



## **Reframing Persecutions: A Socio-Legal Analysis of Asylum Claims Based on Climate Change-Induced Conditions**

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### **Abstract**

Despite international recognition that forced migration is not only a result of conflict or violence, but also a consequence of natural disasters, international protective frameworks such as the 1951 Refugee Convention do not recognise the category of climate refugees. Subsequently, there has been an increased debate going on whether to classify the people who are displaced by the impacts of climate change as refugees. Legally, the suggestion has been rejected by international institutions stating that climate is not one of the five enumerated grounds mentioned in the 1951 Refugee Convention. Subsequently, intentional persecution cannot be established in these cases as the effects of climate change are not arbitrary and discriminative in nature. This paper aims to analyse the socio-legal narratives of those persons who seek asylum based on events they attribute to climate change. The intention is to enquire how discussions around persecution are framed within the asylum tribunals and probe if the definition can be expanded to include climate-affected persons. This needs to be analysed because forced displacement due to climate-induced conditions is an immediate humanitarian crisis affecting the world. Yet lack of legal acknowledgment has left the affected population in a state of uncertainty.

**Keywords:** Asylum Litigation, Climate Refugees, Natural Disasters, Refugee Convention 1951, The International Organisation for Migration

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## 1. Introduction

Long-term shifts in temperatures and weather patterns have forcibly displaced more than 376 million people around the world since 2008 and around 32.6 million persons in 2022.<sup>1</sup> The Institute for Economics and Peace has predicted that around 1.2 billion persons will face displacement by 2050 due to similar reasons.<sup>2</sup> The impact of climate change-induced conditions on human migration is also recognised by international organisations such as United Nations,<sup>3</sup> the World Health Organization<sup>4</sup> and the World Bank.<sup>5</sup> Despite this international recognition that forced migration is not only a result of conflict or violence but also a consequence of natural disasters, international protective frameworks such as the 1951 Refugee Convention do not recognise the category of climate refugees. Consequently, this term which is frequently used in the media and publications, holds no value in law. This is because United Nations High Commissioner for Refugees (UNHCR) defines a refugee as ‘someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.’<sup>6</sup> This definition does not include a large number of people who are displaced by floods, famines, rising sea levels, or barren lands, and such consequences arising out of climate change.

The term refugee under international law requires establishing a well-founded fear of persecution.<sup>7</sup> The International Criminal

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<sup>1</sup> Internal Displacement Monitoring Center, 2021 Global Report on Internal Displacement (GRID) (May 20 2021), <https://www.internal-displacement.org/publications/2021-global-report-on-internal-displacement-grid/>

<sup>2</sup> Jessie Yeung, Climate crisis could displace 1.2 billion people by 2050, report warns, CNN (Sept. 10, 2020, 4:36 AM), <https://edition.cnn.com/2020/09/10/world/climate-global-displacement-report-intl-hnk-scli-scn/index.html>.

<sup>3</sup> Sebastian Rich, UN climate report: It’s ‘now or never’ to limit global warming to 1.5 degrees, United Nations (April 4, 2022), <https://news.un.org/en/story/2022/04/1115452>.

<sup>4</sup> Tara Neville, 2021 WHO health and climate change global survey report, World Health Organization, (Nov. 8, 2021), <https://iris.who.int/bitstream/handle/10665/348068/9789240038509-eng.pdf?sequence=1>.

<sup>5</sup> The World Bank, Health and Climate Change, (April 5, 2024), <https://www.worldbank.org/en/topic/health/brief/health-and-climate-change>.

<sup>6</sup> Convention and Protocol Relating to the Status of Refugees, 1951, art. 1

<sup>7</sup> *Id*



Court Statute defines persecution as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.’<sup>8</sup> The same is deduced on two grounds. First by establishing an ‘intentional agent’ causing persecution and second by establishing rights violation that is both arbitrary and discriminative in nature. It has proved difficult to reach an international consensus on the argument that climate change-induced conditions constitute ‘persecution’<sup>9</sup>. Traditionally, a persecutor has been defined as either a ‘state or non-state’ agent. It is argued that climate change cannot be interpreted under non-state entities as that requires an identifiable entity.

In human rights violations, states are accused of being the persecutor. However, concerns have been raised about interpreting states as persecutors in cases of displacement due to climate-induced conditions. It must be noted that state inaction in protecting the rights of citizens is usually deduced in providing asylum to applicants under five enumerated categories of race, nationality, religion, political opinion, and membership to a particular social group under the 1951 Refugee Convention.<sup>10</sup> However, the threshold for interpreting state inaction can be too vague and ambiguous in cases of climate-related claims of asylum. In order to justify the reason to flee to another nation, the asylum seeker is required to prove the state’s irresponsibility in protecting its citizens from environmental degradation.

