

ANALYZING THE POSSIBLE IMPACT OF CLIMATE CHANGE BASED MIGRATION IN ASIA AND THE ROLE OF INTERNATIONAL LAW IN RECOGNISING CLIMATIC REFUGEES

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INTRODUCTION

As expressed by the United Nations ex- Secretary General Ban Ki Moon that " *Climate change does not discriminate; it doesn't regard who you are - rich or poor, little or huge. Thusly, this is the thing that we call 'worldwide difficulties,' which require worldwide solidarity.*" With day by day increase in the global warming, the threat of climate change migration is increasing. South Asian Countries mainly Maldives, Sri Lanka, India and Bangladesh are more likely to be impacted because of this climate change based migration in days to come. Last year in December 2018, leaders from 164 countries formally adopted the UN Global Compact for Migration at a meeting in Marrakesh, Morocco . But, the document has limitations. It's voluntary and non-binding and it is still a document only not a policy This paper does an in dissection of this issue which is making worldwide danger of termination and expanding the undesired results of migration or thereabouts called "climate migrants" .Further in this paper an endeavor has been made to concentrate on loss of territory as the pointer of a State's identity or statehood may be lost, ocean level ascent could submerge whole parts or partial coastal parts of sovereign countries and consequently will get to be appalling much sooner than they physically vanish .Which leads to their loss of land and livelihood. Though, for now many countries don't have a future plan or road map of combating this possible danger .As, it will result in sudden influx or even gradual influx of people into

other countries or into the other parts of same nation. And under international refugee law there has been no provision for environmental refugees. So, there has been no special protection is given, neither they are recognized as refugee. Therefore, in this regard an attempt has been made in this paper to critically analyze the problem of this climate migration and how proper planning should be made in order to combat this problem in near future, looking at the increasing danger of global warming and other endangering climate changes. Further, how international refugee law can be modified in order to address this issue of statelessness which is very certain in the future. At the end a detailed possible solutions and recommendations will be proposed, that can be adapted by the international agencies especially United Nations High Commissioner for Refugees (UNHCR) in order to prevent this state of identity crisis and statelessness .

CLIMATE CHANGE & REFUGEE CRISIS

“We have a small window now, before the effects of climate change deepen, to prepare the ground for this new reality.” -Kristalina Georgieva, World Bank CEO.¹

According to, a World Bank Group report says the worsening impacts of climate change in sub-Saharan Africa, South Asia and Latin America could mean that by 2050 more than 140 million people had moved within their own countries' borders, creating a human crisis and threatening development . Further, statistics published by the Internal Displacement Monitoring Centre, every year since 2008, an average of 26.4 million persons around the world have been forcibly displaced by floods, windstorms, earthquakes or droughts. This is equivalent to one person being displaced every second . Many find refuge within their own country, but some are forced to go abroad. With climate change, the number of 'climate refugees' will rise in the future. So far, the national and international response to this challenge has been limited, and protection for the people affected remains inadequate . The major challenge that is with the protection of climate refugees is that there is neither a clear definition for this category of people, nor are they covered under the 1951 Refugee Convention.

¹Groundswell :Preparing for Internal Climate Migration, World Bank Report 2018 (Available at: <https://openknowledge.worldbank.org/handle/10986/29461>, last accessed on 15.04.2019 at 4:08pm)

The United Nations (UN) 2030 Agenda for Sustainable Development includes several migration-related targets and calls for regular reviews of progress towards their achievement using data disaggregated by, inter alia, migratory status. The annual displacement of millions of persons worldwide due to environmental disasters needs to be addressed . Many find shelter within their own country, but some are forced to go abroad. In the context of climate change, such movements are likely to increase. So far, the response to this challenge has been limited, and protection for those affected remains inadequate

THE CONCEPT OF CLIMATIC REFUGEE & ITS STATUS

Nineteen years ago, in the UN Intergovernmental Panel on Climate Change (IPCC) First Assessment Report, the report's authors suggested that large-scale, global migrations might represent the 'greatest single impact' on world security resulting from climate change .² The 1992 United Nations Framework Convention on Climate Change (UNFCCC) provides the common international framework to address the causes and consequences of climate change. In 2007, the Fourth Assessment Report of the IPCC authoritatively established that human-induced climate change is accelerating and already has severe impacts on the environment and human lives .³ Over the past several years, numerous policy researchers and humanitarian agencies have tried to address some of these problems by pointing to the fact that 'climate refugees' represent an unrecognised category of migrant that risks falling through the cracks of international refugee and immigration policy. Many have even gone so far as to suggest an extension of the 1951 UN Refugee Convention and its 1967 Protocol to include 'climate refugees' .⁴

