

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**A CASE FOR LEGAL PROTECTION OF CROSS BORDER DISASTER  
DISPLACED PERSONS**

**BY**

**OBIYE LILIAN NYABOKE**

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**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE  
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DEGREE OF THE UNIVERSITY OF NAIROBI**

**SUPERVISOR: DR KENNETH WYNE MUTUMA**

## **Declaration**

I hereby declare that this research project is my original work and has not been submitted for an award to any university or institution.

Name: **OBIYE LILIAN NYABOKE**

Registration no: **G62/7383/2017**

**Signature:** \_\_\_\_\_ **Date:** \_\_\_\_\_

## **Supervisor Approval**

This research project has been submitted to the school of law of the University of Nairobi with my approval as the supervisor

**Signature:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**Name: Dr. WYNE KENNETH MUTUMA**

## **Dedication**

I want to dedicate this thesis to my parents John Obiye and Hellen Matera for encouraging me to strive for excellence. I also want to dedicate this thesis to my siblings, I hope it will inspire you strive for knowledge.

I wish to dedicate this thesis to all persons who are forced to leave their homes, who have amazing strength and have overcome persecution on various grounds and still have enough strength left to fight for their protection.

## **Appreciation**

I wish to thank my Supervisor Dr. Wyne Mutuma for his guidance in writing this thesis. I appreciate his wealth of knowledge in human rights law that was invaluable to this thesis.

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Finally, I want to thank my family and friends for their encouraging words and support.

May God bless you all.

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United Nations General Assembly, Protocol Relating to the Status of Refugees, (adopted 31 January 1967, entered into force 4 October 1967); 606 UNTS 267.

United Nations General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976); 999 UNTS 171.

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United Nations, ‘New York Declaration for Refugees and Migrants’ (3 October 2016); UN Doc A/RES/71/1.

United Nations, Universal Declaration of Human Rights (adopted on 10 December 1948); UN Doc. 217 A (III) (UDHR).

## **Acronyms**

HCR – High Commissioner for Refugees

ICCPR- 1966 International Covenant on Civil and Political Rights.

IDP(s)- Internally Displaced Person(s)

IDMC-Internal Displacement Monitoring Centre

IPCC- Intergovernmental Panel on Climate Change

IRO- International Refugee Organization

NAPA- National Adaptation Programme of Action

OHCR- Office of The High Commissioner of Refugees

OAU-Organization of African Unity

UDHR- Universal Declaration of Human Rights

UN- United Nations

UNCAT-1984 United Nations' Convention Against Torture

UNDP- United Nations Development Programme

UNFCCC- United Nations Framework Convention on Climate Change

UNHCR-United Nations High Commissioner for Refugees

### **Abstract**

*The impact of climate change can be felt through droughts, rising sea level, floods, earthquakes, unpredictable rainfall, increase in temperature, which are clear signs of change weather patterns. Some people are temporarily or permanently displaced from their place of habitual residence and cross a border to seek favorable living environment.*

*The 1951 Refugee Convention defines a refugee as an individual who has a well-founded fear of persecution because of his race, faith, nationality or affiliation to a social or political group and is not within his country which is not able to offer him protection. The OAU Convention and Cartagena Declaration expanded the refugee definition to include acts of indiscriminate violence, foreign aggression, internal clashes, widespread abuse of human rights or other events seriously disturbing public order as additional grounds for seeking asylum.*

*Effects of climate change have increased the number of displaced people globally who cross international borders. However, this category of persons find themselves in a lacuna as there is no framework of the protection and recognition of persons displaced due to climate change. They are not considered IPDs as they have crossed an international border and are not refugees as defined by the 1951 Refugee Convention.*

*This paper discusses the interlink between climate change and displacement of people across international borders and the need to offer recognition and legal protection to persons who are displaced in such circumstances at the international level.*

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## CHAPTER ONE INTRODUCTION

### 1.1 Background

68.5 million people were displaced forcibly globally from conflict, generalized violence and persecution in 2017.<sup>1</sup> Out of the 68.5 million, 25.4 were refugees, 40,0 million were IPDs while 3.1 were asylum seekers. The Internal Monitoring Displacement Centre estimates that 184.4 million people were displaced between 2008 and 2014 with an average of 26.4 million people displaced annually. 22.5 million people were displaced by natural hazards, rising sea level and environmental degradation.<sup>2</sup>

The world has experienced natural calamities such as famine in countries like Somalia in 2011 and 2012, the 2010 and 2012 Pakistani floods, and Nepalese earthquakes of 2015. They resulted to a huge number of people being traumatized, homeless and without basic supplies and clean water.<sup>3</sup> Famines, erratic rainfall and hurricanes led to the greatest number of disaster induced displacement with over 2 million people displaced in 2018.<sup>4</sup>

Reports indicate that sea level rise as a result of climate change will have the most direct impact on Small Islands Developing States (SIDS) which are projected to be at risk of disappearing. All the inhabitants of the islands will be compelled to leave their abodes and move to other countries considered fit for human habitation when the islands are flooded with sea water. Maldives, an island state located in the Indian Ocean, comprises of

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<sup>1</sup> United Nations High Commissioner for Refugees, 'UNHCR Global Trends Forced Displacement in 2017' (2017); <<https://www.unhcr.org/5b27be547.pdf>> accessed on 23 May 2019.

<sup>2</sup> Internal Displacement Monitoring Centre, 'Global Estimates 2015: People displaced by disasters' (2015); 8 <http://www.internal-displacement.org/sites/default/files/inline-files/20150713-global-estimates-2015-en-v1.pdf> accessed on 3 December 2018.

<sup>3</sup> United Nations High Commissioner for Refugees, 'Climate change and disaster' (2019); <<http://www.unhcr.org/climate-change-and-disasters.html>> accessed on 3 March 2019.

<sup>4</sup> World Meteorological Organization, 'WMO Statement on the State of the Global Climate in 2018' (2019); <[https://library.wmo.int/doc\\_num.php?explnum\\_id=5789](https://library.wmo.int/doc_num.php?explnum_id=5789)> accessed on 1 October 2019.

approximately 1,000 small low lying islands with a population estimated at 330,000.<sup>5</sup> In 2009, the President of Maldives chaired a cabinet meeting under water to highlight effects of global warming and particularly rising sea level to small island states.<sup>6</sup>

Common natural disasters reported in Maldives include floods, extreme weather patterns, and tidal waves attributable to climate change.<sup>7</sup> Tangible negative effects attributable to natural disasters on Maldives include the closure of the international airport after the 2004 Tsumani, contamination of ground water, reduced agricultural production, increase in water borne diseases, and reduced tourism due to the extreme weather conditions. SIDS are not major contributors of global greenhouse gases yet are worst hit and their citizens are at risk of being stateless if the islands flood due to rising sea level.<sup>8</sup> Inhabitants of SIDS have rights as victims of climate change against emitters of greenhouse gases.<sup>9</sup>

State necessity in international law exempts a state from being liable for wrongful acts done in exercise of its right to self-preservation that would be otherwise unlawful.<sup>10</sup> Necessity

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<sup>5</sup> Ministry of Environment and Energy, 'Second National Communication of Maldives to the United Nations National Framework Convention on Climate Change' (2016) [https://www4.unfccc.int/sites/SubmissionsStaging/NationalReports/Documents/2348615\\_Maldives-NC2-2-SNC%20PDF.pdf](https://www4.unfccc.int/sites/SubmissionsStaging/NationalReports/Documents/2348615_Maldives-NC2-2-SNC%20PDF.pdf) accessed on 24 November 2019.

<sup>6</sup> BBC, 'Maldives Cabinet Makes a Splash' (2009) <http://news.bbc.co.uk/2/hi/8311838.stm> accessed on 24 November 2019.

<sup>7</sup> Ministry of Environment and Energy, 'Second National Communication of Maldives to the United Nations National Framework Convention on Climate Change' (2016) 18 [https://www4.unfccc.int/sites/SubmissionsStaging/NationalReports/Documents/2348615\\_Maldives-NC2-2-SNC%20PDF.pdf](https://www4.unfccc.int/sites/SubmissionsStaging/NationalReports/Documents/2348615_Maldives-NC2-2-SNC%20PDF.pdf) accessed on 24 November 2019.

<sup>8</sup> Erin Halstead, 'Citizens of Sinking Islands: Early Victims of Climate Change' (2016) Vol. 23 No. 2 Indiana Journal of Global Legal Studies 819 <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1631&context=ijgls> accessed on 23 November 2019.

<sup>9</sup> Katrina Miriam Wyman, 'Sinking States' (2012) in Property in Daniel H. Cole and Elionor Ostrom (eds), Property in Land and Other Resources, Lincoln Institute of Land Policy (2012) 440 [https://www.lincolninst.edu/sites/default/files/pubfiles/sinking-states\\_0.pdf](https://www.lincolninst.edu/sites/default/files/pubfiles/sinking-states_0.pdf) accessed on 23 November 2019.

<sup>10</sup> United Nations General Assembly, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001); UN Doc A/56/10, art 33



can be invoked when the existence of a state is at risk and the state in question has not contributed to the state of necessity.<sup>11</sup> The defense of necessity can be invoked by states whose survival is at risk due to effects of climate change and its inhabitants' cross borders to other nations without the necessary requirements.

The first Article of the 1951 Refugee Convention offers five grounds that qualify a claim for asylum.<sup>12</sup> They are affiliation (both social and political), ethnicity, faith, and nationality. Natural disaster is not a ground recognized for seeking asylum. There is rising concern on the legal status of displaced persons crossing international borders in search of better habitable conditions. The displaced persons are strictly not considered refugees under the 1951 Refugee Convention and fall into a legal vacuum.

Disaster displacement refers to situations where individuals have no choice but to leave their dwellings due to natural calamities to escape the direct or probable impact of the natural hazard.<sup>13</sup> The Guiding Principles on Internal Displacement describe an internally displaced person as a person who has been involuntarily left his or her home or area of habitual dwelling to avoid the effects of armed conflict, situations of generalized violence, violations of human rights, natural or human-made disasters but has not crossed an international border.<sup>14</sup> The difference between an internally displaced person and a refugee

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[https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) accessed on 25 November 2019.

<sup>11</sup> Roman Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) Vol 3 Issue 1 Yale Human Rights and Development Law Journal 1,6

<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1014&context=yhrdlj> accessed on 26 November 2019.

<sup>12</sup> United Nations Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954); 189 UNTS 137 (Refugee Convention) art 1.

<sup>13</sup> The Nansen Initiative, 'The Nansen Initiative Global Consultations Conference Report' (2015) 28 <<https://www.nanseninitiative.org/global-consultations/>> accessed on 20 September 2019.

<sup>14</sup> United Nations, Commission on Human Rights, The Guiding Principles on Internal Displacement (1998); UN Doc. E/CN.4/1998/53/Add.2.

is that the former has not crossed an international border.<sup>15</sup> Natural disaster leading to displacement is not recognized as a ground an individual can rely on to seek international legal recognition as a refugee once they cross an international border. Despite the gap in recognition and protection at the global level, many people are forcibly displaced, cross an international border and require assistance and recognition. World leaders needs to recognize human rights of people exiled from their homes due to the effects of climate change.<sup>16</sup>

## **1. Statement of Problem**

Persons who cross international borders due to persecution are recognized as refugees under international law and entitled to rights under the 1951 Refugee Convention including the right not to be returned to their country of origin. Conversely, persons who are displaced across international borders due to effects of climate change, fall into a legal vacuum as there is no international legal framework that provides for their recognition, rights and obligations of the receiving State.

