of climate refugees. In this text, the multinational organization appears to refuse to acknowledge the term “climate refugee” because of the conflict of interest and implications for recognized political refugees under international law.

However, the UN continued to refer to the movement of these people affected by climate change in conformity with the category of *Forced Displacement*, by its notable usage of “forcibly displaced” when referring to climate refugees.⁸⁵ Additionally, in the same report, the UN made a reference to the protection measures in place for “migrants” as being relevant and applicable to climate change refugees. Therefore, that would mean climate change refugees in turn, would fall under the umbrella of *Voluntary Displacement*. The UNHCR has supported the conceptualization of environmentally displaced peoples, disaster displacement, and climate-induced displacement when it has referred to climate change refugees. As such, in an overview of the categorizations, it is evident that the UN has remained relatively consistent in its application of the definition of displacement in contrast to migrant or refugee, rather discussing the predicament of climate refugees as both *Forced and Voluntary Displacement*. The UN summarizes, in a 2017 report, that the situation concerning climate refugees must be confronted in all cases regardless of whether it is slow or sudden-onset disasters.⁸⁶

In the December 2018 United Nations Framework Convention on Climate Change (UNFCCC) Conference of the Parties (COP24) summit in Katowice, Poland, Patricia Espinosa, Mexican diplomat and current Executive Secretary of the UNFCCC, declared that the effects of climate change would have substantial impacts in Global North and South and that in this issue, it is critical to be united as we are all connected as global

80 KRALER, Albert, CERNEI, Tatiana, and NOACK, Marion. 2011. Directorate-General for Internal Policies: “Climate refugees”, Legal and Policy Responses to Environmentally Induced Migration. European Parliament 1, 54.

81 Article 2 (a) Directive 2001/55/EC.

82 MYRSTAD, Finn and KOLMANNSSKOG *supra* note 70.

83 UNHCR. 2016. “Frequently asked questions on climate change and disaster displacement”. [Accessed 16 March 2020] at: <https://www.unhcr.org/news/latest/2016/11/581f52dc4/frequently-asked-questions-climate-change-disaster-displacement.html>

84 Ibid.

85 Ibid.

86 UNHCR. 2015. “Climate Change and Disasters”. [Accessed 16 March 2020] at: <http://www.unhcr.org/climate-change-and-disasters.html>

citizens.⁸⁷ The UNFCCC Task Force on Displacement (TFD) published a report in advance of the summit in which they repeatedly referred to climate refugees as “climate change-related displacement” and that the TFD “recognizes displacement in both sudden and slow onset events” by climate change.⁸⁸ The report also mentioned that the TFD conceded that “migration” and “displacement” would be considered synonyms if it were in the context of climate refugees. It proceeded to define the movement of climate refugees as a type of migration, although not limited to it.⁸⁹

Furthermore, one noteworthy admission by the TFD is its failure to adequately address and support the voluntary adaptive movement of climate change-induced displacees, which could devolve into a situation of “forced displacement”. Another interesting distinction highlighted by the TFD is that the agency only refers to the movement of climate refugees as a type of “migration” when it is in the context of slow-onset disasters, while “forced displacement is applied to sudden disasters”.⁹⁰ Consequently, the position of the UN indirectly acknowledges and aligns with the stated problem of climate refugees because they are both affected by both *Forced and Voluntary Displacement* when using the terms “forced displacement” and “migration” to contextualize the situation of climate refugees.

10. The UN Global Compact on Refugees

10.1. Background Information

The Global Compact on Refugees (GCR) was founded upon the principles of the New York Declaration of September 2016. After two years of thorough, in-depth consultations spearheaded by the UNHCR to include UN member states, international organizations, civil society actors, refugee voices, experts, and the private sector, it was affirmed by the UN General Assembly on December 17th, 2018.⁹¹ Essentially, its primary objective is to strengthen the manner in which the international community responds to the ongoing large-scale and long-term displacement globally. Whilst giving light to the unique challenges associated with disparate refugee movements throughout the world, the GCR is “a framework for more predictable and equitable responsibility-sharing”, according to the UNHCR.⁹² Ultimately, it has the potential to be utilized as a sort of a blueprint for governments, international actors, and other stakeholders with agreed upon rules to better facilitate the needs of the host populations and the refugees.

The Compact builds upon the foundation of the 1951 Refugee Convention, the regional refugee instruments, and the basic principles of existing human rights and humanitarian law within the wider international refugee protection regime.⁹³ From this foundation, the GCR aspires to provide a basis for more effective operational responses that are consistent with binding legal standards in particular areas where gaps in practice endure. Given that it is also a non-binding instrument, it falls in line with the legal refugee protection regime with the hope of bolstering cooperation amongst states and solidarity with refugees, as well as collaboration with host communities.

87 UNFCCC. 2018. “COP24 Addresses Climate Change Migration Ahead Of UN Migration Pact Meeting In Marrakech”. [Accessed 16 March 2020] at: <https://unfccc.int/news/cop24-addresses-climate-change-migration-ahead-of-un-migrationpact-meeting-in-marrakech>

88 UNFCCC-TFD. 2018. Report of the Task Force on Displacement. [Accessed 16 March 2020] at: https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf

89 Ibid, 10.

90 Ibid.

91 United Nations, Report of the United Nations High Commissioner for Refugees: Part I, Global Compact on Refugees, UN doc A/73/12 (Part I) (13 September 2018) Available at: <https://www.unhcr.org/5c658aed4.pdf>

92 Ibid.

93 United Nations, Report of the United Nations High Commissioner for Refugees: Part II, Global Compact on Refugees, UN doc A/73/12 (Part II) (13 September 2018) Available at: <https://www.unhcr.org/5c658aed4.pdf>

10.2. The Global Compact's Position on the Root Causes of Displacement

In terms of climate refugees, the Global Compact was the first normative framework to recognize climate change as a driver of migration.⁹⁴ Paragraph 8 of the GCR acknowledges that “while not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements”.⁹⁵ Additionally, Paragraph 12 further goes on to note that “external forced displacement may result from sudden-onset natural disasters and environmental degradation”.⁹⁶ Furthermore, Paragraph 8 expresses the compact’s cautious approach to the characterization of displacement when it concerns climate change and disasters directly. It was clear in its indication that not all people forced to flee across borders in these situations will fall within the legal definition of a refugee.⁹⁷ However, it affirms that the causes of needing to flee are complex, and that persecution, violence, and conflict may intersect with climate- and disaster-related events. As a result, people displaced across borders in this context could be entitled to international protection in some cases due to the nuances of particular situations. The crisis of how climate change is detrimentally affecting SIDS, as previously discussed and will be further explored in the Teitiota case is a prime example of how this is being tested.

