Climate Change and Refugees: A Challenge to Legal Frameworks

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Abstract: The impacts of climate change are now widely recognised as a driver of forced migration. Much debate persists, however, as to whether existing legal frameworks can provide effective protection to those affected, especially those who are forced to cross borders to escape the danger. These arguments are closely linked to ones surrounding the terminology used to describe the phenomenon. This chapter contextualises these debates within a selection of key recent legal and policy developments, and attempts to unpick some of these questions and suggest ways forward, based on critical engagement with certain underlying premises of refugee, human rights, and environmental law.

Keywords: Climate change; refugees; law; human rights; nomenclature.

Introduction

The increasing severity of weather events linked to climate change have become a feature of news reports from around the world. Wildfires in the Western USA and Australia, drought in Central America and the Middle East, hurricanes in the Caribbean, mudslides in South America, desertification in the Sahel region, flooding in Europe and South Asia, 'sinking' of Pacific Islands, and many other phenomena are making life increasingly difficult to sustain and increasing numbers of people to seek a life elsewhere. (IPCC 2023, 50-51) In most cases, people are able to move within their countries of origin. (Cissé et al. 2022, 1080) However, particularly in countries in the Global South, often most sharply affected by the impacts of climate change, and with less resources to mitigate or adapt to them, people are being pushed towards seeking protection in other countries. (Kumari Rigaud et al. 2018, xix; United Nations 2023)

And yet, in the face of this challenge, international, regional and national laws remain largely inadequate. A framework of refugee law that was developed in the 20th Century, focussed as it is on persecution, appears to have little or nothing to offer people fleeing the effects of climate change in the 21st century. It is not the case that the issue has only suddenly appeared on the agenda. As far back as 1985 the United Nations Development Programme produced a booklet discussing 'environmental refugees', which inter alia raised the prospect of the kind of impacts now being felt as a result of climate change (El-Hinnawi 1985).In the very first report produced by the Intergovernmental Panel on Climate Change (IPCC) in 1990, it warned that 'even a

modest rise in global sea levels could produce tens of millions of [environmental refugees]'.(Tegart, Sheldon and Griffiths 1990, 5-10) In the mid-1990s the climate scientist Norman Myers made some of the first calculations, estimating that around 200 million people could be displaced as a result of climate change by 2050. (Myers 2002) This was followed in 2006 when the UK government commissioned the Stern Review on The Economics of Climate Change, which endorsed Myers' estimates. (Stern 2006)[1] Since 2010, decisions of the Conference of the Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC) have regularly highlighted displacement as a key concern to be addressed.[2] The Global Compact for Safe, Orderly and Regular Migration (GCM), agreed by all 193 states of the UN in 2016, identifies climate change as one of the key drivers of migration today.[3] Despite all these developments, and more than 30 years since the problem was first addressed, there has been barely any progress in developing pathways to migration and protection for climate refugees at the global level.

Indeed, just the question of nomenclature – whether we should speak of climate refugees, climate migrants, climate-induced displacement or other suggested terms – has taken up much energy and space.[4] It is not a side issue, as questions of terminology are intimately connected to questions of appropriate legal mechanisms and to whom they should apply. In the context of climate change the issue is further complicated as a result of problems in identifying causation and responsibility. Still, it is perhaps a symptom of a generally sclerotic process.

In this chapter, we aim to highlight the various challenges posed by climate change in relation to forced migration, to assess what existing legal frameworks offer and the significant gaps that remain, and to suggest various possibilities for establishing protection in the context of one of the great threats of our time.

● The Challenge

For much of the past few decades identifying the problem of people being displaced by climate change has been discussed in largely speculative terms; will we face the prospect of 50 million, or 200 million, or a billion climate refugees in the 21st Century? However, in recent years, just

[1] The reader should note that Myers' predictions are subject to an ongoing criticism for being overly inflated (see wider discussion in Cord Jakobeit and Chris Methmann, ''Climate Refugees' as Dawning Catastrophe? A Critique of the Dominant Quest for Numbers' in Jurgen Scheffran et al (eds) *Climate Change, Human Security and Violent Conflict* (Springer 2012). At the same time, no other predictions were ever agreed on as a 'consensus number', and given the elusive nature of climate migration it is questionable whether such predictions could be made.

[2] The first mention was made in 'The Cancun Adaptation Framework' 1.CP/16 para. 14(f). A significant step forward was taken with the 'Paris Agreement' in 2015 and the setting up of the Task Force on Migration Decision 1/CP.21, and the more recently the COP 27 Sharm el-Sheikh Implementation Plan (decision CMA.4 (2022)) has noted 'with grave concern' the damage associated with climate-induced mobility and displacement (see para 44).

[3] United Nations, *The Global Compact for Safe, Orderly and Regular Migration*, 13 July 2018 (A/RES/73/195), paras. 18 and 21.

