

Climate displacement and the need for legal protection

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Abstract

This paper explores the discrepancy between the protection available to traditional refugees—as defined in art 1A(2) of the Refugee Convention¹—and other displaced people, including migrants and internally displaced people (IDPs), and the protection available to people displaced due to climate-related factors. This paper proposes changes to the current definitions as a way to secure protection rights for those displaced due to climate-related factors,² without having to change the current legal framework or create a new one. The paper begins by examining the current legal definitions, highlighting precedents for changing the legal definitions of refugees over the years. It then presents the rationale for the proposed changes, describing three common scenarios to demonstrate the plight of those displaced due to climate-related factors, before offering recommendations to secure their protection under both international and domestic law.

Introduction

The *Convention Relating to the Status of Refugees* ('Refugee Convention') was developed in 1951 to respond to the growing need to protect people at risk of persecution in their own country.³ It was developed as a reaction to the massive displacement that took place during and after the Second World War across Europe.⁴ While the causes of displacement have varied significantly over the years, governments still rely on the definition outlined in art 1A(2) of the Refugee Convention. However, this definition falls short of recognising the myriad reasons that force people to move within their own country, or to other countries, in search of protection. Presently, climate-related factors are among the main reasons for displacement. This paper argues the need for a legal framework to protect those who are displaced because of climate-related factors. It explores the current legal definitions and precedents for changing the definition without having to change the legal framework governing the protection of displaced people. Finally, the paper proposes changes to afford those who are displaced because of climate-related factors the protection they deserve.

Examination of existing legal definitions

Article 1A(2) of the Refugee Convention defines a refugee as a 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 and is unable or owing to such fear, is unwilling to avail himself of the protection of that country, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it.⁵

¹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1A(2) ('Refugee Convention 1951').

² 'Those displaced because of climate related factors' is used generically to cover those who would qualify as 'climate refugees', 'migrant refugees' and 'internally displaced people because of climate related factors', should a definition for these categories exist.

³ Refugee Convention 1951 (n 1) art 1A(2).

⁴ *Ibid.*

⁵ *Ibid.*

This definition limits protection rights to those persecuted because of one of the five predetermined reasons, which are race, religion, nationality, membership of a particular social group, or political opinion.⁶ This definition does not cover other reasons, such as civil war, natural disasters, or climate-related factors. The other main criteria to qualify as a refugee is based on being outside of one's own country due to lack of protection within the country.⁷ Again, this definition does not include many other categories of displaced people, such as those who are forced to migrate,⁸ or those who move within their own country to escape violence or climate-related factors.⁹

There is no special legal status or definition for internally displaced people (IDPs) in international law because IDPs remain inside their countries. The United Nations Commission on Human Rights' (UNHCR) *Guiding Principles on Internal Displacement* describes IDPs as:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-induced disasters, and who have not crossed an internally recognised state border.¹⁰

Similarly, there is no legal definition for migrants under international law. The United Nations (UN) International Organization for Migration (IOM) uses 'migrant' as 'an umbrella term' to describe:

a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.¹¹

In addition to the categories mentioned above, there are two additional categories of people that are protected under international law. These are returnees¹² and stateless people.¹³ One aspect all these categories have in common, irrespective of their legal status or the reasons behind their displacement, is that they are all protected under international human rights laws.¹⁴ Each of these categories is governed by a specific legal framework.¹⁵ For example, refugees are protected under the 1951 Refugee Convention¹⁶ and the *Protocol Relating to the Status of Refugees* (the '1967 Protocol'),¹⁷ while IDPs are protected as citizens,¹⁸ and migrants are treated under national migration law of the country where they are based.¹⁹ Despite the many existing definitions, none is broad enough in scope to encompass climate-related refugees. This is why this paper suggests that the definitions need to change, to adapt to new circumstances as they did in the past.

⁶ Ibid.

⁷ Ibid.

⁸ Forced migration is a general term used to describe the movement of refugees and internally displaced people (IDPs) who are fleeing from conflict, as well as those displaced because of natural, environmental, or chemical situations, nuclear disasters, or other factors such as famine. Those displaced under this category usually qualify for migration under a humanitarian stream which is governed by international law. This concept is explored further later in this paper.

⁹ United Nations Commission on Human Rights (UNHCR), *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2, 1998, 1[2] <<http://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>>.

¹⁰ Ibid.

¹¹ International Organization for Migration (IOM), *Glossary on Migration* (International Migration Law Series No. 34, 2019) 132 <https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf>.

¹² 'Returnees', *UNHCR.org* (Web Page) <<https://www.unhcr.org/returnees.html>>.

¹³ 'Statelessness', *UNHCR.org* (Web Page) <<https://www.unhcr.org/statelessness.html>>.

¹⁴ Carlos Pascual, 'Displacement and Human Rights: A Continuing Challenge', *Brookings* (Op Ed, 16 October 2008) <<https://www.brookings.edu/opinions/displacement-and-human-rights-a-continuing-challenge/>>.

¹⁵ The legal framework applicable to each category will be outlined in details later this paper.

¹⁶ Refugee Convention 1951 (n 1).

¹⁷ *Protocol Relating to the Status of Refugees*, signed 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx>> ('1967 Protocol').

¹⁸ *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (n 9).

¹⁹ For example, in Australia, the *Australian Migration Act 1958* (Cth) applies to those seeking settlement in Australia as migrants: <<https://www.legislation.gov.au/Details/C2018C00337>>.