Some have criticized the Global Compact, because although it has expanded protections to include those are being persecuted by gang violence or domestic abuse victims (combined with state inaction or lack of ability to protect them) for example, there are still tens of millions of displaced persons that remain unprotected, including climate refugees.⁹⁸ While it was highly improbable that the GCR would have attempted to amend the definition of a refugee in the 1951 Refugee Convention directly, there was the possibility that it could have added more categories of displaced people in need of international protection who are not recognized as falling under the umbrella of said Convention. In fact, the UNHCR endeavored to do this in multiple iterations in the pre-final drafts.⁹⁹

Critics accurately assert that their inclusion would not have imposed any new obligations given that the Compact is non-binding. Indeed, the first draft was much more robust in wording. In Paragraph 52, it declares that “the need for international protection arises when persons are outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them”.¹⁰⁰ However, the member states opposed the bold rhetoric, which resulted in a second draft. The second draft declared “The need for international protection arises when persons are outside their own country and unable to return home because of risks *recognized under relevant international and regional law or instruments, as applicable in a specific context*” (para 65, emphasis added).¹⁰¹ In effect, the italicized language essentially delimited the ‘need for international protection’ to people already protected by the 1951 Refugee Convention and regional instruments (chiefly amongst them, the OAU Convention). This resulted in more criticism as “inadequate, as it is precisely the recognition that there are groups outside existing law that warrant international protection that needs to be affirmed”.¹⁰²

Finally, the UNHCR settled on this final provision in Paragraph 61. It states: Mechanisms for the fair and efficient determination of individual international protection claims provide an opportunity for States to duly determine

94 BEELEER, Carolyn, 2018, UN compact recognizes climate change as driver of migration for first time. The World from PRX [online]. 11 December 2018. [Accessed 8 May 2020]. Available from: <https://www.pri.org/stories/2018-12-11/un-compact-recognizes-climate-change-driver-migration-first-time>

95 TÜRK, Volker and GARLICK, Madeline, 2019, Addressing Displacement in the Context of Disasters and the Adverse Effects of Climate Change: Elements and Opportunities in the Global Compact on Refugees. *International Journal of Refugee Law*. 2019. Vol. 31, no. 2-3, pp. 389-399. DOI 10.1093/ijrl/eez029.

96 Ibid.

97 Ibid.

98 ALEINIKOFF, T Alexander, 2018, The Unfinished Work of the Global Compact on Refugees. *International Journal of Refugee Law*. 2018. Vol. 30, no. 4, p. 611–617. DOI 10.1093/ijrl/eey057.

99 Ibid.

100 Ibid.

101 Ibid.

102 Ibid.

the status of those on their territory in accordance with their applicable international and regional obligations (A/RES/72/150, para 51), in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it.¹⁰³

In this version, it is evident through the language that the GCR is not attempting to offer a new definition for all those in need of international protection that have fallen in the protection gap. Rather, it appears that it is putting the responsibility on the member states to fulfill this in a manner that is consistent, but technically not restricted by international and regional obligations. The reference made in the above mentioned Paragraph 8 to “increasing interaction”, at least recognizes the principal cause of the refugee movement and climate change, environmental degradation, and disaster.

103 UNHCR, *supra* note 73.

Chapter 2: Advocated Solutions

This chapter will discuss the advocated solutions proposed by the EU, the Global Compact on Refugees formulated by the UN, and the Nansen Initiative and its Protection Agenda. In addition, it will conclude with an analysis of the *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* case and the recent UN Human Rights Committee review and ruling over it. Politically, the EU is willing to acknowledge the issue as one that needs to be addressed, but it is also disinterested in changing its migration policy for the time being. As such, some EU Member States have taken national responses that may help climate refugees on their own terms. Unfortunately for the plight of climate refugees, the GCR was relatively muted on their particular concerns. However, the Nansen Initiative and its Protection Agenda is the most advanced humanitarian framework that works to address the protection gaps for climate refugees and will be explained in detail. Lastly, it is important to address the relevance of the Teitiota case and why it has recently pushed the needle forward for aiding climate refugees.

1. Advocated Solutions by the EU

Starting with the European Commission's report from 2008, it was recommended that the organization should prepare for "environmentally-triggered additional migratory stress in the further development of a comprehensive European migration policy" and it should be dutifully exercised in conjunction with all other relevant international bodies.¹⁰⁴ Additionally, the report found that the international security architecture was already stressed by the current migration policy as it stands. However, it admitted that it would be critical to address the status of climate refugees in global politics despite the probable increase of burden put upon international security. While the tone of the report suggested an openness for international cooperation for dealing with climate refugees, it did not indicate an outline or framework to do so. Therefore, until this point, according to this report, the EU had not yet decided on whether to keep the status quo with the 1951 Convention, reinterpret the Convention, or create a new regime outside of it.

By 2011, the European Parliament drafted a report analyzing to what extent the EU could respond to various problem scenarios of environmentally induced migrants within the current EU policy framework.¹⁰⁵ The European Parliament stated that while it was apparent that climate refugees were steadily rising on the international agenda as a prominent issue due to the effects of climate change, it was still doubtful that the EU possessed the necessary instruments to address the issue. At the very least, those instruments would need to be modified to be more appropriate and adaptable for climate refugees.¹⁰⁶ In addition, it was made clearer that in the current state of affairs, it appeared practically impossible to reimagine or interpret the existing EU policy framework could encompass climate refugees within the protection regime for recognized refugees.¹⁰⁷ It was further held in the study that it was improbable that the EU would create a new specific legal framework just for climate refugees. One additional reason is that this would also entangle the EU asylum provisions. Effectively, the EU would need to "introduce provisions in the asylum legislation that considers displaced persons of both rapid- and slow-onset climate events".¹⁰⁸ "Any policy", the report states in relation to the different regional effects climate change will have on them and their migration patterns,

104 European Commission. 2008. Climate Change and International Security Paper from the High Representative and the European Commission to the European Council. Accessed April 4 2020 at: https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/99387.pdf

105 European Parliament. 2011. "Climate Refugees', Legal and Policy Responses to Environmentally Induced Migration" Accessed April 2020 at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/462422/IPOL-LIBE_ET\(20_11\)462422_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/462422/IPOL-LIBE_ET(20_11)462422_EN.pdf)

106 Ibid, 37.

107 REUBEN, Adam. 2017. "Climate Refugees' and the EU: A Silent Response of what to Come?". Accessed April 2020 at: <https://eulawpol57.wordpress.com/2017/10/10/climate-refugees-and-the-eu-a-silent-response-of-what-to-come/>

108 Ibid.

*“must be based on a clear understanding and a clear typology of the phenomenon of environmentally induced migration... to disentangle and reflect different dimensions”.*¹⁰⁹