The question that this study discusses is whether cross border disaster displaced persons have any rights recognized under international law. This arises from the fact that international refugee law does not recognize persons who are displaced across borders due

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<sup>15</sup> United Nations, Commission on Human Rights, The Guiding Principles on Internal Displacement, (1998); UN Doc. E/CN.4/1998/53/Add.2.

<sup>16</sup> Erin Halstead, 'Citizens of Sinking Islands: Early Victims of Climate Change' (2016) Vol. 23 No. 2 Indiana Journal of Global Legal Studies 819, 829  
<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1631&context=ijgls> accessed on 23 November 2019.

to effects of climate change. And because of that, arguably, there is a legal gap on the obligations of the receiving State towards displaced persons.

## **2. Justification of the Study**

This study is justified on the basis that although there exists a wealth of literature on natural disaster and displacement, there is a lacuna in legal recognition and protection of cross-border displaced individuals.

## **3. Statement of Objective**

### **1.3.1 Main Objective**

The main objective of this study is to explore international legal protection for persons who cross international borders due to natural disasters. By drawing on case-law on forced displacement, this paper analyzes the refugee definition in the 1951 Refugee Convention. It aims to rationalize expanding the refugee definition to include forced migrants who have been exiled to other countries due to natural disasters.

### **1.3.2 Specific Objectives**

The specific objective of this study is to:

1. To evaluate the rationale for international refugee protection.
2. To explore the relationship between natural disasters and human displacement across international borders.

3. To investigate the effect of recognition of persons displaced due to natural disasters as refugees.
4. To propose legal and policy recommendations for protection of natural disaster displaced persons.

## **1.4 Research Questions**

1. What is the rationale for refugee protection?
2. Do natural disasters lead to human displacement across international borders?
3. Why are states hesitant to grant refugee status to persons displaced by natural disaster?

## **1.5. Theoretical Framework**

### **1.5.1 Natural Law**

This research paper relies on the Natural Law School of thought advanced by the three Greek philosophers; Plato, Socrates, and Aristotle. The natural law doctrine distinguishes human behavior as either natural or unnatural. The scholars of this school of thought deduce certain rules to be eternal, and which prescribe the behavior of man. St. Thomas Aquinas (1225-1274) held that just law attains its status by being morally right. He states that a law may be unjust in two ways: if it is contravenes human good, or fails to bind in conscience, and when the law is opposed to the divine good. He argues that law is part of morality and does not contradict the principles of the natural law, which is the moral law.<sup>17</sup>

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<sup>17</sup> Stephen Pope, 'Reasons and Natural Law' in Gilbert Meilaender & William Werpehowski (eds.), *The Oxford Handbook of Theological Ethics* (Oxford University Press 2005) 149 [https://www.bc.edu/content/dam/files/centers/boisi/pdf/f09/Pope\\_Reason\\_and\\_Natural\\_Law.pdf](https://www.bc.edu/content/dam/files/centers/boisi/pdf/f09/Pope_Reason_and_Natural_Law.pdf) accessed on 19 November, 2019.

Natural law proponents believe that there are irreducible principles found in nature which all humanity understands through reason. Human laws like international conventions on human rights can be assumed to be founded on the principles of natural law. It embodies within it a host of ideals such as justice, reason, good conduct and authority.<sup>18</sup>

Natural law maintains the universality of some ethical standards. The Universal Declaration of Human Rights of 1948 advocates for equality and inalienability of human rights.<sup>19</sup> Article 1 states that all persons are born free in dignity and rights. Article 14 of the Declaration gives anyone the right to seek asylum.

Lon Fuller (1906- 1984) imagined a utopia of legality in which rules are, consistent with one another, perfectly clear and known to every citizen and never retroactive. He opined that laws should have internal morality which he defined as a bureaucratic version of natural law which is the ways in which a framework must be understood and administered if it is to be effective and at the same time remain what it should be.<sup>20</sup> Accordingly, in this respect, an unjust law under Fuller's internal morality test would be a law lacking in internal morality and would fail to inspire order and obedience.<sup>21</sup>

L. A Hart (1907-1992) faulted natural law theorists for failing to distinguish law and morality. He contended that the law needs certain minimum content which can be

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<sup>18</sup> Ibid.

<sup>19</sup> United Nations Universal Declaration of Human Rights (adopted on 10 December 1948); UN Doc 217 A (III) (UDRH) <[https://www.ohchr.org/en/udhr/documents/udhr\\_translations/eng.pdf](https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf)> accessed on 18 January 2018.

<sup>20</sup> Lon Fuller, *The Morality of Law* (revised edition, Yale University Press 1969) 39 <[http://faculty.ycp.edu/~dweiss/phl347\\_philosophy\\_of\\_law/fuller%20morality%20of%20law.pdf](http://faculty.ycp.edu/~dweiss/phl347_philosophy_of_law/fuller%20morality%20of%20law.pdf)> accessed on 1 October 2017.

<sup>21</sup> Ibid.

discovered or derived from the nature of man.<sup>22</sup> This research will rely on natural school of thought to bring forth argument that human rights, and more so refugee law should be accessible to all men in all circumstances, binding persons to moral standards that promote a prosperous life.<sup>23</sup>

### 1.5.2 Positive Law

Hans Kelsen (1881- 1973) is a scholar from the positive law school of thought. The natural law school of thought is founded on idealism, the way things ought to be, while the positive law school of thought is founded on realism, that is, the way things are. Positive theorists argue that laws are rules imposing specific duties upon the citizens to induce acting in a particular way or subject them to certain legal sanction. They tell the citizens what the law permits and prohibits. In contrast to legal positivists, natural law philosophers insist that commands accompanied by sanctions are not sufficient to make things legal.<sup>24</sup>

Kelsen argues that norms validate each other, in turn up a hierarchy, until you reach the apex or ultimate norm, the grundnorm which confers validity on all other norms.<sup>25</sup> An example in the Kenyan context is the Refugees Act,<sup>26</sup> that seeks to offer protection to

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<sup>22</sup> Robert S. Summers, 'Professor H.L.A Hart Concept of Law' (1963) 629 *Duke Law Journal* 629, 632 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1879&context=dlj> accessed on 22 November 2019.

<sup>23</sup> Stephen Pope, 'Reasons and Natural Law' in Gilbert Meilaender & William Werpehowski (eds.), *The Oxford Handbook of Theological Ethics* (Oxford University Press 2005) 163 [https://www.bc.edu/content/dam/files/centers/boisi/pdf/f09/Pope\\_Reason\\_and\\_Natural\\_Law.pdf](https://www.bc.edu/content/dam/files/centers/boisi/pdf/f09/Pope_Reason_and_Natural_Law.pdf) accessed on 19 November, 2019.

<sup>24</sup> Francois Rigaux, 'Hans Kelsen on International Law' (1998) 9 *European Journal of International Law* 325, 338 <http://www.ejil.org/pdfs/9/2/1493.pdf> accessed on 19 November 2019.

<sup>25</sup> Green, Leslie, 'Legal Positivism' (2018) *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/spr2018/entries/legal-positivism/> accessed on 22 November 2019.

<sup>26</sup> Refugees Act, No 13 of 2006.

refugees in Kenya. The Refugees Act, is reflected in the Constitution of Kenya, 2010. To understand Kelsen's theory, one would further ask where the 2010 Constitution derives its authority, which question would lead to the 1963 Constitution. One would further question the validity of the 1963 Constitution whose inquiry would lead to further questions that would arrive at a point where there would be no answer. This can explain Kelsen's theory that presupposes the existence of the grundnorm as the power conferring authority. It is therefore true to state that according to Kelsen, the grundnorm is a presupposition and it does not form part of the legal system since according to Kelsen it is not a norm like any other norm due to its extra-legal nature.<sup>27</sup>

The positive school of thought is concerned with viewing events as they occur and discussing actual problems that arise. This called for the reinterpretation of international law not on concepts drawn from reason but rather in terms of what actually happens between states.<sup>28</sup> More focus is drawn on what states have done amongst each other through agreements as opposed to what states ought to do.

This paper draws from the conclusions of the positive school of law that laws should be backed by commands or sanctions. The nature of commitments at the international arena for the protection of persons displaced due to natural disaster does not place pressure on States to comply and offer protection to environmentally forced migrants.

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<sup>27</sup> Julius Cohen, 'The Yale Political Element in Legal Theory: A look as Kelsen's Pure Theory' (1978) Vol 88 No.1 Yale Law Journal, 12  
<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6502&context=yjl> accessed on 19 November 2019.

<sup>28</sup> Malcom N. Shaw, *International Law*, (7<sup>th</sup> edn, Cambridge University Press 2003).

## **1.6. Research Methods**

This research employs use of textual analysis of the sources of information. Sources of information include international and regional conventions, protocols, declarations and compacts, books, journal articles, reports and website articles. Decided asylum applications have also been analyzed to inform the research paper.

## **1.7. Literature Review**

### **1.7.1. Natural Disaster and Human Migration**

Gaim Kibreab notes that natural disasters are a push factor to displacement. The negative effects of disasters lead to the displacement of people from their habitual residence to other locations for safety. Gaim terms such persons as disaster victims.<sup>29</sup> He notes that natural disasters by themselves do not lead to forced migration, but is a contributing factor to migration.<sup>30</sup> He uses the war in Sub-Saharan Africa to illustrate that areas not negatively affected by natural disaster are considered safe spaces and have drawn many people to reside in those locations while the unsafe areas are left inhabitable. Gaim Kibreab notes that displacement due to natural factors is likely to occur when the natural disaster threatens the economic livelihood and availability of food increasing vulnerability of the local community.<sup>31</sup>

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<sup>29</sup> Gaim Kibreab, 'Climate Change and Human Migration: A Tenuous Relationship?' (2009) Vol. 20, No.2 Fordham Environmental Law Review) 357, 358 <<http://www.jstor.org/stable/44175154>> accessed on 4 December 2017.

<sup>30</sup>Ibid.

<sup>31</sup> Ibid.



Natural disaster comprises of many pressures, of which the current is only a neighboring cause. There are typically ripple effects connected to population pressure, political conflict and poverty.<sup>32</sup> The displacement can be temporary for up to six months or permanent with no intention of return for displaced persons. Many scholars, however, agree to the centrality that natural disaster results to displaced populations. For example, the Stern Review estimates that there will be at least 200 million ‘climate refugees’ by the year 2050.<sup>33</sup> The research study benefits from literature and evidence that links natural disaster as a push factor to displacement.

### **1.7.2. Environmentally Displaced People**

In 1985, Essam el- Hinnawi of the UNDP defined environmental refugees as:

“...those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.”<sup>34</sup>

Essam el-Hinnawi grouped environmental refugees into three that is: those who briefly move and return after the reasons that caused them to migrate end; those who decide to relocate permanently and settle in a new location but the environment is not completely

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<sup>32</sup> Ibid.

<sup>33</sup> Nicholas Stern, ‘The Economics of Climate Change’ (2006) Vol. 97, The Stern Review, 111  
<<http://www.hm-treasury.gov.Uk/d/Part II Introduction group.pdf>> accessed on 13 January 2018.