The asylum seeker is also required to prove that rights violation by the persecutor is arbitrary and discriminative. For persons affected by climate change, this is difficult to establish as the impacts of climate change are discriminative in nature. Those who support the recognition of climate refugees argue that climate change does leave certain citizens more vulnerable than others. However, legally, establishing that impact as selective to an individual or group can be quite challenging within the four walls of asylum tribunals. Subsequently, there has been an increased debate going on whether to classify the people who are displaced by the impacts of climate change as refugees. The debate is because environmental migration

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<sup>8</sup> The Rome Statute of the International Criminal Court, 1998, §7.2. g

<sup>9</sup> Convention and Protocol Relating to the Status of Refugees, 1951

<sup>10</sup> Convention and Protocol Relating to the Status of Refugees, 1951, art. 1

terminology is still ambiguous and vague. This is because key institutions and stakeholders have not come to a consensus on whether to apply terms related to the refugee convention when designating persons who are migrating based on the climate-related context. The debate is generally divided between two perspectives.<sup>11</sup> Those who support the inclusion of the category of climate refugees in the 1951 refugee convention refer to the threatened existence of states like the Republic of Kiribati and argue that environmental degradation will shortly be the primary reason for forced migration. These scholars establish a direct relationship between instances of human movement and climate change, like rising sea levels, coastal erosion, the spread of diseases, and the scarcity of water resources.<sup>12</sup> Therefore, from this perspective, people affected by climate change are 'refugees' as they either have left their homes or will soon do so because of the sudden or gradual changes in their natural environments.<sup>13</sup>

Those who are against inclusion, on the other hand, argue that such arguments are mere conjecture based on compassion which is not helpful in legal terms. Expanding the 1951 refugee convention will lead to a weakening of refugee status.<sup>14</sup> The current refugee scenario, is already overcrowded with an enormous amount of people in need of protection and politically unfavourable towards asylum seekers in the Western world, interpreting refugees as security threats.<sup>15</sup> This paper aims to analyse the socio-legal narratives of those persons who seek asylum based on events they attribute to climate change. The paper also examines the asylum claims made in countries like New Zealand and Australia by citizens of Kiribati, Tuvalu, Nepal, Togo, and Honduras for reasons related to the impact of environmental

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<sup>11</sup> Astri Suhrke, Environmental degradation and population flows, 47(2) *Journal of International Affairs* 473, 473–496 (1994).

<sup>12</sup> William Lacy Swing, Managing climate-driven migration in *Climate 2020: Facing the future* 77–80, (N. Samarasinghe eds., OECD Observer, 2015).

<sup>13</sup> Frank Biermann & Ingrid Boas, Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees, 10(1) *Global Environmental Politics* 60, 67 (2010).

<sup>14</sup> Dina Ionesco, Let's Talk About Climate Migrants, Not Climate Refugees, (June 6 2019), <https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees/>

<sup>15</sup> R Lohrmann, Migrants, refugees and insecurity. Current threats to peace?, 38(4) *Int Migr.* 3, 3 22 (2000).



disasters. The objective is to enquire how discussions around persecution are framed within these tribunals. It is important to do so because forced migration due to climate-induced conditions is identified as a humanitarian crisis, yet lack of legal acknowledgement leaves affected people in a state of limbo.

## **2. Defining a 'refugee': Climate Refugees or Environmental Migrants**

The term climate refugees has been the centre of academic attention from 1985 onwards. The UN Environment Programme (UNEP) defined environmental refugees as 'those people who have been forced to leave their traditional habitat, temporarily or permanently, because of marked environmental disruption...that jeopardised their existence and...seriously affected the quality of their life.'<sup>16</sup> This definition is also used for the term climate refugees. However, it is hard to decipher a pragmatic distinction between 'environment' and climate. The difficulties in defining climate refugees while also taking into consideration the discourse that has already developed around the 1951 Convention and earlier efforts taken to provide a definition for environmental refugees, present one of the major obstacles in safeguarding those displaced by climate change. Numerous negative repercussions of climate change are felt by individuals and communities, such as increased susceptibility to illness, loss of housing and employment opportunities, food insecurity, and even human trafficking. These impacts are frequently exacerbated by additional elements including bad administration, lack of natural resources, unstable ecosystems, socioeconomic disparity, xenophobia, and conflicts between politics and religion. People may be forced to flee their country in search of international protection due to the negative impact of climate change and disasters coupled with already existing social vulnerabilities.

Citing this, scholars on climate migration have frequently argued that climate change can also be understood as a trigger for pre-existing socioeconomic vulnerabilities that would put communities under

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<sup>16</sup> Essam El-Hinnawi, *Environmental refugees* (1985), <https://digitallibrary.un.org/record/121267>.

more strain and exacerbate forced displacement.<sup>17</sup> Therefore, climate-induced mobilities should be correlated with several socioeconomic factors that are entwined with a plethora of bad governance concerns that are undermining the ability of populations impacted by climate change to adapt and stay in their country of origin. Thus, interpreting 'climate refugees' as a myth is incorrect and state irresponsibility should be analysed while adjudicating these asylum claims.

The International Organization for Migration (IOM) has proposed the term environmental migrants. The term includes movements that are both voluntary and involuntary.<sup>18</sup> It defines environmental migrants as people who are compelled to suddenly change their location due to adverse living conditions, temporarily or permanently, within their nation or abroad.<sup>19</sup> The above-mentioned definition, however, conveys the complexity of the problem at hand, rather than fulfilling any legal, normative, or consequential purpose or having any bearing on the granting of rights. IOM does not advocate looking at the problem of migration only from the aspect of climate. Instead, it argues that the migration of persons is governed by several other factors that need to be taken into account. It also argues that lack of data is one such aspect. Because climate change is a much slower process, it is difficult to determine its direct impact on human migration and displacement. Further, in situations where climate change is slowly progressing, migration should be seen as a choice instead of categorising it as forced migration.