To continue, the European Parliament drafted an updated report in 2018 which proposed: *“a system that instead recognises the idea of climate change displacement at international level, while leaving the details regarding the form of agreement and degree of engagement to regional groupings, appears as possibly more responsive and appropriate to the problem. A regional system may better employ notions of subsidiarity that more accurately reflect the reality of state behaviour rather than installing a top-down legal framework”.*¹¹⁰ Hence, the advocated solution by the EU thus far appears to follow the status quo of the accepted interpretation of the 1951 Convention and allow regional and national frameworks to sort them out rather than undertake global cooperation efforts. Moreover, the European Parliament’s report made a reference to the European Commission’s Directorate-General for Environment (managed by Director-General Daniel Calleja Crespo) which asserted that “migration patterns to the EU are already being affected by climate change, and that ‘climate refugees’ may not only be individuals coming to the EU but also EU citizens moving within Member States”.¹¹¹

On the domestic front, the European Parliament argues that climate refugees could be covered under the regulations on the free movement of people in this context because it is already built into EU law. However, the policy and solutions for those climate refugees who would be coming from the outside would not be covered, only those migrating between member states.¹¹² Lastly, the European Parliament report stated further research would be needed on the specific type of displacement of climate refugees and its limitations through the regional instruments to determine the possibility of the issue being brought up in customary international law.¹¹³ Although the report admitted that it was “far-reaching proposition at present”, it recognized the slow yet burgeoning development of climate change-related laws in individual states and regional agreements that have been compelled to make them. Plus, the report also noted that as these policies coalesce around the world, it could push customary international law to evolve. In effect, the EU could change their stance from adhering to the status quo to advocating for a new type of regime.

Nevertheless, the European Union as a whole does not appear to have plans to change this stance currently. Therefore, the overall assessment of the advocated solution provided by the EU would be to not advocate for changes to the 1951 Convention, but to stand by regional responses.

2. National Responses

Within the EU member states, there have been a large number of national responses to deal with the problem indirectly via nationally defined protection statuses throughout the past two decades. These have been variously framed as “complementary forms of protection”, “non-harmonized protection statuses”, “categorical protection” or merely “humanitarian statuses”, which all to a great extent respond to the relevant case law of national higher courts, based on national human rights law plus the European Convention of Human Rights as well as on the case-law of the European Court of Human Rights in Strasbourg.¹¹⁴ Even though humanitarian protection statuses are primarily invoked in expulsion cases or when applications for a right to stay on other grounds have been rejected, some EU member states also provide for humanitarian admissions from abroad. A 2011 study on non-harmonized protection statuses found there are at least sixty non-EU harmonized

109 European Parliament *supra*, note 104.

110 European Parliament. 2018. “The concept of ‘climate refugee’ Towards a possible definition”. Accessed April 2020 at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI\(2018\)621_893_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621_893_EN.pdf)

111 *Ibid*, 9.

112 *Ibid*.

113 *Ibid*, 10.

114 KRALER, Albert, 2011, Fixing, Adjusting, Regulating, Protecting Human Rights - The Shifting Uses of Regularisations in the European Union. *European Journal of Migration and Law*. 2011. Vol. 13, no. 3, pp. 297-316. DOI 10.1163/157181611x587865.

protection statuses at the national level of EU member states.¹¹⁵ However, only a very small number of EU member states have introduced and ratified express provisions that specifically address the protection needs of climate refugees. Furthermore, other legislation from member states might be interpreted *lato sensu* (meaning in a broad sense) as potentially applicable also concerning climate refugees.¹¹⁶

3. EU Member States with Express Provisions for Environmental Displacement

There are only four member states (Cyprus, Finland, Italy, and Sweden) that have explicit provisions for environmental displacement with the potential to cover climate refugees. However, even within these countries there are stipulations that can make it difficult for a climate refugee to receive protection.

In Cyprus: Article 29 (4) of the Refugee Law of 2000 provides that:

“No refugee or a person with a subsidiary protection status shall be deported to any country where his life or freedom will be endangered or he will be in danger of being subjected to torture or inhuman or degrading treatment or punishment or persecution for reasons of sex, race, religion, nationality, membership of a particular social group or political opinion or because of armed conflict or environmental destruction”.

However, it is important to note that the threshold of persecution is still required to receive refugee status, and natural disaster is not recognized as persecution. And this stated protection of non-refoulement is only available for those who have already received humanitarian protection or granted refugee status.¹¹⁷

In Finland, there is a more comprehensive policy regarding environmental displaced and climate refugees. In Section 109(1) of the Aliens Acts, it stipulates that:

“Temporary protection may be given to aliens who need international protection and who cannot return safely to their home country or country of permanent residence, because there has been a massive displacement of people in the country or its neighbouring areas as a result of an armed conflict, some other violent situation or an environmental disaster”.

Furthermore, Section 88a (1) of the Aliens Acts provides for more all-encompassing humanitarian protection if:

“An alien residing in Finland is issued with a residence permit on the basis of humanitarian protection, if there are no grounds under section 87 or 88 for granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe or a bad security situation which may be due to an international or internal armed conflict or a poor human rights situation”.

However, this is under the condition that the maximum length of the temporary protection provided would be three years.¹¹⁸ In Italy, Article 20 of Legislative Decree number 286 of 25.07.1998 on the consolidated text of provisions governing immigration and the status of the foreigner provides for extraordinary measures in case of exceptional circumstances and declares the following:

“By decree of the Prime Ministers [...] the temporary protection measures should be adopted, as an exception to the provisions of this single text, in the case of major humanitarian needs, on the occasion of conflicts, natural disasters or other particularly serious events in countries outside the EU”.¹¹⁹

115 ‘The different national practices concerning granting of non-EU harmonised protection statuses’, produced by European Migration Network, p. 105, available at: http://emn.intrasoftintl.com/Downloads/prepareShowFiles.do;jsessionid=4D19F304BDB6A81B9C1C8519414938AC?entryTitle=06_The%20different%20national%20practices%20concerning%20granting%20of%20NONEU%20HARMONISED%20PROTECTION%20STATUSES

116 European Parliament. *supra* note 104.

117 *Ibid.*

118 *Ibid.*

119 Original text available only in Italian at: http://www.immigrazione.regione.toscana.it/lenya/paesi/live/contenuti/norme/286-paesi_it.html?datafine=20110806&css=

It is important to recognize that while it does provide temporary protection in the case of environmental disasters, this clause has only proven to be theoretical as it has never been put into practice.¹²⁰ Finally, in the case of Sweden, Section 2(3) of Swedish Aliens Act dictates that a ‘person otherwise in need of protection’ is an alien who in cases other than those referred to in Section 1 [refugee grounds] is outside the country of the foreigner’s nationality, as he or she is unable to return to the country of origin because of an **environmental disaster**. Nevertheless, “the applicability of this provision is limited to cases of sudden environmental disasters; therefore, slow-onset environmental changes are not considered”.¹²¹

