

**CLIMATE REFUGEES OR CLIMATE MIGRANTS? LEGAL PROTECTION FOR
CLIMATE INDUCED MIGRANTS**

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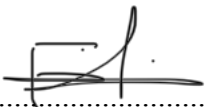
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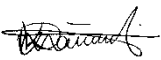
Declaration

I, IKUA FLORA WAIRIMU, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date:27/07/2021.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:..... 

Ms Kate Mavuti.

List of cases, statutes and abbreviations

Cases

Appellant v Minister for Immigration and Multicultural Affairs (2003).

Chan v Minister for Immigration and Ethnic Affairs (1989).

Chitat Ng v Canada (1994).

East African Asians v United Kingdom (1973).

Fadeyeva v Russia, (2005).

Gabcikovo-Nagymaros Project (Hungary v Slovakia), (1997).

H.L.R v France (1997).

Ioane Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment (2013).

Ioane Teitiota v The Chief Executive Ministry of Business, Innovation and Employment (2015).

Immigration and Naturalization Service v Cardoza-Fonseca (1987)

Portillo Caceres v Paraguay (2019).

Soering v The United Kingdom (1989).

Teitiota v Newzealand (2020).

Urgenda Foundation v Netherlands (2018).

Yakye Axa v Paraguay (2005).

Vilvarajah and others v The United Kingdom (2008).

Statutes

Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment

Convention on the Rights of the Child,

Convention Relating to the Status of Refugees

Geneva Convention Relative to the Protection of Civilian Persons.

International Covenant on Civil and Political Rights.

International Covenant on Economic, Social and Cultural Rights.

Male Declaration on the Human Dimension of Global Climate Change

Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa

Paris Agreement to the United Nations Framework Convention on Climate change.

Rio Declaration on Environment and Development

Stockholm Declaration on the Human Environment.

Universal Declaration of Human Rights.

United Nations General Assembly Convention and Protocol Relating to the Status of Refugees.

Abbreviations

ICCPR	<i>International Covenant on Civil and Political Rights</i>
IBHR	<i>International Bill of Human Rights</i>
IDPs	<i>Internal Displaced Persons</i>
OHCHR	<i>Office of the United Nations High Commissioner for Human Rights</i>
SIDs	<i>Small Island States</i>
UDHR	<i>Universal Declaration of Human Rights</i>
UN	<i>United Nations</i>
UNEP	<i>United Nations Environment Program</i>
UNHCR	<i>United Nations High Commissioner for Refugees</i>

Abstract

“I hear the waves on our island shore, they sound much louder than they did before. A rising swell flecked with foam, threatens the existence of our island home. A strong wind blows in from a distant place, the palm trees bend like never before. Our crops are lost to the rising sea and water covers our humble floor.”¹

The rising effects of climate change and global warming are generating a need for environmentally displaced people to be protected. Although existing international and domestic definitions of refugees may be used by governments to protect environmentally displaced persons, it is doubtful that any government is willing to do that. Even if governments expanded current refugee and asylum laws to cover environmentally displaced persons, it would provide inadequate protection because legally, they are not refugees. In addition, it would absorb the judicial services required under refugee and asylum laws for individuals currently receiving protection. Although it is important to protect climate induced migrants, they do not fall within the scope of existing asylum and refugee laws. When climate induced migrants relocate, they move to neighboring countries in search of a new home and place to continue their lives. Through bilateral and regional agreements this article suggests that planned migration offers a better solution to this problem. Managed migration pathways if reinforced with human rights will ensure governments of SIS resettle their citizens before their entire island is submerged beneath sea waters.

This study will discuss climate change as a human rights issue showing the various human rights violated because people displaced due to climate change are not protected. This research will also analyse refugee laws and establish that they lack a legal capacity to protect climate induced migrants. Lastly, it will recommend planned migration as a way to protect climate migrants.

¹ Resture J, ‘Tuvalu and global warming’ 22 June 2007, <http://archive.thedailystar.net/2007/06/22/d706221801121.htm> on January 2 2020.

CHAPTER 1: INTRODUCTION

Background to the study

Climate change poses, perhaps, the biggest threat of the twenty-first century.² As weather-related hazards such as temperatures, sea levels, floods, storms and wildfire rise, governments across the world are facing significant and unprecedented human displacement that there is currently no specific framework for international law to resolve. According to a UNHCR report, displacement linked to climate change is not a future hypothetical but a current reality.³ An annual average of 21.5 million people have been forcibly displaced by environmental related disasters each year since 2008.⁴

Small Island States (SIS) are currently shrinking and might end up sinking due to climate change. Tuvalu consists of twenty-six square kilometers of land made up of 3 islands, and in 1997 the first island, Tepuka Savilivili, vanished into the sea. Due to climate change, Tuvalu may be the first nation sunk by global warming as scientists predict that Tuvaluan islands, within the next 50 years, will be completely submerged.⁵ Many SIS are losing land, Tuvalu being one example. Unfortunately, hundreds of millions of people may be compelled to move cross-border because of environmental pressures. The so-called ‘sinking island’ phenomenon, that has affected states like Kiribati and Tuvalu, has created the urgency of protecting these people.

The terms ‘climate change refugees’ and ‘environmental refugees’ have been used to describe people who are being displaced due to adverse consequences related to climate change. However, this is not a legal term to refer to such persons. UNHCR argues that this term is misleading because in international law ‘refugee’ describes people fleeing war or persecution and who have crossed

² Warren P, ‘Forced migration: Evaluating the climate change displacement coordination facility’ *Columbia Law Review*, 2016, 103.

³ United Nations High Commissioner for Refugees, *Frequently asked questions on climate change and disaster displacement*, 2016,—<<https://www.unhcr.org/news/latest/2016/11/581f52dc4/frequently-asked-questions-climate-change-disaster-displacement.html>> on 1 January 2020.

⁴ United Nations High Commissioner for Refugees, *Frequently asked questions on climate change and disaster displacement*, 2016,—<<https://www.unhcr.org/news/latest/2016/11/581f52dc4/frequently-asked-questions-climate-change-disaster-displacement.html>> on 1 January 2020.

⁵ Moberg K, ‘Extending refugee definitions to cover environmentally displaced persons necessary protection’ 94(3) *Iowa Law Review*, 2009, 1109

international borders.⁶ The *Convention and Protocol Relating to the Status of Refugees* (herein the *Refugee Convention*) under Article 1 defines a refugee as someone who;

‘Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’⁷

Therefore, UNHCR does not recognize them as refugees. As a result, climate change displaced persons are not protected under today’s international law, as they do not fulfil legal requirements to be treated as traditional refugees. Despite this several scholars still argue that they should be protected as refugees. Berg argues that the Convention is designed in an era we no longer live in, an era where the causes and trajectories of global migration are quite different today.⁸

Against this backdrop, managed international migration can provide a relatively safe mechanism for enabling people to relocate without artificially treating them as being in need of international protection in the traditional sense of a refugee.⁹ When such people migrate their rights could be protected by ensuring those who move are given the same rights as people in the host country.

This study aims to show that the best response to the above is through the adoption of bilateral and regional migration agreements which will open up a wider range of legal and policy solutions.

In agreement with this, identifying such people as climate migrants, will be a better way to protect them and the onus of protection will fall upon the international community.¹⁰ The research explores the connections between the international response to climate change, refugee law and migration

⁶ United Nations High Commissioner for Refugees, *Frequently asked questions on climate change and disaster displacement*, 2016, –<<https://www.unhcr.org/news/latest/2016/11/581f52dc4/frequently-asked-questions-climate-change-disaster-displacement.html>> on 2 January 2020.