Some also argue that climate migration is mainly internal. When migration is internal, individuals relocate within their own nation and are under the jurisdiction of their state. They are neither requesting international protection in this situation nor are they requesting protection from a third nation. For example, in the case of Hurricane Andrew in Florida in 1992, only six percent of the population moved out of the state and the rest remained within their

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<sup>17</sup> Pilar Morales-Giner and Cristina Ramos, *The Migration and Climate Change Nexus*, 21(2) *Contexts* 30, 30-35 (2022).

<sup>18</sup> *supra* n.17

<sup>19</sup> Pilar Morales-Giner and Cristina Ramos, *The Migration and Climate Change Nexus*, 21(2) *Contexts* 30, 30-35 (2022).



nation.<sup>20</sup> Consequently, suggestions are made that those advocating for 'refugee' status should advocate for migration management within the countries instead of stressing for refugee protection. It is feared that providing a unique refugee status due to climate change can result in opposite repercussions. There is a high probability that it may result in marginalisation of persons who are already vulnerable in a state, especially the poorest migrants who travel for a variety of reasons and can't prove their migration is caused by environmental or climatic causes.

There is also widespread agreement that the UNHCR cannot assist those displaced by climate change if it expands its definition and scope of 'refugee,' given its current challenges in providing millions of refugees worldwide with the assistance and safety they require from conflict and persecution.<sup>21</sup> The UNHCR while evaluating the impact of displacement due to climate and natural disasters has argued that 'climate change is the defining crisis of our time and disaster displacement one of its most devastating consequences.'<sup>22</sup> It also goes on to accept that 'there may be situations where the refugee criteria of the 1951 Convention or the broader refugee criteria of regional refugee law frameworks could apply', such as in situations where the impact of climate change intersects with violence or armed conflict.<sup>23</sup> Yet, it concludes that 'the term "climate refugee" is not endorsed by UNHCR', and therefore, it will be more appropriate to use 'persons displaced in the context of disasters and climate change.'<sup>24</sup> This means that climate change cannot, by itself, cause one to become a refugee. Rather, it can only intensify other factors, such as military conflicts. According to this definition, a person has to be displaced due to forces that were intentionally put in place by another person.

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<sup>20</sup> Stanley K. Smith and Christopher McCarty, Demographic effects of natural disasters: a case study of hurricane andrew, 33(2) *Demography*, 265-75 (1996).

<sup>21</sup> Tim Gaynor, 'Climate change is the defining crisis of our time and it particularly impacts the displaced', UNHCR (Nov. 30 2020). <https://www.unhcr.org/news/stories/climate-change-defining-crisis-our-time-and-it-particularly-impacts-displaced>.

<sup>22</sup> *Id.*

<sup>23</sup> *supra* n.21

<sup>24</sup> Steven A. Kolmes, Sara K. Kolmes and Pei-Hsuan Lin, What Lies Ahead: How Aid for Climate Refugees Must Focus on Human Rights and Human Health, 64(3) *Environment: Science and Policy for Sustainable Development* 7, 7 16 (2022).

However, there are certain terms used frequently to characterize those who are displaced due to climate change. Various nongovernmental organisations, in their reports, have used the term 'environmental refugee'. The term has also been frequently used in the mass media and academics. In the earlier stages the phrase, was particularly used to draw attention to, and increase awareness of the forced nature of the displacement. However, since the term has legal implications in the context of the 1951 Refugee Convention and international refugee law, the application of the word 'refugee' for persons displaced by natural disasters has been contested. The above-mentioned discussion indicates that international agencies like IOM and UN are against expanding the 1951 Refugee Convention's definition of refugees to encompass more groups of people. Instead, they advocate phrases like environmental migrants or 'persons displaced.' However, as the term 'migrant' implies some degree of volition in the decision to relocate, it may not always be regarded as suitable. Further, phrases like 'person displaced by the environment or climate' do not necessarily imply accountability in terms of governance.

### **3. Politicising Climate Refugees**

Due to a lack of general consensus on the category of climate refugees, there hasn't been a unified stand in public discourse for the protection of people displaced by climate change. This is not surprising given the division in public opinion on traditional refugees and 'climate refugees.' In general, there has been rhetoric that cites persons displaced due to natural disasters as a non-existent category of people. They point out massive human displacement will most likely remain internal for the time being.<sup>25</sup> Naturally, in some specific situations like small island states with extremely little land, climate-driven movements will intensify and would require crossing borders. However, considering the logistical costs of relocation and the disproportionate impact of climate change on impoverished communities, internal mobility appears to be the more likely option.

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<sup>25</sup> Dina Ionesco, *Let's Talk About Climate Migrants, Not Climate Refugees*, United Nations (Jun. 6, 2019), <https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees>.