4. Advocated Solutions by the UN

4.1. Advocated Solutions within Global Compact on Refugees

The GCR promotes the use of existing legal national and regional frameworks to apply to ensure international protection and for other measures for climate refugees that may be fleeing due to multiple catalysts. Additionally, the GCR advocates for arrangements for temporary protection and humanitarian stay that could be considered on a complementary basis in which they may be applicable to international law and standards.¹²² The GCR also emphasizes increased guidance and aid for the implementation of measures to protect and give humanitarian assistance. Most likely, this would come from the UNHCR due to its experience of responding to various types of displacement crises.¹²³

Although the GCR advocates that all migrants, including climate refugees, must have their basic needs met and their vulnerabilities to be taken care of, it does place a special focus on the responsibility-sharing for UN member states to undertake the added challenge of climate refugees fleeing environmental degradation and disaster. To mobilize international cooperation, the GCR proposed a global mechanism, the Global Refugee Forum, at the ministerial to be held every four years.¹²⁴ The first of which convened in Geneva in 2019. “At these fora, member states and other relevant stakeholders are encouraged to make concrete pledges towards the achievement of the goals of the GCR, including through financial, material, and technical assistance; review of national policies, laws, and practices; and resettlement places and complementary pathways for admission for those with international protection needs”.¹²⁵

What is notable about all of these advocated solutions is that these are quite general. Of course, the GCR is meant to cast a wide net for all types of refugees, and it would be extremely difficult to pinpoint every situation, but nothing is mentioned in particular about climate refugees besides ideas that relate to prevention. This means that in the pledges of the GCR, it does address climate change but only in the form of seeking to achieve climate neutrality consistent with the UN Sustainable Development Goals.

4.2. The Nansen Initiative and the Protection Agenda

The Nansen Initiative was initially launched by the Governments of Norway and Switzerland in October 2012 recognizing that under existing international law there is not a viable assurance that people who are compelled to flee across international borders due to natural disasters and climate change would be admitted and receive assistance, let alone find sustainable solutions to their displacement. It was a consultative process with states, civil society, academics, international organizations, and affected communities with an objective to identify the most effective practices and build a consensus on “key principles and elements” to address the

120 European Parliament. *supra*, note 104.

121 *Ibid.*

122 TÜRK, Volker and GARLICK, Madeline, 2019, Addressing Displacement in the Context of Disasters and the Adverse Effects of Climate Change: Elements and Opportunities in the Global Compact on Refugees. *International Journal of Refugee Law*. 2019. Vol. 31, no. 2-3p. 389-399. DOI 10.1093/ijrl/eez029. Page 393.

123 *Ibid.*

124 *Ibid.*, 397.

125 *Ibid.*

needs of climate refugees.¹²⁶ Essentially, the Nansen Initiative was a “state-led bottom-up” approach striving to achieve international consensus on a “protection agenda” for addressing the needs of the population displaced across international borders by disasters and climate change. The Nansen Initiative was completed in December 2015 and laid the genesis of the Protection Agenda. The Nansen Initiative decided that the outcome of its work would be the Protection Agenda with three core pillars¹²⁷:

1. **Standards for the treatment** of people displaced across borders regarding admission, stay, status, and transition to solutions
2. **International cooperation and solidarity** between states and with the international community before (preparedness), during (admission, temporary protection), and after (durable solutions) a natural disaster;
3. **Operational responses**, including in the areas of preparedness, cross-border assistance, solutions, and the respective roles of relevant disaster management, humanitarian, development, and climate change actors

In addition, the Nansen Initiative planned that the Protection Agenda would encapsulate the three primary phases in the forced migration movement. These are “preparedness before displacement occurs, protection (including admission to other countries) and assistance during displacement, and transition to durable solutions in the aftermath of the disaster”.¹²⁸

Before analyzing in greater profundity, it is essential to note that the Protection Agenda is a policy document that is not legally binding. Rather than creating new legal obligations for migrant-destination states that may lack the political will to adhere to them, “the agenda supports an approach that focuses on the integration of effective practices by states and (sub-) regional organizations in accordance with states specific situations and challenges”.¹²⁹

The Protection Agenda is divided into three main sections. Part One provides recommendations and best practices for protecting climate refugees. This part is further subdivided into three subsections with the first subsection dealing with “admission and stay of cross-border disaster-displaced persons” and the second subsection dealing with “non-return of foreigners abroad at the time of a disaster”. The third subsection addresses “finding lasting solutions for cross-border disaster-displaced persons”.¹³⁰ Part One contains several paragraphs that advocate for provisions that guarantee the recognition and protections for climate refugees. For example, paragraph 32 acknowledges the inherent challenges in determining whether a movement across an international border is forced or voluntary for the purpose of determining the status of the persons involved in such movement. However, the subsequent paragraph pinpoints factors which states could consider in determining who is or who is not a climate refugee. These include:

1. An on-going or, in rare cases, an imminent and foreseeable disaster in the country of origin poses a real risk to his/her life or safety
2. As a direct result of the disaster, the person has been wounded, lost family members, and/or lost his/her (means of) livelihood
3. In the aftermath and as a direct result of the disaster, the person faces a real risk to his/her life or safety or very serious hardship in his/her country, in particular due to the fact that he/she cannot access needed humanitarian protection and assistance in that country
 - a. because such protection and assistance is not available due to the fact that government capacity to respond is temporarily overwhelmed, and humanitarian access for international actors is not possible or seriously undermined

126 Nansen Initiative. 2015. Disaster-Induced Cross-Border Displacement. *Cross-border displacement*.

127 Ibid.

128 Ibid.

129 Nansen Initiative, 2015. Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change Volume I. *The Nansen Initiative*.

130 Ibid.

- b. or because factual or legal obstacles makes it impossible for him/her to reach available protection and assistance.¹³¹

The second part of the Protection Agenda centers around “managing disaster displacement risk in the country of origin”. Part Two is subdivided into four subsections. Subsection one addresses the reduction of “vulnerability and building resilience to displacement risk”.¹³² The facilitation of “migration with dignity”, and “planned relocation with respect for people’s rights”¹³³ are addressed in subsections two and three respectively while subsection four concentrates on “addressing the needs of internally displaced persons in disaster contexts”.¹³⁴

Part Three indicates the “priority areas for future action”. The objective of this part is the recommendation of effective practices that will lead to the overall implementation of the Agenda. Part Three of the Agenda is also subdivided into four subsections. Subsection one focuses on the collection of data and enhancement of knowledge on climate change-related cross-border disaster-displacement and highlights the need for more holistic data collection strategies. This subsection denotes a dearth of “comprehensive, reliable and timely global data on cross-border disaster-displacement” despite the gains made by “academic institutions, and non-governmental and international governmental organizations and agencies” on the issue.¹³⁵ Subsection two of part three of the Protection Agenda stresses the use of humanitarian protection measures for climate refugees.¹³⁶ Paragraph 114 indicates that while some countries have local laws and policies which guarantee humanitarian assistance for climate refugees, most do not have this kind of arrangement in place. It recommends “improved accountability for protection and assistance” not only in states that do not have local laws and policies, but also in those that do.