<sup>34</sup> United Nations Environment Programme, ‘Environmental Refugees’ (1985) 4.

destroyed; and those who migrate permanently because their physical environment is completely destroyed and cannot sustain populations.<sup>35</sup>

Stephen Castles acknowledges the close correlation between the environment, economic, social and political well-being. The level of state support, economic activities, social support or poverty affect the vulnerability of people in an environmental disaster referring to it as multi-causality<sup>36</sup> as witnessed in North Korea, Bangladesh and Sudan where people fled their homes due to many factors including natural disasters and governance reasons.<sup>37</sup> Other factors that can be considered include underdevelopment or high population density.<sup>38</sup>

Diminishing resources may lead to conflict as people scramble for the little that is left. Others may decide to relocate to other locations, but if the resources are also constrained, there is potential for violence.<sup>39</sup> Dr Camillo Boano, Dr Tim Morris and Professor Roger Zetter, note that there is no international institution tasked with protecting those who cross international borders because of natural disaster.<sup>40</sup> The UNHCR has reservations to describe such persons as climate refugees or environmental refugees as classifying them as

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<sup>35</sup> Dr Camillo Boano, Professor Roger Zetter, Dr Tim Morris 'Environmentally Displaced People; Understanding the Linkages Between Environmental Change, Livelihoods and Forced Migration' (2008) University of Oxford, 7 <<https://www.rsc.ox.ac.uk/files/files-1/pb1-environmentally-displaced-people-2008.pdf>> accessed on 15 February 2018.

<sup>36</sup> Stephen Castles, 'Environmental Change and Forced Migration: Making Sense Of The Debate' (2002) Working Paper No. 7, Refugees Studies Centre University of Oxford, 5 <[www.unhcr.org/research/RESEARCH/3de344fd9.pdf](http://www.unhcr.org/research/RESEARCH/3de344fd9.pdf)> accessed on 18 June 2019.

<sup>37</sup> Ibid.

<sup>38</sup> Dr Camillo Boano, Professor Roger Zetter, Dr Tim Morris 'Environmentally Displaced People; Understanding the Linkages Between Environmental Change, Livelihoods and Forced Migration' (2008) University of Oxford, 22 <<https://www.rsc.ox.ac.uk/files/files-1/pb1-environmentally-displaced-people-2008.pdf>> accessed on 15 February 2018.

<sup>39</sup> Dr Camillo Boano, Professor Roger Zetter, Dr Tim Morris 'Environmentally Displaced People; Understanding the Linkages Between Environmental Change, Livelihoods and Forced Migration' (2008) University of Oxford, 22 <<https://www.rsc.ox.ac.uk/files/files-1/pb1-environmentally-displaced-people-2008.pdf>> accessed on 15 February 2018.

<sup>40</sup> Ibid.

such would impinge on jurisprudence that already protects a well-known demographic.<sup>41</sup> The UNHCR, however, notes that there are a group of migrants classified outside the scope of international refugee protection who require humanitarian assistance.<sup>42</sup>

Lack of policy and legal framework for the recognition and protection of individuals moving across borders due to climate change compounds their challenge for recognition. This research builds up on the conclusion by Dr. Camillo Boano on the need for the international community to adopt a legally binding framework for the recognition of those who are displaced across borders due to natural disasters.

### **1.7.3 Debate on Protection of Disaster Induced Migrants**

Gaim Kibreab contributes to the debate on the review of the 1951 Refugee Convention to encompass those affected by natural disaster as the environment can be used as a tool of harm noting that one can have well-founded fear of hunger or torture.<sup>43</sup> He proposes that the expansion of the 1951 Refugee Convention should be expanded to offer protection to all persons who flee for their lives regardless of the reasons. This means, therefore, that persons who migrate because of natural disasters are indistinguishable from people who migrate in search of employment or severe economic hardship.<sup>44</sup>

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<sup>41</sup> United Nations High Commissioner for Refugees, 'Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective' (2009) 8 <<https://www.unhcr.org/4901e81a4.pdf>> accessed on 23 May 2018.

<sup>42</sup> Ibid.

<sup>43</sup> Gaim Kibreab, 'Climate Change and Human Migration: A Tenuous Relationship?' (2009) Vol. 20, No.2 Fordham Environmental Law Review) 357, 393 <<http://www.jstor.org/stable/44175154>> accessed on 4 December 2017.

<sup>44</sup> Gaim Kibreab, 'Climate Change and Human Migration: A Tenuous Relationship?' (2009) Vol. 20, No.2 Fordham Environmental Law Review) 357, 394 <<http://www.jstor.org/stable/44175154>> accessed on 4 December 2017.

The Guiding Principles on Internal Displacement describe an internally displaced person as:

“Persons who have been forced or obliged to flee or to leave their homes or places of habitual residence in particular as a result of, or in order to avoid the effects of, armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.”<sup>45</sup>

The difference between an IDP and a refugee is the act of crossing an international border. Inclusion and recognition of those who are displaced by disaster, whether natural or manmade as IDPs is a clear sign for their need of protection. The same recognition should be extended to those who move across counties due to natural disasters.

The act of seeking asylum was envisioned as a temporary measure by the 1951 Refugee Convention that contained a geographical and time limitation to its scope.<sup>46</sup> The geographic and time limitation was later eliminated with the adoption of the 1967 Refugee Protocol.<sup>47</sup> African States included additional grounds for seeking asylum such as acts of aggression, foreign domination and acts seriously disturbing public order in the 1969 OAU Refugee Convention.<sup>48</sup> The 1984 Cartagena Declaration has included generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other events which have seriously disturbed public order as additional grounds for seeking asylum.<sup>49</sup> The two

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<sup>45</sup> United Nations, The Guiding Principles on Internal Displacement; UN Doc. E/CN.4/1998/53/Add.2 (1998).

<sup>46</sup> United Nations General Assembly, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954); 189 UNTS 137 (Refugee Convention) art 1.

<sup>47</sup> United Nations General Assembly, Protocol Relating to the Status of Refugees, (adopted 31 January 1967, entered into force 4 October 1967); 606 UNTS 267.

<sup>48</sup> African Union, Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974); 1001 UNTS 45 (OAU Convention) art 1.

<sup>49</sup> Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984).

regional instruments show the desire of States to expand the protection of refugees by incorporating additional grounds for seeking asylum. The additional grounds include acts of aggression, foreign domination, events seriously disturbing public order, generalized violence, internal conflicts and massive violations of human rights.

As states attempt to safeguard forced migrants, they must take into consideration that some of the drivers of displacement include political instability, environmental degradation, wars among other factors that it would be difficult to separate and determine the main cause of displacement.<sup>50</sup> Gaim Kibreab concludes by arguing that migration is caused by many factors including natural disasters. Calls for concerted action in addressing root causes of natural disaster, its effect on mitigation, and offering protection and aid to those who are forced to relocate ought to be heeded.<sup>51</sup>

#### **1.7.4 Appeal for a New Refugee Convention**

Andrew E. Shacknove, evaluates the 1951 Refugee definition arguing for other reasons that can cause a break in the bond between a citizen and his country other than persecution. He proposes the review of the refugee definition to rest on the lack of basic needs that force the sufferer to relocate from their country.<sup>52</sup>

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<sup>50</sup> Gaim Kibreab, 'Climate Change and Human Migration: A Tenuous Relationship?' (2009) Vol. 20, No.2 Fordham Environmental Law Review) 357, 399 <<http://www.jstor.org/stable/44175154>> accessed on 4 December 2017.

<sup>51</sup> Ibid.

<sup>52</sup> Andrew E. Shacknove, 'Who Is a Refugee' (1985) University of Chicago Press 274, 277 [http://www.law.lu.se/WEBUK.nsf/\(MenuItemById\)/JAMR27material/\\$FILE/Shacknove.pdf](http://www.law.lu.se/WEBUK.nsf/(MenuItemById)/JAMR27material/$FILE/Shacknove.pdf) accessed on 25 July, 2019.

Laura Ferracioli reiterates the inadequacy of the current Convention's definition. This is due to it not being broad, constraining global legal recognition to those who have suffered or live in fear of persecution due to their religion, nationality or race.<sup>53</sup> It is, therefore, clear that many vulnerable individuals are in dire need of a more effective and robust protective framework, that includes those who do not have a moral, but not yet legal, right to asylum and those whose claims are subjected to disparaging judicial interpretations of receipt states.<sup>54</sup> Ferracioli, however, cautions from revising the Convention under the current political climate. She notes that it would most likely be watered down further exposing vulnerable populations.<sup>55</sup> This can be evidenced by the United States withdrawal from the UN global compact on migration, on the grounds that the compact was contrary to its sovereignty and policy.<sup>56</sup>

Gaim Kibreab notes that negative consequences of natural disaster on the environment rather than persecution was the major cause of mass displacement of people in South Asia and Africa causing most governments to fear that the migrants would spill over to their territories and, hence, justifying their restrictive refugee and immigration policies.<sup>57</sup> Climate change leads to variation of weather patterns which results in droughts, rising sea level and even floods. Exodus is one of the survival tactics families in disaster areas adopt as a coping mechanism. He argues that the reason natural disaster is a root cause of

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<sup>53</sup> Laura Ferracioli, 'The Appeal and Danger of a New Refugee Convention Source' (2014) 40 *Social Theory and Practice Journal*, 123, 125.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> Aljazeera, 'US withdraws from UN Global Compact on Migration' (3 December 2017) <<http://www.aljazeera.com/news/2017/12/withdraws-global-compact-migration-171203160804853.html>> accessed on 5 December 2017.

<sup>57</sup> Gaim Kibreab, 'Climate Change and Human Migration: A Tenuous Relationship?' (2009) Vol. 20, No.2 *Fordham Environmental Law Review*) 357, 357 <<http://www.jstor.org/stable/44175154>> accessed on 4 December 2017.

relocation is its undeniable impact on the individual's quality of life negatively affecting access to food, water and healthcare.<sup>58</sup>

Kibreab goes further to discuss the environmental refugees as defined by David Barker, a former UNDP official, as individuals struck by a natural disaster and are not able or willing to obtain assistance from their government.<sup>59</sup> Kibreab points out that the use of the term refugee to refer to persons whose relocation is due to natural disaster would point to the environment as a persecuting factor.<sup>60</sup> He further argues that anyone whose cross-border movement does not have state complicity ought to be given protection similar to that enjoyed by refugees in the 1951 Refugee Convention. That protection should extend to persons who migrate in search for employment, food and better economic conditions. Kibreab concludes his argument by stressing the need to mitigate natural disasters, and support those affected by it.<sup>61</sup> Erin argues that the refugee law needs to evolve to take cognizant of the persons displaced due to climate change.<sup>62</sup>

Though there is existing literature on refugees and the environment as a push factor to displacement, there still exists legal vacuum on the legal recognition of persons displaced across borders due to the effects of climate change. This research paper seeks to contribute to the existing literature through analysis of asylum cases denied refugee protection due to

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<sup>58</sup> Ibid.

<sup>59</sup> Anthony V. Catanese, *Haitians: Migration and Diaspora* (1<sup>st</sup> edn, Routledge, 2019)

<sup>60</sup> Gaim Kibreab, 'Climate Change and Human Migration: A Tenuous Relationship?' (2009) Vol. 20, No.2 *Fordham Environmental Law Review* 357, 385 <<http://www.jstor.org/stable/44175154>> accessed on 4 December 2017.

<sup>61</sup> Ibi.