[4] Various contributions to this debate include: Jane McAdam, *Climate Change, Forced Migration and International Law* (OUP, 2012); Francois Gemenne, 'One good reason to speak of "climate refugees"', (2015) 49 *Forced Migration Review* 70; Avidan Kent and Simon Behrman, *Facilitating the Resettlement and Rights of Climate Refugees* (Routledge, 2018); Roger Zetter, 'Conceptualising forced migration: Praxis, scholarship and empirics' in Alice Bloch and Georgia Dona (eds.) *Forced Migration* (Routledge, 2018).

as climate scientists increasingly report that we are either very near or at a point of seismic changes to global weather patterns, so too we are witnessing actual large-scale displacement as a result of those changes. In 2015 the landmark report of the Nansen Initiative stated that an average of 22.5 million people were being displaced annually due to weather and climate disasters. (Nansen Initiative 2015, 6) By 2020 the Internal Displacement Monitoring Centre was reporting a record 30.7 million people had been internally displaced that year by weather and climate related disasters, representing an increase of more than 50% over five years. (IDMC 2022) Although the numbers dropped to 23.7 million in 2021, the overall trend is upwards, and is consistently higher than those internally displaced by conflict and violence. What is more, while most of these people are concentrated within the Horn of Africa, along with South and South-East Asia, there have been well-reported significant increases in wildfires in North America and Australia, hurricanes in the Caribbean and floods in Europe, and mudslides in South America, leading to millions of people losing their homes.[5] Some authors are also making the link between climatic changes in Central America and the increased migration from countries in this region to the USA. (E.g. Bermeo and Leblang 2021; Felipe Perez 2022) More recently, the Pacific island nations of Tuvalu and the Marshall Islands have launched the Rising Nations Initiative; 'a clarion call for a global settlement that guarantees their nation states a permanent existence beyond the inhabitable lifetime of their atoll homes.'(Global Centre for Climate Mobility 2022) In short, there is now almost no major region of the globe where the effects of climate change are not regularly causing people to be displaced.

Addressing climate-induced migration and providing policy and legal responses will not be a straightforward task. To begin with, it is often argued that climate change is only one of a number of causes for these displacements, and these kinds of arguments about causation are one aspect that has often complicated discussions around what we mean when we speak of 'climate refugees' or 'disaster displacement' or a whole host of other terms. There is also the fear amongst some commentators of appearing catastrophist and provoking militarist or otherwise defensive approaches towards an 'invasion' of climate refugees. (Global Centre for Climate Mobility 2022) Defining who is, exactly, a 'climate migrant/refugee/displaced person' is another challenge (for example, should we consider fisherman abandoning their homes due to rising sea levels and moving 500 metres inland[6] as refugees/migrants?). One could add to this line of difficulties the extremely diverse nature of climate-led populations' mobility, which requires targeted legal solutions for specific communities, rather than a one-size-fits-all answer.

As discussed in this chapter, the current international legal framework offers only limited, and partial solutions. And it is to an analysis of that framework that we now turn.

- **Existing Legal Frameworks and Their Gaps**

[5] See an overview of the phenomenon in Dina Ionesco et al. *the Atlas of Environmental Migration* (Routledge, 2017). The Internal Displacement Monitoring Centre (IDMC) also creates annual detailed breakdowns of the impacts of climate events, along with other drivers, on internal displacement, in their Global Report on Internal Displacement (GRID). The most recent of these (2023) at the time of writing, can be found at https://www.internal-displacement.org/global-report/grid2023/ .

[6] See for example case study reported by Arne Harms 'Under the climate radar: Disaster and displacement in the Bengal Delta' in Ali Nobil Ahmad (ed) *Climate Justice and Migration* (Heinrich Boll Foundation, 2020), 150.

The case of the Teitiota family is a prime example of the legal gaps in protection for those displaced across borders as a result of the impacts of climate change. Ioane Teitiota, a national of Kiribati, emigrated to New Zealand in the 2000s on a work visa.[7] His decision to leave Kiribati was at least partly due to the economic and social pressures experienced in a poor, small and low-lying island state, where land is rapidly being lost to the sea, and increased flooding is compromising the supply of safe drinking water along with damage to homes and crops. Some years later, having worked and started a family in New Zealand, his visa expired and he faced deportation back to Kiribati. Teitiota then launched a claim for refugee status.

The claim failed at all stages, essentially on two grounds.[8] First, that the impacts of climate change do not in themselves fall within the meaning of 'persecution', a central element in any claim for refugee status under the 1951 Refugee Convention.[9] Second, while conditions in Kiribati may be bad, they did not constitute a threat of serious harm to Teitiota and his family.

A week after the Supreme Court denied his final appeal, he was deported back to Kiribati. Teitiota then made a fresh claim to the Human Rights Committee (HRC), alleging a breach of his right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR). In a detailed judgement , the majority of the HRC rejected that claim too.[10] Here the issue was not related to a claim for refugee status per se, but rather under the principle of non-refoulement i.e. that by returning him to Kiribati, New Zealand has placed him and his family under threat to their right to life.[11] The rationale behind the HRC majority can be summed up on the basis that conditions were not yet serious enough to meet the bar of a violation of the right to life, and that although conditions may deteriorate further to such an extent that such a violation would occur, this could be another 10-15 years hence. This was in spite of uncontested evidence of increased incidence of blood diseases, particularly amongst children including those in the Teitiota family, caused by water supply contaminated by sea water ingress. Indeed, the strongly worded dissents from two members of the HRC revolved around this evidence.[12]

The legal gap in protection for climate refugees can best be understood by distinguishing between those who are or will be internally displaced, and those who will be forced to leave their state altogether. With the former group, there are a plethora of human rights treaties and soft laws, along with domestic legal remedies that can apply.[13] In other words, most states are

[7] The most detailed account of the Teitiota family's experiences that led up to this landmark legal case can be found in Kenneth R. Weiss, 'The Making of a Climate Refugee', *Foreign Policy,* 28 January 2015, available at https://foreignpolicy.com/2015/01/28/the-making-of-a-climate-refugee-kiribati-tarawa-teitiota/

[8] This evidence is presented in its most detailed form in AF (Kiribati) [2013] NZIPT 800413 (25 June 2013) paras 5-33, and the decision was affirmed at the New Zealand Supreme Court in *Teitiota v Chief Executive of the Ministry of Business, Innovation, and Employment* [2015] NZSC 107.