Consequently, various narratives have found space in mainstream discourse when discussing people affected by climate change.<sup>26</sup> The first is the security narrative, which supports stricter immigration regulations and mirrors depictions of conventional refugees as threats to national stability. The second, known as the victim framework, centres on the notion that vulnerable populations are unfairly affected by climate change and need to be rescued.<sup>27</sup>

Recent, anti-immigration rhetoric has also affected the category of climate refugee in a charged political context.<sup>28</sup> The unhappiness surrounding the refugee designation has been greatly influenced by the unfavourable connotation that the title currently has internationally in Western nations.<sup>29</sup> Therefore, some islanders like the Pacific Islanders have vigorously refuted this image and translated this term to mean persons who are unworthy or needy in an outsider society.<sup>30</sup> The phrase, subsequently, infuriates these communities experiencing mobility because they do not want to be seen as victims who need to be saved.<sup>31</sup> They feel that their aspirations to move and seek a better future do not qualify them as climate refugees and, as such, do not accord them the dignity they are due. Some actors have advanced that titles such as 'forced climate migrant' are preferred by certain islander communities instead of the word 'refugees.' Rejecting the designation of refugee could help impacted communities separate from the struggles of other groups trying to obtain rights to protection in the West.<sup>32</sup> A preliminary study indicates that islanders are also reluctant

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<sup>26</sup> Sarah M. Munoz, Environmental Mobility in a Polarized World: Questioning the Pertinence of the "Climate Refugee" Label for Pacific Islanders, 22 *Journal of International Migration and Integration*, 1271-1284 (2021).

<sup>27</sup> Sarah M. Munoz, Environmental Mobility in a Polarized World: Questioning the Pertinence of the "Climate Refugee" Label for Pacific Islanders, 22 *Journal of International Migration and Integration*, 1271-1284 (2021).

<sup>28</sup> *Id.*

<sup>29</sup> Richard Black, Environmental refugees: Myth or reality? Working Paper No 34, UNHCR, 1-19 (2001).

<sup>30</sup> Alex Randall, *Don't call them 'refugees': why climate-change victims need a different label*, *The Guardian* (Sep. 18, 2014, 2:00 P.M), <https://www.theguardian.com/vital-signs/2014/sep/18/refugee-camps-climate-change-victims-migration-pacific-islands>.

<sup>31</sup> *Id.*

<sup>32</sup> *supra* n.30

to leave, a situation that is frequently linked to a loss of identity and culture.<sup>33</sup> The cultural shock of transitioning from an entirely self-sufficient island existence to a capitalist system in a Western culture can be too much to handle. Partially, the asylum tribunals which evaluate applications on an individual basis, are also unreceptive towards arguments of the impacts of climate change on their culture and on them as a community. For example, I-Kiribati islanders settled in New Zealand and Australia emphasise the significance of diasporas and communal culture in their survival arguing that they are able to live in another nation by constantly relying on each other.<sup>34</sup>

#### **4. Framing 'persecution': establishing culpability in asylum litigation**

Despite the ambiguity in the international protection framework and public discourse, it is noted that persons displaced due to climate-induced conditions often claim asylum in the host nations. However, passing the litmus test of asylum tribunals has proved to be difficult for climate refugees. This is because a successful asylum claim requires them to establish persecution. A socio-legal analysis of asylum claims has revealed that cases, where claimants can successfully establish prolonged state inaction, are favourably considered as compared to cases where they have failed to do so. Consequently, in cases of the latter, tribunals suggest internal mobility to escape the immediate impacts of climate change.

##### **4.1 Defining climate refugee**

As noted previously, the absence of a specific definition of climate refugees in international protection frameworks has led to legal ambiguity for individuals who are claiming protection based on dislocation due to ecological factors. Consequently, asylum tribunals have more or less interpreted the definition of a 'refugee' based on

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<sup>33</sup> Merewalesi Yee, *Why some Pacific Islanders are staying put even as climate change submerges their homes*, The Conversation (Jan. 11, 2023, 4:00 A.M.), <https://theconversation.com/why-pacific-islanders-are-staying-put-even-as-rising-seas-flood-their-homes-and-crops-195100>

<sup>34</sup> Sarah M. Munoz, *Environmental Mobility in a Polarized World: Questioning the Pertinence of the "Climate Refugee" Label for Pacific Islanders*, 22 *Journal of International Migration and Integration*, 1271 1284 (2021).



five enumerated grounds given in the 1951 Refugee Convention. For example, in *Ontunez Tursios v. Ashcroft* (2002)<sup>35</sup>, *AV (Nepal)* [2017] NZIPT 801125, 26,<sup>36</sup> and 0907346 [2009] RRTA 1168<sup>37</sup>, the United States Court of Appeals, New Zealand Immigration and Protection Tribunal and the Refugee Review Tribunal of Australia respectively used the 1951 Refugee Convention to exclude climate-based asylum seekers. They stated that while natural disasters like earthquakes may create human rights concerns within a nation-state, the claimant should prove potential danger or persecution for reasons of 'race, religion, nationality, or membership of a particular social or political group' to be eligible for asylum under the Refugee Convention.

In certain cases, climate-based asylum seekers have argued that 'those fleeing home for environmental reasons' should be included under the fifth ground i.e. category of membership to a particular social group.<sup>38</sup> This is because the category is not well-defined and is primarily included to deal with claims that do not fit within the other four categories such as race, nationality, religion, political opinion. Therefore, climate-based claims can be adjudicated under this. Subsequently, asylum seekers cite countries like Sweden and their domestic legislation, the Swedish Aliens Act to argue that this category has been used to put in place mechanisms that allow for identifying elements of 'natural disaster or environment problems' as reasons for the rise of people seeking protection outside their territory of nationality. Similarly, 'the Organisation of African Unity through the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa' is also cited to argue for expanding the definition of a refugee to include persons fleeing from natural and environmental disasters.<sup>39</sup> However, asylum tribunals interpreting the 1951 Refugee Convention have been reluctant to expand the definition stating that persons impacted by climate induced conditions cannot be recognized as a cognizable set of individuals requiring protection because of the absence of discriminatory motivation. Climate-based impacts are