<sup>62</sup> Erin Halstead, 'Citizens of Sinking Islands: Early Victims of Climate Change' (2016) Vol. 23 No. 2 *Indiana Journal of Global Legal Studies* 819, 833 <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1631&context=ijgls>> accessed on 23 November 2019.

the restrictive application of the 1951 Refugee Convention while taking into account the rising number of displaced persons due effects of climate change.

## **1.8. Hypothesis**

Persons displaced across international borders due to natural disasters fall into a legal vacuum of protection and recognition.

## **1.9. Chapter Breakdown**

This research paper is comprised of four chapters as provided hereunder:

### **1.9.1. Chapter One- Introduction**

This Chapter briefly introduces the subject with a background and a problem statement arguing for the importance of the research topic. Thereafter the Chapter discusses the research methodology, objectives, research questions and hypothesis. It also discusses in length the theories relied on and literature review analyzing various books and journals articles on the topic.

### **1.9.2. Chapter Two- Plight of Cross Border Disaster Displaced Persons**

This Chapter discusses the interrelationship between enjoyment of human rights and effects of climate change. Harsh climatic conditions, increase vulnerability of people negatively affecting the enjoyment of human rights. This has a ripple effect leading to the displacement of people to migrate to other locations where they can enjoy their rights.



### **1.9.3. Chapter Three- Natural Disaster as Cause of Cross Border Displacement**

This Chapter discusses natural disaster as a cause of cross border displacement and analyzes how states respond to claims for asylum from persons who cross an international border due to natural disaster. The Chapter also analyzes effects of non- recognition of displaced persons as refugees in relation to the spirit of international refugee protection of *non-refoulement*, international principles of right to life, and to seek asylum as pronounced in the Universal Declaration of Human Rights.

### **1.9.4. Chapter Four- Framework for the Protection of Cross Border Displaced Migrants**

This Chapter discusses commitments at the international level aimed at protecting people displaced across borders due to natural disasters. The instruments discussed include the Nansen Principles, New York Declaration for Refugees and Migrants, Global Compact for Refugees and Global Compact for Migrants. The chapter notes that all the commitments are not legally binding but a declaration of aspirations by States.

### **1.9.5. Chapter Five- Conclusions and Recommendations**

The chapter sums up the research's findings. Based on these findings, the Chapter proposes recommendations.

## **CHAPTER TWO**

### **PLIGHT OF CROSS BORDER DISASTER DISPLACED PERSONS**

#### **2.1 Introduction**

Human rights should be enjoyed by displaced persons before, during and after migration. The Human Rights Council notes that migrants who relocate out of compulsion rather than choice are at a greater risk of human rights violations.<sup>1</sup> The lack of a policy document for the recognition and protection of persons displaced across borders due to effects of climate change exposes the displaced persons to vulnerabilities.

This Chapter discusses challenges experienced by cross border disaster displaced persons in countries they call home that forces them to migrate to other locations. The Lacuna in the legal framework for the protection of migrants exposes them to forceful return or *non refoulement*, an international principle. This Chapter also discusses the international principle of necessity and its applicability in the context of climate change displacement.

#### **2.2 Plight of Disaster Displaced Persons**

The 1951 Refugee Convention sets five grounds an applicant needs to prove to have a successful asylum application. Of paramount, an applicant needs to establish persecution on any of the five convention grounds. Persecution in the 1951 Refugee Convention is understood to mean failure of the state to offer protection.<sup>2</sup> Those who successfully present

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<sup>1</sup> Human Rights Council, The Slow Onset Effects of Climate Change and Human Rights Protection for Cross – Border Migrants (2018);c A/HRC/37/CRP.4  
[https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A\\_HRC\\_37\\_CRP\\_4.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A_HRC_37_CRP_4.pdf) accessed on 4 December 2019.

<sup>2</sup> Human Rights Council, The Slow Onset Effects of Climate Change and Human Rights Protection for Cross – Border Migrants (2018); A/HRC/37/CRP.4

their claim for asylum enjoy an extensive list of rights contained in international instruments. Inhabitants of small island states who cross international frontiers due to effects of climate find themselves outside the ambit of the 1951 Refugee Convention and with no backing of a legal framework.<sup>3</sup>

Effects of climate change are felt globally, though experienced by States at different magnitudes. Small island states who are the least emitters of greenhouse gases are largely affected while the greatest emitters of greenhouse gases are the least affected by effects of climate change and can afford to employ mitigation measures.<sup>4</sup> As States adopt mechanisms for adaptation and mitigation of climate change, little is being done to offer legal protection and recognition to persons who migrate due to the consequences of climate change.<sup>5</sup> Disasters negatively impact human rights of persons in close proximity to the location of the disaster and core rights such as right to life, access to adequate food and water are likely not to be realized.<sup>6</sup>

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[https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A\\_HRC\\_37\\_CRP\\_4.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A_HRC_37_CRP_4.pdf) accessed on 4 December 2019.

<sup>3</sup> Tiffany T.V Duong, 'When Islands Drown: The Plight of "Climate Change Refugees" and Resources to International Human Rights Law' (2010) Vol. 31;4 U Pa.J Int'l L. 1239, 1251  
[https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239\(2010\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239(2010).pdf)  
accessed on 3 December 2019.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Human Rights Council, The Slow Onset Effects of Climate Change and Human Rights Protection for Cross – Border Migrants (2018); A/HRC/37/CRP.4  
[https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A\\_HRC\\_37\\_CRP\\_4.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A_HRC_37_CRP_4.pdf) accessed on 4 December 2019.

## **2.3 Human Rights Enjoyment and Climate Change**

### **2.3.1 Right to Life**

Right to life is a universal peremptory norm outlined in the UDHR.<sup>7</sup> This means that no limitation of its enjoyment is allowed in the event of a disaster or emergency. Effects of climate change experienced on small island states include flooding, heat waves, increased water-borne diseases, starvation, drowning and extinction of species threaten all life on the island.<sup>8</sup> Inhabitants of small island states have a well-founded fear that the island they call home will be submerged in water in the coming years and not be able to sustain any form of life.<sup>9</sup> This affects the right to life of the inhabitant who are forced to flee to other countries where their life is not threatened.<sup>10</sup>

### **2.3.2 Right to Food and Water**

The Human Rights Committee concluded in 2003 that availability of water is a core human right.<sup>11</sup> Sources of water for SIDS include rainwater, underground water and ground water. Effects of global temperature such as ocean tides, increase in sea level and saline intrusion contributes to the contamination of fresh water in SIDS.<sup>12</sup> Climate change impedes

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<sup>7</sup> United Nations, Universal Declaration of Human Rights (adopted on 10 December 1948); UN Doc. 217 A (III) (UDHR) art 3.

<sup>8</sup> Office of the High Commissioner for Human Rights, ‘General Comment No. 15 : The Right to Water (Arts 11 and 12 of the Covenant) (2003); UN Doc. E/C.12/2002/11 <https://www.refworld.org/pdfid/4538838d11.pdf> accessed on 3 December 2019.

<sup>9</sup> Tiffany T.V Duong, ‘When Islands Drown: The Plight of “Climate Change Refugees” and Resources to International Human Rights Law’ (2010) Vol. 31;4 U Pa.J Int’l L. 1239, 1256 [https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239\(2010\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239(2010).pdf) accessed on 3 December 2019.

<sup>10</sup> Ibid.

<sup>11</sup> Office of the High Commissioner for Human Rights, ‘General Comment No. 15 : The Right to Water (Arts 11 and 12 of the Covenant) (2003); UN Doc. E/C.12/2002/11 <https://www.refworld.org/pdfid/4538838d11.pdf> accessed on 3 December 2019.

<sup>12</sup> Ibid.

realization of the right to adequate water and balanced nutrition. contained in Article 25 of the UDHR<sup>13</sup> and Article 11 of the ICESCR.<sup>14</sup> Contamination of freshwater destroys crops on the islands leading to crop failure, inadequate supply of agricultural food and reduced income generating activities.<sup>15</sup>

### 2.3.3 Right to Health

While the consequences of global warming is indiscriminate, those in small island states are exposed to great suffering.<sup>16</sup> Climate change affects both the environment and quality of health of people, plants and animals.<sup>17</sup> The right to well-being contained in Article 25 of the Universal Declaration of Human Rights is closely associated with access to adequate food and water. It is anticipated that effects of climate change will result to increased outbreak of deceases, lack of basic sanitation and even death with children and pregnant mothers at high risk of contracting malaria, cardio respiratory and water borne diseases.<sup>18</sup>

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<sup>13</sup> United Nations General Assembly, Universal Declaration of Human Rights (adopted on 10 December 1948); UN Doc. 217 A (III) (UDHR) art 11.

<sup>14</sup> United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1966, entered into force 3 January 1976); 933 UNTS 3 <https://www.refworld.org/docid/3ae6b36c0.html> accessed on 3 December 2019.

<sup>15</sup> Tiffany T.V Duong, 'When Islands Drown: The Plight of "Climate Change Refugees" and Resources to International Human Rights Law' (2010) Vol. 31;4 U Pa.J Int'l L. 1239, 1257 [https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239\(2010\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239(2010).pdf) accessed on 3 December 2019.

<sup>16</sup> Human Rights Council, The Slow Onset Effects of Climate Change and Human Rights Protection for Cross – Border Migrants (2018); A/HRC/37/CRP.4 [https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A\\_HRC\\_37\\_CRP\\_4.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A_HRC_37_CRP_4.pdf) accessed on 4 December 2019.

<sup>17</sup> Derald J. Hay, 'Post- Kyoto Stress Disorder: How the United States Can Influence International Climate Change Policy' (2008) Vol. 15 Issue 3 Missouri Environmental Law Policy Review 493 <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1325&context=jesl> accessed on 4 December 2019.

<sup>18</sup> World Health Organization, 'Malaria in Pregnancy' (2015) WHO Evidence Review Group Meeting Report <https://www.who.int/malaria/mpac/mpac-sept2015-erg-mip-report.pdf> accessed on 3 December 2019.

The elderly, persons with disability and those with chronic illnesses also face unique challenges in accessing healthcare with destroyed infrastructure due to strong winds .<sup>19</sup>

### **2.3.4 Right to Cultural Heritage**

Small island states cannot shield themselves from global warming.<sup>20</sup> Inhabitants of SIDS feel a sense of loss as the island they call home is slowly disappearing due to rising sea level.<sup>21</sup> Migrating to a different country exposes inhabitants of SIDS to loss of their tradition knowledge, cultural way of life and historical artefacts and locations on the island.<sup>22</sup> Increased flooding, strong winds and rise in sea level may result to burial of archeological evidence, erosion of traditional sites, breakdown of social cycles and challenges in celebrating ritual events.<sup>23</sup>

National countries offer protection to the cultural heritage of its nations with the freedom to practice their religion or cultural practices.<sup>24</sup> The same should be extended to persons who cross borders in masses and cannot return to due to effects of global warming.

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<sup>19</sup> Human Rights Council, The Slow Onset Effects of Climate Change and Human Rights Protection for Cross – Border Migrants (2018); A/HRC/37/CRP.4 [https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A\\_HRC\\_37\\_CRP\\_4.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A_HRC_37_CRP_4.pdf) accessed on 4 December 2019.

<sup>20</sup> Tiffany T.V Duong, ‘When Islands Drown: The Plight of “Climate Change Refugees” and Resources to International Human Rights Law’ (2010) Vol. 31;4 U Pa.J Int’l L. 1239, 1253 [https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239\(2010\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239(2010).pdf) accessed on 3 December 2019.