[9] Article 1A, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

[10] *Ioane Teitiota v. New Zealand (advance unedited version)*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020

[11] Specifically in relation to Article 6 (right to life), *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

[12] See Annexes 1 and 2 to the decision.

[13] Beyond key human rights treaties, the UN Guiding Principles on Internal Displacement (UNGP) has played a key role in guiding states' response to internal displacement, despite their non-binding nature. See Walter

bound in international law to ensure basic rights to life, access to education, healthcare etc. within their sovereign sphere.[14] In the case of those who cross borders the potential for access to meaningful protection is far narrower, as the age-old problem asserts itself: in what circumstances do states bear a duty towards non-citizens, both in terms of entry and rights during their stay in the country of asylum. With the absence of any specific migration arrangement[15] the only basis in international law in which people have a right of entry into another country is international refugee law, which provides that those who can demonstrate proof of persecution, or in some cases other forms of serious harm, may be granted asylum. Likewise, the only bar on states being able to deport foreign nationals from their territory is the principle of non-refoulement. The Teitiota case suggests that the first avenue is effectively closed to climate refugees, and the second avenue provides, at best, a very narrow window of opportunity.

Points of Debate

- *Relevant field of law*

For a number of years most scholarship has resolutely rejected refugee law as a relevant field for addressing protection for those displaced due to the effects of climate change. (E.g. McAdam 2012; Mayer 2018) Leading authorities have argued that the 1951 Refugee Convention, the lynchpin of international refugee law, was not designed for such people, nor does it allow for the kind of interpretative flexibility to develop it in such a direction. (E.g. McAdam 2012; Kälin and Schrepfer 2012) However, there have been some attempts to challenge this view. A persuasive argument in this respect, is presented by Matthew Scott. (Scott 2020) His argument is that by recalibrating how we conceptualise the phrase 'being persecuted' in the refugee definition in Article 1A of the Refugee Convention, at least some people forced to move as a result of climate change could be granted asylum. In essence, Scott argues that persecution should be understood as a predicament rather than an event. In other words, the question to be asked is whether, in the context of a natural disaster (whether caused by climate change or not), the person concerned is rendered vulnerable by a pre-existing systemic or structural form of discrimination according to one of the specific grounds in the Convention (race, religion, political opinion, nationality, or social group). The emphasis here is on the passive term 'being persecuted', as formulated in the Convention, and on structural forms of discrimination that make certain groups particularly vulnerable to disasters. Scott makes a convincing case based on a forensic examination of case law in several jurisdictions, that such an interpretation of the Convention definition is possible. However, as Scott acknowledges, this approach would mean that:

Kalin et al. (eds) *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges* (Brookings/ASIL, 2010), introduction.

[14] See, for example, the French case of 'Sheel' reported on by Amali Tower & Ryan Plano, 'French Court Recognizes Country's First Environmentally-Impacted Migrant', *Climate Refugees* January 15, 2021, available at https://www.climate-refugees.org/spotlight/2021/1/15/french-court . At the international level, see the case of *Daniel Billy & others v. Australia (Torres Islanders Case)* CCPR/C/135/D/3624/2019, UN Human Rights Committee (HRC), 22 September 2022.

[15] See for example the IGAD Protocol on Free Movement of Persons in the IGAD Region (2020) (which explicitly recognises the importance of accessible migration routes as a response to climate change and environmental-related events in the preamble), as well as the Compacts of Free Association agreements signed between the USA and the pacific nations of Palau, Micronesia and the Marshall Islands.

> '[T]he personal scope of being persecuted is narrowed from any class of person who faces a sustained or systematic denial of human rights demonstrative of a failure of state protection to the narrower class of persons facing such a predicament as a consequence of her civil or political status.' (Scott 2020, 156)

Indeed, this narrow perspective was at the heart of the *Teitiota* case discussed above.

Although the remit of the New Zealand courts and the HRC were somewhat different, one of the defining features of all the decisions was that there was no clear evidence that the Teitiotas were suffering any serious harm distinct from the rest of the population. In short, as bad as conditions were, there was no evidence it was discriminatory on the grounds of race, religion, political opinion or other similar civil or political grounds. This will be an insurmountable hurdle for arguably most climate refugees, as the impacts of climate change will affect entire communities, and in the case of low-lying countries such as Kiribati, entire states.