Subsection three addresses “strengthening the management of disaster displacement risk in the country of origin”, but does not suggest anything novel that was not stated in Part Two. To encourage the implementation of the Protection Agenda, subpart four, which is titled “Possible Next Steps” recommends the continuation of follow-ups in the form of “a forum for dialogue among interested States to further discuss how best to protect cross-border disaster displaced persons [climate refugees], and prevent disaster displacement, where possible”.¹³⁷ Lastly, it also advocates “cooperation and coordination between international organizations and agencies, and other relevant actors, in order to ensure a comprehensive approach to cross-border disaster displacement”.¹³⁸

4.3. The Relevance of the *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* case

Introduction

A New Zealand case that involved an application for refugee status based on the effects of climate change in the Pacific Island nation of Kiribati has received international media attention. The proceedings in the case came to a close in July 2015, when the Supreme Court of New Zealand, the highest court in the land, dismissed Teitiota’s application for leave to appeal the Court of Appeal’s decision in which it later ruled against him.¹³⁹

131 Ibid, para. 33

132 Ibid, paras. 76-86.

133 Ibid, paras. 87-93.

134 Ibid, paras. 94-98.

135 Ibid, para. 112.

136 Ibid, para. 114-115.

137 Ibid, para. 125.

138 Ibid.

139 Buchanan, K. & Law Library Of Congress, U. S. G. L. R. D. (2015) New Zealand, “climate change refugee” case overview. [Washington, D.C.: The Law Library of Congress, Global Legal Research Center] [Pdf] Retrieved from the Library of Congress, <https://www.loc.gov/item/2016295703/>.

However, after reviewing the case, the U.N. Human Rights Committee ruled in a landmark judgment that climate refugees could not be returned to respect the principle of ‘right to life’.

Case Summary

Mr. Ioane Teitiota and his wife moved to New Zealand from Kiribati in 2007. They subsequently had three children, who were born in New Zealand but not entitled to New Zealand citizenship due to the Citizenship Act 1977. The family remained in the country illegally following the expiration of their visas in October 2010. To avoid deportation, Mr. Teitiota applied for refugee status under Part 5 of the Immigration Act 2009 promptly after his visa expired. This legislation incorporates into domestic law the 1951 Convention Relating to the Status of Refugees.

Mr. Teitiota cited rising sea levels as a threat to his and his family’s lives. Additionally, he claimed that it was difficult to access safe drinking water and that he faced land disputes. Indeed, Kiribati is a nation at risk of becoming the first country to sink due to rising sea levels.¹⁴⁰ Mr. Teitiota argued that because his native island of South Tarawa is expected to become uninhabitable in the next 10 to 15 years, his and his family’s lives are demonstrably at risk. It is true that South Tarawa has become overcrowded as a consequence of neighboring islands becoming uninhabitable, which in turn forced many people to seek refuge in South Tarawa. The island has undergone a massive spike in population. To illustrate, in 1947, South Tarawa was home to only 1671 people but by 2010 housed over 50,000. Overcrowding is suspected to have resulted in increased violence on the island, which also now lacks fresh water and is facing agricultural challenges.¹⁴¹

A refugee and protection officer declined to grant the Teitiota family refugee status, and this decision was later upheld by the Immigration and Protection Tribunal. Thereafter, Mr. Teitiota sought leave from the High Court to appeal the Tribunal’s decision on questions of law under section 245 of the Immigration Act 2009. His application for leave to appeal to the High Court was subsequently declined by both the High Court and Court of Appeal in 2013 and 2014, respectively. On July 20, 2015, the Supreme Court upheld the decisions of the lower courts and dismissed Mr. Teitiota’s application for leave to appeal.¹⁴²

The Supreme Court Decision vs. UN Human Rights Committee

After Mr. Teitota applied to the Supreme Court for leave to appeal against the decision of the Court of Appeal, it did confirm the lower courts’ findings that, in relation to the Refugee Convention, Mr. Teitiota did not face “serious harm”. Furthermore, “there is no evidence that the Government of Kiribati [was] failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can”.¹⁴³ However, it is important to note that the Supreme Court did leave room for future cases and investigations as climate change continues. The Supreme Court explicitly stated that the statements of the IPT and High Court that their decisions “did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction”. Additionally, the Court similarly made clear that its decision in this particular case “should not be taken as ruling out that possibility in an appropriate case”.¹⁴⁴

Five years later, the case had garnered enough global traction to reach the UN Human Rights Committee. Although there was dissension within the tribunal, the UN Human Rights Committee concluded that it was acceptable for New Zealand to reject Mr. Teitota’s request for refugee status.¹⁴⁵ Why? The evidence presented in the case suggested that Kiribati would only become uninhabitable in 10 to 15 years. Thus, the Committee

140 GODIN, Mélissa, 2020, Climate Refugees Cannot Be Sent Home, U.N. Rules. *Time* [online]. 20 January 2020. [Accessed 6 June 2020]. Available from: <https://time.com/5768347/climate-refugees-un-ioane-teitiota/>

141 Ibid.

142 United States Law Library of Congress, 2015.

143 Ibid.

144 Ibid.

145 UN Human Rights Committee, 2020.

concluded that this “could allow for intervening acts by the republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population”.¹⁴⁶

Moreover, according to testimonies and expert panelists, Kiribati was already in the process of taking adaptive measures “to reduce existing vulnerabilities and build resilience to climate change-related harms”.¹⁴⁷ Therefore, the Committee concluded that they were not in the position to rule that deportation back to Kiribati amounted to a denial of justice for Mr. Teitota’s right to life.

Although this was a loss for Mr. Teitota’s individual case, the importance of the Committee’s further ruling has historical significance. It declared that “without robust national and international efforts, 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”. Effectively, articles 6 and 7 the International Covenant on Civil and Political Rights prohibit states under international law from sending refugees back to their home countries, especially given that “the risk of an entire country becoming submerged underwater is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized”.¹⁴⁸ The Committee also recognized that slow-onset processes due to climate change such as land degradation, sea-level rise, and salinization and equally propel people to flee from climate-related harm like those who are displaced by sudden-onset events such as flooding or dangerous storms. This judgment was the *first of its kind* for climate refugees and progress towards bridging the gap for protection. It is now established that climate conditions can trigger the non-refoulement obligations of sending states.