<sup>21</sup> Hee- Eun Kim, ‘Changing Climate, Changing Culture: Adding the Climate Change Dimension to the Protection of Intangible Cultural Heritage’ (2011) International Journal of Cultural Property 256, 263 [https://unfccc.int/files/adaptation/groups\\_committees/loss\\_and\\_damage\\_executive\\_committee/application/pdf/changingclimatechangingculture.pdf](https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/changingclimatechangingculture.pdf) accessed on 4 December 2019.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> United Nations, Universal Declaration of Human Rights (adopted on 10 December 1948); UN Doc. 217 A (III) (UDHR) art 27.

## **2.4 Plight of Disaster Displaced Persons in the Host Country**

States must protect human rights of all persons inside its territory notwithstanding their immigration status.<sup>25</sup> There exists a clear interlink between effects of global warming and the realization of basic human rights.<sup>26</sup> Host countries of refugees are under an obligation to protect basic human rights of refugees. The obligations for the asylum country and the rights entitled to refugees are listed in the 1951 Refugee Convention.<sup>27</sup> Unfortunately the same rights and obligations do not extend to persons who migrate as a result of consequences of global warming.

## **2.5 Necessity as a Justification for Internationally Wrongful Conduct**

State necessity is a circumstance that excludes the wrongfulness of an internationally wrongful conduct of a Government.<sup>28</sup> It arises where a State has to protect its interest when confronted with imminent harm and its actions do not negatively impair the interests of the offended State. It applies where the conduct of a State would otherwise constitute a

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<sup>25</sup> Human Rights Council, *The Slow Onset Effects of Climate Change and Human Rights Protection for Cross – Border Migrants* (2018); A/HRC/37/CRP.4 [https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A\\_HRC\\_37\\_CRP\\_4.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A_HRC_37_CRP_4.pdf) accessed on 4 December 2019

<sup>26</sup> Tiffany T.V Duong, 'When Islands Drown: The Plight of "Climate Change Refugees" and Resources to International Human Rights Law' (2010) Vol. 31;4 U Pa.J Int'l L. 1239, 1261 [https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239\(2010\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239(2010).pdf) accessed on 3 December 2019.

<sup>27</sup> United Nations General Assembly, *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954); 189 UNTS 137 (Refugee Convention).

<sup>28</sup> International Law Commission, *Responsibility of States for Internationally Wrongful Act* (2001); UN Doc. 56/83 Art. 25 [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) accessed on 4 December 2019.

violation of its international law responsibility.<sup>29</sup> The Defense of necessity cannot be invoked by a State if the State has contributed to the wrongful conduct.

Climate change has caused the displacement of masses of people who are forced to cross international borders in large groups. Small island States will migrate in large numbers, fleeing rising sea level that threatens their existence. The host States may be tempted to reject entry of such persons who do not in the strictest sense qualify for international protection under the 1951 Refugee Convention and compel them to return to their home country.<sup>30</sup> This will force the migrants to return to sinking nations where the environment threatens their existence and enjoyment of human rights.<sup>31</sup>

For necessity to be effectively established by a State, the offending State has to satisfy that its conduct does not prejudice the interest of the offended State, and it did not contribute to the situation of necessity.<sup>32</sup> SIDS have a combined population of approximately 71 million people, less than 1 per cent of the global population estimated at 7,713 million people.<sup>33</sup> The population of a single small island State such as Maldives with a population of 0.5 million people does not greatly prejudice the interests of the a host country such an India with a population of 1.391 million, which is less than 1 per cent of the entire populace of

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<sup>29</sup> Ibid.

<sup>30</sup> United Nations General Assembly, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954); 189 UNTS 137 (Refugee Convention).

<sup>31</sup> Hee- Eun Kim, 'Changing Climate, Changing Culture: Adding the Climate Change Dimension to the Protection of Intangible Cultural Heritage' (2011) International Journal of Cultural Property 256, 263 [https://unfccc.int/files/adaptation/groups\\_committees/loss\\_and\\_damage\\_executive\\_committee/application/pdf/changingclimatechangingculture.pdf](https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/changingclimatechangingculture.pdf) accessed on 4 December 2019.

<sup>32</sup> International Law Commission, Responsibility of States for Internationally Wrongful Act (2001); UN Doc. 56/83 Art. 25 [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) accessed on 4 December 2019.

<sup>33</sup> United Nations Department of Economics and Social Affairs, 'World Population Prospects 2019' (2019) [https://population.un.org/wpp/Publications/Files/WPP2019\\_Highlights.pdf](https://population.un.org/wpp/Publications/Files/WPP2019_Highlights.pdf) accessed on 2 December 2019.



India.<sup>34</sup> A report by the Office of the High Representative for the Least Developing Countries, Landlocked Developing Countries and Small Islands Developing States in 2015 reported that SIDS contribute less than 1 per cent of global greenhouse gas emissions as such their emission of greenhouse gases is negligible.<sup>35</sup>

## 2.6 Conclusion

A person cannot be denied entry into a country, barred entry or sent back to a country where there they would experience serious human rights violations.<sup>36</sup> Prohibition of return stems from the international norm of *non-refoulement* reiterated by the 1951 Refugee Convention that protects people from life threatening circumstances.

Erratic changes in weather patterns leads to the displacement of people into an uncertain legal arena. Small island states maybe amongst the first to absorb the consequences of climate change, but they are definitely not the last. The legal safeguard of climate change displaced persons across borders should not be disregarded because the ‘persecutor’ is the environment.<sup>37</sup> A legal framework that anticipates and better responds to the plight of cross border climate change displaced persons is possible through increased awareness on the

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<sup>34</sup> Population Reference Bureau, ‘Population mid- 2019’ (2019)

<https://www.prb.org/international/geography/india> accessed on 4 December 2019.

<sup>35</sup> Office of the High Representative for the Least Developing Countries, Landlocked Developing Countries and Small Islands Developing States, ‘Small Island Developing States in Numbers’ (2015) Climate Change Edition page 18 [https://sustainabledevelopment.un.org/content/documents/2189SIDS-IN-NUMBERS-CLIMATE-CHANGE-EDITION\\_2015.pdf](https://sustainabledevelopment.un.org/content/documents/2189SIDS-IN-NUMBERS-CLIMATE-CHANGE-EDITION_2015.pdf) accessed on 2 December 2019.

<sup>36</sup> Human Rights Council, The Slow Onset Effects of Climate Change and Human Rights Protection for Cross – Border Migrants (2018); A/HsRC/37/CRP.4 [https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A\\_HRC\\_37\\_CRP\\_4.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A_HRC_37_CRP_4.pdf) accessed on 4 December 2019

<sup>37</sup> Tiffany T.V Duong, ‘When Islands Drown: The Plight of “Climate Change Refugees” and Resources to International Human Rights Law’ (2010) Vol. 31;4 U Pa.J Int’l L. 1239, 1252 [https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239\(2010\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Duong31U.Pa.J.Int'lL.1239(2010).pdf) accessed on 3 December 2019.

impact of climate change and its interlink to the enjoyment of human rights before, during and after displacement.

Persons displaced should be offered protection and recognition based on the human rights violations experienced in their home country. The legal vacuum for their recognition and lack of clear obligations of the host State, continues to expose displaced persons to violation of human rights.<sup>38</sup>

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<sup>38</sup> Ibid.

## **CHAPTER THREE**

### **NATURAL DISASTER AS A CAUSE OF CROSS BORDER DISPLACEMENT**

#### **3.1 Introduction**

Climate change has led to increased temperatures, strong winds, droughts, tornadoes and increase in sea level threatening life on small island states. This leads to a ripple effect of displacing people in large numbers to more habitable locations or other countries to seek refuge. With a positivist application of the 1951 Refugee Convention, persons displaced due to effects of global warming or natural disaster, do not fit the description of a refugee.

This chapter discusses natural disaster as a cause of displacement across an international border and the hesitation of states to apply *non refoulement* principle in the context of climate change.<sup>1</sup> This Chapter also analyzes how applicants seeking refugee protection have interpreted natural disaster as a ‘persecutor’ in the light of the 1951 Refugee Convention and how courts have interpreted the refugee definition in relation to displacement due to natural disaster. Thereafter, conclusions are drawn based on the discussion that natural disaster is a drive leading to displacement of people across an international border.

#### **3.2 Impact of Natural Disaster on the Environment**

Countries experience extreme weather conditions, including hurricanes, heat waves, famine, sea level rising and changing weather patterns. Conditions, such as land scarcity,

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<sup>1</sup> Human Rights Council, The Slow Onset Effects of Climate Change and Human Rights Protection for Cross – Border Migrants (2018); A/HRC/37/CRP.4 [https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A\\_HRC\\_37\\_CRP\\_4.pdf](https://www.ohchr.org/Documents/Issues/ClimateChange/SlowOnset/A_HRC_37_CRP_4.pdf) accessed on 4 December 2019

population pressures, and poor infrastructure make countries vulnerable to climate hazards.

<sup>2</sup> Since the pre-industrial period, land surface temperatures have increased twofold; affecting food security, desertification, heat waves and land degradation. <sup>3</sup> Climate change negatively affects food security and reduces animal growth rate due to changing rainfall seasons and higher temperatures. The Intergovernmental Panel on Climate Change (IPCC) in 2019 published that global warming had affected adversely food security in Africa, Asia and America by adversely affecting the environment of the host countries. <sup>4</sup>

The IPCC also predicts that Asia and Africa have the highest risk of desertification. North and South America, Asia and Mediterranean suffer elevated risks of wild fires. These changes induce migration within countries and across international borders: showing the multiple causes of mobility. It is projected that slow onset disasters may increase displacement, threaten livelihoods, reduce availability of food and contribute to increased possibilities for conflicts arising. <sup>5</sup> For example, in 2018, Somalia reported slow onset drought with protracted conflict that led to the displacement of approximately 1.1 million people. <sup>6</sup>

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<sup>2</sup> United Nations Framework Convention on Climate Change, 'Climate Action and Support Trends' (2019) [https://unfccc.int/sites/default/files/resource/Climate\\_Action\\_Support\\_Trends\\_2019.pdf](https://unfccc.int/sites/default/files/resource/Climate_Action_Support_Trends_2019.pdf).

<sup>3</sup> Intergovernmental Panel on Climate Change (IPCC), 'Climate Change and Land' (August 2019) 7 [https://www.ipcc.ch/site/assets/uploads/2019/08/4.-SPM\\_Approved\\_Microsite\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2019/08/4.-SPM_Approved_Microsite_FINAL.pdf) accessed on 1 October 2019.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> World Metrological Organization, 'WMO Statement on the State of the Global Climate in 2018' (2019) [https://library.wmo.int/doc\\_num.php?explnum\\_id=5789](https://library.wmo.int/doc_num.php?explnum_id=5789) accessed on 1 October 2019.