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<sup>35</sup> *Ontunez Tursios v. Ashcroft* 303 F.3d 341 (5th Cir. 2002)

<sup>36</sup> *AV (Nepal)* [2017] NZIPT 801125, 26 para 38

<sup>37</sup> 0907346 [2009] RRTA 1168 para 48

<sup>38</sup> 0907346 [2009] RRTA 1168 para 45

<sup>39</sup> 0907346 [2009] RRTA 1168 para 53

indiscriminate whereas interpreting membership of a particular social group requires proving persecution i.e. infliction of harm for reasons that are intentional, arbitrary and discriminatory in nature. Refugee Review Tribunal of Australia in *0907346 [2009] RRTA 1168*<sup>40</sup> stated the same arguing 'persecution... implies... an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation.' It went on to state that it is impossible to identify agents of persecution in claims of climate change who are resorting to activities that cause injury to the claimants for 'reasons of membership of any particular social group.'<sup>41</sup> It went on to argue that if motivation is absent then the tribunal cannot deduce that persecution is occurring due to membership of any particular group.

The tribunals have not only refused to expand the refugee definition but have also negated any efforts to include climate-based asylum seekers through other applicable international human rights instruments. For example, in *AF (Kiribati) [2013] NZIPT 800413*<sup>42</sup>, an asylum seeker requested refugee status on the grounds of being an internally displaced person covered under 'Principle 15 of the Guiding Principles on Internal Displacement.' The Guiding Principles have specified that persons who are internally displaced not only can move to another part of their country but also have the requisite right to move to another country for their safety and apply for asylum in the host nation. Consequently, they cannot be forced to return or pursue resettlement in any place that jeopardises their life, liberty, and safety. However, the tribunal rejected interpreting Guiding Principles stating that there is a difference between them and the Refugee Convention. The former only applies till internally displaced persons leave their country while the latter is applicable in events of cross-border movement. The causes and consequences of internal displacement can only be relevant in investigating the determination of refugee status. However, the status of any refugee claimant as a former IDP does not confer refugee status alone. Thus, despite the threats faced by climate refugees, international mechanisms and laws have failed to provide them protection. Although the U.N. has

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<sup>40</sup> 0907346 [2009] RRTA 1168 para 50

<sup>41</sup> 0907346 [2009] RRTA 1168 para 52

<sup>42</sup> *AF (Kiribati) [2013] NZIPT 800413* para 17



adopted various non-binding international agreements that address climate change as well as migration, these agreements lack distinct pathways that are also enforceable for the legal protection of these climate refugees. Thus, despite the threats faced by climate refugees, international mechanisms and laws have failed to provide them protection.

#### 4.2 The Role of State

Thus, more often than not, climate-based asylum seekers have faced rejection based on the scope of the definition of 'refugee' under the 1951 Refugee Convention. However, in *Ioane Teitiota v. New Zealand* (2016)<sup>43</sup>, the UN Human Rights Committee have also recognised that stringent rules of definition cannot be applied to deduce non-applicability and care must be taken while examining particular facts of the case.<sup>44</sup> This is because interpreting refugee status also requires establishing a well-founded fear of persecution. There is no precise definition provided for the term 'persecution' under the refugee convention. Therefore, applicants who can establish an imminent risk of persecution or 'a sustained or systemic violation of core human rights' can qualify as refugees.<sup>45</sup>

However, establishing immediate or systematic violations also entails deducing actors of persecution. In claims of natural disasters or environmental concerns, it is difficult to deduce an actor. In some cases, asylum seekers have submitted that being persecuted does not require an actor as the term persecute means fleeing from something; not specifying what that is. However, asylum tribunals reject this reasoning stating that the adverse effects of climate change or natural disasters cannot on their own be actors of persecution as it requires human agency.<sup>46</sup> Consequently, tribunals necessitate that asylum seekers establish some relation between their persecution and a specific human agent. This agent is more often than not required to

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<sup>43</sup> *Ioane Teitiota v. New Zealand* (2016), CCPR/C/127/2728/2016

<sup>44</sup> United Nations Human Rights, *Historic UN Human Rights case opens door to climate change asylum claims* (Jan. 21, 2020), <https://www.ohchr.org/en/press-releases/2020/01/historic-un-human-rights-case-opens-door-climate-change-asylum-claims>.

<sup>45</sup> *AF (Kiribati)* [2013] NZIPT 800413 para 53

<sup>46</sup> *Id* para 51

be a state or its representatives (Australian Law Reform Commission 2011, 542). A general trend of asylum case law indicates that if claimants establish persecution by the state, historically they have been entitled to asylum. Tribunals that move beyond the stringent application of the term 'refugee' in climate-based asylum claims have tried deducing the role of nation-states in mitigating the known effects of climate change. For example, in *AF (Kiribati) [2013] NZIPT 800413*<sup>47</sup>, the New Zealand Immigration Protection Tribunal acknowledged that countries have certain positive duties and obligations to protect their citizens from environmental threats and give humanitarian relief without discrimination.