Precedents in changing or expanding the legal definition of refugees

The first definition of refugees was developed by the League of Nations in 1921.²⁰ However, even before the First World War, there had been variations to the legal definition of refugees to accommodate changes to global needs.²¹ For example, in 1924, during the Ottoman Empire, the mandate of the League of Nations²² was expanded to include the Armenians, and in 1928 to include other categories of refugees such as the Assyrians, the Chaldeans, the Syrians, the Kurds, and some Turks.²³

Similarly, the development of the 1967 Protocol²⁴ is considered an amendment to the 1951 Refugee Convention, which was mainly developed to deal with the aftermath of displaced people from Europe post–Second World War.²⁵ The 1967 Protocol removed the geographical and time limits stated in the Refugee Convention and broadened its application to refugees other than those who came from Europe prior to 1951.²⁶ The term ‘refugee’ had been reserved mainly to ‘political refugees’ and those who met the five criteria for persecution, as previously defined.²⁷ However, in 1990, sexual persecution, which includes the systematic persecution of a gender or of sexual minority, was accepted by some countries as a legitimate category for asylum claims.²⁸

Unfortunately, climate change did not attract the same attention or sympathy as sexual minorities, despite the increased use of the terminology since 1990,²⁹ and despite associating the term ‘climate refugees’ with the conflict in Darfur in 2007.³⁰ Instead of paving the way for incorporation in the definition, the term ‘climate refugees’ attracted more criticism than acceptance.³¹ The main criticism was based on the fear that the use of the term ‘climate refugees’ might dilute the rights and protection available to ‘genuine’ refugees, as per the definition in the Geneva Convention.³² The second criticism argued that the displacement of a population usually depends on multiple interlinked factors, such as political and economic factors, and cannot simply be attributed to climate or environmental factors alone.³³ The third argument highlighted that the extent of displacement usually depends on the resilience of the population and the adaptation and mitigation factors available to them, mostly by their own governments, and therefore should not be a question of international law.³⁴

²⁰ Gilbert Jaeger, ‘On the History of the International Protection of Refugees’ (2001) (September 83(843)) *International Review of the Red Cross* 727 <https://www.icrc.org/ar/doc/assets/files/other/727_738_jaeger.pdf>.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ 1967 Protocol (n 17), 1.

²⁵ *Ibid.*

²⁶ *Ibid.*, 4

²⁷ Refugee Convention 1951 (n 1) art 1A(2).

²⁸ UNHCR, *UNHCR’s Views on Asylum Claims Based on Sexual Orientation and/or Gender Identity: Using International Law to Support Claims from LGBTI Individuals Seeking Protection in the US* (Note, UNHCR Asylum Lawyers Project, November 2016) 3 <<https://www.unhcr.org/5829e36f4.pdf>>.

²⁹ Norman Myers, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Report, The Climate Institute, Washington DC, June 1995) 14–21 <<http://climate.org/archive/PDF/Environmental%20Exodus.pdf>>.

³⁰ Heather Croshaw, ‘Darfur, Conflict, and Climate Change: Identifying Opportunities for Sustainable Peace’ (Masters Thesis, Duke University, 25 April 2008) 27–28 <https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/554/MP_hrc4_a_200805.pdf>.

³¹ Stephan Faris, ‘The Real Roots of Darfur’ [2007] (April) *Atlantic Monthly* 67 <<https://www.theatlantic.com/magazine/archive/2007/04/the-real-roots-of-darfur/305701/>>.

³² Betsy Hartmann, ‘Rethinking Climate Refugees and Climate Conflict: Rhetoric, Reality and the Politics of Policy Discourse’ (2010) 22(2) *Journal of International Development* 236.

³³ Olivia Dun and François Gemenne, ‘Defining “Environmental Migration”’ (2008) 31 *Forced Migration Review* 10 <<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/climatechange/dun-gemenne.pdf>>

³⁴ Kate O’Brien et al, *Disaster Risk Reduction, Climate Change Adaptation and Human Security* (GECHS Report 2008:3, 2008) 17–21 <https://www.preventionweb.net/files/7946_GECHSReport3081.pdf>

It is therefore not surprising that UNHCR—which is considered the custodian of the Refugee Convention and the 1967 Protocol³⁵—does not endorse the term ‘climate refugees’.³⁶ Instead, it refers to them as ‘persons displaced in the context of disasters and climate change’.³⁷ It also refers to the ‘nexus dynamics’ when ‘drought-related famine is linked to situations of armed conflict and violence’.³⁸ In doing so, this brings famine-related displacement—which can be the consequence of droughts caused by climate change—under the umbrella of the traditional definition of refugees, as a way to deal with climate-related displacement under the current framework.³⁹ This indirect acknowledgement of climate-related displacement highlights the need for acknowledging climate change in its own right as a cause of displacement, without having to link it to one of the traditional causes of displacement that warrants protection under current definitions.

Rationales for the proposed changes

Why, then, is it important to make a case to expand the definition of refugees to include climate refugees?⁴⁰ And why is it important to ensure there is adequate protection for climate refugees and other climate-related displaced people, similar to that granted to political and sexual refugees, migrants, and IDPs under international and domestic laws? The proposed changes can be attributed to many reasons, but this paper will limit the discussion to three main arguments. The first argument focuses on equity, shifting the focus from the cause for displacement to the impact of displacement on the affected population.⁴¹ The second argument focuses on justice and the responsibility of developed countries to protect the affected population in developing countries, given that there is a strong assumption that climate change is linked to human activities mainly undertaken by developed countries and hardly benefiting developing countries.⁴² The final argument focuses on humanitarianism and neighbourly compassion: the sense that ‘we are all in this together’ and we ought to help each other through this crisis.⁴³ Each of these rationales will be discussed in detail below.