### 3.3 Disappearing Low Island States and Climate Refugees

Small Islands Developing States are mostly susceptible to rise in sea level. Their climate is affected by large ocean atmosphere interactions such as heavy rainfall, monsoons and cyclones.<sup>7</sup> Most of the land area in SIDS is within 5 meters above sea level, with Tuvalu and Maldives reported to have 100% land area within 5 meters above sea level.<sup>8</sup> Any rise in level of ocean water will have devastating consequences on the population, health and the island socio economic activities. This will translate to severe risks to food security due to the impact on agricultural activities, destruction of existing infrastructure and reduced sources of income generating activities such as fishing.<sup>9</sup>

The process of migrating from small island states is already happening and is likely to continue over time, with increased forced migration becoming gradually more widespread. In addition, SIDS have a collective populace of around 71 million people, less than 1 per cent of the global population estimated at 7,713 million.<sup>10</sup> SIDS contribute less than 1 per cent of worlds greenhouse gas production, but have been and will continue to disproportionately suffer from the damaging impacts of climate change.<sup>11</sup>

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<sup>7</sup> Office of the High Representative for the Least Developing Countries, Landlocked Developing Countries and Small Islands Developing States, 'Small Island Developing States in Numbers' (2015) Climate Change Edition [https://sustainabledevelopment.un.org/content/documents/2189SIDS-IN-NUMBERS-CLIMATE-CHANGE-EDITION\\_2015.pdf](https://sustainabledevelopment.un.org/content/documents/2189SIDS-IN-NUMBERS-CLIMATE-CHANGE-EDITION_2015.pdf) accessed on 2 December 2019.

<sup>8</sup> Office of the High Representative for the Least Developing Countries, Landlocked Developing Countries and Small Islands Developing States, 'Small Island Developing States in Numbers' (2015) Climate Change Edition page 21 [https://sustainabledevelopment.un.org/content/documents/2189SIDS-IN-NUMBERS-CLIMATE-CHANGE-EDITION\\_2015.pdf](https://sustainabledevelopment.un.org/content/documents/2189SIDS-IN-NUMBERS-CLIMATE-CHANGE-EDITION_2015.pdf) accessed on 2 December 2019.

<sup>9</sup> Carol Farbotko, 'Wishful Sinking: Disappearing Islands, Climate Refugee and Cosmopolitan experimentation' (2010) Vol. 51 No.1 Asia Pacific Viewpoint 47, 49 [https://www.researchgate.net/publication/227800434\\_Wishful\\_sinking\\_Disappearing\\_islands\\_climate\\_refugees\\_and\\_cosmopolitan\\_experimentation/link/5b30315f0f7e9b0df5c6e059/download](https://www.researchgate.net/publication/227800434_Wishful_sinking_Disappearing_islands_climate_refugees_and_cosmopolitan_experimentation/link/5b30315f0f7e9b0df5c6e059/download) accessed on 2 December 2019.

<sup>10</sup> United Nations Department of Economics and Social Affairs, 'World Population Prospects 2019' (2019) [https://population.un.org/wpp/Publications/Files/WPP2019\\_Highlights.pdf](https://population.un.org/wpp/Publications/Files/WPP2019_Highlights.pdf) accessed on 2 December 2019.

<sup>11</sup> Office of the High Representative for the Least Developing Countries, Landlocked Developing Countries and Small Islands Developing States, 'Small Island Developing States in Numbers' (2015) Climate Change

The displacement of persons from SIDS will increase in the 21<sup>st</sup> century as a direct consequence of climate change with the potential risk of nationals from SIDS rendered stateless.<sup>12</sup> Inhabitants of SIDS find themselves in a vacuum as the international legal framework does not have a mechanism for the protection and legal recognition of people required to cross a border due to the effects of climate change.

### **3.3 Asylum Case law: Cross- Border Displacement Due to Natural Factors**

#### ***Ioane Teitiota Vs. The Chief Executive of the Ministry of Business Innovation and Employment***

Republic of Kiribati comprises of island groups in the South-west Pacific Ocean. The government of Kiribati has been battling rising sea level, storm surges, high tides and flooding of residential area.<sup>13</sup> The Applicant, a citizen from Kiribati and his wife sought refuge in New Zealand due to overpopulation, rising water level on the island and extreme weather conditions in Kiribati. The Refugee and Protection Officer denied their request, citing the definition of the 1951 Convention.<sup>14</sup> On appeal Priestley, J upheld the reasoning and the decision of the Tribunal.

The judge in his judgement noted that natural disaster can displace people as much as there is no persecution. The government of Kiribati was negatively affected by rising sea level

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Edition page 18 [https://sustainabledevelopment.un.org/content/documents/2189SIDS-IN-NUMBERS-CLIMATE-CHANGE-EDITION\\_2015.pdf](https://sustainabledevelopment.un.org/content/documents/2189SIDS-IN-NUMBERS-CLIMATE-CHANGE-EDITION_2015.pdf) accessed on 2 December 2019.

<sup>12</sup> Ibid.

<sup>13</sup> Kiribati Government, 'Initial Communication under the United Nations Framework Convention on Climate Change of September' (1999) 13 <<https://unfccc.int/resource/docs/natc/kirnc1.pdf>> accessed on 6 September 2019.

<sup>14</sup> AF (*Kiribati*) (2013) NZIPT 800413 New Zealand Immigration and Protection Tribunal.

and environmental degradation which the claimant in the case was arguing as basis for grant of refugee status. The Applicant noted that New Zealand, as a party to the 1951 Convention, recognized persons forced to flee under the convention grounds. The judge recognized that the 1951 Refugee Convention had been domesticated through New Zealand national laws through the Immigration Act of 2009. The Immigration Act provides, in Section 129, that one can be granted refugee status in line with the Act in complicity with the definition in the 1951 Refugee Convention. This is translated therefore to mean, that a person who qualifies for refugee status under the 1951 Refugee Convention, also qualifies for protection under New Zealand National refugee law.

The Judge made reference that the 1951 Refugee Convention does not define the term persecution but New Zealand had accepted the definition adopted by James Hathway's human rights method to define persecution to mean systematic abuse of basic human rights evidenced by failure or absence of a sovereign's protection, which is also adopted by United Kingdom and Canada. An individual needs to prove fear of persecution showing systematic violations of basic human rights evidenced by failure of state protection. The Tribunal held that the fear of being persecuted is proven when there is a actual, as opposed to hypothetical opportunity of it occurring.<sup>15</sup> The Tribunal went further and held that persons fleeing natural calamities have no recourse under the Convention.

The Tribunal held that even though there is an interrelationship between natural calamities and human vulnerability which can easily escalate to armed conflict, there was no such risk in Kiribati. Similarly, there was no risk to the Applicant's right to life as per Article 6 of

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<sup>15</sup> *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC 107 Paragraph 23.

the ICCPR if returned to Kiribati.<sup>16</sup> The situation of the Applicant was no different from any national of Kiribati and the Judge held there was no harm or persecution he or his family would be subjected to if he returned to Kiribati.<sup>17</sup> The discrimination, if at all any, was unselective and not based on any five of the 1951 Refugee Convention grounds.<sup>18</sup> Persons compelled to flee as a result of a natural disaster are not persons to whom Article 1A (2) of the 1951 Refugee Convention covers.<sup>19</sup> The judge rejected the Applicant's case because if he returned to Kiribati he would not suffer human rights violations.

### ***AC (Tuvalu) Vs. New Zealand Immigration and Protection Tribunal***

The case was an appeal from the decision of a refugee protection officer who denied Tuvalu nationals refugee protection; despite the applicants alleging substantial grounds for cruel treatment if they went back to Tuvalu. The issue for determination brought before the court was if Tuvalu's Government could be said to failing to take measures to protect the appellant's lives from the effects of global warming.

The NAPA of May 2007 filed under the auspices of the UNFCCC<sup>20</sup> the country is described as extremely low lying small-sized island located within the central Pacific Ocean. The country has a population of roughly 11,000 people who reside within the coastal area and who are vulnerable<sup>21</sup>

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> United Nations General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976); 999 UNTS 171.

<sup>19</sup> United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (16 December 1966, entered into force 3 January 1976); 993 UNTS 3.

<sup>20</sup> United Nations General Assembly, United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994); 1771 UNTS 107.

<sup>21</sup> Tuvalu's National Adaptation Programme of Action Under the Auspice of the United Nations Framework Convention on Climate Change (May 2007) <<https://unfccc.int/resource/docs/napa/tuv01.pdf>> accessed on 5 October 2019.



According to the NAPA report, common vulnerabilities currently faced by Tuvaluans caused by climate change include coastal erosion with sea level rising, storms and cyclones, flooding, water scarcity from increased population and changes in rainfall patterns, destruction to primary sources for subsistence such as coconut plantations and fisheries, caused by cyclones and sea surface temperature changes, and damage to individual and community assets from storms, drought and fires.<sup>22</sup> The Appellants gave evidence that they had lived on the Island for many years and had noticed that most of the tree foliage cover close to the shores withered and died, causing intensive difficulties in trying to grow foodstuff and increased soil erosion as a consequence of global warming. The public depended on rainwater for fresh water, but even that was threatened due to erratic rainfall patterns.<sup>23</sup>

In the assessment of the case and evidence brought before it, the Tribunal considered Section 198 of the Immigration Act, 2009, whether the Appellants is eligible for protection under the 1951 Refugee Convention or protected persons under the 1984 Convention Against Torture<sup>24</sup> or the ICCPR.<sup>25</sup>

In the interpretation of the 1951 Refugee Convention, Section 129(1) of the Immigration Act provides that an individual must be recognized as a refugee by the 1951 Refugee Convention to enjoy refugee recognition at the national level. In the determination of the applicability of the 1951 Refugee Convention, the principle issues considered objectively

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<sup>22</sup> Ibid.

<sup>23</sup> AC (Tuvalu) [2014] NZIPT 800517-520, New Zealand: Immigration and Protection Tribunal, para 28 <[https://www.refworld.org/cases/NZ\\_IPT\\_585151694.html](https://www.refworld.org/cases/NZ_IPT_585151694.html)> accessed on 6 October 2019.

<sup>24</sup> United Nations General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

<sup>25</sup> United Nations General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976); 999 UNTS 171.

on the facts was whether there was a distinct possibility of persecution and suffering based on the five conventional grounds. It was found and accepted that, based on the Tribunal's rationale in *Chief Executive of the Ministry of Business, Innovation and Employment*,<sup>26</sup> there was no basis for the appellants to be recognized as refugees as the harm they faced in Tuvalu was not based on the grounds set out in the 1951 Refugee Convention.

The Appellant's counsel submitted that the Appellant and his children were in danger of suffering cruel treatment, or even being arbitrarily deprived of life in Tuvalu and relied on Article 6 and 7 of the ICCPR.<sup>27</sup> The Immigration Act (in section 13) makes provision for the protection of people from cruel or inhumane treatment if they were to leave New Zealand. Therefore, the Counsel argued that focus should be the willingness of the Government's mitigation of the adversity that arose from the Tuvalu Appellants suffering.

<sup>28</sup> It was submitted that the harm must not be deliberate nor must Tuvalu's Government deliberately attempt to harm the appellants for their claim to subsist. The Counsel submitted that the failure of the Government to take steps to guarantee safe water for consumption fit the description of arbitrary denial of the right to life.<sup>29</sup> The provision of the law was intended to protect only against present and arbitrary mistreatment and killing of individuals.<sup>30</sup>

The tribunal therefore found no immediate threat to the lives of the appellants if they were to go back to Tuvalu. Similarly, there was no evidence to denote the government of

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<sup>26</sup> Chief Executive of the Ministry of Business Vs. Innovation and Employment (2013) NZHC 3125.