² Benjamin Glahn , "Climate refugees"? "Addressing the international legal gaps", International Bar Association", 11 June 2009", (Available at:<http://www.ibanet.org/Article/Detail.aspx?ArticleUId=B51C02C1-3C27-4AE3-B4C4-7E350EB0F442>, last accessed on 13.04.2019, at 10:39pm).

³ *Ibid.*

⁴ Betts, Alexander, Gil Loescher and James Milner , "UNHCR: The Politics and Practice of Refugee Protection, Abingdon: Routledge.",2013 Report.

Interpretation and Reference to Climatic Refugees under Various Conventions and Instruments:

The interpretation of the refugee definition in the UNHCR Handbook, which is undoubtedly the most authoritative interpretation of the 1951 Refugee Convention and the 1967 Refugee Protocol, excludes victims of natural disasters and rules them out from acquiring refugee status.⁵ Although a lot of scholars, lawyers, and governments use the terms: 'environmental refugee' and 'climate change refugee', and try to apply refugee law for their protection, there are a number of significant obstacles in qualifying people displaced by climate change as refugees under international law.⁵ Before turning to these obstacles it is important to note that several regional instruments contain a broader definition of a refugee.⁶ Among notable examples are the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), the 1984 Cartagena Declaration on Refugees (Cartagena Declaration) of Latin America and the 1994 Arab Convention on Regulating Status of Refugees in Arab Countries (Arab Convention).⁷

- “Further, the Arab Convention even mentions natural disasters among the reasons for acquiring refugee status, and defines a refugee as 'any person who unwillingly takes refuge in a country other than his country of origin or his habitual place of residence because of the sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof'.⁸ It should be noted, however, that so far no States have ratified the Arab Convention and therefore it has no legal force”.
- “Also The Cartagena Declaration is a non-binding instrument. Nevertheless, most of the Latin American States apply the definition as a matter of practice and some have incorporated the definition into their own national legislation”.
- The OAU Convention is a binding legal instrument and is a part of regional law.

⁵ Goodwin-Gill, Guy and Jane McAdam, “The Refugee in International Law”, Oxford University Press, 3rd edn, page 23.

⁶ *Ibid.*

⁷ Kälén, W and Schrepfer, N, Protection of People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches, UNHCR, February 2012 .

⁸ McAdam, J, “Climate Change, Forced Migration, and International Law”, (Oxford: OUP, 2012), 10 .

- In sum, several regional instruments provide for a broader definition by including persons that flee events that seriously disturb public order.⁹ But as these regional instruments also build on the definition as provided in the 1951 Refugee Convention,¹⁰

Regional Agreements & Its Impact on Definition of Climatic Refugees

Indeed, the fact that there is still no internationally agreed definition of what it means to be an environmental 'migrant', 'refugee', or 'displaced person' makes it difficult to systematically progress deliberations about appropriate multilateral legal and institutional responses. Questions of definition have governance implications, because they inform the appropriate location of climate-related movement institutionally as an international, regional or local, developed and/ or developing State concern/responsibility as well as normatively for example, within the existing refugee protection framework or under the UN Framework Convention on Climate Change (UNFCCC).¹¹

Furthermore, there is a risk that a one-size-fits-all response could downplay the cultural and livelihood needs of displaced communities and local knowledge bases for adaptation. When the law is faced with a novel challenge, it may be brought to bear in a number of different ways. Existing legal principles might be elongated, adapted, or particularized to respond to new circumstances, whether through creative interpretation or extrapolation by analogy.¹² Thus, for example, norms developed to protect refugees have been transplanted to address the similar situation (but for the fact of crossing an international border) of some internally displaced persons, while women, children, and the disabled are subject to specialist treaty regimes while simultaneously coming within the protective framework of general 'human' rights treaties.¹³

⁹ *Ibid.*

¹⁰ Abrar, CR and Malik, *Towards National Refugee Law in South Asia*, Dhaka: University of Dhaka Press, 2003.