Rationale 1—Equity, focusing on the impact of displacement on the affected population

Irrespective of the causes for displacement, the experience of ‘climate refugees’ is not dissimilar to that experienced by ‘traditional’ refugees fleeing from conflict or violence, or those who are displaced because of natural disasters.⁴⁴ Climate refugees often experience loss of housing because of flooding or mudslides, along with loss of water, electricity, food supply, livelihood, and employment.⁴⁵ Those who rely on agriculture, for example, might lose their livelihood because of climate-induced drought.⁴⁶ Also,

³⁵ UNHCR, *The Legal Framework for Protecting Refugees* (UNHCR, 2012) 6 <<https://www.unhcr.org/en-au/legal-protection.html>>.

³⁶ ‘Climate Change and Disaster Displacement’, *UNHCR.org* (Web Page) <<https://www.unhcr.org/climate-change-and-disasters.html>>.

³⁷ Sanjula Weerasinghe, *In Harm’s Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change* (UNHCR Report, Legal and Protection Policy Research Series PPLA/2018/05, December 2018) 30–35 <<https://www.unhcr.org/protection/globalconsult/5c1ba88d4/39-harms-way-international-protection-context-nexus-dynamics-conflict-violence.html>>.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ The emphasis is on changing the legal definition for ‘climate refugees’ because there is no legal definition for migrants or IDPs. That said, the argument expands the need for protection to all categories of displaced people because of climate related factors, not just ‘climate refugees’.

⁴¹ Walter Kälin, ‘Displacement Caused by the Effects of Climate Change: Who Will be Affected and What Are the Gaps in the Normative Framework for Their Protection?’ *Brookings* (Web Page, 10 October 2008) <<https://www.brookings.edu/research/displacement-caused-by-the-effects-of-climate-change-who-will-be-affected-and-what-are-the-gaps-in-the-normative-framework-for-their-protection/>>.

⁴² GermanWatch, ‘The Role of “Developing Countries” in the Climate Regime’ (GermanWatch Working Paper No. 16, March 1999) <<https://germanwatch.org/en/2881>>.

⁴³ UN Office for the Coordination of Humanitarian Affairs, ‘Climate Change and Humanitarian Action: Key Emerging Trends and Challenges’ (OCHA Occasional Policy Briefing Series No. 2, August 2009) 3–4 <<https://www.uncclearn.org/sites/default/files/inventory/ocha703.pdf>>.

⁴⁴ Kälin (n 41).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

they experience loss of social and cultural resources including cultural properties and community networks.⁴⁷

Other common factors include the inability of climate refugees to return to their home, or sometimes to their country, because it may have disappeared completely.⁴⁸ Those who are displaced because of climate-related factors usually migrate collectively in large numbers, similar to those fleeing from political violence and unrest.⁴⁹ Sometimes they migrate because climate-related factors lead to increased violence and unrest.⁵⁰ These common elements experienced by climate refugees and traditional refugees alike provide a justification to expand the current definition of refugees to include climate-related refugees. It is evident that irrespective of the cause for displacement, the impact is very similar on the affected population, particularly on the most vulnerable.

Rationale 2—Justice and responsibility, given the link between climate change and human activities

While there is no agreed definition for climate change or its causes, the *United Nations Framework Convention on Climate Change*⁵¹ focuses in its definition on changes that can be attributed directly or indirectly to human activities. Also, the Intergovernmental Panel on Climate Change (IPCC) defines climate change as ‘any change in climate over time, whether due to natural variability or as a result of human activities’,⁵² reinforcing that climate change is linked to human activities, particularly the emission of greenhouse gases.⁵³

For this reason, there is always an emphasis on mitigation and adaptation as a solution for climate-related displacement.⁵⁴ However, adaptation and mitigation alone will not always be sufficient to address the problem facing the affected population, due to the speed of change and limited resources of the affected country.⁵⁵ There is a case to be made for the responsibility of developed countries—the biggest contributors to greenhouse gas emissions—to protect developing countries and their affected populations against the impact of climate change by reducing their greenhouse gas emissions, among other factors.⁵⁶

Rationale 3—Humanitarianism and neighbourly compassion

Just as there is a humanitarian reason to support those displaced because of human-induced and natural disasters,⁵⁷ so there is a humanitarian reason to support those displaced because of climate-related factors.⁵⁸ The United Nations Framework Convention on Climate Change (UNFCCC) has a provision stating that developed countries will assist developing countries to address the adverse effects of climate change.⁵⁹ Thus far, this provision has been limited to financial assistance to introduce adaptive

⁴⁷ Ibid.

⁴⁸ Maxine Burkett, *In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier* (Asia Pacific Issues No. 98, January 2011) 4–5 <<https://www.eastwestcenter.org/system/tdf/private/api098.pdf?file=1&type=node&id=32472>>.

⁴⁹ Ibid 3.

⁵⁰ Ibid 2–4.

⁵¹ *United Nations Framework Convention on Climate Change*, signed 4–14 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) <<https://unfccc.int/resource/docs/convkp/conveng.pdf>> (‘UNFCCC’).

⁵² Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, ed Martin Parry, Osvaldo Cansiani, Jean Palutikof, Paul van der Linden and Clair Hanson (Cambridge University Press, 2007) 6 <https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf>.

⁵³ Ibid 8–15.

⁵⁴ Rafael Leal-Arcas, ‘Climate Migrants: Legal Options’ (2012) 37 *Procedia: Social and Behavioral Sciences* 87, 87–88.

⁵⁵ Jo-Ellen Parry and Anika Terton, ‘How are Vulnerable Countries Adapting to Climate Change?’ *IISD.org* (Web Page, 21 November 2016) <<https://www.iisd.org/articles/adapting-to-climate-change>>

⁵⁶ GermanWatch (n 42).

⁵⁷ UN Office for the Coordination of Humanitarian Affairs (n 43) 5–6.