The kind of structural forms of discrimination that Scott discusses that might indeed usefully map onto cases such as Teitiota is that of economic deprivation. One of the grounds of persecution specified in the 1951 Refugee Convention is that of 'social group',[16] a somewhat ambiguous term that has been subject to significant academic and judicial interpretation. It has, for example, been used to encompass discrimination on the basis of gender and sexuality, although not on occupation.[17] The parameters of 'social group' seem to rest on aspects of one's identity that are inherent.[18] Yet, it has often been suggested that what the drafters had in mind at the time were certain socio-economic groups being targeted in communist states, such as landowners or other representatives of bourgeois society.(Goodwin-Gill and McAdam 2007, 74-75) Arguably, on this basis the category could be extended to poorer social classes today, who will be most vulnerable to serious harms caused by the impacts of climate change, and would indeed cover those in a similar situation to Teitiota. It would, however, take a brave court to extend the law in such a radical direction.

Two and a half years after *Teitiota* the HRC revisited the issue of harms resulting from climate change impacts in the *Torres Islanders Case*.[19] Unlike *Teitiota,* this case did not concern people already displaced, although the claims did prominently include a fear of displacement in the near future[20] and the requested remedies addressed adaptations and mitigation measures that will ultimately prevent such displacement and 'ensure the continued safe existence of the communities on their islands'.[21] However, like *Teitiota*, the question of the right to life was revisited. Again, the HRC found no violation on this basis because the alleged harms were too far in the future; as in *Teitiota* the timeframe of 10-15 years was generally accepted. As they had done in *Teitiota,* HRC members, Duncan Laki Muhumuza and Vasilka Sancin, this time

[16] Article 1(A)(2) of the Refugee Convention (n 17).
[17] E.g. *Shah and Islam v. Secretary of State for the Home Department* [1999] 2 AC 629, UK House of Lords; *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, UK Supreme Court; *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985
[18] E.g. *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canadian Supreme Court.
[19] *Billy & Others* (n 22).
[20] Forced displacement was the first 'threat' described in the communication to the HRC, see part VI(1) of the Communication under the Optional Protocol to the International Covenant on Civil and Political Rights (13 May 2019), online: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2019/20190513_CCPRC135D36242019_complaint.pdf.
[21] Ibid, para 214.

joined by Arif Bulkan and Marcia V. J. Kran gave dissenting opinions, arguing again that the HRC was adopting too narrow a test.[22] And yet, the HRC, by a clear majority, appears unwilling to relax its rather strict application of the right to life when it comes to the kind of slow onset problems characteristic of climate change impacts.

However, there is a further problem with framing the phenomenon of climate refugees within either refugee law or human rights law. In both cases the emphasis is on individual claims. There is no basis in the main international refugee treaties for group refugee status. Indeed, the insistence on processing each claim this way is at least partly responsible for the system to cope with large movements of refugees, as was made tragically clear in the case of Syrian refugees attempting to seek asylum in Europe in 2015. The effects of sudden disasters such as wildfires, mudslides, hurricanes, and flooding – all typical and increasingly frequent examples of the effects of climate change – create mass displacement by their very nature. As these types of phenomena become more frequent and more devastating, it is arguable that refugee law will fail to accommodate the people displaced in much the same way as happened in 2015.

The scope of human rights law is more flexible. The presumption is that a claim for a violation of the right to life must be of a personal nature i.e. must be over and above that faced by the local population as a whole.[23] Yet it is acknowledged that there may be situations of such severe and general threat to life that this restriction may be waived.[24] Nonetheless, it is unclear from the jurisprudence what the bar for such a finding would be, except using vague terms such as the 'most extreme cases'.[25] Indeed, we are not aware of any case in any human rights tribunal where there has been a finding that such a bar has been reached. Perhaps it will indeed be a case involving severe impacts of climate change on a community that will lead to such a judgement ? A careful reading of the Teitiota case implies that in the future, this could be the case. The Committee has accepted that 'without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant,[…]',[26] and accepted that without 'intervening acts', sea level rise will render Kiribati inhabitable.[27] For the time being, however, in both the recent cases in the HRC discussed above, the risk was still seen as not imminent or severe enough. It is likely then that the question is no longer one of 'if', but one of 'when' the impact of climate change will be acknowledged as 'the most extreme' cases.

In short, human rights law, and its nexus to refugee law via the customary principle of non-refoulement is, at best, only able to support climate refugees if they are still within the borders of their country of origin, or if they have already reached a country of potential asylum. This is evident in the two recent cases at the HRC. With Teitiota, his legal claim only arose because he had already gained access to New Zealand on a work visa. In *Billy,* the claimants are already citizens and residents of the state (Australia) against whom they were making their claim. For people forced to leave their countries of origin to seek protection in another state there is no legal avenue for them to claim access to a putative host state. The central problem as to how someone facing imminent or longer-term catastrophic effects on their lives and livelihoods as

[22] See Annex I and III of the decision, *Billy & Others* (n 22).
[23] HRC General Comment no.36, para. 30.
[24] ECtHR, *NA v UK* (2008), para. 115.
[25] HRC General Comment no.36, para. 30.
[26] *Ioane Teitiota v. New Zealand* (n 18), para 9.11.
[27] Ibid., para 9.12.

a result of climate change impacts, and who needs to cross an international border to escape that, can safely and legally make such a move is still far from being answered. Whilst the principles outlined in the HRC decision on *Teitiota* could be applied on the facts of a future case successfully, this would still only protect those, like Teitiota, who had *already* entered a country of asylum i.e. through, as in his case, a work visa, or similar.