Consequently, asylum seekers have either tried to validate a prolonged inaction by their government in addressing the effects of climate change on its citizens or establish a risk of harm to them in the future due to continued state inaction. For example, in *AC (Tuvalu) [2014] NZIPT 800517-520*,<sup>48</sup> a family claimed a violation of their right to life in Tuvalu due to various factors of climate change such as sea level rise, coastal erosion, and drought. They also cited detrimental impacts of climate change such as negligible job opportunities, lack of clean drinking water, and sub-standard quality of medical facilities jeopardising their quality of life in Tuvalu. While assessing the deprivation of the right to life, the New Zealand Immigration Protection Tribunal compared the context of their claims with the actions of the Tuvalu government to examine if steps were taken to mitigate these circumstances. After the review, even though the tribunal deduced that the conduct of the Tuvalu government was satisfactory and there was no evidence of state irresponsibility, it also went on to argue that 'evidence of historical failure to discharge positive duties against known environmental hazards'<sup>49</sup> could be accounted for in the analysis of well-founded fear of persecution.

In some cases, establishing indirect role of state in aiding persecution has been adequate for a successful asylum claim. For example, the Supreme Court of Italy in 2021 argued that humanitarian protection should be granted not only in cases of armed conflict but

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<sup>47</sup> *AF (Kiribati) [2013] NZIPT 800413* para 53

<sup>48</sup> *AC (Tuvalu) [2014] NZIPT 800517-520*

<sup>49</sup> *AC (Tuvalu) [2014] NZIPT 800517 520* para 69



also in cases of environmental degradation if the country of origin does not fulfil the minimum requirements of the right to life. It gave this direction in the case of a citizen of the Niger Delta area of Nigeria who sought humanitarian protection in Italy because of armed conflict in the area which was further aggravated by environmental devastation including innumerable oil spills.<sup>50</sup> The application was initially rejected by the Territorial Commission for the Recognition of International Protection and the Court of Ancona. Following this, the applicant appealed to the Supreme Court of Italy stating that the rejection of his claim violated 'the Consolidated Immigration Act (Legislative Decree) No. 286/1998'<sup>51</sup> which extended humanitarian protection for environmental concerns. Supreme Court concluded that 'states are bound to ensure that individuals have living conditions that make it possible to fully express the right to life, in its broad form, even regardless of the existence of a present danger to survival.'<sup>52</sup> The judgment further noted that environmental degradation can compromise individual's ability to effectively enjoy their human rights if local government does not ensure 'conditions necessary to guarantee everyone access to essential natural resources, such as arable land and drinking water, with a consequent compromise of the individual right to life.'<sup>53</sup> This was contrary to the position taken by the UN Human Rights Committee in *Ioane Teitiota v. New Zealand* (2016)<sup>54</sup>, which on one hand recognised that the Republic of Kiribati would be uninhabitable in the subsequent ten years depriving its citizens of the right to life arbitrarily due to environmental factors. Yet, on the other hand, rejected the asylum claim stating that the danger was not immediate.

#### 4.3 Persecution in case of demonstrating against State inaction

The above-mentioned ideas indicate that tribunals have set a high

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<sup>50</sup> I.L. v. Ministry of the Interior and Attorney General at the Court of Appeal of Ancona, 24 February 2021, No. 5022

<sup>51</sup> Italy: Legislative Decree No. 286/1998 *Consolidated Text on Immigration and provisions on the legal condition of foreigners*.

<sup>52</sup> I.L. v. Ministry of the Interior and Attorney General at the Court of Appeal of Ancona, 24 February 2021, No. 5022

<sup>53</sup> *Id*

<sup>54</sup> *Ioane Teitiota v. New Zealand* (2016), CCPR/C/127/2728/2016

standard for claimants to establish violations by states of their obligations. Unless asylum seekers prove that they are part of a vulnerable community that is aggressively neglected by their state government for reducing the impact of climate change, they do not have any chance of a successful asylum claim. Thus, infliction of harm is not significant instead steps taken by the state to prevent the harm are intrinsic to the determination of refugee status. To circumvent this high standard, asylum applicants often refer to political circumstances post-disaster to establish persecution. For example, asylum seekers have referred to the 'conduct of state or non-state actors' in human rights violations post-environmental calamities. In the case of the former, applicants point out the reluctance of the state to control its government officials who indulge in violation of human rights. In the case of the latter, the failure of the state is established through evidence of a lack of steps taken by the state to decrease the power of non-state actors in the infliction of harm.<sup>55</sup>

Consequently, asylum claimants for giving rise to convention obligations do not focus on establishing prolonged inaction by the government. Instead, they try to establish themselves as part of a marginalised community whose recovery needs have not been met due to the politically motivated discriminatory response of the state government in post-relief work. For example, in *Refugee Appeal No 74665 (7 July 2004)*<sup>56</sup>, the Refugee Status Appeals Authority of New Zealand argued that the 'right to life' encompasses the 'right to adequate food.' A person can be deduced to being persecuted if faces a 'real risk of starvation' due to 'discriminatory denial of food in the wake of a drought.'<sup>57</sup>

Similarly, in 2009, the Refugee Appeals Authority of New Zealand gave asylum to a Burmese citizen who successfully established persecution by the state on the grounds of participation in post-relief work. In this case, the Burmese government, in the wake of Cyclone Nargis in Burma in May 2008, refused assistance for disaster relief from private actors. It also punished citizens who tried reporting on

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<sup>55</sup> AF (Kiribati) [2013] NZIPT 800413 para 54