⁵⁸ Ibid 7.

⁵⁹ UNFCCC (n 51) art 4[4].

measures. However, as a humanitarian action covers many aspects beyond financial assistance, responding to climate-related displacement requires a holistic approach to support the affected population. This holistic approach needs to include settlement options, particularly for small island nations at risk of disappearing.⁶⁰

Collectively, these arguments indicate the importance of expanding the definition for refugees to include those displaced due to climate-related factors. After all, there is agreement that no one factor alone is the cause of displacement and by the same token, there is a multitude of reasons why it is important to provide adequate protection for climate refugees, commensurate with that provided to 'political' and 'sexual' refugees. The next section will look at the three likely scenarios of climate change, and how to deal with those displaced according to each scenario.

Three likely scenarios of climate-related displacement

Climate-related displacement can manifest in many scenarios. However, this paper will only focus on three central scenarios⁶¹ that correlate to one or more of the arguments for change offered under the rationale section, and the recommendations offered later in the paper.

Scenario 1—Deforestation and land degradation

The first scenario to explore is that resulting from desertification and land degradation, which mainly affect sub-Saharan African nations and the West African Sahel.⁶² The destruction of arable lands and agriculture in underdeveloped countries—particularly countries with high birth rates such as Nigeria⁶³—is leading to conflict, which in turn is leading to displacement.⁶⁴ In the sub-Saharan and Sahel regions, while climate change is considered one of many factors impacting on displacement, the main reason is usually attributed to armed conflict and terrorism. This is what UNHCR refers to as the 'nexus dynamics'. Attributing the displacement to conflict allows UNHCR to support the population affected by the drought and climate change, as per its current mandate under international law.⁶⁵

Similar conditions of deforestation and land degradation are facing the populations of North America.⁶⁶ It is reported that these conditions have caused the displacement of close to 1 million people from Mexico, mainly internally but also across the border into the United States (US).⁶⁷ In this scenario, despite similarities in the conditions facing the populations in Africa and North America, only those in Africa usually fit the 'nexus dynamics' due to other factors such as armed conflict and terrorism. The 'nexus dynamics' grants those who are displaced from Africa protection under international law. Meanwhile, those in North and Central America do not fall into this category, even though they might be experiencing narcotrafficking and gang-related violence. Consequently, they do not benefit from the same level of protection granted to their African counterparts: those affected by this type of crime-related violence might have recourse to justice under national law but are not granted protection under

⁶⁰ Myers (n 29) 150–53.

⁶¹ Benoit Mayer, 'The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework' (2011) 22(3) *Colorado Journal of International Environmental Law and Policy* 357 <[https://www.colorado.edu/law/sites/default/files/Mayer%20\(Corrected\)-S.pdf](https://www.colorado.edu/law/sites/default/files/Mayer%20(Corrected)-S.pdf)>.

⁶² *Ibid* 364.

⁶³ Chioma Ezegwu, 'Climate Change in Nigeria: The Impacts and Adaptation Strategies' *SSRN* (Preprint, 20 December 2014) 5, 8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543940>.

⁶⁴ Johan Schaar, 'The Relationship Between Climate Change and Violent Conflict' (Green Tool Box/Peace and Security Tool Box Working Paper, Sida, 2018) 7–11 <<https://publikationer.sida.se/contentassets/c571800e01e448ac9dce2d097ba125a1/working-paper---climate-change-and-conflict.pdf>>.

⁶⁵ Weerasinghe (n 37) 29.

⁶⁶ Livia Wagner, Diana Siller and Rosalba Landa, *People and Forests at Risk: Organised Crime, Trafficking in Persons and Deforestation in Chihuahua, Mexico* (Report, Global Initiative Against Transnational Organised Crime, 2020) 13–22 <https://globalinitiative.net/wp-content/uploads/2020/04/Mexican_Illegal_Logging_22.04.v1.final_.pdf>.

⁶⁷ Adriana Abdenur, 'Climate Migration Hotspots in Mexico and Central America' (News Release, Igarapé Institute, 24 January 2019) <<https://reliefweb.int/report/world/climate-migration-hotspots-mexico-and-central-america>>.

international law. This scenario highlights great inequalities in the treatment of people affected by deforestation and land degradation, which leads to displacement. Limiting the protection to the ‘nexus dynamics’ fails to recognise that climate change—not just conflict—is the underlying factor for displacement in this scenario. As highlighted earlier, the fact that the impact on the affected population is similar—irrespective of cause of displacement—reinforces the need to recognise as climate refugees those displaced because of deforestation and land degradation, irrespective of whether the ‘nexus dynamics’ apply or not.

Scenario 2—Extreme weather conditions and rising sea levels in coastal areas

The second scenario is related to extreme weather conditions and rising sea levels in coastal areas.⁶⁸ The Mekong Delta in Vietnam, for example, is home to 18 million people, and half of the nation’s rice production, which represents 10 per cent of the world rice market, comes from this region.⁶⁹ The climatic changes in this region are affecting people’s ability to secure sufficient food, due to changes to the weather conditions and the risk of flooding. Consequently, this is affecting the population of the Mekong Delta’s resilience and ability to cope with the changes.⁷⁰ Similarly, Bangladesh is one of the most densely populated countries in the world and most of its territory is near the current sea level, which is rising, causing coastal cities to become uninhabitable.⁷¹ This is pushing the population of these coastal cities inland, seeking refuge in other parts of the country.⁷² Unfortunately, the country is unable to absorb its internally displaced population because of the high density and poor economic conditions in all parts of the country.⁷³

Some of the coastal cities in the US and the European Union (EU) are facing similar threats. Miami⁷⁴ and other areas of Florida⁷⁵ are experiencing coastal floods, rising sea levels, tsunamis, and other environmental disasters.⁷⁶ It is expected that, in less than a century, coastal US states will face the same fate as Tuvalu and Kiribati.⁷⁷ It is also predicted that Hamburg, Amsterdam, Lisbon, and other European cities will experience similar conditions by the end of the century.⁷⁸ The difference between the internally displaced population in countries such as Vietnam and Bangladesh and the populations in the US or any of the EU countries is the latter are likely to have the capacity and resources to absorb their own people, whereas the former do not. This pushes the population of countries such as Vietnam and Bangladesh to seek refuge outside of their own country as a matter of survival, not just as a matter of livelihood.⁷⁹

⁶⁸ Mayer (n 61) 364.