⁷ Article 1, *Convention and Protocol Relating to the Status of Refugees* (18 July 1951) 137 UNTS 189.

⁸ Berg C, ‘Why cling to an outdated refugee convention?’ ABC News, 19 October 2011, –<<https://www.abc.net.au/news/2011-10-19/berg-why-are-we-clinging-to-an-outdated-refugee-convention/3577538>> on 3 January 2020.

⁹ Mcadam J, *Climate change, forced migration and international law*, 1st ed, Oxford University Press, New York, 2012, 201.

¹⁰ Abdikarim A, ‘Climate-induced migrants, international law and human rights an assessment’ Unpublished undergraduate dissertation, University of Ottawa, Ottawa, 2015, 35.

laws. Taking the Pacific region and small islands as its geographic focus such as Kiribati and Tuvalu.

Statement Problem

The ideal situation should be that people forced to relocate into other states due to environmental pressures are protected under international law and their human rights are protected.

The current situation is that despite the reality of coerced relocation due to climate disaster as a growing reality there is no adequate international protection for this particular group of people. There have been steps taken by the international community to help these people however, these measures are not enough. Such people are forced to cross borders into neighboring countries, and unlike people displaced as a result of civil wars who are likely to be accepted into foreign states as refugees, are left without legal protection as their situation is not catered for in international law.

This research proposes to improve the status of climate change displaced people. Legal process ought to be undertaken to create law that enshrines the needs of climate migrants and states have a role to play in the protection of these people. This study aims to achieve this by analyzing two legal concepts in international law. First, whether they could be accorded the same status as traditional refugees if their needs are similar to those of refugees. Second, if protecting them under international law that caters to migrants would better protect such persons.

Justification of The Study

This paper will criticize the application of the term ‘refugee’ as a reference to climate induced migrants by arguing it lacks legitimacy under international law. Even if this definition is stretched to apply to climate migrants, there is a lack of political will from governments to protect them under refugee law because so far, no state has done this. The research will show that extending refugee status to people displaced due to climate change will do more harm than good as it will open floodgates and eventually end up not protecting the people it was meant to protect.

It will further explore the term ‘climate migrants’ and justify its application as a better way to protect climate displaced persons under international law. The study will show that managed migration pathways to neighbouring states is a more realistic approach to help climate induced migrants. This is because, when citizens from Kiribati are displaced, they move to states like New Zealand and Australia which are nearer. In addition, they already have migration programmes with those states, even if the climate change threat does not exist, and if others move, due to climate change, there would be existing communities. This research proposes SIS to have bilateral and regional agreements with adjacent states facilitating mutual understanding between these states and ensuring that those who move, due to climate change, will be accorded the same rights as citizens of the receiving state.

Significance of Research

This study is important as it aims to help persons displaced as a result of dangerous weather conditions by providing solutions on how they could be protected under international law. It will ensure climate migrants are granted protection by states and under international organisations like UNHCR, IOM and their key partners.

Currently, these people are not adequately protected under international law. International Refugee Laws may be used to protect them but it will not do so sufficiently because climate induced migrants do not meet the threshold of protection accorded to refugees. There is also a lack of political will to protect these people under the status of refugees.

This research suggests the best way to protect climate migrants is through planned migration. When SIS governments agree with bordering states to relocate their citizens to their states before it is too late it will help ensure the process is gradual and does not burden the host countries. In addition, contrary to staying hopelessly in camps, the migration process ensures these people work and get an education thereby contributing to the country’s economy and living a dignified life.

Aim and Objectives of The Study

This paper’s main goal is to provide a legal framework as a solution to protect people displaced because of climate change by describing them as climate migrants instead of climate refugees.

My specific objectives are:

- I. To justify why climate induced people should be protected under international law.
- II. To examine the applicability of existing refugee law to people displaced by climate change.
- III. To establish whether the use of the term ‘climate migrants’ would provide legal protection in the international realm.

Research Questions

Throughout this study, this dissertation will seek to establish that climate migrants is the best legal terms to protect environmentally displaced people. This will be done by answering the following questions:

- I. What human rights are violated as a result of climate change?
- II. What are the gaps or shortfalls in refugee law regarding the protection of people displaced by the effects of climate change?
- III. How does migration law adequately protect people displaced by the effects of climate change vis a vis refugee law?

Hypothesis

This research is based on the following hypotheses:

- I. Due to lack of proper protection the human rights of these people are being violated.
- II. The term ‘refugee’ is a legal term of art. Therefore, those migrating because of climate change are not likely to be protected under refugee laws.
- III. Due to the unique nature posed by climate change displacement, the best way to address their plight is by referring to them as climate migrants.

Theoretical Framework

This research is informed by the principle of human rights, mainly human dignity. Carozza suggests that human dignity is a central pillar of the UDHR and it expresses a value unique to

itself, on which human rights are built.¹¹ Courts have accepted that human dignity constitutes rights such as right to life,¹² and degrading treatment¹³ which will be further discussed in chapter two. Each and every human being has an inherent right to the enjoyment of human rights by virtue of being a human being. Residents of Kiribati have argued that using the term refugee suggests that they are victims in dire need of protection which makes them feel ‘undignified’ as opposed to people with skills to offer as migration suggests.¹⁴ Migration policies relating to climate related movement in response to rapid or slow-onset impacts, ensures that people can maintain their dignity, which necessarily requires ensuring respect for their human rights. As stated in the Stockholm Declaration, “man had the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”.¹⁵

Owing to the research's heavy reliance on the concept that the term refugee is a legal definition, the research looks at the problem from a legal positivist approach. This theory came up in the 16th century when philosophers like Thomas Hobbes, John Locke and John Austin recognized that in order for England to be stable again there must be a new definition of law. This definition finally became known as positive law.¹⁶ In *Positivism and the Separation of Law*, H.L.A Hart contends that law is and what is and not what it ought to be.¹⁷ Thus, positivists argue that the law should be read ‘black letter’ as it is written. Austin formulated the doctrine that the existence of law is one thing its merits or demerit is another thing.¹⁸ Positivist view that once there is a rule of law whether morally good or not it is a law nevertheless. Consequently, Article 1 of the Convention, as aforementioned, defines a refugee and its definition does not meet the threshold of people displaced by environmental pressures but only those escaping war. Many scholars argue that the Convention is not up to date and it should be interpreted so as to protect climate migrants or it

¹¹ Carozza P, ‘Human dignity and judicial interpretation of human rights: A reply’ *European Journal of International Law* 19, 2008, 931-937.

¹² *Yakye Axa v Paraguay* IACmHR case 125.1509 (2005).

¹³ *East African Asians v United Kingdom* ECHR judgment of 14 December 1973.

¹⁴ Mcadam J, *Climate change, forced migration and international law*, 194.

¹⁵ Principle 1, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/299.

¹⁶ St Rosemary Institution, *Positive Law: Thomas Hobbes, Jeremy Bentham, John Austin*, 2010.

¹⁷ Hart H, *The concept of law*, 15, Oxford University Press, Oxford, 1961, 189-195.

¹⁸ Hart H, ‘Positivism and the Separation of law and morals’ 71 *Harvard Law Review* 4, 1958, 596.

would be morally right to include climate displaced persons under the legal term refugee but, just like Hart stated an unfair legislation is still an existing law.¹⁹

Research Methodology

This study is a qualitative research and exclusively desk research.