<sup>27</sup> United Nations General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976); 999 UNTS 171.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

Tuvalu's failure to implement policy measures in response to past catastrophes in ways amounting to the said mistreatment. Nor was there any evidence of the state exposing its citizens to inhumane and cruel treatment with regards to climate change. The Tribunal, therefore, held that the appellants were not refugees as per the 1951 Refugee Convention, nor protected persons within the import of the Convention Against Torture or the Covenant on Civil and Political Rights.

***RRT Case No. 0907346 Vs. Australia Refugee Review Tribunal***

The Applicant in the case was a citizen of Kiribati who moved to Australia in 2007 to find shelter as the land in Kiribati was slowly sinking because of rising sea levels and absence of fresh drinking water due to climate change. The applicant claimed that he could not return home to his country, due to the foreseeable possibility of lack of a habitable space in the country. He claimed that adversities ushered by climate change should have the classification of persecution within the meaning of the 1951 Refugee Convention. For purposes of the 1951 Refugee Convention, the appellant came from a part of the island that was affected by rising ocean rise and fell within the ambit of a social and political group as set out in the Convention.

It was acknowledged that Australian laws do not offer protection to persons fleeing the effects of natural disaster, and in the absence of such legislation, the law should be understood in a manner that allows people to be recognized as refugees. The Applicant explained that his fear was based on the rising sea level.<sup>31</sup>

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<sup>31</sup> *RRT Case No. 0907346*, [2009] RRTA 1168, Australia: Refugee Review Tribunal <<https://www.refworld.org/pdfid/4b8fdd952.pdf>> accessed on 12 October 2019

The Tribunal accepted that torture within the meaning of the Refugee Convention must involve a discriminatory element. The Tribunal made reference to *Applicant A & Anor v MIEA & Anor*,<sup>32</sup> where Brennan CJ held that the victims of persecution should be selected by reference to a criterion of one of the categories of discrimination including, political opinion, race, nationality or religion or social grouping.<sup>33</sup>

The Tribunal held that the Applicant did not have a well-established fear of oppression based on any of the convention grounds and should be returned to Kiribati having been denied a protection visa.<sup>34</sup>

### **3.4 Right to Enter and Remain in an Asylum State**

The 1951 Refugee convention has a restrictive refugee description limited to persons who have a deep-rooted fear of persecution on grounds of race, religion, nationality, membership of a particular group or political opinion.<sup>35</sup> Article 14 of the Universal Declaration of Human Rights<sup>36</sup> provides for the right to seek and enjoy asylum in other countries. Countries are not permitted to return a person where their life or fundamental freedoms would be at risk based on any five convention grounds.

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<sup>32</sup> *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> United Nations General Assembly, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954); 189 UNTS 137 (Refugee Convention) art 1.

<sup>36</sup> United Nations Universal Declaration of Human Rights (adopted on 10 December 1948); UN Doc 217 A (III) (UDRH) <[https://www.ohchr.org/en/udhr/documents/udhr\\_translations/eng.pdf](https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf)> accessed on 18 January 2018.

The right not to return, or *non-refoulement*, is a universally accepted human right and also a basic refugee principle contained in Article 33(1) of the 1951 Refugee Convention.<sup>37</sup> It is reiterated in human rights treaties such as Article 22(8) of the American Convention on Human Rights<sup>38</sup> and Article 3 of the Convention against Torture.<sup>39</sup>

States are knotted by their responsibility under Article 33(1) of the 1951 Refugee Convention not to return a person and any interpretation that seeks to limit the application of the principle of *refoulement* would be conflicting to objects and application of the convention and accepted international law principles. Mass expulsion of people is not permitted as contained in Article 12(5) of the African Charter on Human and Peoples' Rights.<sup>40</sup> The principle of *non-refoulement* does not automatically mean that States should grant protection to individuals who are seeking asylum. On the contrary, an individual can be returned to a country where his or her life may be threatened if there are reasonable grounds for regarding him or her as a threat to national security or is convicted of a grave wrongdoing constituting a danger to the public or society as provided in Article 33 (2) of the 1951 Refugee Convention. Ejection from a country can happen either through refusal to verify an applicant's refugee claim, weak asylum laws, initiatives that encourage return or refusal of entry within a States.<sup>41</sup> Refugee protection is humanitarian in nature and any

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<sup>37</sup>United Nations General Assembly, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954); 189 UNTS 137 (Refugee Convention) art 33.

<sup>38</sup> Organization of American States, 'American Convention on Human Rights' (Costa Rica, 22 November 1969) Pact of San Jose.

<sup>39</sup> United Nations, 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 10 December 1984, entered into force 26 June 1987) UNTS vol. 1465, p. 85 <<https://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf>> accessed on 29 March 2019.

<sup>40</sup> Organization of African Unity (OAU), 'African Charter on Human and Peoples' Rights' (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (Banjul Charter) <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>

<sup>41</sup> James C. Hathaway, *The Rights of Refugees Under International Law* (first published 2005, 5<sup>th</sup> edn, Cambridge University Press, 2015) 291.

attempt that seeks to limit protection of persons who require international protection such as individuals exiled across borders due to natural disasters should be frowned on.<sup>42</sup>

### **3.4 Conclusion**

Climate change has negative impacts leading to harsh weather patterns, slow onset disasters, and scarce resources that lead to conflict and a push factor that leads to displacement. States should adopt adaption and mitigation measures within the United Nations Framework Convention on Climate Change.<sup>43</sup>

At the domestic level, States are limited by the application of the 1951 Refugee Convention to offer legal recognition to persons who are displaced due to natural disaster as refugees. Unless an asylum seeker can prove that the displacement is attributable to the convention five reasons, they will not be granted asylum based on the 1951 Refugee Convention. Asylum applications claiming migration as a result of effects of natural disaster are unsuccessful.

To avoid such, States can adopt appropriate mutually supportive policies that offer protection to persons who are exiled due to natural conditions. The policies can be adopted at the international, regional and national level to expand the protection of the 1951 Refugee Convention.

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<sup>42</sup> United Nations Human Rights Office of the High Commissioner, 'The Slow Onset Effect of Climate Change and Human Rights Protection for Cross Border Migrants' (2018)

<sup>43</sup> United Nations General Assembly, United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994); 1771 UNTS 107.

The next chapter will analyze why States are hesitant to have an international binding instrument recognizing and offering protection to persons forced to migrate due to environmental disasters.

## **CHAPTER FOUR**

### **FRAMEWORK FOR THE PROTECTION OF CROSS BORDER DISPLACED MIGRANTS**

#### **4.1 Introduction**

There is no framework at the international level for the protection of disaster displaced persons, they are entitled to and obligations of States. The previous Chapter examined decided judgments from various jurisdictions where it was held that persons who move from their countries of nationality or home countries due to environmental calamities or rising sea level do not qualify to be given refugee status or legal protection under the 1951 Refugee Convention. This chapter will analyze displacement due to environmental factors and why countries are hesitant to review the 1951 Refugee Convention to include the recognition of people exiled due to environmental factors, natural disaster or rising sea level for consideration as refugees. Various attempts to offer protection to cross border displaced persons will also be discussed and analyzed. Recommendations at the end of the Chapter will propose possible protection mechanisms that can be employed for people who are forced to move due to natural disasters through internationally binding instruments.

#### **4.2 ‘Environmental Refugee’: Politics of Definition**

Definitions are key as they guide policies of governments and states at the global level. In the 1951 Refugee Convention, the refugee meaning is paramount as it highlights individuals who can benefit from recognition and protection. The term ‘environmental refugee’ is legally not accepted as natural disaster is not recorded as a ground a person can rely on to seek



refugee status under the Convention. It can, therefore, be resolved that the Convention is not sympathetic to the reality of displacement from environmental factors or natural disasters.

Stephen Castles argues that the term ‘environmental refugees’ is deceptive and possibly harmful. He argues that it can be used to limit asylum prospects for immigrants by people who claim that those who cross international borders are not sincere victims of persecution. He concludes by arguing that inclusion of the environment as a ground one can rely on in seeking asylum may result in devaluation of refugee protection.<sup>1</sup>

Individual state recognition of people who migrate due to environmental effects of global warming is instrumental in obtaining global consensus. Furthermore, to including global warming or environmental disasters as a ground for seeking asylum under the 1951 Refugee Convention, States can adopt an international convention to protect persons displaced due to natural disasters. Dr Camillo Boano, Dr Tim Morris and Professor Roger Zetter, proposed adoption of a new convention that recognizes environmentally displaced persons and does not dilute the 1951 Refugee Convention.<sup>2</sup>

James C. Hathaway disputes the notion that a renegotiated Convention would weaken refugee protection, relinquishment of state migration control responsibilities and their obligations to national security.<sup>3</sup> James notes the growing discussion on reform of the 1951

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<sup>1</sup> Stephen Castles, ‘Environmental Change and Forced Migration: Making Sense Of The Debate’ (2002) Working Paper No. 7, Refugees Studies Centre University of Oxford 5, 10  
<[www.unhcr.org/research/RESEARCH/3de344fd9.pdf](http://www.unhcr.org/research/RESEARCH/3de344fd9.pdf)> accessed on 18 June 2019.

<sup>2</sup> Dr Camillo Boano, Professor Roger Zetter, Dr Tim Morris ‘Environmentally Displaced People; Understanding the Linkages Between Environmental Change, Livelihoods and Forced Migration’ (2008) University of Oxford, 7 <<https://www.rsc.ox.ac.uk/files/files-1/pb1-environmentally-displaced-people-2008.pdf>> accessed on 15 February 2018.

<sup>3</sup> James C. Hathaway, *The Rights of Refugees Under International Law* (first published 2005, 5<sup>th</sup> edn, Cambridge University Press, 2015) 999.

Refugee Convention in line with current events, such as climate change and disaster induced displacement.<sup>4</sup>

## **4.2 Non-Binding International Instruments**

### **4.2.1 The Nansen Initiative**

The Nansen Initiative borrowed its name from Fridtjof Nansen, a polar explorer, scientist and a prominent human rights actor born 150 years ago, and the world's first High Commissioner for Refugees. The Nansen Initiative is a State lead consultative initiative aimed at identifying best practices and fundamental issues that address the legal protection of individual forced to relocate by natural factors. The Agenda for the Protection of Cross – Border Displaced Persons in the Context of Disasters and climate change was adopted in October 2015.<sup>5</sup>

The Initiative does not call for a compulsory legal framework globally, but focuses on the regional commitments by states in harmony with their defined challenges. It advocates for states to offer temporary protection to cross border disaster displaced persons with rights they can enjoy during the period of displacement.<sup>6</sup> The Nansen Initiative advocates for policies that are informed by relevant knowledge and raising awareness of vulnerable persons preventing humanitarian crisis by having a uniformed approach at the international level to meet protection concerns of cross border displacement due to environmental reasons.<sup>7</sup>

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<sup>4</sup> Ibid.

<sup>5</sup> The Nansen Initiative, 'The Nansen Initiative Global Consultations Conference Report' (2015) <<https://www.nanseninitiative.org/global-consultations/>> accessed on 20 September 2019.

<sup>6</sup> Ibid.

<sup>7</sup> Norwegian Refugee Council, 'Climate Change and Displacement in the 21<sup>st</sup> Century' (The Nansen Conference, Oslo, June 2011) 3 <<https://www.unhcr.org/4ea969729.pdf>> accessed on 3 November 2019.