⁶⁹ CD Woodroffe et al, ‘Landscape Variability and the Response of Asian Mega-Deltas to Environmental Change’ (Archive, Paper 1-1-2006, 2006) 13–17 <<https://ro.uow.edu.au/cgi/viewcontent.cgi?article=7204&context=scipapers>>.

⁷⁰ Ibid 19–30.

⁷¹ Nour Mohammad, ‘Climate Change and Displacement in Bangladesh: Issues and Challenges’, in W Leal Filho (ed), *Handbook of Climate Change Adaptation* (Springer-Verlag Berlin Heidelberg, 2015) 177, 179–83 <https://link.springer.com/content/pdf/10.1007%2F978-3-642-38670-1_4.pdf>.

⁷² Ibid 183–85.

⁷³ Ibid 189–91.

⁷⁴ Robert Meyer, ‘Miami and the Costs of Climate Change’, *Risk Management and Decision Processes Centre, University of Pennsylvania* (Web Page, 2014) <<https://riskcenter.wharton.upenn.edu/miami-and-the-costs-of-climate-change/>>

⁷⁵ Megan Mayhew Bergman, ‘Florida is Drowning. Condos are Still Being Built. Can’t Humans see the Writing on the Wall?’, *The Guardian* (15 February 2019) <<https://www.theguardian.com/environment/2019/feb/15/florida-climate-change-coastal-real-estate-rising-seas>>.

⁷⁶ United States Environmental Protection Agency, *Climate Change Indicators in the United States* (Report, 2016) <<https://www.epa.gov/climate-indicators>>.

⁷⁷ Ibid.

⁷⁸ ‘Climate Change Impacts on European Cities’, *Climate ADAPT* (Web Page) <<https://climate-adapt.eea.europa.eu/knowledge/tools/urban-ast/step-0-2>>.

⁷⁹ Elizabeth Ferris, Michael M Cerna and Daniel Petz, *On the Front Line of Climate Change and Displacement: Learning from and with Pacific Island Countries* (Report, The Brookings Institution – London School of Economics Project on Internal Displacement, September 2011) 17–20 <https://www.brookings.edu/wp-content/uploads/2016/06/09_idp_climate_change.pdf>.

As mentioned above, in developed countries, when faced with extreme weather conditions, the population usually moves to another part of the country, and their government is usually in a position to support them as internally displaced citizens.⁸⁰ However, in some developing countries, where resources are limited and human rights records might be questionable, IDPs risk losing all rights available to them.⁸¹ Therefore, it is recommended that the international community intervene under a framework similar to that of their ‘responsibility to protect’ against mass crimes to protect internally displaced populations in these contexts.⁸²

Also, when these IDPs attempt to cross borders to seek refuge in ‘safer’ countries as a last resort, they usually fall victims of trafficking, forced labour, and other forms of modern-day slavery. This is in part due to lack of a legal definition for this category of displaced people, which makes them even more vulnerable than other categories. This scenario highlights the inequity between countries at the global level, and their varying abilities to cope with their own IDPs. It is apparent that greater protection is needed for those who are internally displaced in countries that have no capacity to cope with the consequences of climate change. They, therefore, ought to be protected the same way people who are fleeing from other human-induced disasters are.

Scenario 3—Submergence of low-lying islands

The third scenario is that of low-lying islands that are at risk of being submerged.⁸³ Research has shown that many of the Pacific Islands such as Tuvalu, Fiji, the Marshall Islands, and Kiribati are the most endangered and most likely to be impacted to the extent of disappearing in the next half century due to climate-intensified storms, floods, sea-level rise, and desertification.⁸⁴ These island nations risk becoming economically non-viable and uninhabited in the next generation due to fear of being submerged.⁸⁵ This, of course, will lead to massive displacement, of whole nations in some cases.⁸⁶ The lack of a legal definition for these refugees—combined with the absence of a political will to confront the issue—exacerbates the problem for climate-related displaced people who have no legal recourse to seek protection, despite the fact that they are at high risk of becoming stateless, or more accurately, ‘nationless’.⁸⁷ There is a moral argument to be made given that climate refugees, particularly from small island nations, contribute very little to global greenhouse gas emissions.⁸⁸ The same cannot be said about climate refugees from developed nations such as the US, Australia, and many European countries. There is also neighbourly obligation to be considered in this context. Just as Jordan, for example, absorbed many of the refugees from Palestine who were at risk of being stateless,⁸⁹ one can argue that Australia, New Zealand, and other countries have an obligation to welcome the populations of neighbouring island nations who are at risk of being submerged.

⁸⁰ *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (n 9).

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Burkett (n 48) 2–5.

⁸⁴ Ilan Kelman and Jennifer J West, ‘Climate Change and Small Island Developing States: A Critical Review’ (2009) 5(1) *Ecological and Environmental Anthropology* <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.611.8076&rep=rep1&type=pdf>>.