146 Ibid.

147 Ibid.

148 Ibid.

Chapter 3: The Case for the Climate Refugee Crisis as a Human Rights Issue

1. Amending the 1951 Convention Relating to the Status of Refugees?

While the 1951 Convention is a hallmark of international refugee law, which itself could be considered to fall under the vast umbrella of human rights law, it is the primary narrow lens in which we view the climate refugee. As previously discussed, the 1951 Convention is only applicable in very specific cases linked to environmental phenomena. For example, a scenario in which the government fails to protect against the effects of environmental change which affects a particular social group. Therefore, a refugee could have a demonstrable basis to claim if members of that group fled to another state as a result of negligence or deliberate policy of the host country to protect a particular social group. Another possible basis of a refugee claim could be found in the scenario of an international exodus resulting from a prior conflict affecting a particular social group over access to environmental resources such as water or arable land.¹⁴⁹

However, key stakeholders such as the UNHCR, the EU, and other leading international refugee experts such as Kälin and McAdam have voiced concerns over the extension of the scope to the 1951 Convention for climate refugees. There is much apprehension that any type of expansion or amendment of the definition of a refugee would lead to a grave devaluation of the current protection for ‘convention refugees’ because it may “encourage receiving states to treat (refugees) in the same way as ‘economic migrants’ to reduce their responsibility to protect and assist”, according to the European Parliament. Furthermore, the UNHCR has concerned that any initiatives to amend the definition of a refugee would consequently risk the renegotiation of the 1951 Convention.¹⁵⁰ That type of gamble could result in lowering protection standards for refugees of all stripes and undermine the current international refugee protection systems due to the politically hostile environment to mass influxes of refugees today. “The reality is that there is no consensus for extending the refugee regime. Most receiving states want to restrict it further than improve it”.¹⁵¹

2. The Shortcomings of the Global Compact on Refugees and the Protection Agenda

As previously mentioned, the GCR was disappointing for the advancement of protections for climate refugees. While it is true that dedicating resources to preventing climate change is beneficial for climate refugees and more so, for potential climate refugees in the future, it fails to address the populations that are already fleeing. Pledges such as: “To reduce the negative impact on the climate and the environment in response to refugee situations” or “Actively promote green humanitarian response to ensure that environmental and climate-related considerations are fully integrated into humanitarian responses” are theoretically responsible steps.¹⁵² However, these pledges remain abstract and vague without concrete actionable steps to achieve those objectives. Another “yawning gap” according to Aleinikoff is that the GCR is the failure to include internally displaced people who make up “tens of millions” of refugees and a significant proportion of climate refugees.¹⁵³

149 These scenarios were the only two recognized by the European Parliament 2011 study on climate refugees. European Parliament. 2011.

150 UNHCR, 2009.

151 CASTLES, Stephen., 2006. Global perspectives on forced migration. *Asian and Pacific Migration Journal*, 15(1), pp. 7-28.

152 UN Global Compact on Refugees.

153 ALEINIKOFF, T Alexander (2018), The Unfinished Work of the Global Compact on Refugees. *International Journal of Refugee Law*. 2018. Vol. 30, no. 4, pp. 611–617. DOI 10.1093/ijrl/eey057. Page 615.

2.1. The UNHCR's reticence to include more about climate change came from pressure from some

UN Member States.¹⁵⁴ Ultimately, it pushed the dilemma of climate refugees onto the UN Migration Compact which is primarily about 'voluntary' economic migrants. Perhaps it would have been more coherent to amalgamate all issues that concern displacement and forced migration under the GCR. The GCR falls short of explicitly linking forced migration and climate change because the UN Member States recognize refugee norms as binding. Hence, the inclusion of climate refugees in the GCR would threaten to impose new mandates and obligations on UN Member States, whereas in the UN Migration Compact would not.¹⁵⁵

The Protection Agenda of the Nansen Initiative remains the most advanced international normative framework for helping to breach protection gaps for climate refugees. It is successful in the fact that it has been endorsed by over 100 states which shows that the international community is at least about to acknowledge the critical nature of the issue in the theoretical sense.¹⁵⁶ However, it is still merely a toolbox in name with no legal recourse to force states to take action. Having been a part of the task force designing the Protection Agenda, Kälén said, "There is absolutely no willingness right now to adopt a binding legal instrument at the global level. Even if we were to get such an instrument, many states would not ratify it, particularly countries that would be the destination of displaced people".¹⁵⁷ Taking this assertion into account, the Protection Agenda does not exert enough pressure upon states to fulfill any particular recommendation of the framework. This would mean that the states would most likely not be inclined to fulfill the more strenuous parts of responsibility / burden-sharing. In the worst-case scenario, this means that climate refugees are ultimately still stuck in the same legal limbo as before due to the Protection Agenda's lack of legal bindingness.

3. Expanding the Lens Under a Human Rights Framework

While international refugee law is limited in scope, having the 1951 Refugee Convention as its foundation, international human rights law has a variety of sources. This most principal basis is the International Bill of Human Rights, however, there are many other declarations and conventions that address critical human rights issues such as the prohibition of torture¹⁵⁸, prevention of genocide¹⁵⁹, or the rights of people with disabilities¹⁶⁰. The United Nations Treaty Collection contains sixteen different instruments under its general section of "human rights", but there are a myriad of other sections that are dedicated to issues that are under the umbrella of human rights.¹⁶¹ For example, three sections are outlined under "status of women", eleven sections under "traffic in persons" and more under "health".¹⁶² The point is that the jurisdiction over what is considered to be within the framework of human rights law is broad and inclusive.

While it is true that the International Bill of Human Rights and other major treaties were adopted before climate change was a critical issue for human security, that does not mean that the right to a safe and clean environment has not been proposed to be a binding legislation. However, according to the Australian Human Rights and Equal Opportunity Commission, "the environmental dimension of these rights has therefore not been extensively articulated and the precise connection between climate change and the international

154 Interview with Martina Castiglioni, IOM.

155 Ibid.

156 KALIN, Walter. (2019). INTERNATIONAL RESPONSES TO CLIMATE-RELATED MIGRATION. *Journal of International Affairs*, 73(1), 255-260. doi:10.2307/26872797.

157 Ibid.

158 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force on 26 June 1987).

159 Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948, entered into force on 12 January 1951).

160 Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force on 3 May 2008).

161 See: UN Treaty Collection. Available at: <http://treaties.un.org/Pages/ParticipationStatus.aspx> [Accessed 3 May 2020].

162 Ibid.

human rights law system is as yet undeveloped”.¹⁶³ In 1994, the UN Special Rapporteur on Human Rights and the Environment drafted a report which concluded that “everyone has a right to a safe and healthy environment”. A Draft Declaration of Principles on Human Rights and the Environment was even appended to the report as well, but a legally binding treaty was never fully realized.¹⁶⁴ Although there is yet to be a codified human right to a clean environment, there are a number of recognized human rights that are currently / will be compromised by slow-onset environmental degradation and sudden-onset natural disasters for climate refugees (especially those from SIDS) that I will argue in greater depth in the following section.