The main source of information for this study is the analytical review of literature and scholarly material on the subject from books, journals and articles as well as industry materials from reports and publications as secondary data.

Additionally, this study involves a doctrinal analysis including review of case law, an analyses of international statutes and guidelines such as treaties and conventions and their interpretation.

This is the most appropriate mode of investigation for this study as doctrinal research allows for an in-depth look into the purpose and policy of laws that exist, in this case, refugee law as in chapter 3. It also aims at consistency and certainty of laws. While qualitative research will show how the law is serving the society and whether it is suited in the context of which it is applied. This method will help me analyse if refugee laws can serve climate induced migrants if applied in their situation.

Literature Review

There is sufficient information available on climate refugees and, according to writers like Entman and Rojecki, Glitin and Gamson, these opinion ideas and conceptions play an important role in all kinds of social action, and certainly in policy.²⁰ Most writers agree that climate change poses a threat that leads to millions of people being displaced. The Intergovernmental Panel on Climate

¹⁹ Hart H, *The concept of law*, 143-144.

²⁰ Glitin T, *The whole world is watching: Mass media in the making and unmaking of the new left*, University of California Press, Berkeley, 1980, 281.

Gamson, W, *Talking Politics*, Cambridge University Press, New York, 1992, 122.

Entman R and Rojecki A, 'Freezing out the public: Elite and media farming of the U.S anti-clear movement' 10 *Political Communication*, 1993, 167.

Change (IPCC) predicted that the gravest effects of climate change will be on human migration.²¹ Mayer argues by 2050 200 million people will be displaced.²² Leal-Arcas highlights how global warming, rising sea levels, frequent rainstorms, droughts and other climate changes worldwide will lead to human migration and displacement that is inevitable.²³

In addition, many writers agree that people displaced as a result of climate change are not protected in international law. Mark and Melanie state that international law holds few, if any, protections for people faced with this situation.²⁴ Docherty and Giannini argue that the concern of climate change refugees is an issue that transcends traditional disciplinary boundaries, which is why it is difficult to achieve a comprehensive understanding through purely disciplinary research.²⁵ Nishimura specifies the gaps in law environmental, human rights and international refugee laws do not account for climate induced displacement.²⁶

However, different writers have different terms to describe persons displaced by climate change. Warner K, Ehrhart C, Sherbinin A, Adamo and Chai-Onn define climate refugees as persons for compelling reasons of sudden or progressive changes in the environment that adversely affect their living conditions are obliged to leave their home, or by choice, either temporarily or permanently who move either within their country or abroad.²⁷ Bierman and Boas define the same set of people as victims of a set of three direct, largely undisputed climate change.²⁸ Bates D refers to such people as environmental refugees and defines them as people who absolutely have no control over their relocation as a result of climate change; he argues that the relocation of such persons should

²¹ Intergovernmental Panel on Climate Change, *Climate change 2014 synthesis report summary for policymakers*, 2014, 23.

²² Mayer B, 'The international legal challenges of climate- induced migration: Proposal for an international legal framework' 22 *Columbia Journal on International Environmental Law and Policy*, 2011, 365.

²³ Leal-Arcas R, 'Climate migrants: legal option' *Social and Behavioral Sciences*, 2012, 87.

²⁴ Baker M and Baker M, 'Teitiota v the chief executive ministry of business, innovation and employment a person displaced,' 15 *QUT Law Review* 2, 2015, 103.

²⁵ Docherty B and Giannini T, 'Confronting a rising tide: A proposal for a convention on climate change refugees' 33 *Harvard Environmental Law Review*, 2009, 351.

²⁶ Nishimura L, 'Climate change migrants: Impediments to protection framework and the need to incorporate migration into climate change adaption strategies' 27(1) *International Journal of Refugee Law*, 2015, 107-135

²⁷ Warner, K., Ehrhart, C., de Sherbinin, A., Adamo, S., & Chai-Onn, T, Columbia University, *In Search of Shelter: Mapping the Effects of Climate Change on Human Migration and Displacement. Care International*, 2009, 5.

²⁸ Biermann F and Boas I, 'Preparing for a warmer world: Towards a global governance system to protect climate refugees' *Global environmental politics*, 2010, 64.

be strictly involuntary.²⁹ This is a problem that this paper seeks to address and suggest that a clear-cut definition in law to protect such persons.

In addition to this, scholars like Hartmann, Docherty and Giannini, Dr. Aruna and Xing-Yin Ni refer to people displaced because of climate change as refugees.³⁰ However, the term ‘refugee’ is a legal term in the *Refugee Convention*. The UNHCR actively rejects the reference to climate induced migrants as climate or environmental refugees and all causal uses of the word refugee, given that such references lack legitimacy in international law.³¹ Beniot Mayer advocates for the use of climate migrants.³² Jane McAdam, author of, *Climate Change and Forced Migration and International law* shed light on managed migration and how it will better protect climate induced migrants.³³ This paper will discuss reasons as to why environmentally displaced people are not refugees and why such scholars were wrong referring to them as refugees.

This paper also aims to fill in the gaps that other scholars have not filled. For instance, Dr. Aruna does not discuss the type of migration that happens as a result of climate change in detail.³⁴ More research on the types of migration and duration will be examined in this paper. Also, the author of this paper will discuss the various human rights violated because there is no protection for climate migrants. Several writers including Xing -Yin, Hartmann, Dreher and Voyer have not done in depth research as to the human rights being violated.

²⁹ Bates D, ‘Environmental refugees? Classifying human migrations caused by environmental change’ *Population and environment*, 2002, 465.

³⁰ Docherty B and Giannini T, ‘Confronting a rising tide: A proposal for a convention on climate change refugees’ 350.

Xing- Yin N, ‘A nation going under: Legal protection for climate change refugees’ 38 *Boston College Law School* 2, 2015, 358.

Hartmann B, ‘Rethinking climate refugees and climate conflict: Rhetoric reality and the politics of policy discourse’ 22 *Journal of International Development*, 2010, 233.

Aruna V, ‘Global warming and refugees of climate change’ 4 *Environmental Law and Practice Review*, 2015, 116.

³¹ United Nations High Commissioner for Refugees, *Frequently asked questions on climate change and disaster displacement*, 2016, –<<https://www.unhcr.org/news/latest/2016/11/581f52dc4/frequently-asked-questions-climate-change-disaster-displacement.html>> on 4 March 2020.

³² Mayer B, ‘The international legal challenges of climate- induced migration: Proposal for an international legal framework’ 371.

³³ Mcadam J, *Climate change, forced migration and international law*, 201.

³⁴ Aruna V, ‘Global warming and refugees of climate change’ 129.

Limitations

Due to the Covid-19 pandemic and social distancing protocols put in place by the government, there was limited access to libraries thus lack of access to physical books and journals. To mitigate this, this study heavily relies on online literature and journals from a global library and database.

Scope

To narrow the scope of this research I will not discuss in detail measures taken or that should be taken to prevent climate induced migrations and measures states have taken to deal with climate change. This paper will focus on people who have already been displaced because of climate change. Furthermore, it is important to note that most environmentally displaced people move within their country. However, there is a possibility that SIS might end up sinking and such people will move into other countries. This study will focus on those who move across borders and not internal movement.