There has been some movement around the key question of providing safe and legal pathways for climate refugees to enter a putative country of asylum. At the global level, the GCM calls on states to:

> 'Cooperate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin owing to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise, including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible'.[28]

Now, this is merely soft law, and is phrased in quite general ways that shy away from concrete commitments to grant access to people fleeing these phenomena. Nonetheless, it does recognise that new pathways are needed and that even permanent resettlement may be a necessary solution. The reference to 'slow-onset' disasters is important too, in acknowledging that people will move ahead of a cataclysmic disaster, and are deserving of help in those circumstances. The GCM has also led to important institutional developments, notably the creation of the Migration Multi-Partner Trust Fund and the International Migration Review Forum, whose aim is to facilitate further discussion on the global level and put meat on the bones of the kind of principles quoted above.

An approach that has been developed in the Pacific region is the creation of labour migrant schemes explicitly formulated in the context of climate change. In 2017 an 'experimental humanitarian visa' was announced by New Zealand. The idea was to grant up to 100 of these each year to people from Pacific Small Island Developing States (SIDS) that are particularly vulnerable to short and medium threats of rising sea levels and the consequent disappearance of much their territory over the coming years and decades. The scheme was dropped, apparently due to opposition to the SIDS themselves, who wanted greater focus on industrialised states such as New Zealand on reducing carbon emissions, supporting mitigation and adaptation efforts to enable people to remain in their home countries. (Dempster and Ober 2020)

However, much more recently the idea has been revived with the Australia-Tuvalu Falepili Union, agreed in November 2023. In this case, the treaty commits Australia to both help fund adaptation efforts in Tuvalu as well as offering a limited number of visas to allow Tuvaluans to enter Australia for either work, study or to join family members.[29] While this treaty promises a pathway to migration with dignity, there are potentially some serious problems with it, both conceptual and practical. Conceptually, admittance is still controlled by Australia in terms of numbers (the cap is to be reviewed and set by Australia at various intervals) and, possibly, on

[28] UN General Assembly, *Global Compact for Safe, Orderly and Regular Migration* (19 December 2018), A/RES/73/195, objective 5, paragraph 21(h).

[29] The text of the treaty can be found at: www.dfat.gov.au/sites/default/files/australia-tuvalu-falepili-union-treaty.pdf

the basis of its needs i.e. to fill labour requirements or student places. The Treaty creates migration pathways for citizens of Tuvalu to 'live, study and work in Australia'. Whether the term 'live' is entirely independent from the terms 'study and work' is key. If it is (as reasonably proposed by McAdam[30]), it could mean an open migration pathway to any climate refugee, whether she intends to work, study, or merely to live in Australia. However, if 'live' is seen only as deriving from (and depending on) economic activities, namely 'study and work', it could have a problematic result. It could mean that the old, the infirm, and those without the necessary skills will be left behind, which will further impoverish the community, and reinforces the 'trapped' nature of the most disadvantaged and vulnerable people in countries affected by climate change.[31]

Another unique, and novel agreement that aims to facilitate international migration (also) in the context of climate change is the 2020 IGAD Protocol of Free Movement of Persons.[32] This Protocol regulates movement between eight Eastern African countries. According to the IGAD Protocol preamble, the member states are:

> 'RECOGNIZING the positive contribution that free movement of persons can have in mitigating the impact of conflict, poverty, unemployment and underemployment, drought and disasters, as well as the adverse effects of climate change and environmental degradation as important drivers of displacement and migration in the IGAD region;'

In light of this recognition, Article 5 of the Protocol grants a visa-free right of entry and stay to citizens of all member states within this block. This right is limited to 90 days, but extensions may be permitted according to the domestic regulations of host states. Similarly to the Australia-Tuvalu treaty (or at least to our understanding of it), also here the right to cross a border is not depending on economic activity or any other pre-condition.

The focus on finding legal solutions, amongst both academics and practitioners, has largely been centred on the fields of refugee and human rights law. However, these frameworks are fundamentally based on the acute mid-20th Century phenomena of state persecution against individuals or specific groups based on their ethnic, religious or political identities. Perhaps the repeated, and so-far mostly failed attempts to apply these frameworks to the far more complex and multifaceted nature of the climate change/forced migration nexus is going too far in fitting square pegs into round holes.

Much less discussed has been what international environmental law may offer. Here, despite long standing academic calls for the UNFCCC to address the wider issue of climate-induced migration,[33] reaction has been limited, yet not insignificant. The UNFCCC was the first major international institution to acknowledge that the climate-induced migration phenomenon exists,

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[30] Jane McAdam, "Australia's offer of climate migration to Tuvalu residents is groundbreaking – and could be a lifeline across the Pacific' The Conversation 11 November 2023 < https://theconversation.com/australias-offer-of-climate-migration-to-tuvalu-residents-is-groundbreaking-and-could-be-a-lifeline-across-the-pacific-217514>.

[31] The issue of 'trapped populations', especially in the context of the climate change, has been much discussed in recent years e.g. Black and Collyer 2014; Nawrotzki and DeWaard 2018.

[32] IGAD, *Protocol of Free Movement of Persons in the IGAD Region* (26 February 2020).