¹¹ Hurwitz, A, *The Collective Responsibility of States to Protect Refugees*, Oxford: OUP, 2009, Page.95.

¹² *Ibid.*

¹³ Kälin, W and Schrepfer, N, "Protection of People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches", UNHCR Report, February 2012.

Major challenges possessed by the climatic refugees and the lack of proper legal framework

The term ‘climate refugee’ is most uncertain in law and practice. While environmental migration is not a new phenomenon, the acceleration of climate change and its impact on habitation is a matter of substantial concern likely to increase the volume of cross-border movement over time. “The former UN representative on the Human Rights of Internally Displaced Persons, Professor Walter Kälin, undertook substantial work on the issue during his mandate at the UN ending in 2010 and subsequently for UNHCR. Together with Nina Schrepfer, he has produced the most comprehensive work on the subject to date.¹⁴ They start with the definition of climate change adopted by the UN Framework Convention on Climate”.¹⁵

Kälin and Schrepfer identify three kinds of impediments to forced return of people in such circumstances:¹⁶

(a) ***“legal impediments to return after the end of an environmental crisis under human rights law – whether in forcing return, the host state would expose the individual to a substantial risk of torture, inhuman or degrading treatment or punishment”***;

(b) ***“Factual impediments – there is no means of sending people to the country (e.g. no airports, roads etc)”***;

(c) ***“Humanitarian impediments where it is possible to return people and there is no human rights obstacle but people should not be sent back on compassionate and humanitarian grounds”***.

Countries without asylum laws:

Where there is no asylum law in a state, that state, by definition, cannot be safe for someone in need of international protection because the person will have no right in law to claim it. In such circumstances, it would thwart the objective of the Refugee Convention to seek to send someone in need of international protection to such country on the basis that he or she could obtain protection in such a country.¹⁷ The core issue here is one of effectiveness of rights and

¹⁴ M. Rafiqul Islam, and Md. Jahid Hossain Bhuiyan, An Introduction to International Refugee Law, Martinus Nijhoff Publishers, 2013, Page no.46.

¹⁵ McAdam, J, Climate Change, Forced Migration, and International Law, Oxford: OUP, 2012, Page no.39.

¹⁶ *Ibid.*

¹⁷ *Supra* note 22.

legal certainty.¹⁸ Where there is no legal provision for an individual right because the subject matter is not covered by law, then the individual cannot be guaranteed international protection as a matter of law . This is a different problem from the one where there is a law on asylum but there are serious problems with its implementation and well documented examples of unlawful refoulement by authorities or tolerated by state authorities and carried out by private actors.¹⁹ In the case of states with no asylum law, even the first and most basic precondition for international protection is not fulfilled, that is to say the existence of a law on asylum .²⁰

INTERNATIONAL LEGAL FRAMEWORK & STATUS OF REFUGEES

Without an official definition of what constitutes a ‘climate refugee’, and lacking some form of official recognition under international law, persons forced to migrate across international borders as a result of climate change may continue to be, as the International Organization for Migration has said , “almost invisible in the international system unable to prove political persecution in their country of origin they fall through the cracks of asylum law’. Although neither the UN Framework Convention on Climate Change (UNFCCC), nor its Kyoto Protocol, contains provisions concerning specific assistance or protection for persons directly affected by climate change, the Cancun Agreements of 2010 referred to migration and displacement for the first time, in particular identifying them as relevant adaptation strategies”. More recently, recommendations for a 'global guiding framework or instrument' to address climate-related forms of external displacement (other than those covered by the 1951 Convention) have been made at two important international events. Details have, however, yet to be worked out or agreed.²¹

The modern framework of international obligations in respect of persons in need of international protection dates from the end of WWII . The cornerstone of the international

¹⁸ Hurwitz, A, *The Collective Responsibility of States to Protect Refugees* , Oxford: OUP, 2009,Page no.81 .

¹⁹ Mole, N, and Meredith, C, *Asylum and the European Convention on Human Rights*, Human Rights Files Vol. 9, (Strasbourg: Council of Europe, 2010) .