<sup>56</sup> Refugee Appeal No 74665 (7 July 2004) para 89

<sup>57</sup> AF (Kiribati) [2013] NZIPT 800413 para 68



the natural disaster and provided relief assistance themselves.<sup>58</sup> These opened grounds for claiming political opinion-based persecution in the case of natural disasters. The applicant argued that there was an active fear of returning to the country of origin because humanitarian work had become politicised in Burma, and her disaster relief work was known to local authorities. The tribunal, consequently, concluded that even though a tropical cyclone was a non-political naturally occurring event,<sup>59</sup> the government treated it as a national security issue transforming a 'humanitarian space into a highly politicised space.'<sup>60</sup> Consequently, those who were carrying out disaster relief independently were seen as facilitating domestic and international criticism against the government over the management of the natural disaster. This 'means the regime will in all probability impute a negative political opinion to the appellant' which 'is sufficient to engage the protection of the Refugee Convention.'<sup>61</sup> Similarly, in *A.L. v. Austria*, Appl. No. 7788/11, Council of Europe (2012)<sup>62</sup>, a citizen of Togo applied for asylum stating that he feared for his life and safety due to soldiers of Togo who had targeted him due to his participation in protests organised in favour of flood victims due to unequal and discriminatory distribution of disaster relief. His claim was rejected due to lack of evidence. The court stated that conduct of peaceful Presidential elections in Togo demonstrates that there is no real risk of persecution to citizens in the country.

## 5. Alternative response to the crisis of climate refugees

Rising sea levels cause massive problems in low-lying coastal areas of the world. For instance, in Asia in 1995, half of the Bhola Island in Bangladesh was submerged by rising sea levels, forcing 500,000 people out of their homes.<sup>63</sup> Venice in Italy is already sinking into the sea. The urban establishments are at high risk due to rising sea levels

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<sup>58</sup> Refugee Appeal No. 76374 (28 October 2009) para 35

<sup>59</sup> Refugee Appeal No. 76374 (28 October 2009) para 35

<sup>60</sup> *Id.*

<sup>61</sup> *supra* n.59

<sup>62</sup> *A.L. v. Austria*, Appl. No. 7788/11, Council of Europe: European Court of Human Rights, 10 May 2012 para 66

<sup>63</sup> Emily Wax, For flood-prone Bangladesh, a floating future, NBC News, (Sept. 27, 2007), <https://www.nbcnews.com/id/wbna20982307>.

and flooding. Since the 1950s, its population has greatly reduced with many of the locals becoming environmental migrants.<sup>64</sup>

Furthermore, the East and Horn of Africa and Great Lakes region is one of the most climate-vulnerable regions in the world, and has recently suffered from acute droughts and floods.<sup>65</sup> In 2023, brutal clashes in Laascaanood in Somalia forced around 100,000 people to flee to and take refuge in the Somali region of Ethiopia where the living conditions for the host communities had already been worsened due to the longest drought ever recorded.<sup>66</sup> At present, the same region is impacted by acute floods, estimated to affect over half a million people, including Somalian refugees. The floods have led to the displacement of around 240,000 people and the flood waters have wiped out 1,000 hectares of crops.<sup>67</sup> This is coupled with poor sanitation infrastructure exposing people to the risk of infectious diseases like cholera, and access to healthcare services is hampered by ruined roads and fuel scarcity.<sup>68</sup>

Consequently, the 2018 Global Compact for Safe, Orderly, and Regular Migration (Migration Compact)<sup>69</sup> offered various recommendations for protecting people who have been affected and displaced by climate change. Such as planned relocation and visa opportunities for persons affected by climate change, specifically for those individuals whose return to country of origin is not possible. Similarly, UNHCR also provided Strategic Framework for Climate Action in the year 2023 that provided a global roadmap to governments, private sector and humanitarian organisations to

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<sup>64</sup> Environmental Refugee, National Geographic (October 18, 2024), <https://education.nationalgeographic.org/resource/environmental-refugee/>.

<sup>65</sup> Madhumita Paul, 11.7 million persons displaced in East Africa and Great Lakes region in 2023: UN Report, Down To Earth, (June 26, 2023), <https://www.downtoearth.org.in/africa/11-7-million-persons-displaced-in-east-africa-and-great-lakes-region-in-2023-un-report-90257>

<sup>66</sup> *Id.*

<sup>67</sup> Climate and conflict – aggregating humanitarian crises in Ethiopia, UNHCR (Dec. 8, 2023), <https://www.unhcr.org/neu/117893-climate-and-conflict-aggregating-humanitarian-crises-in-ethiopia.html>.

<sup>68</sup> *Id.*

<sup>69</sup> Global Compact for Safe, Orderly, and Regular Migration (Migration Compact), IOM (Dec. 17, 2018) <https://www.iom.int/global-compact-migration>.



protect and preserve rights of individuals facing force displacement due to climate change.<sup>70</sup>

In the absence of a specific international legal policy for addressing climate refugees, nation-states have also taken various domestic steps to reevaluate the definition of climate change and how it affects migration. For example, in October 2021, the United States White House published a report<sup>71</sup> that noted various significant issues such as the geopolitical ramifications of migration brought on by climate change, the importance of US foreign aid, the protection and resettlement of impacted people, and the function of multilateral cooperation. The report tried to establish a link between climate change and forced migration and suggested several steps that can be put into practice to respond to this issue.