[33] Most prominently Biermann, Frank, and Ingrid Boas. "Protecting climate refugees: the case for a global protocol." Environment: Science and Policy for Sustainable Development 50, no. 6 (2008): 8-17..

and that it requires a global solution.[34] The UNFCCC has also demonstrated leadership in this area, notably by establishing a cross-institutional Task Force together with organisations such as the UNHCR, IOM, UNDP, Platform on Disaster Displacement (PDD) and the ILO. Despite its bureaucratic nature, the Task Force's wide membership reflects an important holistic understanding of the nature of this phenomenon and the demand for cross-sectoral expertise in addressing it. Furthermore, the Task Force's members (mostly public servants) have gained valuable expertise and experience in this particular area; an element that was missing in most major institutions.

Finally, the 2022 UNFCCC COP 27's Sharm el-Sheikh Implementation Plan has linked climate migration with the issue of loss and damage, creating a potential bridge between this phenomenon and much needed global finance. This links was re-enforced with the operationalisation of the UNFCCC Loss and Damage Fund, which was agreed on at the 2023 COP 28 UAE Consensus. This COP Decision[35] instructs *inter alia* that:

> 'The Fund will provide finance for addressing a variety of challenges associated with the adverse effects of climate change, such as climate-related emergencies, sea level rise, displacement, relocation, migration, insufficient climate information and data, and the need for climate-resilient reconstruction and recovery.'

While it is unlikely that efforts within the UNFCCC will change affected individuals' right to cross borders or even the protection of their most basic human rights, this mechanism is probably the most promising venue for ensuring that significant resources are directed towards relevant affected stakeholders.

- *Nomenclature*

The question of what term to use in describing people displaced in the context of climate change has generated a great deal of controversy. Indeed, that phrase in the previous sentence, adopted to be as neutral as possible – 'people displaced in the context of climate change' – is indicative of the kind of vagueness that sets in when trying to avoid these kinds of debates. Indeed, variations on this rather clumsy formulation are typically used by leading IGOs such as the UNHCR,[36] IOM[37] and the Platform on Disaster Displacement,[38] so as to avoid using what are seen as more loaded terms such as 'refugee', or even to be more direct in labelling climate change as *a* or *the* major cause of displacement. The rather vague and passive nature of the

[34] Paragraph 14(f) of the Cancun Adaptation Framework (n 5).
[35] UNFCCC COP 28, *Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4* (Advanced unedited version, 2023), Annex I, Article 6.
[36] UNHCR officials often rely on the term 'disaster displacement', see for example https://www.unhcr.org/uk/climate-change-and-disasters.html. Elsewhere, in a chapter authored by officials from the UNHCR, they used the term 'people displaced in the context of disasters and climate change', see Madeline Garlick et al, 'Enhancing legal protection for people displaced in the context of disasters and climate change: challenges and opportunities' in Simon Behrman and Avidan Kent (Eds) '*Climate Refugees': Beyond the Legal Impasse?* (Routledge 2018).
[37] The IOM seems to prefer the term climate and/or environmental migration, see for example on their website https://www.iom.int/migration-environment-and-climate-change, and their Environmental Migration Portal https://environmentalmigration.iom.int/.
[38] As their official name suggests, the Platform on Disaster Displacement prefers the terms 'disaster displacement' or 'environmental displacement'.

phraseology is also evidenced in the attachment to the word 'displaced', which is itself a passive way of describing the situation as opposed to identifying people as migrating or fleeing or even just moving away from the danger. In short, there appears to be a great deal of nervousness in official circles about using any term that may denote either agency on the part of people seeking protection or that may engage specific legal rights under refugee and human rights law. This may be largely due to a fear of spooking states, who are these days always hyper-vigilant about the prospect of acknowledging any increase in the scope of rights of refugees and migrants.

A particularly striking example of this concern to demarcate the boundary between rights-bearing and non-rights bearing subjects can be found in the two Global Compacts adopted by the UN General Assembly in 2018. While the one on migrants has plentiful references to the impacts of climate change as a driver, the one on refugees is practically silent. There is just one mention of climate change in the Global Compact on Refugees (GCR), but only in the context of specifying that it is not in itself a cause of refugee movements.[39] Even a brief mention of people displaced due to natural disasters and other environmental hazards is coyly referred to as examples of 'external forced displacement', a term with no legal basis whatsoever, so as to distinguish from refugees and internally displaced persons, both categories that relate to specific legal regimes of protection.[40] By contrast, the sister Global Compact for Safe, Orderly and Regular Migration (GCM) is far more extensive in recognising climate change as a driver for forced movement.[41] A whole section is devoted there to addressing the topic of natural disasters, climate change and environmental degradation.[42]

The arguments against using the term 'refugee' have several foundations. First, the language of refugee law, specifically the definition in Article 1A of the 1951 Convention, as discussed above, appears to exclude those fleeing the effects of climate change from its remit. Although, as we have seen there have been attempts by some authors to argue that by recalibrating our understanding of the term 'being persecuted' it might be possible to convince judges otherwise.[43]

Second, it is argued that 'refugee' is too specific to capture the myriad ways in which climate change impacts manifest themselves. While sudden disasters, such as hurricanes and wildfires, may create the kind of displacement we associate with refugee situations i.e. people moving as a result of immediate and life-threatening dangers, in a great many cases we are dealing with slow-onset disasters, such as erosion of coastlines and decreased crop yields and fresh water supplies. In those situations people will typically move before conditions become so acute as to present an immediate threat to life. It is argued that those types of movements, involving a greater degree of choice and planning, and often couched in terms of seeking a better life elsewhere, are more akin to migrants than refugees.