⁸⁵ *Ibid.*

⁸⁶ Ilan Kelman, ‘Difficult Decisions: Migration from Small Island Developing States under Climate Change’ (2015) 3(4) *Earth’s Future* 133 <<https://agupubs.onlinelibrary.wiley.com/doi/full/10.1002/2014EF000278>>.

⁸⁷ IOM, *Compendium of IOM’s Activities in Migration, Climate Change and the Environment* (Report, IOM, 2009) 66–69 <https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/compendium_climate_change.pdf>.

⁸⁸ Burkett (n 48) 6–7.

⁸⁹ Tianshe Chen, ‘Palestinian Refugees in Arab Countries and Their Impacts’ (2009) 3(3) *Journal of Middle Eastern and Islamic Studies (in Asia)* 42 <<https://www.tandfonline.com/doi/abs/10.1080/19370679.2009.12023136>>.

Is a new definition for climate-related displacement needed?

This section will draw a comparison between those displaced because of climate-related conditions, as highlighted in the abovementioned scenarios, and existing legal frameworks and definitions. As will become apparent, it is possible to provide protection to those displaced because of climate-related conditions without changing the existing legal frameworks that are available to refugees, IDPs, and migrants. However, in order to do so, there is a need to recognise climate change as a cause for displacement, independent from all other causes, and to change the legal definition to reflect this recognition.

Refugees

As mentioned above, the current legal framework does not recognise climate refugees, or those displaced because of climate-related factors. In addition, with the exception of ‘refugees’, there is no legal definition for ‘migrants’ or ‘internally displaced people’ in international law. Hence, technically speaking, refugees and other categories such as returnees and stateless people are the only categories that benefit from the legal framework for protection, as outlined in the 1951 Refugee Convention and its 1967 Protocol.⁹⁰ This definition does not need to be changed in order to include those who are displaced because of climate-related factors. All that is needed to extend the protection to this group is to recognise they are members of ‘a particular social group’.⁹¹ In this case, the group can be defined as ‘people who are displaced because of climate-related factors, and who fear being persecuted (by nature or climate change) if they return to their country of origin’. All it takes is a recognition of climate change as a genuine cause of fear for one’s life.

Internally displaced people (IDPs)

Even though there are *Guiding Principles on Internal Displacement*, which were developed in 1998,⁹² the protection of the internally displaced is governed by domestic law.⁹³ In addition, the internally displaced are protected under international human rights law, which guarantees the right to life, food, water, and shelter, among others basic rights.⁹⁴

The abovementioned guiding principles apply to:

persons or groups of persons who have been forced to or obliged to flee or to leave their homes or place of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights, or natural or human-made disasters, or who have not crossed an internationally recognised State border.⁹⁵

This definition should also cover people ‘whose place of origin has become uninhabitable’. The above definition can easily be applied to climate-related displacement, as severe climate conditions can and often do lead to natural disasters. Efforts have been made in the last decades to ensure the protection of IDPs, especially when their governments failed to do so due to conflict, war, poor human rights records, or other factors.⁹⁶

⁹⁰ Refugee Convention 1951 (n 1) art 1A(2).

⁹¹ Refugee Convention 1951 (n 1) art 1A(2).

⁹² *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (n 9).

⁹³ Leal-Arcas (n 54) 91.

⁹⁴ *Ibid.*

⁹⁵ *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (n 9).

⁹⁶ *Ibid.*

Migrants

National migration laws usually permit people to settle under one of the following three categories: economic and skilled migration, family reunion, or humanitarian.⁹⁷ In general, national migration laws do not have provisions to accommodate climate-related migrations. However, there are some exceptions. For example, New Zealand migration policy has a ‘Pacific Access Category’, which allows residents of threatened islands such as Kiribati and Tuvalu to settle in New Zealand.⁹⁸ Similarly, Finland and Sweden have climate-related provisions in their national migration laws.⁹⁹ While other countries might not have specific provisions for climate-related migrants, they have temporary protection provisions that could be used for people displaced due to environmental and climate-related factors, should they choose to.¹⁰⁰ Migration under the humanitarian category is usually covered by international law. Australia and New Zealand, despite their generous policies in relation to the settlement of migrants from neighbouring nations, have already rejected claims of refugee status for a citizen of Kiribati for climate-related reasons, based on the international definition of a refugee.¹⁰¹ They did that as part of a wider policy that aims at curbing migration and reducing the intake of refugees and asylum seekers. This highlights the controversies surrounding refugees and migrants’ policies at the domestic level, and the struggle governments face when they try to reconcile their domestic and international obligations.

Recommendations to protect climate-related displaced people under the law

Despite the limitations of the definitions mentioned above, it is possible to widen their use to provide protection to climate-related displaced people under existing legal frameworks. In the last two decades, the number of natural disasters worldwide has doubled, with 90 per cent of these events considered climate-related.¹⁰² IOM estimates that by 2050 there will be between 200 million to 1 billion displaced people due to climate change.¹⁰³ Also, there is increased realisation that the world is not in an adequate position to address the situation in an effective manner.¹⁰⁴

Nexus dynamics (conflict and climate change)

Scholars have developed a myriad of recommendations to address climate-related displacement. There is already acknowledgement of the existing link between climate-related displacement, peace and security, and ‘nexus dynamics’.¹⁰⁵ There is no doubt that forced displacement because of climate change will lead to increased violence in countries that are already suffering from poor governance and weak

⁹⁷ Jane McAdam and Ben Saul, ‘An Insecure Climate for Human Security? Climate-Induced Displacement and International Law’, in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens* (Cambridge University Press, 2010) 357, 357.

⁹⁸ Jane McAdam, ‘Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer’ (2011) 23(1) *International Journal of Refugee Law* 2, 20–21.