Chapter Breakdown

- Chapter 1: **Introduction and background.** This will be the introductory chapter of this dissertation.
- Chapter 2: **Climate change as a human rights issue.** In this chapter, I aim to answer the question whether climate change affects human rights of the locals in SIDS. It will discuss what human rights that have been violated by not protecting this group of persons. This chapter will discuss this to create a platform for the upcoming chapters. This is because it will provide the justification for the protection of climate migrants.
- Chapter 3: **Inapplicability of Refugee law.** This section will focus on the definition of a refugee and through an analysis show that this term is not best suited to legally protect people displaced as a result of climate change.
- Chapter 4: **Recommendations and Conclusion.** This will be the last chapter of the dissertation. It will recommend planned migration and bilateral or regional agreements as a legal framework to protect environmentally displaced persons.

CHAPTER 2: CLIMATE CHANGE HUMAN RIGHTS APPROACH

Introduction

Human rights are inherent, the *UDHR* is a globally accepted and endorsed document outlining those rights while mandating state obligations to guarantee and protect those rights.³⁵ As such, human rights are perceived as constitutive by the international community, which means that other norms should be reinterpreted in their light. The *UDHR*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, and the *International Covenant on Civil and Political Rights (ICCPR)*, form the basis for international human rights protection.

Human rights as a basis for the protection of climate change migrants

Member states of SIS affected by climate change consequences have drawn attention to the human rights implications of climate change. These implications are disputed, but this section argues that human rights are important for this vulnerable group as they rely on international protection.

Human rights are important as it first shows which rights are compromised by climate change. If those rights are at risk, human rights provide a legal framework on which protection can be obtained and granted in another state. Thirdly, human rights law mandates minimum standards of care to be followed in the host state if displacement happens and is thus applicable to the legal status afforded to those displaced.³⁶

A cardinal step in reframing the climate change debate may be the interpretation of climate change as a human rights issue. Indeed, because of the principle that the absolute inner value of an individual, otherwise known as dignity must be protected, human rights law calls for the security of people displaced as a result of climate change. The norms and principles of human rights provide migrants with protections, including those affected by climate change. Everyone is a right-holder and at least one international human rights treaty has been ratified by all states. Human rights treaties such as ICESCR and ICCPR place obligations on all nations, without prejudice, to protect, respect and fulfill human rights for all.

³⁵ United Nations Human Rights office of the high commissioner, ‘what are human rights?’ – <<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> on 12th september 2020

³⁶ Mcadam J, *Climate change, forced migration and international law*, 53.

Generally, human rights instruments have stronger compliance mechanisms than international environmental frameworks. Human rights bodies are rooted in UN Charter organs in the Human Rights Council and the treaty bodies of the *ICCPR* and *ICESCR*.³⁷ Despite the fact that human rights instruments lack strong enforcement mechanisms, their treaties are increasingly treated as authority and thus the protection of human rights is perceived as a precondition of political legitimacy.³⁸

Another reason is due to the intrinsic link between the environment and human rights. The first reference to the interrelatedness is established in the *Stockholm Declaration* where the right to life of dignity is achieved in an environment of quality.³⁹ This link is also enshrined in the *Rio Declaration* and the *preamble of the Paris Agreement*.⁴⁰ More so, the Alliance of Small Island States (AOSIS) adopted the *Male Declaration* of 2007, the declaration asked for a thorough study by the OHCHR on the relationship between climate change and human rights. The report concluded that climate change threatens the full enjoyment of human rights by affecting certain rights.⁴¹

Further, the responsibilities and values of human rights have the ability to educate and improve international and national climate change policy making. Climate cases have taken this approach using human rights arguments to combat climate change by combining it with the greater concern for the ways in which climate change may harm affected communities.⁴² This approach succeeded in getting the Dutch Supreme Court to hold the state accountable to further reduce greenhouse gas emissions. The court used human rights to establish that the dangers of climate change fell within the confines of ECHR: "This obligation of the state to do 'its part' is based on Articles 2 and 8 *ECHR*, because there is a grave risk that dangerous climate change will occur that will endanger

³⁷ Goboers L 'Protecting and preventing climate refugees: an interdisciplinary study on climate change refugee issues and the United Nations' LAS Thesis, Utrecht University, Utrecht, 2017, 21.

³⁸ Donnelly J, 'The relative universality of human rights' 29 (2), *Human Rights Quarterly*, 2007, 289.

³⁹ Article 1, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

Stockholm declaration

⁴⁰ Preamble, *Paris Agreement to the United Nations Framework Convention on Climate Change*, 12 December 2015, 1771 UNTS 102.

⁴¹ UNGA, *Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps*, A/HRC/38/21, 23 April 2018.

⁴² Yoshida K, 'The trends and challenges of climate change litigation and human rights' 2 *European Human Rights Law Review*, 2020, 2.

the lives and welfare of many people in the Netherlands".⁴³ In doing so, the Court offered a significant boost to the argument that climate change is a human rights issue. Specifically to climate induced migrants, human rights was used to trigger non-refoulement obligation in *Teitiota v New Zealand*.⁴⁴ The committee stressed that severe environmental degradation may violate the right to life with dignity.

Some scholars criticize the application of human rights to climate induced migrants because climate change is not a human right violator in a strict legal sense and it cannot be sanctioned as a violator.⁴⁵ The study done by the OHCHR, nonetheless, dictates that member states have obligations to protect their citizens from internal and external threats. Therefore, they are obligated to design adaptation strategies to climate change to ensure their citizens' full enjoyment of human rights.⁴⁶

Persons crossing borders because of the adverse effects of climate change lack safe and orderly migration because they fall outside the specific legal protection accorded to refugees. Despite this it is critical to ensure their human rights are protected. The *preamble* of the *Paris Agreement* states that parties should consider their human rights obligations when taking action to address climate change.⁴⁷ To comply with these obligations the Human Rights Climate Change and Migration advocates that states should facilitate migration with dignity for migrants affected by climate change. States should put in place mechanisms to guarantee migrants have rights like water, education, adequate food, housing, healthcare and decent work. Additionally, they should uphold the fundamental principle of non-refoulement and the prohibition of collective expulsion as well as the rights to liberty, family unity and personal integrity and ensuring the best interest of the child.⁴⁸

The effects of environmental change such as coastal erosion, flooding and sea-level rise together with extreme weather occasions like cyclones has affected the infrastructure, services, the

⁴³ *Urgenda Foundation v Netherlands* (2018), Dutch Supreme Court (unreported).

⁴⁴ *Ioane Teitiota v New Zealand*, CCPR.

⁴⁵ Goboers L 'Protecting and preventing climate refugees: an interdisciplinary study on climate change refugee issues and the United Nations', 22.

⁴⁶ UNGA, *addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from adverse effects of climate change*.

⁴⁷ Preamble, *Paris Agreement to the United Nations Framework Convention on Climate change*.

⁴⁸ UNGA, *Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from adverse effects of climate change*.

continued habitability and agricultural practices of people living in pacific islands. This in turn affects the enjoyment of human rights as it may threaten the right to health, culture, life, property, work, adequate living standards and self-determination. This will be discussed briefly, in the next section.

Specific human rights violated

a) Right to life

Article 3 of the *UDHR*, Article 6 of the *ICCPR*, Article 6 of the *Rights of the Child* and all regional treaties on human rights protect the right to life.⁴⁹ It is a supreme right that it is considered non-derogable.⁵⁰ Given that the risk of an entire state becoming submerged under water 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.⁵¹ Additionally, the right to life is closely connected to other human rights such as the right to health, food, adequate living standards and housing. This is especially true when it comes to environmental change as these rights are inevitably threatened when such calamities occur.