Third, and related to the previous argument, the relationship between climate change, its myriad impacts, and patterns of migration is so complex that attempting to reduce this

[39] UN General Assembly, *Global Compact on Refugees* (17 December 2018), A/RES/73/151, at para. 8
[40] Ibid. at para. 12
[41] UN General Assembly, *Global Compact for Safe, Orderly and Regular Migration* (19 December 2018), A/RES/73/195
[42] Ibid. para. 18 (h)-(l)
[43] See our discussion of Matthew Scott's views above..

phenomenon to a direct causal relationship expressed in the term 'climate refugee' is misleading. That is why more expansive and looser terms such as migration and displacement are preferred, along with a less precise causal nexus such as 'in the context of'.

Our view is quite firmly that 'climate refugee' does convey an accurate description of the phenomenon, and moreover, it carries with it important signifiers about the rights of people to move away from the dangers caused by climate change, and the responsibilities of states to assist them.[44]

We do not dispute that existing refugee law is a poor vehicle for encompassing people displaced as a result of climate change impacts. For the reasons given above, we do not believe that its form and content is equipped to meet the needs of climate refugees. But we also do not believe that existing refugee law instruments, particularly those formulated over 70 years ago, should be the last word on who is or is not a refugee. The 1951 Convention was conceived of as a temporary measure to deal with the specific context of people who had fled the mid-20th Century dictatorships and wars in Europe. Today the vast majority of people forcibly displaced from their homes fall outside of those types of conditions. To state that only people who fit the legal definition of a refugee are refugees, because that definition is itself universal, is a circular argument. And indeed, there are already other, non-Eurocentric, definitions of a refugee that have very different parameters, such as those found in the Organization of African Unity Refugee Convention of 1969 and the Cartagena Declaration of 1984.[45] There is also the specific category of Palestine Refugees within the mandate of the UN Relief and Works Administration.[46] But beyond legal terms, there is a common understanding of the term 'refugee' that accords *inter alia* with its French etymology and in many dictionary definitions, that it simply describes people fleeing some form of danger,[47] which is certainly applicable to the situation facing those forced to leave their homes in the face of climate change impacts, such as hurricanes, droughts, wildfires, and rising sea levels.

While it is true that some distinction can be made between people who leave their homes by choice and those who are forced, these exist on a continuum. It is easy to point to clear cut extremes on both sides – those who move because of a sense of adventure or desire for a different culture, weather, food etc. as opposed to those fleeing an imminent threat to life, who would otherwise wish to stay in their country of origin. However, in most cases there are

[44] For a detailed set of arguments see, Avidan Kent & Simon Behrman, *Facilitating the Resettlement and Rights of Climate Refugees* (Routledge 2018), Chapter 2.

[45] Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45; *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984. Both instruments, while adopting the definition in Article 1A of the 1951 Refugee Convention, add a further category of persons covering events *inter alia* 'seriously disturbing public order'. It has been argued by some that these legal instrument may be extended to climate refugees, or indeed in some informal contexts have already been. See, for example, Michael Addaney, Ademola Oluborode Jegede, and Miriam Z. Matinda, 'The protection of climate refugees under the African human rights system: proposing a value-driven approach' (2019) 3 *African Human Rights Yearbook* 242, 249-250.

[46] UNRWA's definition of Palestinian refugees is 'persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict.'.

[47] Refugee derives from the verb *se réfugier,* defined in Larousse as 'se retirer en un lieu ou auprès de quelqu'un pour échapper à un danger ou à une chose désagréable'. The Oxford English Dictionary includes within its definition of 'refugee', those fleeing 'natural disasters', or as synonymous with a 'displaced person'.

elements of both choice and forced circumstances.[48] A migrant wishing to study or work elsewhere may be seeking a new experience for its own sake as well as wishing to escape relatively poor economic conditions at home. Such was the combination of factors that prompted Teitiota's original decision to leave Kiribati . Another person may have experienced persecution for political reasons over a period of time, but decides at a certain point that an opportunity to study abroad presents a good moment to leave. Just because there is some element of choice involved in the decision to leave does not render invalid the forced element. Indeed, it is accepted within the realm of refugee law that the persecution alleged is not the only or even the main reason for their seeking asylum; so long as they can prove that there is indeed a well-founded fear of persecution in their home country they will qualify for protection.(UNHCR 2019, para. 53) Why should those fleeing the impacts of climate change be held to a higher bar than political refugees?

It is certainly true to say that the impacts of climate change manifest themselves often in myriad and complex ways. Nonetheless, climate scientists are able to map hotspots where new environmental phenomena, or pre-existing ones that have become greatly exacerbated, are largely a result of the cumulative increase in global carbon emissions. (E.g. IPCC 2023, Section 3) Of course, not all communities and individuals affected will either need or want to move at any given time, but we can and should also take into account various socio-economic factors that will map on to those climate hotspots in order to identify those who should be able to access safe and legal means to move to safety. So, while it may not always be completely straightforward to identify climate change as *the* cause of people seeking to move elsewhere, it is certainly possible to identify communities and individuals most at risk and who should be given a means to move away from the danger at a time and in a manner of their choosing.