Similarly, in 2012, the governments of Norway and Switzerland launched a Nansen Initiative.<sup>72</sup> This state-led initiative aims to create a consensus on fundamental principles and identify best practices in order to address the issues impacting forced migrants and provide safeguards for the interests and needs of individuals who are displaced across borders during disasters. This initiative also identifies three pillars towards this end. This includes securing international solidarity and cooperation, framing guidelines for the admission, stay, and status of impacted individuals, and devising operational responses that encompass international development and humanitarian player's roles and financial sources.

A Task Force on Displacement (TFD) was created during COP 21 in 2015, and in 2018, the ExCom recommended extending the TFD's scope. During the first stage of its development, the TFD produced various recommendations to prevent or manage forced displacement caused by the adverse effects of environmental change. As it enters its second phase, the TFD's work is more generally

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<sup>70</sup> Strategic Plan for 2024 – 2030, UNHCR (Dec. 13, 2023), <https://data.unhcr.org/en/documents/details/106704>.

<sup>71</sup> Report on the Impact of Climate Change on Migration, Government, United States of America (October 21, 2021) <https://reliefweb.int/report/world/report-impact-climate-change-migration-october-2021>.

<sup>72</sup> Walter Kälin, From the Nansen Principles to the Nansen Initiative, Forced Migration Review (No date), <https://www.fmreview.org/kalin/>

focused on improving collaboration and facilitation with regard to human mobility, including migration, displacement, and planned relocation.<sup>73</sup> This strategic workstream is specifically focused on improving our understanding of how climate change affects human mobility, sharing and encouraging the adoption of the first phase's recommendations, and encouraging stakeholder participation for additional action.

To advocate for the rights of people against environmental hazards, UNHCR revised its guidelines in 2020.<sup>74</sup> It declared that those who are leaving their homes due to the adverse effects of climate change are eligible to apply for refugee status under the 1951 Refugee Convention. UNHCR recognised various negative impacts of natural disasters such as food and water shortages, the spread of infectious diseases, social injustices such as human trafficking etc. It also recognised other factors such as bad governance, unstable political environment, and social and economic disparities which can turn violent and can further increase the negative impact of natural disasters. These aggravating circumstances could force people to flee their nation and look for safety abroad. It should be noted that while present international refugee law do not address displacement brought on by slow-onset climate change or climate processes, they may be instrumental in certain circumstances where the negative consequences of climate change entwine with other elements, such as violence and conflict.

Recently, Argentina moved to establish a special visa in 2022 for those who had been displaced by natural disasters, and Finland has started to consider accepting migrants based solely on climate concerns.<sup>75</sup> Furthermore, Australia is developing a plan to facilitate the migration of Pacific Islanders, a group particularly susceptible

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<sup>73</sup> Lisa Vanhala & Elisa Calliari, *Governing people on the move in a warming world: Framing climate change migration and the UNFCCC Task Force on Displacement*, 76 *Global Environmental Change* 1, 1-9 (2022).

<sup>74</sup> UN High Commissioner for Refugees (UNHCR), *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*, 1 October 2020, <https://www.refworld.org/policy/legalguidance/unhcr/2020/en/123356>.

<sup>75</sup> David Cremins, *The ABCs of South American Policy Responses to Climate Displacement*, *Earth Refuge* (February 28, 2024) <https://earthrefuge.org/the-abc-of-south-american-policy-responses-to-climate-displacement/>.



to the effects of climate change, especially in search of seasonal employment.<sup>76</sup> There are similar measures under discussion worldwide, and their proliferation and the fervent conversations around them point to a growing consciousness regarding climate refugees and visa opportunities.<sup>77</sup>

## 6. Conclusion

The absence of specific international protection frameworks for persons displaced due to climate change has left many desperate in destabilising environments. Today the world is reeling from the negative impacts of rampant industrialisation and national and regional conflicts. Climate migration is not only the result of destabilised climate but also a consequence of various of socio-ecological factors. Destabilized climate may intersect with factors of governmental oppression and state hegemony giving rise to an acknowledgment of climate refugees within the four walls of asylum tribunals. Consequently, those seeking asylum or humanitarian protection must establish that geopolitical turbulence after unfriendly climate conditions induce their movement.

However, what about those who cannot interweave the negative impact of climate change with state inaction? The international community, both ethically and realistically cannot ignore their plight. Mother Earth has been impacted due to widespread historical irresponsibility around environmental concerns, and as a consequence, widespread displacement is bound to happen in the next century. We can address this imminent calamity by expanding the language of 1951 Refugee Convention for those fleeing their country of origin due to environmental pressures. While this may lead to the opening of floodgates of migration, it is pertinent to address this humanitarian crisis. Protecting the right to life under human rights norms, encompasses the right to life in its widest form, irrespective of the presence of an impending threat to existence. Therefore, nation-states

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<sup>76</sup> Dominic Simonelli, Rethinking Australia's Pacific Islander Migration Policies, Australian Institute of International Affairs, Australian Outlook (No date) <https://www.international-affairs.org.au/australianoutlook/rethinking-australias-pacific-islander-migration-policies/>

<sup>77</sup> Supra n.76

in climate-based claims should strictly apply the non-refoulement principle that forbids the expulsion of asylum seekers to their territory when there is a significant danger of destruction to human life.