²⁰ *Ibid.*

²¹ Meron, T, ‘Extraterritoriality of Human Rights Treaties’, (1995) 89 *American Journal of International Law* 78.

refugee protection system is the UN Convention relating to the status of Refugees 1951 and its 1967 Protocol (The Refugee Convention).²² The key elements of the Refugee Convention are:

- **First**, “that it defines who is a refugee as a person outside his or her country of nationality or habitual residence with a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion”.²³
- **Secondly**, “it requires all contracting states to respect the principle of non-refoulement: no person who claims to be a refugee must be returned to the borders of the state where he or she fears persecution. Thus all contracting states must consider and assess an application for refugee status and protection before any action is taken to expel a person to his or her country of origin or to any intermediate country where there is a substantial risk that he or she will suffer onwards expulsion to persecution”.
- **Thirdly**, “it sets out the rights and obligations of state parties in respect of the treatment of refugees. The Refugee Convention permits contracting states to apply an exclusion provision where the refugee has committed particularly serious (and circumscribed) crimes or is guilty of acts contrary to the principles of the UNHCR.²⁴”.

Relevance of the 1951 Refugee Convention

The term 'refugee' is a legal term of art. The legal definition of a 'refugee' and the rights and entitlements it entails are set out in the 1951 Refugee Convention relating to the Status of Refugees, read in conjunction with its 1967 Protocol. A 'refugee' is defined as someone who: owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, 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.²⁵

On the other hand, it provides a starting point to which States are willing to agree, and from which subsequent solutions and developments may stem.²⁶ Compellingly, and importantly,

²² *Ibid.*

²³ *Supra* note. 15.

²⁴ Zard, M, 'Exclusion, Terrorism and the Refugee Convention', Forced Migration Review, 2002, Page no.13

²⁵ Interagency Standing Committee, "Addressing the humanitarian challenges of climate change, regional and national perspectives," Interagency Standing Committee.2009.

²⁶ *Ibid.*

legal definitions bind States in a way that descriptive labels cannot. The key point here is that the law does not answer or resolve the fundamental problems of definitional debates—it simply provides a set of criteria from which certain rights and obligations may flow.²⁷ Higher courts across the world have explained that the Refugee Convention does not cover people in search of better living conditions or victims of natural disasters, even though 'both of these cases might seem deserving of international sanctuary'.²⁸ It has expressly recognized that this is so, 'even when the home state is unable to provide assistance'.²⁹ This is because the Refugee Convention has a more limited scope. "As the High Court of Australia has observed, the requirement of 'persecution' limits the Convention's 'humanitarian scope and does not afford universal protection to asylum seekers'.³⁰ No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention. People fleeing 'natural disasters and bad economic conditions' fall outside the Convention." The House of Lords in the United Kingdom has also observed that the Convention does not provide protection in all cases":³¹

*"The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well founded, does not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy."*³²

Since 2000, there have been a small number of cases in Australia and New Zealand where people from Tuvalu, Kiribati, and Tonga have sought to argue they should receive refugee protection from climate change impacts.³³ Nonetheless, there remain limited exceptions where exposure to climate impacts or environmental degradation might amount to persecution for a Convention reason.³⁴

²⁷ *Supra* note. 17.

²⁸ *Canada Attorney General v Ward* [1993] 2 SCR 689, 732

²⁹ *Ibid.*

³⁰ *Minister for Immigration v. Haji Ibrahim* (2000) 204 CLR 1, 48-9

³¹ *Supra* note 18.

³² *Horvath v. Secretary for the Home Department* [2001] 1 AC 489,499-500.

³³ *Supra* note. 17.

³⁴ Goodwin-Gill, GS, and McAdam, J, *The Refugee in International Law*, 3rd Ed., Oxford: OUP, 2007, Page No.47.

New Zealand's Court of Appeal ruled that “*while climate change is a major and growing concern for the international community, the phenomenon “and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention.” That 1951 treaty defines a refugee as a person who “has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion”.*³⁵