Courts have held a similar opinion. Justice Weeramantry in the *Gabcikovo-Nagymaros Project case*⁵² noted that environmental protection is an essential part of the contemporary doctrine of human rights, as it is an indispensable condition for a variety of human rights like the right to health. In a similar way, the European Court has recognised that the right to a safe environment is related to the right to life in the case *Fadeyeva v Russia*.⁵³ The court further stated that environmental damage can affect the rights to life, property, home and private life. In addition, the committee in the case *Teitiota v New Zealand*⁵⁴ stated that the right to life includes the right of individuals to enjoy a life with dignity.

⁴⁹ Article 3, *Universal Declaration of Human Rights*, 10 December 1948, UNGA/RES 217A.
Article 6, *International Covenant on Civil and Political Rights*, 23 March 1976, 999 UNTS 171.
Article 6, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

⁵⁰ Article 4, *International Covenant on Civil and Political Rights*.

⁵¹ *Ioane Teitiota v New Zealand*, CCPR.

⁵² *gabcikovo-Nagymaros Project (Hungary v Slovakia)*, Separate Opinion, ICJ Reports 1997, section VII.

⁵³ *Fadeyeva v Russia*, ECtHR Judgment of 9 June 2005.

⁵⁴ *Ioane Teitiota v New Zealand*, CCPR.

b) Right to water

As a result of sea level rise in Kiribati and Tuvalu, salinity intrusion in the water causes a reduction in drinkable freshwater and staple food crops yet, drinking water is essential for survival.⁵⁵ In 2008 representatives of the small island states testified before the general assembly that they have to ration drinking water because it was contaminated by flooding salty water.⁵⁶ Sea level rise results in salination of freshwater sources, drought reduces access to water supplies and flooding can impact the quality of water.⁵⁷ In agreement to this, committee member Vasilka agreed that because the claimant and his family in Kiribati had no access to safe drinking water posed an imminent threat to their lives.⁵⁸ Climate change is expected to worsen existing problems with accessing clean water and it is predicted that it could double the total population of people who lack access to an adequate water supply.⁵⁹

c) Right to food

Furthermore, climate change also affects the right to food through disruption of food systems and sources. For instance, increase in ocean and sea temperatures reduces fish stocks in areas like the Maldives and Kiribati and they depend on fish as a staple food and a key source of protein. Similarly, in Tuvalu groundwater salination caused by sea level rise is depleting agricultural production of Taro, coconuts, panadanus fruit and bananas⁶⁰ The right to life is violated as it entails availability of food including feeding oneself through natural resources which is not the case with residents in these small islands. As highlighted by the Special Rapporteur on the right to food, an estimated half of the world's 854 million hungry people live in already degraded lands, degradation which will be exacerbated by climate change.⁶¹

⁵⁵ Centre for Tropical Coastal Management Studies, *The Implications of Sea Level Rise for the Republic of the Maldives*, 1989.

⁵⁶ Rubin N, 'Does climate change compromise fundamental human rights?' American Psychology Association, 6th October 2013, <https://www.apa.org/international/pi/2013/10/un-climate> on 13th September 2020.

⁵⁷ *The slow onset effects of climate change and human rights protection for cross-border migrants*, HRC 37th report 2018, UN Doc A/HRC/37.

⁵⁸ *Ioane Teitiota v New Zealand*, CCPR.

⁵⁹ HRC, *The slow onset effects of climate change and human rights protection for cross-border migrants*.

⁶⁰ Abdikarim A, 'Climate-induced migrants, international law and human rights an assessment' Unpublished undergraduate dissertation, 28.

⁶¹ Office of the High Commissioner of Human Rights, 'Situation of Migrants in Transit' 2017, 15.

d) Right to health

By the same token, the right to health is violated as the health of these residents is directly related to the health of their environment. they depend on their environment for everything they are and everything they have: the air they breathe, the food they eat and the water they drink.⁶² Health is related to sufficient food and water, but if these rights are limited, as discussed above, so is human health. Additionally, climate change has major health implications such as (i) increased risk of injury, sickness, and death due to more severe heat waves and fires; (ii) stress that affect mental health; (iii) health consequences resulting from loss of work capability and decreased labor productivity in vulnerable populations; (iv) increased risk of under-nutrition due to reduced food production in poor regions; (v) increased danger of water and vector borne diseases.⁶³

e) Right to adequate standard of living

Health is also related to adequate housing and is a part of an adequate standard of living. The right to an adequate standard of living is more than the mere provision of shelter and includes the right to live in safety, peace and dignity, as well as the right to express cultural identity. In the sense of climate change, this right is at risk for climate induced migrants because they may face poor living conditions.⁶⁴

f) Right of self-determination

The collected right to self-determination would further be affected by climate change. This right grants all individuals the right to ‘freely determine their political status and freely pursue their economic, social and cultural development’.⁶⁵ The possible disappearance of traditional territories due to sea level rise and coastal erosion threatens the territorial integrity, livelihoods, and cultural survival of people in the small developing island states.⁶⁶ Furthermore, the loss of land threatens the right to appreciate one’s culture and to engage in cultural life which preserves peoples traditions and languages.⁶⁷ Therefore, the right to self-determination and culture is critical to the

⁶² Tedors A and Espinosa P, ‘Health, climate and small island states’ Bulletin of the World Health Organisation, 2018, <https://www.who.int/bulletin/volumes/96/2/17-206474/en/> on 13th September 2020.

⁶³ United Nations Environmental Programme and Colombia Law School, *Climate change and human rights*, 2015, 8.

⁶⁴ HRC, *The slow onset effects of climate change and human rights protection for cross-border migrants*, 42.

⁶⁵ Article 1(1), *International Covenant on Economic, Social and Cultural Rights*, 3 January 1976, UNTS 993.

⁶⁶ HRC, *The slow onset effects of climate change and human rights protection for cross-border migrants*, 44.

⁶⁷ Article 15, *International Covenant on Economic, Social and Cultural Rights*.

process of planned relocation and should be considered to empower the residents of the pacific islands.

Conclusion

Climate change and human rights are interdependent, and the answer to our question as to whether climate change jeopardizes the basic human rights of people living in vulnerable areas is ‘yes’. Therefore, human rights law is fundamental to the protection of persons moving as a result of climate change and can provide a ground for potential claims for entry or non-return on the basis of the harm to which migrants may be exposed due to the adverse effects of climate change in their country of origin. The Immigration and Security Tribunal recognized in New Zealand that disasters caused by climate change could provide a context in which a recognition claim is based.⁶⁸

Article 27, *International Covenant on Civil and Political Rights*.

⁶⁸ *Ioane Teitota v The Chief Executive of the Ministry of Business, Innovation and Employment* (2015), New Zealand Supreme Court.

CHAPTER 3: INAPPLICABILITY OF REFUGEE LAW

Climate induced migrants are often described as environmental or climate ‘refugees’ in journalistic language and some scholarly articles. While this label may be useful from a political perspective because it highlights some of the most inordinate ways climate change affects society, it is legally and conceptually flawed.⁶⁹ This section analyses the relationship between climate induced migrants and refugees in the traditional sense and establishes that International Refugee Law does not accommodate them.