- *Rights and responsibilities*

The point just made about people being given a choice about when to move away from climate hotspots and where to move to, raises important issues about the kind of rights climate refugees should have, and who should bear the responsibilities for ensuring those rights are honoured. As already mentioned above, refugee law and, certainly in its classical forms, human rights law are fundamentally based on individual claims. This has two negative effects. The first is that it places the burden on the person displaced to establish proof of their claim for protection, which can be particularly onerous for someone who has had to flee quickly and who will have a lack of resources at their disposal. The second problem, particularly pertinent in the context of climate change, is that its impacts will be felt by whole communities of people. Thus the legal bar, discussed above in relation to the Teitiota case, that claimants must demonstrate harm over and above others in their communities would appear to present an almost insuperable test. For these reasons, our view is that protection for climate refugees must be offered on a group, rather than an individual basis. There is plenty of historical and current precedent for such an approach. The first decades of refugee law from its inception in the early 1920s until the late 1940s defined the bearers of rights on such a basis, as Armenians, White Russians, persecuted groups under the Nazis etc.[49] The EU developed the Temporary Protection Directive in 2001

[48] For a discussion of the inherent tensions involved in these two aspects, see Simon Behrman, 'Accidents, agency and asylum: Constructing the refugee subject (2014) 25 *Law and Critique* 249.

[49] For example, the various arrangements for White Russians, Armenians and others created under the auspices of the League of Nations in the 1920s, and the Provisional Arrangement Concerning the Status of Refugees Coming From Germany (1936).

which is designed specifically to grant asylum to large numbers of refugees on a group basis.[50] As recently as 2022 this Directive was implemented for the first time on a broad basis to include all people residing in Ukraine at the time of the Russian invasion of February that year.[51] The UNRWA, in existence since 1950, has always extended support and assistance to Palestine refugees on a group basis. As such, there is nothing unusual or unprecedented about adopting a similar approach to groups of people fleeing the effects of climate change.

Equally, attempting to assess responsibility for the plight of climate refugees on an individual basis is also likely doomed to fail. In 2007 the Inter-American Commission on Human Rights summarily rejected a petition from Inuit communities in the circumpolar region of Canada against the US and Canada, alleging that their carbon emissions were responsible for the damage to their habitats.[52] The Commission's decision appeared to be based on the fact that it was impossible as a matter of fact to establish that the carbon emissions from those two states had any causative impact on their environment, over and above that of other states. (Harrington 2007, 526) Climate change is by its very nature a globally systemic problem, resulting from a combination of historical and contemporary carbon emissions. As such, it can be distinguished from other man-made environmental problems such as pollution of rivers, in that it is impossible to trace responsibility for a specific impact of climate change to a particular carbon emitter or even a select group of them. Thus, in our view, an effective legal framework must mirror collective rights owed to climate refugees with collective responsibilities on the part of states.

- **Conclusion**

The nexus of climate change and forced migration is complex, both in terms of causation and in defining rights bearers. It thus presents challenges to pre-existing legal frameworks of protection that date from long before climate change was considered or even well understood as a phenomenon. Insofar as the major human rights and refugee treaties remain living documents, in which jurisprudence has developed principles in response to new challenges, we may have reached their limits when considering the needs of climate refugees. Further litigation and academic proposals on this score are both welcome and necessary to test these limits. However, for some of the reasons we have outlined above and elsewhere, (Kent and Behrman 2018, Chapter 3) we believe that we need to move beyond them. To begin with, harnessing principles of environmental law, along with the kind of practical mechanisms that prevail within that sphere, especially within the UNFCCC, may offer, for now, some of the best opportunities for developing global solutions. Collective, rather than individual, rights should be complemented by a greater recognition of collective responsibilities by states that have been the most responsible for carbon emissions. Indeed, the wealth these states have built up, fuelled precisely by those carbon emissions, enable them to bear the responsibilities of facilitating

[50] Council of the European Union, *Council Directive 20 01/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, 7 August 2001, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC

[51] Article 2, Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

[52] Letter of official rejection can be found at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf

cross-border movement and to support communities in exile, certainly more effectively than leaving this almost solely to states in the Global South, as is mostly the case today.[53] Whichever direction is taken, though, the inescapable fact is that the speed at which climate change is developing, and the impacts it is having on vulnerable communities, causing increasing numbers to move to safety elsewhere, is not being matched by the kind of urgency required in policy and legal circles. In the 30 years between the refugee crises that followed World War I and World War II, many attempts were made to develop effective legal responses. A combination of historical conditions and the commitment shown by key states and jurists, led in a relatively short time – 1945-1951 – to a much faster process and a resulting comprehensive framework of legal protections, that for all its faults laid the cornerstone of refugee protection for the next 70 years. We are now more than 30 years on from the first IPCC report, and the founding conference of the UNFCCC. Climate change is now solidly at the centre of global political and legal discourse. What is needed is a collective will to turn these conditions into practical solutions for what will likely be the dominant group of refugees in the 21st Century.

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[53] For a detailed argument on this basis, see Carmen G. Gonzalez, 'Climate justice and climate displacement: evaluating the emerging legal and policy responses' (2018) 36 *Wisconsin International Law Journal* 366.

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