UNHCR AND THE NEED TO INCREASE ITS MANDATE TO ACCOMMODATE CLIMATIC REFUGEES

UNHCR has no mandate for so-called “climate displacement” as it falls beyond the scope of its Statute and the Refugee Convention. In 2011, UNHCR commemorated the sixtieth anniversary of the Refugee Convention and the fiftieth anniversary of the Stateless Persons Convention. The high commissioner made climate change a core theme of the year's celebrations, which culminated in two major ministerial meetings in December 2011.³⁶ In May 2011, UNHCR urged states to address this protection gap in their pledges to the Ministerial Meeting. The agency wrote a guidance note for the pledging process and encouraged states to identify situations that fell outside of the scope of the existing refugee protection instruments; develop the international protection regime in a way that provides appropriate and consistent responses to these situations; and/or develop a guiding framework for temporary or interim protection scenarios identifying the circumstances in which protection would be activated, the treatment that would be provided, and how it would come to an end. The pledging document did not explicitly mention climate change induced displacement as UNHCR was concerned that states would be less likely to support or make pledges on this agenda item if they did so.³⁷ However, UNHCR hoped that states would be favorable to an involvement of UNHCR in addressing protection gaps related to cross-border displacement as a result of natural disaster and climate change induced displacement.³⁸

³⁵ *Supra* note 32.

³⁶ *Ibid.*

³⁷ Biermann, Frank and Ingrid Boas (2010) “Preparing for a warmer world: towards a global governance system to protect climate refugees,” *Global Environmental Politics* 10(1):60–88.

³⁸ *Ibid.*

CONCLUSION & RECOMMENDATION

To address the issue of such large movements of refugees and migrants, on 19 September 2016 the UN General Assembly adopted the New York Declaration for Refugees and Migrants, in which it called for the development of two global compacts, one on refugees and one on 'other migrants', endorsed on 17 December 2018 in New York and on 10 December 2018 in Marrakech respectively . While the reasons for the internal or international displacement of individual migrants or diasporas vary, the UN Internal Displacement Monitoring Centre (IDMC) and the Norwegian Refugee Council identify natural disasters as the number one cause for this phenomenon. With rising sea levels, desertification and extreme weather events, climate action must be a part of any meaningful agreement on refugees or migrants. 'Climate refugees', migrants who move due to natural disasters and climate change, are now recognised in the 2018 global compact on safe, orderly and regular migration under its Objective 2 .

This compact aims to protect the rights of those displaced and help address the root economic, environmental and social drivers that are compelling people to leave their communities and countries . However, the current text lacks actionable commitments to control the numerous manmade forces underlying global mass migration. There is a clear protection gap with regard to 'climate refugees', who are neither clearly defined as a category nor covered by the 1951 Convention relating to the Status of Refugees (the 1951 Refugee Convention). The latter extends only to people who have a well-founded fear of being persecuted on grounds related to race, religion, nationality or membership of a particular social group or political opinion, and are unable or unwilling, owing to fear of persecution, to seek protection from their home countries . When the compacts were first proposed in 2016, there was some hope among migration researchers and advocates that they could provide a platform for new international policies on climate refugees , which had gained prominence since the 2015 Paris climate talks. But that hope was quashed in March, when Louise Arbour, the U.N. official leading the migration compact which, of the two agreements, was considered the more likely venue for strong climate language but the document would not grant "specific legal international protection to climate-induced migrants. Both compacts do make some reference to the climate. The latest draft of the migration compact calls on U.N. members to "better map, understand, predict and address migration movements, including those resulting from sudden and slow onset natural disasters, environmental degradation , the adverse effects of climate

change" and "cooperate to identify, develop and strengthen solutions, including planned relocation and visa options" for climate migrants .

Recommendations

- *Transforming development planning to factor in the entire cycle of climate migration (before, during and after migration);*
- *Investing in data and analysis to improve understanding of internal climate migration trends and trajectories at the country level ;*
- *The refugee compact stops much shorter, only mentioning climate as one of many factors that "may interact with the drivers of refugee movements." Ideally, the compacts should encourage countries to create new legal processes to document and manage climate migrants " " ;*
- *Time has come that , UNHCR should start formulating proper action plans to accommodate the climatic refugees otherwise , in near future it will going to be the biggest challenge that UNHCR plays , as it is said "a stich in time saves nine;"*
- *UNHCR also has a key role to play in developing policy coherence and mainstreaming the protection dimensions of climate change and disaster-related displacement in relevant policy processes, including the Habitat III New Urban Agenda, the SDGs and the Paris Agreement ;*
- *Acceptance of various regional agreements concluded within the remit of the global compact on migration and the international climate change framework would lead to the creation of binding customary international law " ;*
- *Development of national level bodies in the affected countries to identify the IDPs and plan the framework, which over the course of time can also help in developing international framework .*