Origin/Historical background of Refugee Protection

According to Agnes Hurwitz who sheds light on the origins of refugee protection states that it first came to play in the nineteenth century.⁷⁰ The aftermath of the First World War is that a growing number of displaced people who lacked legal rights overwhelmed the international system. This was the impetus for the development of international refugee protection instruments.⁷¹ The High Commission for Refugees was established in 1933 and the refugee crisis emanating from Germany was resolved and formally integrated into the League of Nations in 1938.⁷² When the UN was founded one of the issues it dealt with was developing a tool to protect refugees from the Second World War. To facilitate the repatriation of millions of displaced Europeans, the International Refugee Organisation was established in 1947. Finally, in 1950 the UNHCR was created as a subsidiary organ pursuant to Article 22 of the *UN Charter*. The *1951 United Nations Convention Relating to the Status of Refugees* (hence *Refugee Convention*) reaffirmed the *UN Charter* and *UDHR* and was the first international legal refugee instrument. The *Refugee Convention* of 1951 was signed on 28 July in Geneva and came into force in April 1954. The adoption of the *1967 Protocol on the Status of Refugees of the United Nations* gave full universal application to the *1951 Refugee Convention*.

The *1951 Refugee Convention* as amended by the Protocol defines a refugee as any person who;

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality

⁶⁹ Mcadam J, *Climate change, forced migration and international law*, 39.

⁷⁰ Hurwitz A, *The collective Responsibility of states to protect refugees*, Oxford University Press, New York, 2009, 10-281.

⁷¹ Hurwitz A, *The collective Responsibility of states to protect refugees*, 10-281.

⁷² Abdikarim A, ‘Climate-induced migrants, international law and human rights an assessment’, 40.

and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”⁷³

Climate change migrants will most likely not qualify as refugees, following this definition and the origin of refugee laws. International laws provide protection to displaced populations through refugee law, but this definition is a rather narrow one and climate migrants do not benefit from the *Convention's* provisions or claim refugee status.

In addition, as a guide for governments to decide who qualifies for refugee status, the UNHCR has provided a Handbook on Procedures and Conditions for Assessing Refugee Status. These guidelines rule out natural disaster victims.⁷⁴ In Australia and Newzealand, there have also been several unsuccessful refugee applications in which individuals from Pacific Island nations have sought protection from the impacts of climate change. Those decisions indicate that the essence of the Refugee Convention makes it impossible for such applications to succeed.

Legal difficulties in classifying such persons as refugees are inferred for the definition. First, it is difficult to establish persecution and the source of persecution and second, this persecution is because of the five grounds in the Convention. Furthermore, there are other difficulties like human dignity, lack of political will and opening of floodgates.

a) Well-founded fear of persecution

Climate induced migrants would have a hard time convincing courts that they have a well-founded fear of persecution. First, the *Refugee Convention* of 1951 requires that the fear of persecution is well founded. As expressed in *Chan v Minister of Immigration and Ethnic Affairs*⁷⁵, the norm for well-founded fear requires 'a real chance' as opposed to a remote possibility of persecution. The U.S. Supreme Court in *INS v Cardoza-Fonseca*⁷⁶ determined, looking at the legislative background and intent of the Refugee Convention, that asylum seekers need to demonstrate that there might even be a 10 percent prosecution. Since global warming is not deniable, climate migrants could

⁷³ Article 1.2, *United Nations General Assembly Convention and Protocol Relating to the Status of Refugees*, 30 January 1967, 606 UNTS 267.

⁷⁴ United Nations High Commissioner for Refugees, *Handbook on procedures and criteria for determining refugee status and guidelines on international protection*, 1979.

⁷⁵ *Chan v Minister for Immigration and Ethnic Affairs* (1989), High Court of Australia.

⁷⁶ *Immigration and Naturalization Service v Cardoza-Fonseca* (1987), United States Supreme Court.

easily demonstrate that their homes and livelihoods are endangered. In the *Teitiota case*, the tribunal argued that if Teitota and his family went back to Kiribati their living standard would be less than that of New Zealand but there was no sufficient evidence that he would be unable to provide for his family.⁷⁷

Another difficulty is characterizing climate change as persecution. Persecution entails violations of human rights that are sufficiently serious either because of their inherent nature or because of their repetition.⁷⁸ Persecution is a question of degree and proportion as stated in *Appellant v Minister for Immigration and Multicultural Affairs*, it will constitute persecution if by intensity or duration the person cannot be expected to tolerate it.⁷⁹ As discussed above climate impacts are harmful, can be fatal and violate several human rights, nonetheless, they do not meet the threshold of persecution. As stated by Jane McAdam, it needs to be shown that the persecutor is engaging in such an act because of an attribute of the person being persecuted, rather than being a random attack. The *Refugee Convention* requires an identifiable, human actor to cause harm.⁸⁰ Furthermore, the persecutor is a government actor or a non-state actor that the government is unwilling or unable to control.⁸¹

Identifying a persecutor is part of the problem. Some scholars have argued that the persecutor is the international community mainly developed countries because they are responsible for the majority of greenhouse gas emissions and maintain an enormous average per capita carbon footprint compared to small island states.⁸² The Australian Refugee Review Tribunal rejected this argument stating that, there is simply no basis for concluding countries which can be said to have been historically high emitters of carbon dioxide have any element of motivation to have any impact on residents of low lying countries such as Kiribati.⁸³ In addition, McAdam states that this argument is a complete reversal of the traditional refugee paradigm. Whereas refugees flee from their persecutors to seek refuge from other states which do not persecute them, a person fleeing

⁷⁷*Ioane Teitiota v New Zealand*, CCPR.

⁷⁸ Mcadam J, *Climate change, forced migration and international law*, 43.

⁷⁹ *Appellant v Minister for Immigration and Multicultural Affairs* (2003), High Court of Australia.

⁸⁰ Xing- Yin N, 'A nation going under: Legal protection for climate change refugees' 338.

⁸¹ Moberg K, 'Extending refugee definitions to cover environmentally displaced persons necessary protection' 93.

⁸² Gonzalez C, 'Climate justice and climate displacement: Evaluating the emerging legal and policy responses' 36(2) *Wisconsin International Law Journal*, 2019, 372.

⁸³ 0907346, Australia Review Tribunal 1168 (10 December 2009), para 51.

from the effects of climate change is seeking refuge from states that ‘persecute’ them. This is because climate migrants might move into developed countries.⁸⁴

Since persecutors ought to be the government or the government’s failure to offer protection, climate migrants fail this threshold. In fact, the governments of Tuvalu and Kiribati are not responsible for climate change and are willing to protect their people, although there is no consistent ability to do so over time. Mr Teitiota admitted that the Kiribati government was taking steps to respond to climate change, but he claimed that it was unable to avoid climate change. This argument failed to bring Teitiota under the *Refugee Convention* because he did not present evidence that the government failed to take adequate measures to protect him from such damage.⁸⁵

Under Refugee law persecution is beyond mere realization of rights violated, discrimination is an important element. Particularly, persecution must be based on the five Convention grounds which will be discussed in the next part.

b) Based on the five Refugee Convention grounds

To qualify as a refugee the basis of persecution must be on the five grounds listed in the *Refugee Convention*: race, religion, nationality, political opinion or a particular group.⁸⁶ The difficulty in this provision is that the impacts of climate change are indiscriminate and are not tied to a persons’ particular characteristics. This was echoed by the New Zealand Immigration Tribunal in *Teitiota* when they stated that the effects of environmental degradation were faced by the population generally.⁸⁷

In *Refugee Appeal 0907346*⁸⁸, the appellant argued that, on the basis of the fact that the people of Kiribati come from parts of the island that are severely affected by rising sea levels and salinity, separate from the general population, they may be described as a member of a particular social category. Nevertheless, McAdam argues that this claim is difficult to construct since the law required the community to be related by a simple, immutable feature rather than the danger of

⁸⁴Mcadam J, *Climate change, forced migration and international law*, 46.