⁹⁹ Emily Hush, ‘Developing a European Model of International Protection for Environmentally – Displaced Persons: Lessons from Finland and Sweden’ (2017) *Columbia Journal of European Law*.

¹⁰⁰ Erol Yayboke and Janine Staguhn, *A New Framework for US Leadership on Climate Migration* (Centre for Strategic and International Studies Brief, 23 October 2020).

¹⁰¹ *New Zealand: ‘Climate Change Refugee’ Case Overview* (Legal Report, The Law Library of Congress, July 2015) <<https://www.loc.gov/law/help/climate-change-refugee/new-zealand.php>>.

¹⁰² Asian Development Bank, ‘Global Increase in Climate-Related Disasters’ (Topical Paper/Independent Evaluation/Working Paper, Asian Development Bank, November 2015) 3 <<https://reliefweb.int/sites/reliefweb.int/files/resources/global-increase-climate-related-disasters.pdf>>.

¹⁰³ Frank Laczko and Christine Aghazarm (eds), *Migration, Environment and Climate Change: Assessing the Evidence* (IOM, 2009) 5–6 <https://publications.iom.int/system/files/pdf/migration_and_environment.pdf>.

¹⁰⁴ *Ibid* 23–24.

¹⁰⁵ Stellina Jolly and Nafees Ahmad, ‘Climate Refugees under International Climate Law and International Refugee Law: Towards Addressing the Protection Gaps and Exploring the Legal Alternatives for Climate Justice’ [2018] (January) *International Humanitarian and Refugee Law* 216, 222–27 <https://www.researchgate.net/publication/322568935_Climate_Refugees_under_International_Climate_Law_and_International_Refugee_Law_Towards_Addressing_the_Protection_Gaps_and_Exploring_the_Legal_Alternatives_for_Climate_Justice>.

law and order structures.¹⁰⁶ This is likely to have a ripple effect on festering terrorist activities and can lead to the destabilisation of countries, or even regions.¹⁰⁷ Therefore, it is in the best interests of developed countries and global powers to intervene and help find solutions, including structured resettlement, to avoid long-term negative consequences of climate-related displacement.¹⁰⁸

The below will focus on two main recommendations: *in situ* adaptation, which would be effective to deal with the displaced population in-country, and *ex situ* nationhood, which offers a solution for the population of small island nations at risk of disappearing.

In situ adaptation

Nationally focused solutions depend heavily on in situ adaptation. This falls broadly under global development and climate resilience programs.¹⁰⁹ The Copenhagen Agreement only mentions ‘adaptation’ as ‘the solution’ for climate change, without considering resettlement options, disregarding the limitation of adaptation and the limited capacity of national solutions.¹¹⁰ In situ adaptation might be an effective solution to mitigate climate-related factors, as they impact IDPs in developed countries who have the means to adapt.¹¹¹ However, it falls short of recognising that adaptation might be too expensive, too dangerous, or have limited impact when trying to address the situation in developing countries.¹¹²

Adaptation also disregards the fact that the actions of developed countries disproportionately and negatively affect the populations of the least-developed countries, or that developed countries are disproportionately contributing to the emission of greenhouse gases.¹¹³ Some countries, such as Canada and Russia, might even benefit from the global warming.¹¹⁴ Unfortunately, many countries are reluctant to take responsibility for their own actions, as evidenced by the US withdrawal from the Paris Agreement in November 2019.¹¹⁵ Also, adaptation disregards the fact that climate change is a human-induced disaster. Therefore, unless global mitigating factors are identified and agreed to, it is possible to draw parallels between climate change and mass crimes such as ‘genocide, war crimes, ethnic cleansing and crimes against humanity’, which invoke a responsibility to protect from the international community.¹¹⁶ This approach acknowledges that climate change affects entire populations, such as the populations of small island nations.

Ex situ nationhood

Ex situ nationhood allows the continued existence of a sovereign country after its physical disappearance.¹¹⁷ This recommendation is particularly relevant to small island nations at risk of totally disappearing. Ex situ nationhood addresses the challenge of continuing to exist as a sovereign nation without having a physical mass of land, which is one of the main criteria for sovereignty.¹¹⁸ One of the main challenges of implementing this recommendation is the need to establish a governance structure

¹⁰⁶ Ibid 220–22.

¹⁰⁷ Mayer (n 61) 370.

¹⁰⁸ Ibid 361.

¹⁰⁹ Ibid 370–71.

¹¹⁰ ‘A Copenhagen Climate Agreement’, *Centre for Climate and Energy Solutions* (Web Page, November 2009) <<https://www.c2es.org/document/a-copenhagen-climate-agreement/>>.

¹¹¹ Mayer (n 61) 370.

¹¹² Ibid.

¹¹³ Keith Wade and Marcus Jennings, ‘Climate Change and the Global Economy: Regional Effects’, *Schroders* (Web Page, 26 July 2015) <<https://www.schroders.com/en/us/insights/economic-views/climate-change-and-the-global-economy-regional-effects/>>.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc A/63/677 (12 January 2009) 8[11(a)] <https://www.un.org/ruleoflaw/files/SG_reportA_63_677_en.pdf>.

¹¹⁷ Maxine Burkett, ‘The Nation Ex-Situ: On Climate Change, Deterritorialised Nationhood and the Post-Climate Era’ (2011) 2(3) *Climate Law* 345, 353–55 <<https://www.law.hawaii.edu/files/content/coliver/345-374%20Burkett.pdf>>.