3.1. Right to Life

The extreme challenges that affront climate refugees, particularly those from SIDS, will be a threat to their lives and physical wellbeing. The right to life is enshrined in Article 3 of the Universal Declaration of Human Rights and Article 6(1) of the International Covenant on Civil and Political Rights. They both declare that “everyone has the right to life, liberty and security of person”, and that “every human being has the inherent right to life”. Additionally, the Convention on the Right of the Child upholds the right to life of children.¹⁶⁵

“The Inter-American Commission on Human Rights has recognized that realization of the right to life is necessarily linked to and dependent on the physical environment”, McAdam affirmed.¹⁶⁶ In addition, McAdam asserted that the rights upheld by the International Covenant on Economic, Social and Cultural Rights to an adequate standard of living, adequate supply of food, housing and the continuous improvement of living conditions can all be seen as necessary components of the right to life.¹⁶⁷ In 1982, the Human Rights Committee also affirmed in its General Comment No. 6 on the right to life that “the expression ‘inherent right to life’ cannot properly be understood in a restrictive manner” and has been “too often narrowly interpreted”.¹⁶⁸

While the human right to life is *de jure*, inalienable, and universal, meaning that no one can deny any human being this right, securing and enforcing this right is only effective when a state has the obligation to do it. Essentially, this means that the *de facto* effectiveness is frequently very different from the *de jure* guarantees that are outlined in the human rights instruments. The primary disadvantage of initiatives aimed at improving human rights conditions for any type of migrant in receiving countries is that they may only apply to migrants and forcibly displaced people that are already within the territory of the host country. Thus, they do not provide protection in the country of origin or while people are on the move. This would harm the chances for many climate refugees.

The general consensus is that states only have a direct human rights obligation to people within their territory or jurisdiction. Moreover, even if a forcibly displaced person like a climate refugee reaches the territory of another state, international human rights law generally does not give rise to a right to remain within that state’s territory and prevent it from sending the person back.¹⁶⁹ However, this is where I contend that the principle of non-refoulement could potentially apply for the benefit of climate refugees given that it is rooted in international customary law and international human rights law. As established by the ruling for climate refugees by the UN Human Rights Committee in the Teitiota case, the principle of non-refoulement upholds

163 Human Rights and Equal Opportunity Commission (HREOC) Australia, ‘Background Paper: Human Rights and Climate Change’, 2008, 3; see also: Advisory Council of Jurists of the Asia Pacific Forum, ‘Observations and Recommendations – Reference on the Right to Environment’, 2007. Available at: http://www.asiapacificforum.net/acj/references/righttoenvironment/downloads/environment/observations_recommendations.doc

164 UNCommissiononHumanRights, ‘DraftDeclarationofPrinciplesonHumanRightsandtheEnvironment’, UNDoc,E/CN.4/Sub.2/1994/9, 6 July 1994. Available at: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/eeab2b6937bcca18025675c005779c3?Opendocument>

165 Convention on the Right of the Child, Article 6 (ratified on 20 November 1989, entered into force on 2 September 1990).

166 MCADAM, Jane, 2011. However, the case concerned Brazilian Yanomami indigenous peoples who lost one-fifth of their tribe due to gold-miners spreading disease and pollution in the 1980s.

167 Ibid.

168 UN Human Rights Committee, ‘General Comment No. 6 – The Right to Life’, 1982. Available at: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/84ab9690ccd81fc7c12563ed0046fae3?Opendocument>

169 CASTLES, Stephen., 2006.

the prohibition of returning any individual to circumstances where their lives might be in danger or where they might be subjected to inhumane or degrading treatment.¹⁷⁰

Of course, not every climate refugee has a scenario as extreme as those of disappearing states. There are nuances in every case and there are still protection gaps to be filled. For example, climate refugees displaced by sudden-onset natural disasters could arguably use the UN Guiding Principles of Human Rights for protection against forced migration if the land was left uninhabitable or hazardous enough to be unsustainable for one's livelihood.¹⁷¹ However, the idea of climate change as a use of force remains subjective and debatable. Climate refugees fleeing from slow-onset environmental degradation that is not as drastic as those in sinking states have a more difficult threshold of force to prove. Naturally, people will often try to escape those situations in anticipation of disaster refusing to wait until climate change damages their livelihoods to such a high degree. Unfortunately, it is practically impossible to determine at which point a situation becomes so dire that a climate refugee is no longer a voluntary economic migrant and in need of protection under human rights law. Nevertheless, international human rights law in 2020 has already shown through the UN ruling of the *Teitiota* alone and further challenges to the European Court of Human Rights more binding legal potential for climate refugees than those of international refugee law has in the past two decades.

3.2. Further Advantages of International Human Rights Law

Given that it is evident that climate change is violating climate refugees' human rights to life (as shown in the *Teitiota* case) and potentially others such as the right to health and right to water, there are certain policy effects that states would need to take into account. The most important of those is: The economic and/or social costs to those causing climate change (particularly in the Global North) that are incurred by policies meant to reduce the threat of climate change to climate refugees would become irrelevant for policy.¹⁷² This means that if an individual or entity is violating human rights, it is imperative that they desist even if it is costly while it seems practically implausible in terms of climate change since many powerful states are main contributors, it has happened in the past. For example, the abolition of slavery was quite costly to slave importers and slave owners, but their costs were deemed irrelevant by nature of policy. International human rights law is meant to establish obligations that are not diluted by economic self-interest.¹⁷³

Another advantage is the fact that international human rights law can address internally displaced climate refugees. For forced internal displacement, the soft-law UNHCR Guiding Principles on Internal Displacement is applicable.¹⁷⁴ The added value of these Guiding Principles is that it explicitly includes disasters in the definition to recognize that people who have been displaced by disasters also have human rights and protection that necessitates international attention.¹⁷⁵

4. Navigating EU's Human Rights Policy for the Advancement of Climate Refugees

Although the EU has been a leader in the global fight against climate change, it has been noticeably stagnant on the legal fight for protections for climate refugees. Most likely due to the large influx of refugees in recent years, the EU currently lacks the political will to take on more obligations. As previously discussed, climate refugees risk serious violations of their human rights (the right to life in particular). This is why it is critical to

170 UN Human Rights Committee, 2020.

171 BEHRMAN, Simon and KENT, Avidan, 2018, *Climate refugees: beyond the legal impasse?* Abingdon, Oxon : Routledge, an imprint of the Taylor & Francis Group.

172 WESTRA, Laura and SATVINDER, Juss, 2017, *Towards a refugee oriented right of asylum*. Routledge. pp. 51-55.

173 Ibid.

174 Ibid 171. p. 19.

175 Ibid.

note that all EU Member States are party to the primordial human right treaties and based on Article 52 (2&3) EU Charter, the European Court of Human Rights is indirectly able to affect the judgments of the CJEU.¹⁷⁶

To determine whether climate refugees could be protected from being removed to their country of origin where they would “fear torture and inhuman or *degrading treatment*” based on socio-economic deprivation, case law from both the CJEU and the European Court of Human Rights has been investigated previously, but the differences in the specificities of climate refugees’ situations still require further research by EU institutions.¹⁷⁷ What is promising, however, is that the European Court of Human Rights could adopt a similar posture to the one of the UN Human rights Committee in the Teitiota case. In effect, this would engage the EU’s non-refoulement obligations.