⁸⁵ *Ioane Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* (2013) New Zealand High Court.

⁸⁶ Article 1.2, *United Nations General Assembly Convention and Protocol Relating to the Status of Refugees*, 30 January 1967, 606 UNTS 267.

⁸⁷ *Ioane Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* (2015) New Zealand Supreme Court.

⁸⁸ New Zealand Refugee Status Appeal Authority, *Refugee Appeal No 72189/2000*, Decision of 17 August 2000.

persecution itself. Indeed, in relation to poor refugee claimants from Tuvalu, the New Zealand Refugee Status Appeals Authority reiterated this,

‘This is not a case where the appellants can be said to be differentially at risk of harm amounting to persecution due to any one of these five grounds. All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and family property being partially submerged at high tide. As for the shortage of drinkable water and lack of hygienic sewerage systems, medicines and appropriate access to medical facilities, these are also deficiencies in the social services that applies indiscriminately to all citizens of Tuvalu and cannot be said to be forms of harm directed at the appellant for reason of their civil or political status’⁸⁹

c) Lack of political will

Amending the *Refugee Convention* or interpreting it widely to include climate-displaced persons has been proposed by legal scholars as one of the solutions to climate induced migration.⁹⁰ Notably, Docherty and Giannini, have proposed new definitions of climate change refugees and new international climate change refugee international instruments.⁹¹ They argue that these people should be accorded refugee protection. Others argue the refugee convention is outdated and it should be amended to include climate change refugees.⁹²

However, states have demonstrated a lack of political will to adopt this approach as migration policy grows increasingly contentious.⁹³ Currently, states that have ratified the 1951 Convention, have the discretion to interpret the definition as it pleases and so far no country has extended the refugee status to environmentally displaced persons. Instead, they are construing the definition of refugee more narrowly.⁹⁴ States prefer to keep this distinction, effectively disqualifying environmental and economic migrants from protection. This reduces their risk of incurring the

⁸⁹ New Zealand Refugee Status Appeal Authority, *Refugee Appeal No 72189/2000*, Decision of 17 August 2000.

⁹⁰ Brooke H, ‘Seeking protection: Recognition of environmentally displaced persons under international human rights law’ 78-79.

⁹¹ Docherty B and Giannini T, ‘Confronting a rising tide: A proposal for a convention on climate change refugees’ 372.

⁹² Berg C, ‘Why cling to an outdated refugee convention?’ ABC News, 19 October 2011, –<
<https://www.abc.net.au/news/2011-10-19/berg-why-are-we-clinging-to-an-outdated-refugee-convention/3577538> >
on 20 November 2020.

⁹³ Gonzalez C, ‘Climate justice and climate displacement: Evaluating the emerging legal and policy responses’ 381.

⁹⁴ Moberg K, ‘Extending refugee definitions to cover environmentally displaced persons necessary protection’ 1115.

increased responsibilities, cost and legal obligations that come with recognizing a new category of migrants.⁹⁵

The provision of international protection for refugees is a political decision and states prefer to assist migrants in situations where migration is related to a problem of perceived significance to the state. Therefore, it is not shocking that states are unable to commit these people because millions are displaced and the pressure on countries to find solutions falls on them. Moreso, in times of economic uncertainty, there appears to be little to gain for receiving states.⁹⁶

d) Human dignity

According to McAdam,, the term 'climate change refugee' is at best preemptive and at worst offensive to those assigned to it.⁹⁷ The refugee label is denied at both official and personal levels within the SIS of Kiribati and Tuvalu. The explanation behind this is that the word refugee invokes a feeling of helplessness and lack of dignity that contradicts the very strong sense of pride in the Pacific.⁹⁸ Their discomfort also stems from the fact that refugees escape from their own government, whereas these people have no desire to escape their own countries.⁹⁹

In agreement with this, the President of Kiribati explained, “we do not want to lose our dignity. We are sacrificing much by being displaced. So the last thing we want to be called is ‘refugee’ We are going to be given as a matter of right something that we deserve because they have taken away what we have.” He added that refugees are perceived as passive victims waiting helplessly in camps relying on handouts with no prospects for the future.¹⁰⁰ The people of Tuvalu and Kiribati do not want to be seen this way rather they would like to be regarded as active, valued members of a community who can positively contribute to it.

⁹⁵ Nishimura L, ‘Climate change migrants: Impediments to protection framework and the need to incorporate migration into climate change adaption strategies’ 115.

⁹⁶ Nishimura L, ‘Climate change migrants: Impediments to protection framework and the need to incorporate migration into climate change adaption strategies’ 119.

⁹⁷ Mcadam J, *Climate change, forced migration and international law*, 40.

⁹⁸ Mcadam J, *Climate change, forced migration and international law*, 40-41.

⁹⁹ Mcadam J, *Climate change, forced migration and international law*, 43.

¹⁰⁰ Mcadam J Interview with President Anote Tong, President of Kiribati, on 12 May 2009.

e) floodgates

Altering the international definition to include climate refugees would have negative results on the existing refugee laws. The High Court in *Teitiota* expressed concern that deciding in favor of Teitiota would open floodgates to millions of others facing similar hardships caused by climate change.¹⁰¹ Courts therefore, will have to narrow who can receive protection by redefining persecution and well-founded fear. The difficulty in determining whether climate migrants deserve permanent or temporary relief will result in arbitrary barriers that will further delay the programs and inhibit both climate induced migrants and applicants currently eligible for refugee protection. Due to an increase in applicants, the programs will operate more slowly.¹⁰²

Therefore, although many academics refer to persons displaced by environmental circumstances as environmental refugees this term is a misnomer since climate induced migrants do not qualify as refugees under international law.

¹⁰¹ *Ioane Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* (2013) New Zealand High Court.

¹⁰² Moberg K, 'Extending refugee definitions to cover environmentally displaced persons necessary protection' 1129.

CHAPTER 4: RECOMMENDATIONS AND CONCLUSION

Introduction

SIS are continuing to shrink and in the next 50 or so years, they might completely disappear.¹⁰³ The number of climate refugees is increasing and current international refugee laws fail to offer sufficient protection. Countries are reluctant to admit these people as refugees yet the large number of environmentally displaced persons will increase and subsequently lead to mass migration. To avoid this, this research suggests countries should accept climate migrants gradually and the protection should not fall under the current definition of a refugee. Planned migration is a better solution as it protects the dignity of climate migrants and it would ensure a gradual transition as opposed to waiting until the last minute when millions of people are displaced.

Recommendations

a) Migration response

Blame game is unproductive and demanding for admissions of liability or compensation is futile and will waste time. Instead, it is best to endorse a framework that acknowledges the reality of climate change related movement and commits to facilitate movement through migration programmes. A common opinion in Tuvalu and Kiribati officials is that they would like to see an international framework acknowledging a moral responsibility through a combination of strategies like funding for adaptation, committing humanitarian assistance if needed and offering migration pathways.¹⁰⁴

It is preferable to work with affected governments in order to achieve solutions involving a combination of *in situ* adaptation and migration acknowledging that planned movements may be an adaptation strategy. This relocation must be done with consideration of human rights. Moreover, managed international migration can provide a secure mechanism to allow people to migrate away from the effects of climate change, without treating them as in need of international security, from a persecutory state in the conventional context of refugee law.¹⁰⁵

¹⁰³ Moberg K, 'Extending refugee definitions to cover environmentally displaced persons necessary protection', 1109.

¹⁰⁴ Mcadam J, *Climate change, forced migration and international law*, 201.