There is a void in the universal policy framework that specifically provides for the protection of disaster displaced individuals and the rights they are entitled to from the host state.<sup>8</sup>

#### **4.2.2 New York Declaration for Refugees and Migrants**

The United Nations General Assembly unanimously accepted the New York Declaration for Migrants and Refugees on 19<sup>th</sup> September 2016.<sup>9</sup> The Declaration reiterates the importance of the universal refugee protection and contains assurances by Member States to reinforce and develop ways to safeguard displaced persons.

States committed to applying a comprehensive approach to all persons who move across borders in large numbers including migrants and refugees taking into account that the response is humane and people centered. States also committed to gather accurate data regarding huge movements of migrants, reasons for movement and identify those who desire to seek international protection as refugees.<sup>10</sup> States also committed to collect accurate data of those migrating due to effects of natural disaster to inform advance relevant policy and legislative instruments at the national, regional and international level.

States reaffirmed that all individuals who cross borders are permitted to entry, stay and due process in the assessment of their claim. States also committed to address origin reasons of huge displacement which would have a ripple effect of reducing vulnerability of people. Member States reiterated that relocation should be a choice, not forced, and processes need

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<sup>8</sup> The Nansen Initiative, 'The Nansen Initiative Global Consultations Conference Report' (2015) 17 <<https://www.nanseninitiative.org/global-consultations/>> accessed on 20 September 2019.

<sup>9</sup> United Nations, 'New York Declaration for Refugees and Migrants' (3 October 2016) UN Doc A/RES/71/1 <https://www.refworld.org/docid/57ceb74a4.html> accessed on 12 October 2019.

<sup>10</sup> Ibid.

to be put in place for employment, economic growth, sustainable development, environmental conversation.<sup>11</sup>

Member States at the New York Meeting appreciated States that had provided provisional protection against return of migrants who are not traditional asylum seekers and are not able to go back to their home countries owing to various conditions in their countries of origin. Countries agreed to develop non-binding guidelines and principles in consultation with United Nations entities for the protection and assistance of migrants.<sup>12</sup> The non-binding nature of the principles will have little force for the protection of persons displaced due to global warming, but it will be one step forward in their protection and recognition internationally.

States agreed to develop a all-inclusive response policy document for mass migration of refugees to catapult refugee admission that is people centered and in accordance to international law. The Comprehensive Refugee Response Framework (CRRF) was an annexure from the New York Declaration. Its objective is to enhance refugee self-reliance, share the burden with refugee hosting countries, increase access to resettlement solutions and aid development in countries of origin to encourage go back home in safety and dignity.

### **4.2.3 Global Compact on Refugees**

The Global Compact on Refugees adopted by the General Assembly in 2018 provides a predictable response by UN Member States, UN bodies and other international organizations to refugees and host communities. The Global Compact is not legally enforceable, but

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

embodies the political desire for the global arena to support refugees and host communities. The objective of the Global Compact is to ease pressure in asylum countries, increase independence of refugees and encourage conditions in countries of origin for dignified return. The Global Compact calls for States to employ early disaster preparedness and emergency planning to respond to refugee situations. Procedure for fair and effective resolution of individual refugee claims should be done in accordance with the nation's global, regional and domestic obligations.<sup>13</sup>

The primary objective of the Global Compact was to encourage access to lasting results including eradicating primary grounds of displacement.

#### **4.2.4 Global Compact for Safe, Orderly and Regular Migration**

Heads of State and Government in December 2018 adopted the Global Compact for Safe, Orderly and Regular Migration,<sup>14</sup> a shared pledge to increasing cooperation in cross border movement. The Global Compact is a not legal enforceable, but is a universal framework that contributes to the promises made by States in the New York Declaration for Refugees and Migrants. The Compact is based on guiding principles that are people centered, international cooperation, national sovereignty, whole of society approach, rule of law and due process.

States committed to collect correct and differentiated information as a basis for evidence based laws and to reduce the root causes that force people to leave their homes. This will be

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<sup>13</sup> United Nations, 'Global Compact on Refugees' (2018) UN Doc A/73/12 para 61  
[https://www.unhcr.org/gcr/GCR\\_English.pdf](https://www.unhcr.org/gcr/GCR_English.pdf) accessed on 18 August 2019.

<sup>14</sup> United Nations Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration,( Marrakech, December 2018) UN Doc A/CONF.231/3 para 8  
<<https://undocs.org/A/CONF.231/3>> accessed on 18 October 2019.

achieved through strengthened mechanisms to monitor threats that might generate migration of people. Establishment of early warning signs of natural disaster will assist States to intervene at an early stage and mitigate the effects of the disaster and reduce the number of individuals who would have otherwise migrated.<sup>15</sup> Adverse effects of climate change, natural disaster and environmental degradation ought be taken into consideration as drivers of displacement with implementation of disaster preparedness systems and promotion of cooperation with neighboring countries to be able to intervene.<sup>16</sup>

The Compact acknowledges that migrants are exposed to susceptibility which may originate from the environment in which they migrate or the experiences they face in their home countries, through flight or destination. States are also encouraged to develop policies that offer protection through issuance of legal documents that define the legal status of the migrants within their territories. People who are displaced due to environmental disasters are at risk of immigration detention and States are called on to review and revise laws and policies related to immigration detention to ensure migrants are not detained arbitrarily, and that decisions to detain are based on rule of law.<sup>17</sup> Issuance of documents that define the legal status of persons displaced due to natural disaster will protect them from arbitrary detention reducing their vulnerabilities.

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<sup>15</sup> Ibid.

<sup>16</sup> United Nations Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration,( Marrakech, December 2018); UN Doc A/CONF.231/3 <<https://undocs.org/A/CONF.231/3>> accessed on 18 October 2019.

<sup>17</sup> Ibid.

## 4.5 Conclusion

It is, unfortunate, to note that documents agreed by States at the international level including the New York Declaration for Refugees and Migrants, Global Compact for Refugees and the Global Compact on Compact for Safe, Orderly and Regular Migration are all not legally binding but are mere aspirations.

International conventions and protocols need to be adopted to protect these group of migrants who are not refugees in the strictest sense and cannot return due to circumstances in their country of origin.<sup>18</sup> States can also adopt temporary protection or humanitarian stay arrangements as a form of protection to persons displaced by natural disaster and not be forced to return to their countries.<sup>19</sup>

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<sup>18</sup> Paramjit S. Jaswal and Stellina Jolly, 'Climate Refugees: Challenges and Opportunities for International Law' (Journal of the Indian Law Institute Vol 55 No. 1, Indian Law Institute, 2013) 45, 57 <<http://www.jstor.org/stable/43953626>> accessed on 4 December 2017.

<sup>19</sup> United Nations High Commissioner for Refugees, 'Legal Considerations on Refugee Protection for People Fleeing Conflict, and Famine affected Countries' (5<sup>th</sup> April 2017) 2 <<https://www.refworld.org/pdfid/5906e0824.pdf>> accessed on 5 December 2018.

## CHAPTER FIVE CONCLUSION AND RECOMMENDATIONS

### 5.1 General Conclusion

The right to control entry of foreigners is an inherent power of every State. Global refugee law is hushed as to when migrants may be allowed by another country as a result of a natural disaster and legal status they should have once recognized.<sup>1</sup> States are reluctant at the international level to agree on a legal framework that offers protection and recognition for protection of persons displaced due to climate change as it may impact on national social, economic and political state policy.<sup>2</sup> On the contrary, states are more willing to commit at regional levels and offer an expanded protection outside the ambit of the 1951 Refugee Convention.

Regional documents that offer protection to refugees have expanded their definitions to include external aggression, foreign domination or events seriously disturbing public order as contained in the 1969 OAU Refugee Convention<sup>3</sup> and immense abuse of human rights and internal conflicts contained in the Cartagena Declaration.<sup>4</sup> Existing legal frameworks at the domestic arena are mostly erratic, because they depend on favorable political goodwill as opposed to a legal responsibility to allow the entry of natural calamity displaced persons.

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<sup>1</sup> The Nansen Initiative, 'The Nansen Initiative Global Consultations Conference Report' (2015) 35 <<https://www.nanseninitiative.org/global-consultations/>> accessed on 20 September 2019.

<sup>2</sup> Paramjit S. Jaswal and Stellina Jolly, 'Climate Refugees: Challenges and Opportunities for International Law' (Journal of the Indian Law Institute Vol 55 No. 1, Indian Law Institute, 2013) 45, 56 <<http://www.jstor.org/stable/43953626>> accessed on 4 December 2017.

<sup>3</sup> African Union, Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974); 1001 UNTS 45 (OAU Convention) art 1.

<sup>4</sup> Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984) Article 3 <<https://www.refworld.org/docid/3ae6b36ec.html>> accessed on 3 October 2019.



## **5.2 Recommendations**

### **5.2.1 Preventing future harm**

States should unite in addressing the root causes of disaster induced displacement through adoption of adaptation and mitigation measures within the United Nations Framework Convention on Climate Change.<sup>5</sup>

### **5.2.2 Right to Enter by Cross Border Disaster Displaced Persons**

States should allow entry and stay of disaster displaced persons through issuance of temporary entry and stay visas, such as giving of humanitarian visas or other special immigration status. The documentation issued should indicate the legal status of the displaced person and their right to stay within the territory.<sup>6</sup> States can also grant temporary protection measure or stay agreements where the asylum country is experiencing large influx of persons or where the condition in the home country is ongoing such as drought.<sup>7</sup>

### **5.2.3 Policy Recommendations to Strengthen Knowledge Base and Understanding**

Stakeholders including the donor community, national governments, regional bodies and international organizations should promote high level discussions to develop and strengthen knowledge-base between ecological conservation, socio economic impacts and

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<sup>5</sup> United Nations General Assembly, United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994); 1771 UNTS 107.

<sup>6</sup> The Nansen Initiative, 'The Nansen Initiative Global Consultations Conference Report' (2015) 40 <<https://www.nanseninitiative.org/global-consultations/>> accessed on 20 September 2019.

<sup>7</sup> United Nations High Commissioner for Refugees, 'Legal Considerations on Refugee Protection for People Fleeing Conflict, and Famine affected Countries' (n 134) 1.

environmentally forced relocation. The knowledge –base will be used to generate reliable data and statistics on people who migrate as a result of natural disasters, mapping out potential environmental hotspots, trends on climate change, conflict induced migration and raise awareness on the plight of cross border displaced persons.

#### **5.2.4 Adoption of an Convention That Offers Protection to Cross- Border Disaster Displaced Persons**

There is need for harmonization of the refugee definition globally, cognizant of the regional definitions in the OAU Refugee Convention and the Cartagena Declaration to provide uniform protection. The United Nations needs to agree on an internationally accepted definition of environmentally forced migrants without risk of dilution of the protection of the traditional refugees. This will inform the development of a legal framework clarifying on the definition, rights and obligations of the institution charged with protection and coordination responses to environmentally forced migrants.<sup>8</sup>

The negotiated international instrument will include the rights of disaster displaced persons while outlining the obligations of hosting states. This will contribute to greater response by states, refugee agencies and civil societies reducing the number of people negatively affected natural disasters.

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<sup>8</sup> Dr Camillo Boano, Professor Roger Zetter, Dr Tim Morris ‘Environmentally Displaced People; Understanding the Linkages Between Environmental Change, Livelihoods and Forced Migration’ (2008) University of Oxford, 31 <<https://www.rsc.ox.ac.uk/files/files-1/pbl-environmentally-displaced-people-2008.pdf>> accessed on 15 February 2018.

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