Although neither the European Court of Human Rights nor the CJEU, has ever dealt with cases concerning the protection against refoulement to be granted to climate refugees, the European Court of Human Rights seems likely to adopt a similar reasoning than the UN Human Rights Committee, based on its extensive interpretation of Article 3 of the ECHR prohibiting removal contrary to this provision, according to EU immigration experts.¹⁷⁸ Conversely, it is possible the CJEU might exclude climate refugees from subsidiary protection (under the QD as discussed in Chapter 1). However, the CJEU could take such a scenario into consideration under Article 4 of the EU Charter of fundamental rights, the equivalent of Article 3 ECHR, hence adopting a reasoning similar to the European Court of Human Rights and the UN Human Rights Committee.

176 VAN DUREN, Cee., 2018. The legal obligations for the European Union to protect climate-induced migrants crossing European borders. Tilburg University Law School.

177 Ibid.

178 Ibid; DELVAL, Eugénie, 2020. *From the U.N. Human Rights Committee to European Courts: Which protection for climate-induced displaced persons under European Law?* EU Immigration and Asylum Law and Policy. Available at: <http://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/>

Conclusions

Amongst the new situations that have emerged in the contemporary international landscape, climate change and its consequences undeniably represent a challenge, especially concerning catastrophic slow-onset environmentally-induced displacements. Human migration has always been a complex social phenomenon because it usually involves more than one causal factor conditioning the movement of people. This is why the climate refugee will almost always face an uphill battle trying to prove climate change as a form of persecution to fit in the conventional definition of a refugee. Regarding the myriad of adverse effects that environmental disasters have on the population, especially those associated with climate change, migratory movements that occur because people are not able to gain a livelihood can gain much more problematic contours in the eyes of international refugee law. To recapitulate, my research question was to determine what can be achieved for environmental refugees based on the current conditions given the lack of international protection, and ultimately can environmental migration be reframed as a human rights issue? With this in mind, I have formulated a series of conclusions with respect to my original hypothesis.

1. Indeed, the complexity of situations that climate refugees face has been alarming the international community as well as challenging the ability of states and institutions to address the growing demands arising from environmental degradation. The shortcomings and limitations of international law in the face of these new and unusual challenges require/demand a fundamental reconsideration of the functioning of the international refugee / human rights system as a whole and how we are tackling these dilemmas. Therefore, the way in which the international community rises to protect climate refugees provides a lucid and comprehensible space for change. The issue of international protection for climate refugees is inserted in this context permeated by legal uncertainty in international refugee law, which reinforces the need for an integrated approach that takes into account not only the crisis of environmentally-induced displacement itself but a solution consistent with the multiple nuances of this phenomenon that should also have a basis in international human rights law.
2. While it is essential to acknowledge the forcible nature of this type of migration, framing it as part of the refugee system has not proved to be the best solution. Initiatives to amend existing international refugee instruments in order to extend their application to reach new and complex legal situations would confront structural limitations that are intrinsic to the scope of the elaboration of these standards. Simply stated, it would be very difficult to categorize a climate refugee from a SIDS in the Pacific and another from the Horn of Africa in the same type of environmental refugee definition without significant legal challenges. Furthermore, if we set aside the lack of “environmental rationale” as a persecution factor, changing the category of refugee could potentially mean stricter measures for both refugees and environmentally displaced persons. Hence, the suggestion to broaden the refugee definition in the 1951 Convention fails to address the root causes of the issue and consequently neglects central aspects to solve the problem comprehensively.
3. One of the main obstacles regarding this matter lies in circumventing the political challenges that are posed as a priority by states in addressing human rights issues. This is evident in the advocated solutions by the European Union, the United Nations, and the Nansen Initiative and its Protection Agenda. Thus, the political will of states (and maintaining state sovereignty) appears to be the leading obstacle used as a vehicle to contain advances regarding environmentally-induced displacement agreements at the international level, which is focused prioritizing the classification of environmental displacement occurrences as a form of humanitarian aid, a temporary situation, or an issue that should be solved regionally (i.e. in the Global South, where most of these movements occur. Most of the instruments related to protection in international refugee law are based on the criteria of state sovereignty and fail to encompass the reality of environmental displacement due to disaster or degradation. As a result, climate refugees are consistently maintained on the fringes of international apparatuses of protection due to a lack of a consistent definition regarding their condition. Also, current refugee normative instruments like the Global Compact on Refugees do not create legal obligations for states nor address environmentally

displaced specific needs. Thus, relying exclusively on existing soft law texts like the Nansen Initiative and its Protection Agenda and the Global Compact on Refugees would not be the most effective method to guarantee protection for climate.

In sum, while international human rights law is not a perfect solution, because it too lacks binding legal tools/instruments for climate change-induced displacement, it could serve as a solid foundation for advancement if we reframe the discourse in that direction. As recently exemplified in the 2020 UN Human Rights Committee ruling in the Teitiota case, the principle of non-refoulement has now added protection for climate refugees. Even as states are increasingly hostile politically towards migrants, the international community still respects the 'right to life' as an inalienable and salient argument. Still, international human rights law is often applied remedially which is why I conclude that it is better reframed as the basis (rather than international refugee law) for a larger legally binding protection framework for climate refugees.

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Resumen: El vínculo entre el clima y la migración solo ha hecho metástasis en su complejidad y peligro a medida que avanza el cambio climático. Por lo tanto, existe una necesidad imperiosa de encontrar un recurso legal apropiado para los pueblos desplazados debido a crisis climáticas lentas o repentinas. Si bien en el léxico común se hace referencia a estas personas como «refugiados climáticos» o «refugiados ambientales», no están cubiertas por el marco legal internacional de refugiados. Esta investigación busca analizar lo que se puede lograr actualmente a pesar de la brecha global de protecciones legales y posibles ganancias y retrocesos si encuadramos la lente legal en un marco de derechos humanos.

Abstract: The climate-migration nexus has only metastasized in complexity and danger as climate change progresses. Hence, there is a dire need to find an appropriate legal recourse for displaced peoples due to slow or sudden-onset climate crises. While these people are referred to in the common lexicon as «climate refugees» or «environmental refugees», they are not covered by the international refugee legal framework. This investigation endeavors to analyze what can be achieved currently in spite of the global gap of legal protections and potential gains and/or setbacks if we reframe the legal lens to a human rights framework.

Palabras clave: Cambio Climático, Migración, Desplazamiento, Refugiado, Naciones Unidas, Unión Europea, Derecho Internacional sobre Refugiados, Pacto Mundial sobre Refugiados, Derechos Humanos, Refugiado Climático

Keywords: Climate Change, Migration, Displacement, Refugee, United Nations, European Union, International Refugee Law, Global Compact on Refugees, Human Rights, Climate Refugee