¹⁰⁵ Mcadam J, *Climate change, forced migration and international law*, 201

According to McAdam, in Kiribati and Tuvalu the development of a migration pathway is better attuned to a) the desires of people in those countries, b) the likely patterns of climate change which is slow and gradual and c) the history of movement in the region. The Kiribati government's long-term plan is to secure 'merit-based migration' alternatives to neighboring countries such as Australia and New Zealand, so that those who want to migrate permanently have an early chance to do so. In this way, the President hopes that 'pockets' of I-Kiribati communities will be developed abroad and the culture and traditions of I-Kiribati will be kept alive.¹⁰⁶

Furthermore, this would enable a gradual transition and when the population has to move there would be existing communities to join. Unlike going as refugees in fifty to sixty years, beginning migration now and doing it over the years. The former might end up burdening the receiving state while the latter will end up being painless and a win-win situation all if done properly. Also, this will be beneficial for the receiving states as if these people are accepted as migrants they bring new skills and ideas to the state because they will work and get education as opposed to staying in camps. Meaning they will be making economic contributions to the receiving state.

Not only will the process be gradual and less drastic but it will also give the opportunity to test it and adjust the relocation process in a constructive manner. For instance, the migration should be reinforced with local adaptation to avoid depletion of local resources.¹⁰⁷ Besides the migration process ensures the citizens play a role instead of waiting for the government to arrange everything for them. They need to to skill up so that they can be accepted by the receiving state. Moreover, most cross-border displacement will occur within regions.

This migration option can be achieved through bilateral or regional cooperation agreements. There is an already set up regional intergovernmental organization dealing with climate change set up in 2005, Islands Framework for Action on Climate Change. The *Niue Declaration* on Climate Change was also designed to bridge the different regional initiatives in the Pacific. It requested development partners to increase their support for climate change relocation if necessary. However, there is no regional agreement with immigration schemes towards international obligation to protect Pacific people from climate displacement.¹⁰⁸ There are regional migration

¹⁰⁶ Mcadam J Interview with President Anote Tong, President of Kiribati, on 12 May 2009.

¹⁰⁷ Mcadam J, *Climate change, forced migration and international law*, 203.

¹⁰⁸ Xing- Yin N, 'A nation going under: Legal protection for climate change refugees' 350.

programs like, Australia has aid programs to train nurses and horticulture workers in Kiribati to aid their transition into the Australian workforce and the Pacific Access Category in New Zealand which offers places for migrants from Kiribati and Tuvalu.¹⁰⁹

Pacific regional governments with the assistance of international institutions like IOM could aid the governments of SIS negotiate with neighbouring states to adopt this migration process. The IOM has been an active institution since early 1990s on the issue of environmental migration and has produced research reports on the effects of climate-related movement. IOM recognizes that the interactions between environment and mobility are much more complex than disaster-related displacement, and that migration can be a solution rather than a problem in the context of climate change.¹¹⁰

New Zealand has an established track record of providing assistance in the Pacific where possible, and their approach to climate migrants should be consistent with this furthermore, they already acknowledge the SIS's concerns regarding this issue.¹¹¹ Strategically, Australia and New Zealand will benefit from a more cooperative approach to migration, especially because many Pacific islanders see movement to New Zealand as the first step towards Australia, they can freely travel to and work in Australia once they obtain New Zealand citizenship.¹¹²

b) Principle of non-refoulement

Although refugee law does not strictly apply, certain protective principles and status envisaged for those displaced might be relevant. Specifically, the principle that no one should be retired to a country where one is likely to face persecution, ill-treatment or torture.¹¹³ This principle is an internationally recognized principle and it is believed that it has gained customary status and may even be *jus cogens*.¹¹⁴

The *Geneva Convention* was the first international treaty to codify the principle of non-refoulement with the limitation that individuals would not pose a security risk or danger to the receiving state.¹¹⁵

¹⁰⁹ Xing- Yin N, 'A nation going under: Legal protection for climate change refugees' 350

¹¹⁰ Mcadam J, *Climate change, forced migration and international law*, 229.

¹¹¹ Mcadam J, *Climate change, forced migration and international law*, 117.

¹¹² Mcadam J, *Climate change, forced migration and international law*, 206.

¹¹³ Article 33 (1), *Convention on the status of refugees*.

¹¹⁴ Newmark R, 'Non-refoulement run afoul: The questionable legality of extraterritorial repatriation programs' 71 *Washington University Law Quarterly Fall*, 1993, 845.

¹¹⁵ Article 33(2), *Geneva Convention*, 21 October 1950, 75 UNTS 287.

That notwithstanding, state practice has shown that this principle applies to a broader class of persons than those identified in the *Geneva Convention*. The Human Rights Committee in interpreting Article 7 of the *ICCPR* stipulated that it also caters for circumstances of expulsion which states have an obligation not to expose individuals to torture, cruel and inhumane treatment outside its jurisdiction.¹¹⁶

Violation of human rights triggers the principle of non-refoulement. In particular, the right to life and the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment. These two rights are clearly recognized in international laws as giving rise to this obligation.¹¹⁷ Therefore expulsion or any other measure to remove an alien where substantial grounds have been shown for believing the alien, if expelled, would face a real risk of being treated contrary to *Article 7 ICCPR* raises an obligation to the state not to expel the individual to that country.¹¹⁸

Additionally, the *Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment* broadens the scope of non-refoulement so as to include degrading treatment. The approach of the UN Human Rights Committee is to regard these forms of ill-treatment on a hierarchy with torture being the most severe manifestation.¹¹⁹ It is not clear the ascertainment of the level of severity and as per the European Court of Human Rights, it depends on the circumstances of the case like the physical and mental effects, the duration of the treatment and the state of the victim.¹²⁰

The *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa* Article 3, provides that no person should be turned away at the border or returned to a country where his life or physical integrity would be threatened. As aforementioned, climate change threatens the right to life of climate induced migrants. In agreement with this the Human Rights Committee recognised that though not directly, climate change poses serious threat to the right to life and states need to consider this before deporting aliens back to their states. The

¹¹⁶ *Chitat Ng v Canada*, CCPR Comm No.469/1991 (1994).

¹¹⁷ Mcadam J, *Climate change, forced migration and international law*, 55.

¹¹⁸ *Soering v The United Kingdom*, ECtHR, 7 July 1989, Para 90-91, *Vilvarjah and others v United Kingdom*, ECtHR, 26 September 1992, para 103 and *H.L.R v France*, ECtHR, 22 April 1997 para 34.

¹¹⁹ *HRC General Comment No. 20 Concerning Prohibition of Torture and Cruel Treatment or Punishment*, 10 March 1992, 4.

¹²⁰ *N v United Kingdom*, ECtHR, 27 May 2008, para 29.

message passed was SIS do not need to be underwater to trigger the right to life. The Committee stated,

“...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 ICCPR, thereby triggering the *non-refoulement* obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water 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.”¹²¹

The European Union also adopted a Qualification Directive in 2004 that contains the non-refoulement principle when outlining the protection available to persons not qualified for the refugee status but still need protection.¹²²

Conclusion

To conclude, this study confirms the hypothesis that international law mainly refugee law does not cater for climate induced migrants. Nevertheless, these people deserve help and protection before it is too late and planned relocation can offer a solution.

¹²¹ *Ioane Teitiota v New Zealand*, CCPR.

¹²² Article 2(e), Council of the European Union, ‘Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted’, 2004/83/EC, 29 April 2004.

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