¹¹⁸ Ibid 355–60.

which will have authority over diffused people.¹¹⁹ One might argue that the UN or the State of Israel provide successful legal structures of how *ex situ* nationhood could be adopted and modified to accommodate populations of submerged nations.¹²⁰

Proposed expansion of legal definitions as a solution for the climate-displaced dilemma

In general, law strives for consistency, universality, and predictability. However, given the multitude of reasons behind modern displacement, there is a need for international and domestic laws related to displacement to be flexible, responsive, and customised.¹²¹ Given there have been variations to the definition of refugees since the beginning of the last century, as outlined earlier in this paper, it would be possible to expand the current definitions to include climate change as a legitimate factor for displacement. This would be the simplest and most straightforward solution to offer protection for climate-related displaced people under the current legal framework.¹²² For example, those who are experiencing the ‘nexus dynamics’ as described by the UNHCR—which links ‘drought-related famine to situations of armed conflict and violence’—could be labelled as ‘climate refugees’ and treated as ‘refugees’.¹²³ Similarly, the populations of underdeveloped countries experiencing similar conditions—who are unable to seek protection in their own country due to low levels of resilience, poor human rights records, and limiting economic factors—should be granted protection as ‘climate refugees’, or at least protection under the ‘nexus dynamics’.¹²⁴ This is also likely to reduce their vulnerability and the likelihood of them being exploited as they cross borders—sometimes using dangerous means and putting their lives at risk—to seek refuge in other countries.

By contrast, the population of developed countries that are experiencing rising sea levels in coastal areas and extreme weather conditions such as floods, bushfires, and hurricanes, and those who seek refuge within their own country, should be considered ‘climate-related internally displaced people’.¹²⁵ In these circumstances, the recovery efforts and the humanitarian assistance are usually provided by their own government.¹²⁶ Furthermore, the *in situ* adaptation recommendations above could be deployed to support the protection efforts. The same could apply to populations of countries with high level of resilience and ability to cope with climate change.

Finally, the populations of island nations at risk of disappearing over the next half century due to rising sea levels¹²⁷ might be labelled ‘climate migrants’¹²⁸ if they migrate as individuals or as family units. However, should the whole population be forced to leave as their islands become gradually or totally submerged, they should be treated as ‘climate refugees’ and be given priority to settle in neighbouring countries. If the law does not change to include this category of displacement, neighbouring countries

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Mayer (n 61) 379.

¹²² Ibid 388–98.

¹²³ ‘Climate Change and Disaster Displacement’ (n 36).

¹²⁴ Caitlin Werrell and Francesco Femia, ‘Climate Change, the Erosion of State Sovereignty, and World Order’ [2016] (Spring/Summer, 22(2) *Brown Journal of World Affairs* 221, 226–30 <https://climateandsecurity.files.wordpress.com/2012/04/werrell_femia_final-article_climate-change_state-sovereignty_world-order.pdf>.

¹²⁵ *Climate Change and Internal Displacement* (Report, The Brookings Institution – London School of Economics Project on Internal Displacement, October 2014) <<https://www.brookings.edu/wp-content/uploads/2016/06/Climate-Change-and-Internal-Displacement-October-10-2014.pdf>>.

¹²⁶ Angela Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’ (2008) 30 *Law & Policy* 502 <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.1467-9930.2008.00290.x>>.

¹²⁷ Kelman (n 86).

¹²⁸ According to the IOM, climate migrants are those who, ‘for compelling reasons of sudden progressive changes in the environment that adversity affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad’. While this definition opens the door to call for the introduction of environmental persecution as a new category under the definition for refugees, the challenge it presents is that it demands that climate become the only reason for displacement. However, as it has been demonstrated, climate is seldom the only reason for displacement (IOM, <<https://www.iom.int/key-migration-terms>>).

should exercise neighbourly compassion towards the populations of these island nations.¹²⁹ Furthermore, the ex situ nationhood recommendation mentioned above could be considered to find a more permanent solution.

Conclusion

There are three obvious scenarios that can apply to climate-related displacement. The first is resulting from desertification and land degradation, which is also linked to famine and violence in developing countries, and to internal displacement in developed countries. The second results from the rise of sea levels in coastal areas and extreme weather conditions, which leads to massive internal displacement in developed countries and cross-border displacement linked to trafficking and exploitation in poorer and overpopulated countries. The third and most pressing scenario is that of low-lying islands at risk of being submerged and completely disappearing. This scenario is linked to discussions about climate-related migration, remote sovereign protection, neighbourly compassion, and the mitigating factors available to these nation islands to combat climate-related displacement.

The rationale for protecting climate-related displaced people is multifaceted. There is an argument to be made about focusing on the impact of the affected population, rather than the reasons for displacement. A second argument can be posed about climate justice, and developing countries taking responsibility for their contribution to climate change, which is subsequently contributing to climate-related displacement in and from developing countries. A third argument can be presented about humanitarianism and neighbourly compassion, which is embedded in a belief in our common humanity and common fate.

Recommendations presented in this paper to ensure the protection of climate-related displaced people can be divided into two broad categories: in situ adaptation based on existing commitments and frameworks, and the creation of a new category of ex situ nationhood to accommodate populations of submerged island nations. This latter recommendation requires a robust framework to protect the identity and legal status of the displaced population. In the meantime, there is a need to consider expanding current definitions to include climate-related factors as a cause of protection. The legal definition of refugees should be expanded to include ‘climate refugees’, and so should the definitions of migrants and IDPs.

There is an urgent need to recognise climate change as a primary contributor to displacement, and to develop relevant legal protection frameworks to protect the most vulnerable and most affected. While the impact of climate-related factors on the displaced population will vary significantly based on the ability of each country to mitigate or adapt, it is evident that no one will be spared from it.

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¹²⁹ Tiffany Duong, ‘When Islands Drown: The Plight of “Climate Change Refugees” and Recourse to International Human Rights Law’ (2010) 31(4) *Journal of International Law* 1239, 1244–46
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